

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

BROWARD BULLDOG, INC. and
DAN CHRISTENSEN,

Plaintiffs,

v.

Case No. 16-61289-CIV-ALTONAGA

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

Defendants.

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON COUNT I OF
PLAINTIFFS' COMPLAINT**

Defendants, United States Department of Justice and its component, the Federal Bureau of Investigation, pursuant to Rule 56, Federal Rules of Civil Procedure, move for summary judgment on Count I of Plaintiffs, Broward Bulldog, Inc., and Dan Christensen's Complaint under the Freedom of Information Act. In support of this Motion, Defendants submit and incorporate herein by reference the attached Fourth and Second Declarations of David M. Hardy, Section Chief of the FBI's Record/Information Dissemination Section ("RIDS"), Records Management Division (Exhibits A and B hereto, respectively). Defendants are also submitting, *ex parte*, an additional Declaration of David M. Hardy regarding classified material withheld from production, and an Unclassified *Vaughn* Index for the Court's consideration *in camera*.

The unclassified *Vaughn* Index includes unredacted versions of the unclassified records at issue. The classified records at issue will be delivered to Chambers through the Clerk of Court.¹

INTRODUCTION

This lawsuit is based on three separate FOIA requests Plaintiffs submitted to the FBI in April and July of 2015, related to the FBI 9/11 Review Commission. The FBI 9/11 Review Commission was established in January 2014 pursuant to a congressional mandate that the FBI create a commission with the expertise and scope to conduct a “comprehensive external review of the implementation of the recommendations related to the FBI that were proposed by the National Commission on Terrorist Attacks Upon the United States (commonly known as the

¹ Due to the closure of the FBI’s Records and Information Dissemination Section office in Winchester, Virginia, on this date, because of poor weather conditions, the Exhibits to the Fourth Hardy Declaration, and other documents supporting this motion are not available for filing or in camera submission at this time. Defendant will file and submit these documents promptly after the FBI’s Winchester reopens.

9/11 Commission).”² The FBI 9/11 Review Commission released its Final Report on March 25, 2015.³

Two of Plaintiff’s requests sought records and memoranda related to, or identified in, the FBI 9/11 Commission’s Final Report. The third request sought records of any disciplinary action taken by the FBI against a certain FBI Special Agent associated with the FBI’s investigation of the 9/11 terrorist attacks.⁴ The Court has previously ruled on Defendant’s Motion for Summary Judgment as to Counts II and III of Plaintiffs’ Complaint. Defendants now move for summary judgment on the FOIA Requests corresponding to Counts I of Plaintiffs’ Complaint (DE 1).⁵

² The Review Commission was tasked specifically to report on:

1. an assessment of the progress made, and challenges in implementing the recommendations of the 9/11 Commission that are related to the FBI;
2. an analysis of the FBI’s response to trends of domestic terror attacks since September 11, 2001, including the influence of domestic radicalization.
3. an assessment of any evidence not known to the FBI that was not considered by the 9/11 Commission related to any factors that contributed in any manner to the terrorist attacks of September 11, 2001; and
4. any additional recommendations with regard to FBI intelligence sharing and counterterrorism policy.

³ A copy of the report is available at the following URL:

<https://www.fbi.gov/news/pressrel/press-releases/resolveuid/8446caf2-8514-445a-9c36-f526a9525db6>.

⁴ Plaintiffs prioritized their three separate FOIPA requests for processing purposes. Plaintiffs’ FOIPA Request Number 1335424-000 was the first FOIPA requested, followed by, FOIPA Request Number 1326525-000, and finally, FOIPA Request Number 1332564-000. *See* Hardy Decl. at ¶ 5.

⁵ Several documents responsive to the FOIA request underlying Count I of Plaintiff’s Complaint were also responsive to the request underlying Count II of Plaintiffs Complaint. As indicated below, the Fourth Declaration of David M. Hardy submitted in support of this Motion for

STANDARD ON A MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate if the pleadings, the discovery and disclosure materials on file, and any affidavits show “there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a), (c). An issue of fact is “material” if it might affect the outcome of the case under the governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). It is “genuine” if the evidence could lead a reasonable jury to find for the non-moving party. *See id.*; see also *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party moving for summary judgment bears the initial burden of identifying “those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.” *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (alterations and internal quotation marks omitted)).

ARGUMENT

FOIA requires federal agencies to make records and documents publicly available upon request, unless they fall within one of several statutory exemptions. *See* 5 U.S.C. § 552(b). Pursuant to FOIA, a court is authorized to enjoin an agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. *See* 5 U.S.C. § 552(a)(4)(B). FOIA cases should generally be resolved on motions for summary judgment. *Miscavige v. IRS*, 2 F.3d 366, 369 (11th Cir. 1993); *St. Andrews Park, Inc. v. U.S. Dept. of Army Corps of Engineers*, 299 F. Supp. 2d 1264, 1267 (S.D. Fla. 2003). Defendants are

Summary Judgment on Count I provides additional factual support for the FBI’s redaction of information with respect to which the Court did not grant summary judgment for Defendant on Count II.

entitled to summary judgment in this case because they have not improperly withheld any records from Plaintiffs.

There are generally two issues for a court to consider in actions under FOIA: the adequacy of an agency's search for responsive records, and the lawfulness of any exemptions claimed by the agency to justify its withholding of responsive information. The agency bears the burden of showing "beyond a material doubt ... that it has conducted a search reasonably calculated to uncover all relevant documents." *Miccosukee Tribe of Indians of Florida v. United States*, 516 F.3d 1235, 1248 (11th Cir. 2008) (quoting *Ray v. U.S. Dep't of Justice*, 908 F.2d 1549, 1558 (11th Cir.1990), *rev'd on other grounds sub nom. U.S. Dep't of State v. Ray*, 502 U.S. 164, 112 S.Ct. 541, 116 L.Ed.2d 526 (1991)). But the agency "need not show that its search was exhaustive." *Ray*, 908 F.2d at 1558.

