

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-61735-CIV-ZLOCH

BROWARD BULLDOG, INC., a Florida
corporation not for profit, and DAN
CHRISTENSEN, founder, operator and editor
of the BrowardBulldog.com website,

Plaintiffs,

vs.

U.S. DEPARTMENT OF JUSTICE and
FEDERAL BUREAU OF INVESTIGATION,

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
(With Incorporated Memorandum of Law)

Defendants, U.S. Department of Justice (“DOJ”), and its component, Federal Bureau of Investigation (“FBI”), respectfully move for summary judgment and, in support of this motion, submit the attached declaration, with exhibits, of David M. Hardy, Section Chief of the FBI’s Record/Information Dissemination Section, Records Management Division. Hardy decl. ¶ 1.

Plaintiffs are bringing this action pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.¹ See Complaint ¶ 2. They allege that defendants are improperly withholding records

¹ Plaintiffs also allege that their action is being brought under the Declaratory Judgment Act, 28 U.S.C. § 2201. Complaint ¶ 2. However, the Declaratory Judgment Act merely provides that the Court “may declare the rights and other legal relations of any interested party seeking such declaration.” 28 U.S.C. § 2201.

which they requested under FOIA. See Complaint ¶¶ 2, 77-78, 83-85, 91.

There is no basis for the Court to grant relief pursuant to 5 U.S.C. § 552(a)(4)(B) in this action because there are no records being improperly withheld by defendants from plaintiffs. Summary judgment is appropriate, pursuant to FED. R. CIV. P. 56, because there is no genuine issue of material fact and defendants are entitled to judgment as a matter of law.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. By letter dated September 26, 2011, plaintiffs submitted a FOIA request to FBI Headquarters for "information pertaining to a closed anti-terrorism investigation into the activities of Saudi nationals who lived in and/or owned a residence at 4224 Escondito Circle, near Sarasota, Florida prior to 9/11." Hardy decl. ¶ 6, Exh. A. The request identified the residents at 4225 Escondito Circle and the owners of the residence by name and requested that a search be conducted of the FBI's indices to the Central Records System and the filings system of the FBI's Tampa field office. Hardy decl. ¶ 6, Exh. A.

2. By letter dated October 6, 2011, the FBI informed plaintiffs that, since their September 26, 2011, request (FOIPA Request No. 1174909-000) concerned a third party (or parties), the request could not be processed unless they provided a third party privacy waiver or proof of death or a clear demonstration that the public interest in disclosure outweighs the personal privacy interest and that significant public benefit would result from the disclosure of the requested records. Hardy decl. ¶ 7, Exh. B. The FBI further advised plaintiffs that, upon request, the FBI would search for public records contained within the FBI's files. Hardy decl. ¶ 7, Exh. B. The FBI also informed plaintiffs that they could appeal the FBI's response by writing to DOJ's Office of Information Policy ("OIP") within sixty days. Hardy decl. ¶ 7, Exh. B.

3. By email dated October 27, 2011, plaintiffs submitted a FOIA request to FBI Headquarters for "information pertaining to an anti-terrorism investigation regarding activities at the residence at 4224 Escondito Circle, in the Prestancia development near Sarasota, Florida prior to 9/11/2001." Hardy decl. ¶ 8, Exh. C. Plaintiffs noted that "[t]his request is a modified version of FOIPA request 1174909-000" and "concerns no third parties." Hardy decl. ¶ 8, Exh. C.

4. The FBI acknowledged receipt of plaintiffs' October 27, 2011, modified request and assigned it FOIPA Request No. 1176403-000. Hardy decl. ¶ 9, Exh. D.

5. By letter dated February 7, 2012, the FBI advised plaintiffs that the records they sought are governed by the provisions of the Privacy Act and that disclosure of those records could constitute an unwarranted invasion of personal privacy pursuant to FOIA Exemptions (b)(6) and (b)(7)(C). Hardy decl. ¶ 11, Exh. F. The FBI informed plaintiffs, however, that, while the FBI had received a large number of calls concerning suspicious activity in the aftermath of the 9/11 attack, no credible evidence was developed to connect the address at 4224 Escondito Circle, Sarasota, Florida to any of the 9/11 hijackers. Hardy decl. ¶ 11, Exh. F. Finally, the FBI advised plaintiffs of their right to appeal the FBI's response to OIP within sixty days. Hardy decl. ¶ 11, Exh. F.

6. By letter dated February 23, 2012, plaintiffs appealed the FBI's February 7, 2012 response to OIP. Hardy decl. ¶ 12, Exh. G. OIP acknowledged receipt of plaintiffs' appeal letter and assigned it no. AP-2012-01599. Hardy decl. ¶ 13, Exh. H.

7. On May 23, 2012, OIP responded to plaintiffs' February 23, 2012, appeal letter by affirming the FBI's action on partly modified grounds. Hardy decl. ¶ 14, Exh. I. OIP noted that the FBI had conducted a search for responsive records although it was not required to do so under the circumstances. Hardy decl. ¶ 14, Exh. I.

8. Plaintiffs filed the above-captioned action on September 5, 2012. Complaint [D.E.1], Hardy decl. ¶ 15.

9. The Central Records System (“CRS”) is the system used by the FBI to maintain the records and information which it compiles for law enforcement purposes, including records maintained at FBI Headquarters and in FBI field offices. Hardy decl. ¶ 17. The CRS files are searched by means of General Indices. Hardy decl. ¶ 22.

10. As detailed in the Hardy declaration, the FBI conducted a search of the CRS to identify any main and cross-reference files responsive to plaintiffs’ October 27, 2011, request and initially located six documents, which were withheld pursuant to FOIA Exemptions (b)(6) and (b)(7)(C) as indicated in the FBI’s February 7, 2012, response letter. Hardy decl. ¶¶ 23, 11.

11. Subsequent to the filing of this action, the Tampa Field Office (“TPFO”) was contacted regarding this matter since it was the FBI field office which handled the alleged complaint regarding the address at 4224 Escondito Circle, Sarasota, Florida. Hardy decl. ¶ 24. TPFO canvassed personnel who were directly involved in, and thus had direct knowledge of, the 2001 investigation to determine whether they had any records that might be responsive to plaintiffs’ FOIA request. Hardy decl. ¶ 24. TPFO also canvassed personnel responsible for assisting in the FBI’s response to a prior Congressional request from Senator Graham related to 4224 Escondito Circle. Hardy decl. ¶ 24. The personnel familiar with the investigation into 4224 Escondito Circle and/or the prior request from Senator Graham conducted additional searches of FBI files, including searches of files specifically related to the 9/11 investigation, additional text searches of the electronic case file, and searches of known telephone numbers, in order to locate potentially responsive documents. Hardy decl. ¶ 24. As a result of these searches, fourteen documents, consisting of 35 pages, were

located, which included the six documents previously located. Hardy decl. ¶ 24.

12. By letter dated March 28, 2013, the FBI advised plaintiffs that it had reviewed 35 pages responsive to their October 27, 2011, request and was releasing 31 pages, with information deleted pursuant to FOIA Exemptions (b)(1), (b)(3), (b)(6), (b)(7)(C), (b)(7)(D), and (b)(7)(E).² Hardy decl. ¶ 16, Exh. J.

MEMORANDUM OF LAW

In a FOIA action, the District Court has subject matter jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

FOIA cases generally should be resolved on motions for summary judgment. *Miccosukee Tribe of Indians of Florida v. United States*, 516 F.3d 1235, 1243 (11th Cir. 2008)(citing *Miscavige v. I.R.S.*, 2 F.3d 366, 369 (11th Cir. 1993)); *St. Andrews Park, Inc. v. U.S. Dep’t of Army Corps of Engineers*, 299 F. Supp.2d 1264, 1267 (S.D. Fla. 2003).

The government has the burden of proving that it properly invoked FOIA exemptions in its withholding of records and information. *Miccosukee Tribe*, 516 F.3d at 1258 (citing *Ely v. F.B.I.*, 781 F.2d 1487, 1489-90 (11th Cir. 1986)).

Affidavits or declarations may be used to meet the government's burden so long as they provide an adequate factual basis for the Court's decision. *Miccosukee Tribe*, 516 F.3d at 1258; *Del Rio v. Miami Field Office of the FBI*, No. 08-21103, 2009 WL 2762698, at *6 (S.D. Fla. Aug. 27, 2009). Alternatively, an adequate factual basis may be established through a *Vaughn* index and/or

² The FBI also informed plaintiffs in its letter that other government agency information had been located within the responsive records and that the other government agency had been consulted and its response incorporated within the FBI's release. Hardy decl. ¶ 16, Exh. J.

in camera review, or through some combination of methods (affidavits, *Vaughn* index, and/or *in camera* review).³ *Miccosukee Tribe*, 516 F.3d at 1258.