As for any information withheld from production in response to a FOIA request, the agency has the burden of proving that it properly invoked a FOIA exemption as a basis for the withholding. *Miccosukee Tribe*, 516 F.3d at 1258. Affidavits or declarations may be used to meet the agency'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).⁶ The affidavits submitted by an agency are accorded a presumption of good faith. *Del Rio*, 2009 WL 2762698, at *6.

Summary judgment for the federal agency is proper "[i]f the affidavits provide specific

⁶ Alternatively, when the circumstances of the case require it, an adequate factual basis may be established through a *Vaughn* index and/or in camera review, or by some combination of methods (affidavits, *Vaughn* index, and/or in camera review). *Miccosukee Tribe*, 516 F.3d at 1258. A *Vaughn* index is used by the government to meet its burden of proof in FOIA litigation and generally consists of a listing of information withheld or redacted, the specific FOIA exemption(s) applicable and the specific agency justification for the non-disclosure. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith.”

Florida Immigrant Advocacy Center v. National Security Agency, 380 F. Supp.2d 1332, 1338 (S.D. Fla. 2005), quoting *Hayden v. N.S.A.*, 608 F.2d 1381, 1384 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); *see also Inter Ocean Free Zone, Inc. v. U.S. Customs Service*, 982 F. Supp. 867, 871 (S.D. Fla. 1997); *Halperin v. C.I.A.*, 629 F.2d 144, 148 (D.C. Cir. 1980); *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).

COUNT I – RECORDS IDENTIFIED IN, OR RELATED TO, THE FINAL REPORT OF THE FBI 9/11 REVIEW COMMISSION

Count I of Plaintiffs’ Complaint asserts that Defendants have violated FOIA by failing to satisfy Plaintiff’s request for certain memoranda and other records identified in, or related to, the Final Report of the FBI 9/11 Review Commission. Plaintiffs’ FOIA request dated April 8, 2015, sought the following:

- “[t]ranscripts of commission proceedings and interviews, Memorandums for the Record, Personal Services Contracts with commissioners and staff and draft copies of the [Commission’s] final report”;
- a copy of “the FBI Briefing, ‘Overview of the 9/11 Investigation,’ provided to commissioners on April 25, 2014”;
- “the 2012 FBI summary report regarding Fahad al Thumairy . . .”;
- “the Memorandum for the Record [dated] April 30, 2014”; and
- “an undated FBI HQ briefing on the ‘Sarasota Family’ and the ‘Sarasota family’ case file, including reports of interviews, reviewed by the Commission.”

The Request also asked the FBI to “identify how many pages of the 9/11 Review Commission’s final report were classified in their entirety and not included in the final, unclassified report.” A copy of the request is attached to the Complaint as Exhibit 3. In a letter dated April 20, 2015, the FBI acknowledged its receipt of the Request assigned it FOIPA Request No. 1326525-000. A copy of the FBI’s April 20, 2015 letter to Plaintiffs is attached to the Complaint as Exhibit 4.

I. The FBI Conducted an Adequate Search for Records Responsive to Plaintiffs’ Request

As indicated above, an agency responding to a FOIA request must conduct a search reasonably calculated to uncover all responsive documents.” *Ray*, 908 F.2d at 1558; *Oglesby v. U.S. Department of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Weisberg v. U.S. Department of Justice*, 705 F.2d 1344, 1352 (D.C. Cir. 1983). An agency may establish that it conducted a reasonable search through the 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).⁷

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 need not show that it has conducted an exhaustive search

⁷ Generally, declarations accounting for searches of documents that contain hearsay are acceptable.” *Kay v. F.C.C.*, 976 F. Supp. 23, 33 n.29 (D.D.C. 1997), *aff’d*, 172 F.3d 919 (D.C. Cir. 1998). It is not necessary that the agency employee who actually performed the search supply an affidavit describing the search. *Maynard v. C.I.A.*, 986 F.2d 547, 560 (1st Cir. 1993); Affidavits of officials responsible for supervising or coordinating search efforts have been found to be sufficient to fulfill the personal knowledge requirement of FED. R. CIV. P. 56(e). *Id.*; *see also Patterson v. I.R.S.*, 56 F.3d 832, 840-41 (7th Cir. 1995) (declarant’s reliance on a standard search form completed by his predecessor was appropriate).

but must 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; *Oglesby*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Miller*, 779 F.2d at 1383 ("the search need only be reasonable; it does not have to be exhaustive"). 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. Moreover, a search is not presumed unreasonable if it fails to produce all relevant documents. *Id.*

The attached Fourth Declaration of David M. Hardy explains the procedures the FBI used to search for, review, and process the records responsive to Plaintiffs' FOIA request. *See* Fourth Hardy Decl. ¶¶ 14-16. Because the 9/11 Review Commission's Report was addressed to the Director of the FBI (the "DO"), the FBI's Records/Information Dissemination Section ("RIDS") judged the Director's Office to be the entity within the FBI most likely to possess the records sought by Plaintiffs and focused its search for responsive records accordingly. *See* Fourth Hardy Decl. at ¶ 14. RIDS provided the FBI Director's Office a copy of plaintiffs' FOIA request letter and, in turn, the Director's Office provided RIDS with access to DO's electronic storage housing documents relating to the FBI 9/11 Review Commission. *Id.*

RIDS performed a document by document search of the records provided by the FBI Director's Office. *See* Fourth Hardy Decl., at ¶¶ 11-13. As a result of its search, RIDS located and processed a total of 1416 pages⁸ of records responsive to the three FOIA Requests underlying this lawsuit. *Id.* Of those, 896 pages were specifically responsive to FOIPA Request

⁸ Although the Bates range of the documents is Broward Bulldog 0001 through Broward Bulldog 1556, the range of numbers between Broward Bulldog 1018 and Broward Bulldog 1156 were not assigned to any documents.