Affidavits submitted by an agency in a FOIA action are accorded a presumption of good faith. *Florida Immigrant Advocacy Center v. National Security Agency*, 380 F. Supp.2d 1332, 1343 (S.D. Fla. 2005)(citing *Carney v. U.S. Department of Justice*, 19 F.3d 807, 812 (2nd Cir. 1994), *cert. denied*, 513 U.S. 823 (1994), quoting *SafeCard Services Inc. v. S.E.C.*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)); *Del Rio*, 2009 WL 2762698, at *6.

The declaration of David M. Hardy and the exhibits thereto provide an adequate factual basis for the Court's decision.⁴ The declaration describes the FBI's record-keeping system and the procedures by which the FBI searched for records responsive to plaintiffs' request, identifies the records and information withheld by the FBI pursuant to FOIA exemptions, and provides justification for the withholdings. The declaration and exhibits are sufficient to meet defendants' burden in this case of establishing that a reasonable search was conducted for records responsive to

³ A *Vaughn* index is a tool used by the government to meet its burden of proof in a FOIA action. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). The index usually lists each withheld document, or portion thereof, and indicates the specific FOIA exemption(s) applicable and the specific agency justification for non-disclosure of the document or information. *Vaughn*, 484 F.2d at 827.

⁴ The Hardy declaration and the coded copy of the redacted records and deleted page information sheets contained in Exhibit J to the declaration fulfill the function of a *Vaughn* index in this case by identifying each withheld document or portion thereof and indicating the specific FOIA exemption or exemptions applicable to the withheld document or information and the justification for the withholding.

Although the Hardy declaration and exhibits thereto provide an adequate factual basis for the Court's decision, FOIA specifically provides that the Court may examine withheld records or information *in camera* to determine whether the records or portions of records withheld fall within FOIA exemptions. *See* 5 U.S.C. § 552(a)(4)(B). Upon the Court's request defendants will provide copies of the withheld records and information to the Court for *in camera* review.

plaintiffs' FOIA request and that FOIA exemptions were properly invoked to withhold information.

A reasonable search was conducted for records responsive to plaintiffs' FOIA request.

It is the agency's burden to "show beyond a material doubt...that it has conducted a search reasonably calculated to uncover all relevant documents." *Miccosukee Tribe*, 516 F.3d at 1248 (quoting *Ray v. U.S. Dep't of Justice*, 908 F.2d 1549, 1558 (11th Cir. 1990) (quotations omitted), *rev'd on other grounds*, *U.S. Dep't of State v. Ray*, 502 U.S. 164 (1991)).

An agency may establish that it conducted a reasonable search through affidavits of responsible agency officials "so long as the affidavits are relatively detailed, nonconclusory and submitted in good faith." *Ray*, 908 F.2d 1558; *Miller v. U.S. Department of State*, 779 F.2d 1378, 1383 (8th Cir. 1985); *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982).

Whether a search was reasonable depends upon the circumstances of each case. *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990); *see also Maynard v. C.I.A.*, 986 F.2d 547, 559 (1st Cir. 1993). The agency is not required to prove that every responsive document has been located. *See Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 892 n.7 (D.C. Cir. 1995); *Miller*, 779 F.2d at 1385. The agency must only show beyond a material doubt that it made a good faith effort, using methods which could reasonably be expected to uncover the requested information or documents. *See Ray*, 908 F.2d at 1558; *Miller*, 779 F.2d at 1383 ("the search need only be reasonable; it does not have to be exhaustive"); *see also Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986) ("[A] search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request.").⁵

⁵ Once an agency demonstrates that it has conducted a reasonable search, the burden shifts to the requester to show that the search was not reasonable or was not conducted in good

The Hardy declaration describes in reasonable detail how the FBI searched for records responsive to plaintiffs' FOIA request, by conducting a General Indices search of its Central Records System and through contacts with the Tampa Field Office and personnel most likely to have responsive records or knowledge of the existence and location of any responsive records. See Hardy decl. ¶¶ 17-22 (describing the FBI's Central Records System, how it is used, and how information in the system is indexed and accessed) and ¶¶ 23-24 (detailing how the FBI conducted its search for records responsive to plaintiffs' request).

The declaration establishes that a reasonable search was conducted by showing that a good faith effort was made to locate any responsive records through methods which could reasonably be expected to uncover the requested information or documents.

Defendant properly withheld records and portions of records pursuant to FOIA exemptions.

The purpose of FOIA "is to encourage public disclosure of information so citizens may understand what their government is doing." *Miccosukee Tribe*, 516 F.3d at 1244 (quoting *Office*

faith. *Ray*, 908 F.2d at 1558; *Miller v. U.S. Department of State*, 779 F.2d 1378, 1383 (8th Cir. 1985). The agency affidavits are accorded a presumption of good faith which "cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473, 489 (2nd Cir. 1999); see also *SafeCard Services, Inc.*, 926 F.2d at 1200; *Maynard*, 986 F.2d at 559-60; *Carney*, 19 F.3d at 813; *Flowers v. I.R.S.*, 307 F. Supp.2d 60, 67 (D.D.C. 2004).

A search is not presumed unreasonable simply because an agency failed to produce all relevant documents. *Nation Magazine*, 71 F.3d at 892 n. 7. Further, "[t]he fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it." *Maynard*, 986 F.2d at 564 (quoting *Miller*, 779 F.2d at 1385); see also *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003) (indicating that the fact that an agency had a document at one time but does not produce it in response to a FOIA request does not necessarily mean that the agency's search was unreasonable).

of the Capital Collateral Counsel, N. Region of Fla. ex rel. Mordenti v. Dep't of Justice, 331 F.3d 799, 802 (11th Cir. 2003)). However, "Congress recognized . . . that public disclosure is not always in the public interest" and carved out nine exemptions from disclosure in 5 U.S.C. § 552(b). *C.I.A. v. Sims*, 471 U.S. 159, 166-67 (1985). These statutory exemptions represent the balance struck by Congress "between the right of the public to know and the need of the Government to keep information in confidence" and must be given "meaningful reach and application." *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989).

As indicated above, defendants have invoked FOIA Exemptions 1, 3, 6, 7(C), 7(D), and 7(E), 5 U.S.C. §§ 552(b)(1), (b)(3), (b)(6), (b)(7)(C), (b)(7)(D) and (b)(7)(E), to withhold four pages in their entirety and redacted portions of other pages.

FOIA Exemption 1

FOIA Exemption 1 exempts from disclosure matters that 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).

An agency demonstrates that FOIA Exemption 1 was properly applied to withhold requested materials if it shows, through affidavits or other evidence, that the documents withheld are properly classified. *See Hayden v. National Security Agency/Central Sec. Services*, 608 F.2d 1381, 1386-87 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); *see also Florida Immigrant Advocacy Center*, 380 F. Supp.2d at 1339 (the agency must demonstrate that it followed proper classification procedures and that the document "logically falls within the claimed exemption").

Pursuant to Exemption 1, the FBI withheld detailed intelligence activities information gathered or compiled by the FBI on a specific individual or organization of national security interest. David M. Hardy determined that this information was properly classified pursuant to Executive Order (“E.O.”) 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009)(amended at 75 Fed. Reg. 1013). The information falls within the category listed in E.O. 13,526, § 1.4(c), “intelligence activities (including covert action), intelligence sources or methods, or cryptology,” the unauthorized disclosure of which “could reasonably be expected to cause identifiable or describable damage to the national security.” E.O. 13,526, §1.4(c). It is marked “Secret” because its unauthorized disclosure reasonably could be expected to cause serious damage to national security.

Hardy, who has been designated by the Attorney General as an original classification authority and declassification authority pursuant to E.O. 13,526, §§ 1.3 and 3.1, attests that he examined this information to insure that all of the requirements of E.O. 13,526 were met, that the information was properly classified, and that it continues to warrant classification at the “Secret” level. Hardy determined that the disclosure of this information would reveal intelligence activities and methods which are being used by the FBI to gather intelligence information. He describes, at ¶¶ 38 - 40 of his declaration, the reasons that the disclosure of this information could reasonably be expected to cause serious damage to national security.