No. 1326525-000, the request underlying Count I of Plaintiff's Complaint. *Id.* Of the 896 pages specifically responsive to FOIPA Request No. 1326525-000, 328 pages were released to Plaintiffs subject to partial redactions, while the remainder were withheld in full. *Id.* The production of records responsive to the request at issue in Count I was made in three parts, on December 30, 2017, February 13, 2017 and February 22, 2017. *Id.*

Following their review of the records produced by the FBI on February 13, 2017, Plaintiffs identified to Defendants' counsel a number of areas where Plaintiffs perceived the production to be deficient:

- a. Plaintiffs questioned whether the FBI had searched for and produced "the 'Sarasota family' case file, including reports of interviews, reviewed by the Commission";
- b. Plaintiffs questioned whether FBI had searched for and produced "staff and draft copies of the [FBI 9/11 Review Commission's] final report";
- c. Plaintiffs questioned whether the FBI 9/11 Review Commission had generated any responsive records, beyond those produced, for the three months between the December 2, 2014, and the date of the Commission's Final Report, March 25, 2015;
- d. Plaintiffs questioned whether the FBI had searched for and produced any Memoranda for the Record concerning the FBI 9/11 Review Commission's visit to Beijing, Manila, Singapore and/or Madrid;
- e. Plaintiffs questioned whether the FBI had searched for and produced records concerning interviews at Headquarters with the LEGATS from Abu Dhabi, Ankara, Hong Kong, Kiev, Nairobi, and Tel Aviv;

f. Plaintiffs questioned whether the FBI had searched for and produced any report of an interview of the FBI Special Agent who wrote the April, 2002, Electronic Communication which noted “many connections” between the Sarasota Family and the 9/11 hijackers.

g. Plaintiffs questioned whether the FBI had searched for and produced any memoranda for the record regarding 38 topics on which the Commission had been briefed.⁹

In response to Plaintiffs’ inquiry as to whether the FBI had produced “the ‘Sarasota family’ case file, including reports of interviews, reviewed by the Commission,” the FBI confirmed that the FBI’s case file concerning the Sarasota family, redacted of information exempt under FOIA, had been produced to Plaintiffs in response to a previous FOIA Request from Plaintiffs, FOIPA No. 1176403. That production is currently the subject of the litigation before Judge Zloch, in *Broward Bulldog, et al., v. U.S. Dept. of Justice, et al.*, Case No. 12-61735-CIV-ZLOCH. Judge Zloch is currently conducting his own search of FBI records for any

⁹ The briefing topics were as follows: 1. 9/11 Background brief; 2. Anwar al-Aulaqi Part II; 3. Countering Violent Extremism; 4. Cyber Dark Tourist and Inspired Calm Brief; 5. Cyber Strategic Plan; 6. Cyber Texas Model Demonstration; 7. DI Employee Development brief; 8. DI Inspection Report; 9. DI Strategic Plan; 10. Disruptions of Attempted Terrorist Attacks; 11. Evolution of the National Security Branch; 12. FBI Leadership Briefing; 13. Guardian/eGuardian Briefing; 14. Integrated Training for Agents & Analysts – Integrated Curriculum Initiative; 15. IOD Americas Unit Brief; 16. IOD Briefings on Asia Legats; 17. IOD Europe Unit Brief; 18. Legat Ankara; 19. LEGAT Meeting - Abu Dhabi; 20. LEGAT Meeting - Tel Aviv; 21. Moner Abusalha Brief; 22. Moner Abusalha Brief - Part II; 23. National Cyber Investigative Joint Task Force; 24. Overview of Basic Training; 25. Overview of Cyber Division; 26. Overview of Office and Partner Engagement; 27. Overview of the Directorate of Intelligence; 28. Overview of the International Operations Division (IOD); 29. Overview of Weapons of Mass Destruction Division; 30. RPO Brief about SMO and IPM; 31. Saudi Report Overview; 32. Science & Technology Branch; 33. Senior National Intelligence Officer Meeting - Abu Dhabi; 34. Syrian Traveler; 35. Terrorist Use of the Internet; 36. The Company Man; 37. TRP Brief; and 38. WMD Exercise.

records regarding the Sarasota Family which may not have been identified by the FBI as responsive to Plaintiffs' FOIA request. Defendants have deemed the portion of the request underlying Count I in this lawsuit, for the "Sarasota family' case file, including reports of interviews reviewed by the Commission" as duplicative of, and subsumed by, the FOIPA request now at issue before Judge Zloch. *See* Fourth Hardy Declaration at fn. 7.

As for Plaintiffs' question as to whether the FBI 9/11 Review Commission had generated any responsive records between December 2, 2014, and the date of the Commission's Final Report, March 25, 2015, the FBI's Records and Information Dissemination Section produced all records it located which were responsive to Plaintiffs' request, without regard to the dates on which the records were generated. *See* Hardy Declarations (generally).

As for Plaintiffs' question of whether the FBI had searched for and produced any Memoranda for the Record concerning the FBI 9/11 Review Commission's visit to Beijing, Manila, Singapore and/or Madrid, the FBI reviewed its production and determined that the agency had, in fact, located and produced records relating to Beijing (*See* Bates Nos. 1310-1321, 1328-1331), Manila (1332-1345, 1354-1355) and Singapore (1450-1456). The FBI's initial search, however, did not yield responsive records relating to the Commission visit to Madrid. *See* Fourth Hardy Declaration at fn. 6.

Although it believed that its initial search had complied with FOIA, inasmuch as the search was reasonably calculated to locate all responsive documents, the FBI responded to Plaintiffs' questions by performing additional searches for the specific information Plaintiffs believed was missing from the production. *See* Fourth Hardy Decl. at ¶¶ 15-16. The FBI's Record and Information Dissemination Section again contacted personnel within the Director's

Office familiar with the material at issue to verify it had located all available responsive records.