The Hardy declaration demonstrates that the FBI is properly withholding information pursuant to Exemption 1. See Hardy decl. ¶¶ 31-43.

Great deference should be given to an agency’s decision to withhold from disclosure documents which implicate national security interests "given the magnitude of the national security interests and potential risks at stake." *C.I.A. v. Sims*, 471 U.S. at 179. In the absence of bad faith,

or some other compelling showing that there has been an abuse of discretion, courts should not second guess the agency's judgment as to whether documents should be exempt from disclosure for reasons of national security. *See id.* at 174-81; *Knight v. United States C.I.A.*, 872 F.2d 660, 663-65 (5th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Krikorian v. Dep't of State*, 984 F.2d 461, 464 (D.C. Cir. 1993); *see also American Civil Liberties Union of Michigan v. FBI*, No. 11-13154, 2012 WL 4513626, *5 (E.D. Mich. 2012)(noting that substantial weight should be given agency declarations in determining the applicability of Exemption 1, since courts generally lack the necessary expertise to second-guess agency opinions in national security FOIA cases); *American Civil Liberties Union of New Jersey v. Department of Justice*, No. 11-2553, 2012 WL 4660515, *6 (D.N.J. 2012).

FOIA Exemption 3

Exemption 3 provides that FOIA's disclosure provisions do not apply to matters that are:

specifically exempted from disclosure by statute (other than section 552b of this title), if that statute--(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.⁶

5 U.S.C. § 552(b)(3).

⁶ The 2009 Amendments to FOIA (the Open FOIA Act of 2009), Pub. L. No. 111-83, § 564(b), rewrote Exemption 3, which formerly read: "(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;". Former sections 552(b)(3)(A)-(B) are now sections 552(b)(3)(A)(i)-(ii), and the amendments added a new provision, as section 552(b)(3)(B), applicable to statutes "enacted after the date of enactment of the OPEN FOIA Act of 2009."

Exemption 3 is properly invoked if: (1) "there is a relevant statute," and (2) "the document falls within that statute." *Judicial Watch, Inc. v. U.S. Dep't of State*, 650 F. Supp.2d 28, 33 (D.D.C. 2009); *see also Goland v. C.I.A.*, 607 F.2d 339, 350 (D.C. Cir.1979), *cert. denied*, 445 U.S. 927 (1980)("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 withheld material within that statute's coverage."); *Perry-Torres v. U.S. Dep't of State*, 404 F. Supp.2d 140, 143 (D.D.C. 2005).

Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. § 403-1(i)(1), states that the "Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." This section, formerly 50 U.S.C. § 403-3(c)(7), is an exemption statute under FOIA Exemption 3. *Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009)(citing *Fitzgibbon v. CIA*, 911 F.2d 755, 761 (D.C. Cir. 1990)).

Pursuant to Exemption 3 and based on 50 U.S.C. § 403-1(i)(1), the FBI withheld information on one page because its disclosure would reveal intelligence sources and methods which the FBI, as a member of the Intelligence Community, is required to protect pursuant to 50 U.S.C. § 403-1(i)(1). See Hardy decl. ¶¶ 45-47.

Exemption 7 Threshold

Section 552(b)(7), 5 U.S.C., sets forth the various exemptions which are applicable specifically to "records or information compiled for law enforcement purposes."⁷

⁷ Information contained in records originally compiled for law enforcement purposes continues to meet the threshold requirement under FOIA Exemption 7 even when it is reproduced or summarized in a new document prepared for other than law enforcement purposes. *FBI v. Abramson*, 456 U.S. 615, 623 (1982). Also, the Supreme Court has rejected the argument that information not originally compiled for law enforcement purposes cannot be exempt under

Under Exemption 7, “records or information compiled for law enforcement purposes” are exempt from disclosure to the extent that their disclosure could reasonably be expected to cause one of the harms enumerated in the subparts of the exemption. 5 U.S.C. § 552(b)(7).

Defendant has invoked several law enforcement FOIA exemptions, specifically, 7(C), 7(D), and 7(E), 5 U.S.C. §§ 552(b)(7)(C), (b)(7)(D) and (b)(7)(E), to withhold records and information in this case.

The Hardy declaration establishes that the records and information withheld pursuant to these exemption provisions are “records or information compiled for law enforcement purposes” and, therefore, meet the Exemption 7 threshold requirement. See Hardy decl. ¶¶ 48-49.

As indicated in the Hardy declaration, at ¶ 49, the documents responsive to plaintiffs' October 27, 2011, request relate to the FBI's investigation into the residence at 4224 Escondito Circle, which falls within the FBI's performance of its mission to protect and defend the United States against terrorist and foreign intelligence threats. Thus, these documents were compiled for law enforcement purposes.

FOIA Exemptions 6 and 7(C)⁸

FOIA's exemptions were intended to afford broad protection against the government's release of information about individual citizens. See *U.S. Dep't of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 763-64 (1989) (“FOIA's central purpose is to ensure that the

FOIA Exemption 7 when it is later recompiled for law enforcement purposes. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 157 (1989).

⁸ These exemptions are discussed together because they both protect the privacy interests of individuals. Although the standards for their applicability vary, both exemptions are applicable, under their relative standards, to the information withheld in this case to protect personal privacy interests.

Government's activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.”).

FOIA Exemption 6 exempts from disclosure matters contained in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The Supreme Court has given the term "similar files" a broad meaning; all information which "applies to a particular individual" may fall within FOIA Exemption 6. *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599-603 (1982).

FOIA Exemption 7(C) exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information...could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

The Supreme Court has broadly defined the privacy interest protected by these exemptions. *See Reporters Committee*, 489 U.S. at 763-64. The protected privacy interest under FOIA extends beyond the common law and the Constitution. *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 170 (2003). It accords individuals the right “to determine for themselves when, how, and to what extent information about them is communicated to others.” *Reporter Committee*, 489 U.S. at 764, n.16 (citation omitted, emphasis added); *see also Office of the Capital Collateral Counsel*, 331 F.3d at 802 ("The privacy interest protected by exemption 6 includes an individual's interest in avoiding disclosure of personal matters."); *L & C Marine Transport, L.T.D. v. United States*, 740 F.2d at 923.⁹

⁹ The protected privacy interest is so broad that, under some circumstances, even information about an individual which is, or has been, in the public record is protected. In *Reporters Committee* the Supreme Court held that there was a substantial privacy interest in

Particularly, courts have recognized that the privacy interest in information regarding individuals contained in law enforcement investigative records is substantial, since disclosure of such information pertaining to subjects of investigation or agents and employees, victims, third parties, and confidential sources might subject these individuals and their families to embarrassment, harassment, or reprisal.¹⁰ See *Cappabianca v. Commissioner, U.S. Customs Service*, 847 F. Supp. 1558, 1564-66 (M.D. Fla. 1994); *L & C Marine*, 740 F.2d at 923; *Cleary v. F.B.I.*, 811 F.2d 421, 424 (8th Cir. 1987); *Fitzgibbon v. C.I.A.*, 911 F.2d 755, 767 (D.C. Cir. 1990). Thus the protection afforded under Exemption 7(C) to information pertaining to individuals contained in law enforcement records is even broader than that afforded to information regarding individuals under Exemption 6. *Favish*, 541 U.S. at 165-66; *Office of Capital Collateral Counsel*, 331 F.3d at 803 n. 6.

The applicability of Exemptions 6 and 7(C) is determined by a balancing of interests. See *Office of the Capital Collateral Counsel*, 331 F.3d at 803 n. 5, citing *U.S. Dept. of Defense v. F.L.R.A.*, 510 U.S. 487, 496 n.6 (1994). Individual privacy interests must be weighed against the public interest, if any, in disclosure of the information requested in order to determine whether a particular disclosure “would constitute a clearly unwarranted invasion of personal privacy” under Exemption 6 or “could reasonably be expected to constitute an unwarranted invasion of personal

personal information such as is contained in “rap sheets” even though the information had been made available to the general public at some place and point in time. *Reporters Committee*, 489 U.S. 749; see also *L&C Marine*, 740 F.2d at 922.

¹⁰ Any assessment of the extent of the privacy invasion must consider the ramifications of release not just to the requester but to the public at large, since any member of the public “must have the same access under FOIA as the [requester]” to the information sought in a given case. *U.S. Dept. of Defense v. F.L.R.A.*, 510 U.S. 487, 501 (1994).; see also *Favish*, 541 U.S. at 174 (“once there is disclosure, the information belongs to the general public”).

privacy" under Exemption 7(C). *See Reporters Committee*, 489 U.S. at 762; *L & C Marine*, 740 F.2d at 922-23; *Office of the Capital Collateral Counsel*, 331 F.3d at 802; *U.S. Dept. of Defense v. F.L.R.A.*, 510 U.S. at 495.