Id.

On March 7, 2017, in response to the additional search efforts undertaken by RIDS, the FBI Director's Office provided RIDS with additional search leads which led to the identification of four additional Memoranda for the Record¹⁰, and to the location of a number of transitory records held in storage. *Id.* Transitory records are records required to be kept for short periods of time until a specific action has occurred, after which the file or document no longer has value. *Id.* The FBI routinely purges these types of records, as it is not legally required to permanently retain them. *Id.* The transitory records identified by the FBI's latest search were to have been purged in April, 2016, but were not destroyed. *Id.* The four additional Memoranda for the Record are responsive to the FOIA request underlying Count I and are being processed for production to Plaintiffs as soon as possible. The transitory records retrieved from storage have been preserved, and are being reviewed. The transitory records may contain responsive material. *Id.*

II. The FBI has Properly Invoked FOIA Exemptions to Protect Certain Information Within the Responsive Records

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 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)). It represents a balance struck by Congress "between the right of the public to know and the need of the Government to keep information in confidence." *John*

¹⁰ The memoranda for the records were located within the FBI's Sentinel case management system, an electronic database which had not previously been searched.

Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989). “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 must be given “meaningful reach and application.” *John Doe*, 493 U.S. at 152.

Immediately following the FBI’s production of records on February 13, 2017, the parties began conferring in an attempt to narrow the scope of issues requiring the Court’s attention. As result of this effort, Plaintiffs limited their challenge to the redactions made to the documents identified on the following table prepared by Plaintiffs’ counsel¹¹:

Doc	Start	End	Pages	DocDate	EventDate	Subject
1	1	4	4	04/30/14		Sarasota
2	5	6	2	10/24/14		Additional Evidence - Guantanamo Bay - None of this identifies new participants in the 9/11 attacks but hardens the existing known connections to the plot.
3	7	8	2	11/30/14		Bassem Youssef Interview
4	9	12	4	10/05/12		Penttbomb Summary Report

¹¹ The shaded portion of the table indicates records that were also the subject of the FOIA request underlying Count II of Plaintiffs’ Complaint. On February 27, 2017, the Court ruled upon the adequacy of FBI’s claims of exemption under FOIA in justification for the redaction certain information from such records. Guided by the Court’s rulings, the FBI will rerelease the records to Plaintiff, disclosing some—but not all—of the information previously redacted. At this time, the FBI maintains its claims of FOIA exemption with regard to some of the information redacted from the rereleased records, notwithstanding the Court’s ruling that the declaration submitted in support of the Motion for Summary Judgment on Count II did not adequately support the FBI’s redaction of information as exempt under FOIA. In an attempt to address the Court’s rulings as to the lawfulness of FBI’s FOIA exemption claims over such information, the Fourth Declaration of David M. Hardy and the unclassified *Vaughn* index furnished to Chambers for *in camera* review provide additional factual support for the FBI’s claimed exemptions.

13	221	224	4	04/30/14		Duplicate Broward Bulldog 1-4
15	229	230	2	09/15/11	09/15/11	FBI - Alleged Sarasota Link to 9/11 Hijackers
38	615	616	2			Withheld (NOT ON VAUGHN INDEX)
47	657	662	6	03/11/14		Counterterrorism Division
52	672	674	3	03/31/14		Pentbomb Investigation
58	692	696	5	04/23/14		Draft summary of a briefing between 9/11 commissioners and 9/11 investigators regarding the 9/11 investigation.
60	702	705	4	04/30/14		Overview of Dan Christensen's Miami Herald article written in 2011 and the FBI findings. The FBI found no evidence that connected the family members mentioned in the Miami Herald article. The briefing also discusses the 04/16/2002 EC. Duplicate of Broward Bulldog 1-4
61	706	709	4	05/09/14		Aulaqi
76	757	758	2	10/24/14		Draft summary of a briefing between 9/11 commissioners and 9/11 investigators regarding additional 9/11 evidence.
77	759	760	2	02/18/14	07/10/03	Economist Article
125	859	859	1			Briefing
126	860	861	2	06/13/14		Withheld (NOT ON VAUGHN INDEX)
186	1016	1017	2			Withheld (NOT ON VAUGHN INDEX)

223	1263	1270	8	Unknown		Draft briefing between NY FO personnel and local law enforcement in regarding a classified counterterrorism investigation. This includes summaries of interviews of various individuals that possibly had knowledge of the 9/11 attacks and/or contact with 9/11 hijackers.
224	1271	1279	9	09/18/14		Draft briefing between FBI, DOJ, and Naval Criminal Investigative Serice (“NCIS”) personnel discussing the 9/11 conspirators and the lessons learned.
261	1356	1379	24	08/25/14		Draft intelligence briefing regarding counterterrorism

The FBI has either redacted or withheld in full records responsive to Plaintiffs’ request pursuant to FOIA exemptions (b)(1), (b)(3), (b)(5), (b)(6), (b)(7)(C), (b)(7)(D), and (b)(7)(E). The FBI has provided its justification and factual bases for the redaction or withholding of documents in the Fourth Declaration of David M. Hardy, attached hereto as Exhibit A. In further support of FBI’s FOIA exemption claims, Defendants are also submitting, *ex parte*, an additional Declaration of David M. Hardy (addressing the FBI’s claims related to classified material) and an Unclassified *Vaughn* Index for the Court’s consideration *in camera*. The *Vaughn* Index includes the complete and unredacted unclassified records, marked to show information withheld from Plaintiffs. The Fourth Hardy Declaration at times refers to and incorporates by reference the Second Hardy Declaration, which was submitted in support of Defendant’s Motion for Summary Judgment on Counts II and III. For ease of reference, the Second Hardy Declaration is attached hereto as Exhibit B. Below is a discussion of each of the FOIA Exemptions FBI has invoked to protect the information now at issue.