While the privacy interest protected under FOIA has been broadly defined, the public interest which is weighed against it is strictly limited to the public's interest in being informed about "what their government is up to." *Reporters Committee*, 489 U.S. at 772-75. The identity of a FOIA requester, as well as the requester's personal reasons for requesting the records at issue, have no bearing on the requester's entitlement to the records under FOIA. *See Reporters Committee*, 489 U.S. at 771.¹¹

Disclosure is in the public interest only to the extent that it would "contribute *significantly* to public understanding of the operations or activities of the government." *Reporters Committee*, 489 U.S. at 775 (emphasis added); *see also Office of the Capital Collateral Counsel*, 331 F.3d at 803. The public interest is not furthered by "disclosure of information about private citizens...that reveals little or nothing about an agency's own conduct." *Reporters Committee*, 489 U.S. at 773.

In order to trigger the balancing of public interests against privacy interests, a FOIA requester must show (1) that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake, and (2) that the information requested is likely to advance that interest.¹² *Favish*, 541 U.S. at 172; *see also Schrecker v. Department of Justice*, 349

¹¹ The identity of a FOIA requester is only relevant when an objection to disclosure is based on a claim of privilege and the FOIA requester is the party protected by the privilege. *See Reporters Committee*, 489 U.S. at 771. No such situation exists here.

¹² For example, courts have rejected general assertions of public interest in fair trials or administration as a basis for establishing a public interest under FOIA. *See Peltier v. Federal Bureau of Investigation*, 563 F.3d 754, 763-64 (8th Cir. 2009) ("simply pointing to the public's

F.3d 657, 661, (D.C. Cir. 2003)(noting that whether the public interest will be furthered by disclosure of requested information is not determined by asking whether there is “general public interest in the subject matter of the FOIA request” but, rather, by examining “the *incremental value* of the *specific information* being withheld” for shedding light on agency action).

Thus, it is the plaintiffs’ burden in this case to show both that the public interest which they are seeking to advance is “significant”and "more specific than having the information for its own sake" and that the requested information “is *likely* to advance *that interest*.” See *Favish*, 541 U.S. at 172 (emphasis added). Speculation is insufficient to meet this burden. See *U.S. Dep’t of State v. Ray*, 502 U.S. at 179 (“[M]ere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy.”).

Pursuant to Exemptions 6 and 7(C), the FBI has withheld the names and/or identifying information of the following individuals: FBI special agents and support personnel, third parties of investigative interest, third parties merely mentioned in the records, third parties who provided information to the FBI, and state and/or local law enforcement officers.

Each of these individuals has a significant privacy interest in his/her name or identifying information, particular when the information is associated with an FBI law enforcement investigation.

The non-exempt information which the FBI has released is sufficient to fulfill any public interest under FOIA in informing the public as to the FBI’s operations or activities. Disclosure of

interest in fair criminal trials or the even-handed administration of justice” was not sufficient to override legitimate privacy interests); see also *Burge v. Eastburn*, 934 F.2d 577, 580 (5th Cir. 1991)(the public interest in fair trials is not the kind of public interest which compels disclosure under the FOIA).

the names and personal information which the FBI has redacted pursuant to FOIA Exemptions 6 and 7(C) is not likely to significantly contribute to the public's understanding of the FBI's operations and activities.

As established by the Hardy declaration, at ¶¶ 50-59, individual names and identifying information are properly being withheld pursuant to FOIA Exemptions 6 and 7(C).

FOIA Exemption 7(D)

FOIA Exemption 7(D) exempts from FOIA disclosure provisions:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information...(D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,...

5 U.S.C. § 552(b)(7)(D).

A source is deemed to be confidential if either of two situations exist: 1) the source furnished information with the express understanding that the agency would not divulge the communication except to the extent necessary for law enforcement purposes or 2) circumstances, such as the nature of the crime being investigated and the source's relation to it, support an inference of confidentiality. *U.S. Dept. of Justice v. Landano*, 508 U.S. 165 (1993); *L & C Marine*, 740 F.2d at 923-24 (a confidential source is one who provides information "under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred").