Exemption (b)(1) – Classified Information

FOIA Exemption (b)(1) protects from disclosure information that is “(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). Executive Order 13526, signed by President Barack Obama on December 29, 2009, is the Executive Order that currently applies to the protection of national security information. For information to be properly classified, and thus properly withheld from disclosure pursuant to Exemption (b)(1), the information must meet the requirements set forth in E.O. 13526 § 1.1 (a):

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

The FBI invoked FOIA exemption (b)(1) on the following pages of the records at issue: Broward Bulldog-672-674, 707, 1016-1017, 1263-1279, 1356-1379. The attached Fourth Hardy Declaraion (Ex. A hereto), adopts by reference the FBI’s justification for asserting Exemption (b)(1) provided in paragraphs 33-44 of the Second Hardy Declaration (Ex. B hereto). *See* Fourth Hardy Decl., at fn. 11. Mr. Hardy’s Second Declaration explained how the information designated as exempt from disclosure to Plaintiffs pursuant to FOIA Exemption (b)(1) satisfies all of the requirements of E.O. 13526 § 1.1 (a). *See* Second Hardy Decl. at ¶¶ 33-44. Mr.

Hardy's *ex parte* Declaration, submitted in support of this Motion for the Court's *in camera* review, provides additional detail concerning the classified information withheld from the records now at issue, as a more detailed description on the public record of the withheld material would expose the very classified information that is exempt from disclosure.

As explained in his Declarations, Mr. Hardy personally and independently examined the information withheld from plaintiff pursuant to FOIA Exemption (b)(1).¹² The records withheld pursuant to FOIA Exemption (b)(1) were marked at the "Top Secret" or "Secret" level since the unauthorized disclosure of this information reasonably could be expected to cause exceptionally grave or serious damage to national security. As a result of his examination, Mr. Hardy has determined the classified information continues to warrant classification and is exempt from disclosure pursuant to E.O. 13526, § 1.4, category (c). Accordingly, the FBI has properly invoked FOIA Exemption (b)(1) and the Court should defer to its determination. *See, e.g., Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 926-27 (D.C. Cir. 2003) (discussing deference shown to Executive Branch in national security matters); *Ray v. Turner*, 587 F.2d 1187, 1190-95 (D.C. Cir. 1978) (discussing role of three branches of federal government in determining national security sensitivity); *Cozen O'Connor v. U.S. Dep't of Treasury*, 570 F. Supp. 2d 749, 773 (E.D. Pa. 2008) (noting that courts have "neither the expertise nor the qualifications to determine the impact upon national security" and that a "court must not substitute its judgment for the agency's regarding national defense or foreign policy implications" (citing *Halperin v. CIA*, 629 F.2d 144,

¹² Mr. Hardy's responsibilities as Section Chief of the Record/Information Dissemination Section include the review of FBI information for classification purposes as mandated by Executive Order 13526, and the preparation of declarations in support of Exemption (b)(1) claims asserted under the FOIA. *See* Second Hardy Decl. at ¶ 2. Mr. Hardy has been designated by the Attorney General of the United States as an original classification authority and a declassification authority pursuant to Executive Order 13526, §§ 1.3 and 3.1. *Id.*

148 (D.C. Cir. 1980)).

Exemption (b)(3) – Information Exempted from Disclosure by Statute

FOIA Exemption (b)(3) exempts from disclosure information which is

specifically exempted from disclosure by statute... provided that such 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.

5 U.S.C. § 552(b)(3).

The FBI invoked FOIA exemption (b)(3) on the following Bates pages: Broward Bulldog-672-674, 707, 1016-1017, 1263- 1279, 1356-1379. The Fourth Hardy Declaration (Ex. A hereto) incorporates by reference the FBI's justification for its assertion of exemption (b)(3) provided paragraphs 46-48 of the Second Hardy Declaration (Ex. B hereto). See Fourth Hardy Decl. at fn. 12. The FBI invoked FOIA Exemption (b)(3) to justify its withholding of information subject to § 102A(i)(1) of the National Security Act of 1947 (“NSA”), as amended by the Intelligence Reform and Terrorism Prevention Act of 2004 (“IRTPA”), 50 U.S.C. §3024(i)(1). *See* Second Hardy Decl. at ¶ 45. This statute requires the Director of National Intelligence (“DNI”) to “protect from unauthorized disclosure intelligence sources and methods.”¹³ Disclosure of such information presents the potential for individuals to develop and implement countermeasures, which would result in the loss of significant intelligence information, relied upon by national policymakers and the intelligence community. To fulfill his obligation of protecting intelligence sources and methods, the DNI has established and

¹³ Section 1024(i)(1) of the National Security Act was previously codified at 50 U.S.C. § 403(i)(1). As a result of the reorganization of Title 50 of the U.S. Code, Section 102A(i)(1) is now codified at 50 U.S.C. § 3024(i)(1).

implemented guidelines for the Intelligence Community (“IC”) for the classification of information under applicable laws, Executive Orders, or other Presidential Directives, and for access to and dissemination of intelligence. 50 U.S.C. § 3024(i)(1). The FBI is one of 17 member agencies comprising the IC, and as such is obligated protect intelligence sources and methods pursuant to the NSA, as amended by the IRTPA.

As explained in the Second Hardy Declaration, the FBI has invoked FOIA Exemption (b)(3) to protect against the disclosure of intelligence sources and methods. The FBI is prohibited by the NSA, as amended by the IRTPA, from disclosing such information. *See* 50 U.S.C. § 3024(i)(1). The NSA, as amended by the IRTPA, leaves no discretion to agencies about withholding from the public information about intelligence sources and methods. Thus, the protection afforded to intelligence sources and methods by 50 U.S.C. § 3024(i)(1) is absolute and the FBI’s withholding of such information in response to Plaintiff’s FOIA request is lawful and appropriate. *See CIA v. Sims*, 471 U.S. 159 (1985).

Exemption (b)(5) – Documents Normally Privileged in Civil Discovery

FOIA Exemption (b)(5) exempts from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). In other words, the exemption “withholds from a member of the public documents which a private party could not discover in litigation with the agency.” *N.L.R.B. v. Sears, Roebuck & Co.*, 41 U.S. 132, 149 (1975) (citation omitted).

The FBI invoked FOIA exemption (b)(5) to protect information on the following Bates pages: Broward Bulldog-615-616, 657-658, 660-662, 674, 708, 759-760, 859-861, 1263-1269, 1271, 1273-1279, 1356-1379. *See* Fourth Hardy Decl. at fn. 13. The Fourth Hardy Declaration incorporates by reference the FBI’s justifications for invoking exemption (b)(5) provided in

paragraph 53 of the Second Hardy Declaration.

The deliberative process privilege protects the internal decision-making processes of the executive branch in order to safeguard the quality of agency decisions. *Sears, Roebuck & Co.*, 421 U.S. at 150-51. Two prerequisites must be met before the Government properly may withhold a document from production pursuant to the deliberative process privilege. First, the document must be “predecisional,” i.e., “prepared in order to assist an agency decision maker in arriving at his decision.” *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184, 95 S. Ct. 1491, 1500, 44 L. Ed.2d 57 (1975). Second, it must be “deliberative,” that is, “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C.Cir.1975).

The purpose of the deliberative process privilege is to protect the quality of the agency's decision-making process. Even factual material contained in a “deliberative” document may be withheld pursuant to the privilege where disclosure of the factual material would reveal the deliberative process or where the factual material is so inextricably intertwined with the deliberative material that meaningful segregation is not possible.

Miccosukee Tribe, 516 F.3d at 1263, citing *Nadler*, 955 F.2d at 1490; *see also Sears, Roebuck & Co.*, 421 U.S. at 151. The privilege encourages open, frank discussions, protects against premature disclosure of proposed policies, and prevents the disclosure of reasons and rationales which are not ultimately the grounds for the agency's action. *See, e.g., Russell v. Dept. of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Jordan*, 591 F.2d at 772-73.

Mr. Hardy's Declaration demonstrates why the information withheld from in this case is subject to the deliberative process privilege and the potential harm posed by its disclosure. Specifically, Mr. Hardy indicates that “[t]he information withheld discusses internal deliberations and recommendations.” *See Fourth Hardy Decl.* at fn. 13. Mr. Hardy explains that

the information withheld reflects the agency's internal deliberative process before a final decision has been made on the matters discussed. *Id.* Mr. Hardy explains the potential harm that disclosure would pose to the deliberative process as follows: "if agency personnel knew their preliminary opinions, evaluations, recommendations and analytical comments would be released for public consumption, they may be more guarded in their suggestions and in what they put in writing, and thereby, impede candid discussions and consideration of issues surrounding the decision-making and policy formulation process." *Id.* Because the information at issue was "predecisional" and "deliberative," it is subject to the government's deliberative process privilege and was properly withheld pursuant to FOIA exemption (b)(5).

Exemption (b)(7) Law Enforcement Threshold

In addition to the FOIA Exemptions discussed above, the FBI has protected from disclosure certain information within the responsive records compiled for law enforcement purposes. Pursuant to FOIA Exemption (b)(7), six categories of records "compiled for law enforcement purposes" (lettered "A" through "F") are protected from disclosure. For these exemptions to apply, however, the threshold that the records be "compiled for law enforcement purposes" must be met.

Exemption (b)(7) "covers investigatory files related to enforcement of all kinds of laws,' including those involving 'adjudicative proceedings,' " and administrative matters. *Jefferson v. DOJ, Office of Prof. Responsibility*, 284 F.3d 172, 178 (D.C.Cir.2002) (quoting *Rural Housing Alliance v. Dep't of Agriculture*, 498 F.2d 73, 81 n. 46 (D.C.Cir.1974)). Further, "FOIA makes no distinction between agencies whose principal function is criminal law enforcement and

agencies with both enforcement and administrative functions.” *Tax Analysts v. IRS*, 294 F.3d 71, 77 (D.C.Cir.2002) (citing *Pratt v. Webster*, 673 F.2d 408, 416 (D.C.Cir.1982)). “However, courts apply a more deferential standard to a claim that information was compiled for law enforcement purposes when the claim is made by an agency whose primary function involves law enforcement.” *Id.* (citing *Pratt*, 673 F.2d at 418).

“Because the FBI specializes in law enforcement, its decision to invoke exemption 7 is entitled to deference.” *Campbell v. U.S. Dept. of Justice*, 164 F.3d 20, 32 (D.C. Cir. 1998) (citing *Pratt*, 673 F.2d at 419).¹⁴ “If the FBI relies on declarations to identify a law enforcement purpose underlying withheld documents, such declarations must establish a rational ‘nexus between the investigation and one of the agency’s law enforcement duties,’ and a connection between an ‘individual or incident and a possible security risk or violation of federal law.’” *Id.* (quoting *Pratt*, 673 F.2d at 420).

Mr. Hardy explains in his Declaration that records protected from disclosure pursuant to FOIA Exemption 7 in this case

were compiled to memorialize, study, and scrutinize the United States government’s investigation of activities leading up to the terrorist attacks of September 11, 2001. These records serve the FBI’s law enforcement, national security, and intelligence gathering missions as they provide clear examples of past investigative successes and failures. Such studies and self-examinations are key to an agency’s development of best practices – in the case of the FBI, best practices that can be used to better enforce the laws of the United States..

Fourth Hardy Decl. at ¶ 21.