If information is obtained from a confidential source during a criminal investigation, the information itself is protected from disclosure. *Ferguson v. F.B.I.*, 957 F.2d 1059, 1069 (2nd Cir. 1992); *see also L & C Marine*, 740 F.2d at 925, n. 8 (quoting Conference Report No. 93-1200, 1974 U.S.Code Cong. & Adm.News at 6267-6291)(“in every case where the investigatory records sought were compiled for law enforcement purposes-either civil or criminal in nature-the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source who furnished the information”).

Exemption 7(D) is applicable even if the requester is aware of the source’s identity through other means. *See Edwards v. Executive Office for U.S. Attorneys*, 436 Fed. Appx. 922, 924, 2011 WL 3360655, **1 (11th Cir. 2011)(citing *L & C Marine*, 740 F.2d at 925 (11th Cir.1984))(stating that the “per se limitation on disclosure under 7(D) does not disappear if the identity of the confidential source later becomes known through other means”).

FOIA Exemption 7(D) has been asserted to protect police reports and information obtained and provided to the FBI under an implied assurance of confidentiality by local law enforcement agencies in conjunction with a local agency investigation. The FBI’s release of such confidential information to the public could have a chilling effect on future cooperation by various law enforcement agencies with the FBI and could undermine the FBI’s ability to obtain essential information from local law enforcement agencies during future investigations.

Exemption 7(D) has also been invoked to withhold the name and identifying information provided by a third party. The position of this third party source and the sensitivity of the information provided is such that it may be inferred that the information was provided with the expectation of confidentiality. The FBI has released as much segregable information as possible

without disclosing the source's identity; the withheld information provided by the source is such that its release would clearly identify the source. Public disclosure of this information provided under an implied assurance of confidentiality would have a chilling effect on the FBI's ability to obtain information and cooperation from this source and other confidential sources in the future.

As established by the Hardy declaration, at ¶¶ 60-64, the FBI has properly asserted FOIA Exemption 7(D) to protect confidential sources and confidential source information. The Eleventh Circuit has recognized that the public has no right under the FOIA to disclosure of the identities of confidential sources of information; once the government shows that an individual has the status of a confidential source, his name and identifying information relating to him are exempt from disclosure. *L & C Marine*, 74 F.2d at 924-25.

FOIA Exemption 7(E)

FOIA Exemption 7(E), exempts from FOIA disclosure provisions:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information...(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.

5 U.S.C. § 552(b)(7)(E).

The FBI has asserted Exemption 7(E) to protect the following information:

1. Sensitive FBI case file numbers
2. Dates and Types (Preliminary or Full) of Investigations
3. Internal Non-Public Facsimile Numbers of FBI agents and support personnel
4. Investigative Techniques and Procedures used by the FBI to conduct national security

investigations

5. Analytical Techniques and Procedures used by an FBI Intelligence Analyst
6. Database and Database Information.

The Hardy declaration, at ¶¶ 66-72, describes in detail how public disclosure of each of these types of information would disclose techniques and procedures for law enforcement investigations or guidelines for law enforcement investigations and how such disclosure could reasonably be expected to risk circumvention of the law.

Public disclosure could enable individuals to circumvent the law, disrupt official business communications, gain access to internal communication channels, and undermine the effectiveness of the FBI and its databases, techniques, and procedures. Disclosure could diminish the benefit of law enforcement techniques and procedures and analytical processes, patterns, and techniques.

Therefore, the types of information described above were properly withheld pursuant to FOIA Exemption 7(E).

All reasonably segregable non-exempt information has been provided to plaintiffs.

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under [5 U.S.C. § 552(b)]." 5 U.S.C. § 552(b)(sentence following the list of exemptions). "[N]on-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

The FBI withheld only those portions of responsive documents which are exempt from disclosure and provided the requesters all reasonably segregable non-exempt information contained

in responsive documents.

CONCLUSION

Defendants have conducted a reasonable search for records responsive to plaintiffs' FOIA request. Any information withheld in response to the request was properly withheld pursuant to FOIA exemptions. There are no agency records being improperly withheld from plaintiffs.

Therefore, defendants respectfully request that the Court grant summary judgment in their favor.

Dated: May 13, 2013
Miami, Florida

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that, on May 13, 2013, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

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