¹⁴ As Mr. Hardy explains in his Declaration, Pursuant to 28 USC §§ 533, 534, and Executive Order 12333 as implemented by the Attorney General’s Guidelines for Domestic FBI Operations and 28 CFR § 0.85, the FBI is the primary investigative agency of the federal government with authority and responsibility to investigate all violations of federal law not exclusively assigned to another agency, to conduct investigations and activities to protect the United States and its people from terrorism and threats to national security, and further the foreign intelligence objectives of the United States. Fourth Hardy Dec. at ¶ 21.

Accordingly, the records the FBI withheld or redacted pursuant to one or more of the categories of records described in FOIA Exemption (b)(7), were “compiled for a law enforcement purpose.” The information or records squarely fall within the law enforcement duties of the FBI and readily meets the threshold requirement of Exemption (b)(7).

Exemptions (b)(6) and (b)(7)(C) – Unwarranted Invasion of Personal Privacy

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. Dept. 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 applicability of Exemptions 6 and 7(C) is determined by a balancing of interests that is the same under both exemptions. *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 whether the disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy” under Exemption 7(C). *See U.S. Dept. of Justice v. Reporters Committee for Freedom of Press*, 489

U.S. 749, 762 (1989); *L & C Marine Transport, Ltd. v. United States*, 740 F.2d 919, 922-23 (11th Cir. 1984); *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; *Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997).

The Supreme Court has recognized that FOIA's exemptions were intended to afford broad protection against the government's release of information about individual citizens, and the Court has broadly defined the privacy interest protected by these exemptions. *See* Reporters Committee, 489 U.S. at 763-64. The 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 923.¹⁵

Particularly, courts have recognized that there is a substantial privacy interest in information regarding individuals contained in law enforcement investigative records, including information not just about the subjects of investigation but also agents and employees, victims, third parties and confidential sources, the disclosure of which might subject these individuals or

¹⁵ 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 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.

their families to embarrassment, harassment, or reprisal.¹⁶ 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). The protection afforded under Exemption 7(C), which pertains to law enforcement records and information, is even broader than that afforded under Exemption 6. *Favish*, 541 U.S. at 165-66; *Office of Capital Collateral Counsel*, 331 F.3d at 803 n. 6.

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. 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.

Whether or not 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. *Schrecker v. Department of Justice*, 349 F.3d 657, 661, (D.C. Cir. 2003). It is the requester's burden to show both that the public interest which he is seeking to advance is "significant" and "more specific than having the

¹⁶ It should be noted that 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. at 501; see also *Favish*, 541 U.S. at 174 ("once there is disclosure, the information belongs to the general public").

information for its own sake" and that the information he is requesting "is likely to advance that interest." *Favish*, 541 U.S. at 172 (emphasis added).

As explained in paragraph 20 of the Fourth Hardy Declaration, the FBI has invoked Exemptions (b)(6) and (b)(7)(C) to withhold the following:

- (1) the names of third parties who were of investigative interest to the FBI (coded as "(b)(6)-1 and (b)(7)(C)-1", such redactions were made to the following Bates pages: Broward Bulldog-229-230, 673, 859, 1264-1269, 1273, 1277-1278, 1358-1360; the FBI's justification for invoking the exemption is provided in paragraph 58 of the Second Hardy Decl.);
- (2) the names and identifying information¹⁷ of FBI Special Agents and support personnel who were responsible for conducting, supervising, and/or maintaining the investigative activities reflected in the documents responsive to plaintiff's FOIA request (coded as "(b)(6)-2 and (b)(7)(C)-2", such redactions were made to the following Bates pages: Broward Bulldog-657, 672-673, 706, 859, 1263, 1356-1357, 1361-1362, 1366-1368, 1370-1371, 1373-1378; the FBI's justification for invoking the exemption is provided in paragraphs 59-60 of the Second Hardy Decl.);
- (3) the names and identifying information of local law enforcement personnel (coded as "(b)(6)-3 and (b)(7)(C)-3", such redactions were made to the following Bates pages: Broward Bulldog-1263, 1271; the FBI's justification for invoking the exemption is provided in paragraph 25 of the Fourth Hardy Decl., which incorporates by reference paragraphs 59-60 of the Second Hardy Decl.);

¹⁷ As used herein and the attached Declaration, the term "identifying information" includes, but is not limited to dates of birth, social security numbers, addresses, telephone numbers, and/or other personal information. See Fourth Hardy Decl. at fn. 15.

- (4) the names and identifying information of non-FBI federal government personnel (coded as “(b)(6)-6 and (b)(7)(C)-6”, such redactions were made to the following Bates pages: Broward Bulldog-1271, 1358, 1370-1371, 1377; the FBI’s justification for invoking the exemption is provided in paragraphs 26-27 of the Fourth Hardy Decl., which incorporate by reference paragraphs 59-60 of the Second Hardy Decl.); and
- (5) the names and identifying information of third parties who provided information to the FBI (coded as “(b)(6)-7 and (b)(7)(C)-7”, such redactions were made to the following Bates pages: Broward Bulldog-1271; the FBI’s justification for invoking the exemption is provided in paragraphs 28-29 of the Fourth Hardy Decl.).

For the reasons set forth above, in Mr. Hardy’s Declarations, and in the *Vaughn* Index submitted to Chambers, the FBI has properly invoked FOIA Exemptions (b)(6) and (b)(7)(C) to protect against the unwarranted invasion of the privacy of those individuals whose information has been withheld.

Exemption (b)(7)(D) – Confidential Source Information

The FBI has invoked FOIA Exemption (b)(7)(D) to protect the name(s) of third part(ies) who provided information to the FBI. FOIA Exemption (b)(7)(D) provides protection for

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).

Under Exemption (b)(7)(D), “the question is not whether the requested *document* is of the type that the agency usually treats as confidential, but whether the particular source spoke with an understanding that the communication would remain confidential.” *U.S. Dep’t. of Justice v. Landano*, 508 U.S. 165, 172 (1993). “[A] source is confidential within the meaning of Exemption 7(D) if the source ‘provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred.’” *Id.* (quoting S.Rep. No. 93–1200, at 13, U.S.Code Cong. & Admin.News pp. 6267, 6291). “[T]he word “confidential,” as used in Exemption 7(D), refers to a degree of confidentiality less than total secrecy.” *Id.* at 174. “A source should be deemed confidential if the source furnished information with the understanding that the FBI would not divulge the communication except to the extent the Bureau thought necessary for law enforcement purposes.” *Id.*

As explained in paragraph 20 of the Fourth Hardy Declaration, the FBI has invoked FOIA Exemption (b)(7)(D) to protect the following:

- (1) the names, identifying information about, and information provided by third parties under implied assurance of confidentiality (coded as “(b)(7)(D)-1”, such redactions were made to the following Bates pages: Broward Bulldog-229, 673, 707, 1264-1265; the FBI’s justification for invoking the exemption is provided in paragraphs 67-68 of the Second Hardy Decl.); and
- (2) the identity of, and the information provided by, foreign government agencies to the FBI under an “express” assurance of confidentiality (coded as “(b)(7)(D)-3”, such redactions were made to Bates page Broward Bulldog-1265; the FBI’s justification for invoking the exemption is provided in paragraphs 71-72 of the Second Hardy Decl.).

Mr. Hardy's Second Declaration explains how the release of the foregoing records to Plaintiffs could reasonably be expected to disclose the identity of a confidential source or the disclosure of information provided by a confidential source. Accordingly, the FBI has properly asserted FOIA Exemption (b)(7)(D) to protect these records.

Exemption (b)(7)(E) – Investigative Techniques and Procedures

FOIA Exemption (b)(7)(E) protects 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 ... 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).

Under Exemption (b)(7)(E), an agency can decline to disclose internal agency materials that relate to “guidelines, techniques, sources, and procedures for law enforcement investigations and prosecutions.” *Morley v. CIA*, 508 F.3d 1108, 1129 (D.C.Cir.2007) (quotation marks omitted). The exemption protects “investigatory techniques and procedures not generally known to the public,” *Doherty v. U.S. Dep't of Justice*, 775 F.2d 49, 52 n. 4 (2d Cir.1985), and is similar to Exemption (b)(2) in that it requires the agency to establish that disclosure would risk circumvention of the law. *See PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 249–50 (D.C.Cir.1993); *Hidalgo v. FBI*, 541 F.Supp.2d 250, 254 (D.D.C.2008) (“Exemptions 2 and 7(E) allow information about law enforcement techniques to be withheld when publication would allow perpetrators to avoid them....”).

As explained in the Hardy Declaration, the FBI invoked FOIA Exemption (b)(7)(E) to protect the following:

- (1) information about sensitive techniques and procedures used by the FBI in conducting national security investigations into terrorism, including information that would reveal what types of techniques and procedures are routinely used in such investigations, and non-public details about when, how, and under what circumstances they are used (coded as “(b)(7)(E)-1”, redactions of such information were made on the following Bates pages: Broward Bulldog-615, 657-662, 673, 707, 757, 1272-1279, 1356-1357, and 1361-1379; the FBI’s justification for claiming the exemption is set forth in paragraph 76 of the Second Hardy Declaration)¹⁸;
- (2) information pertaining to the types and dates of investigations referenced in the records at issue in this case (coded as “(b)(7)(E)-2”, redactions of such information were made on the following Bates pages: Broward Bulldog-706-708, 1360; the FBI’s justification for claiming the exemption is set forth in paragraph 77 of the Second Hardy Declaration)¹⁹;
- (3) methods that the FBI uses to collect and analyze the information that it obtains for investigative purposes (coded as “(b)(7)(E)-3”, redactions of such information were made on the following Bates pages: Broward Bulldog-615-616, 662, 708; the FBI’s

¹⁸ The FBI inadvertently cited exemption (b)(7)(E)-1 on Bates pages Broward Bulldog-672, 674, 706, 708. *See* Fourth Hardy Decl. at fn. 19.

¹⁹ The FBI inadvertently cited exemption code (b)(7)(E)-2 on Broward Bulldog-674. On Broward Bulldog-708, the FBI inadvertently coded a portion of the information (b)(7)(E)-1 while this information actually falls under Category (b)(7)(E)-2. *See* Fourth Hardy Decl. at fn. 20.

- justification for claiming the exemption is set forth in paragraph 78 of the Second Hardy Declaration)²⁰;
- (4) the FBI's strategies for using a particular type of evidence gathered during its national security investigations. (coded as "(b)(7)(E)-4", redactions of such information were made on the following Bates pages: Broward Bulldog-615 and 662; the FBI's justification for claiming the exemption is set forth in paragraph 79 of the Second Hardy Declaration);
- (5) the locations and identities of FBI units and/or joint units, squads or divisions that were involved in the investigations at issue in the responsive documents (coded as "(b)(7)(E)-6", redactions of such information were made on the following Bates pages: Broward Bulldog-659, 661, 672-673, 860 and 1263; ; the FBI's justification for claiming the exemption is set forth in paragraph 81 of the Second Hardy Declaration);
- (6) the investigative focus of specific FBI investigations (coded as "(b)(7)(E)-7", redactions of such information were made on the following Bates pages: Broward Bulldog-673-674 and 1358-1360; the FBI's justification for claiming the exemption is set forth in paragraph 82 of the Second Hardy Declaration); and
- (7) unknown sensitive investigative databases and or unknown investigative uses or capabilities of investigative databases or database information (coded as "(b)(7)(E)-9", redactions of such information were made on the following Bates pages: Broward Bulldog-615, 659, 674, 709, 1272, 1274, 1358, 1365 and 1368; the FBI's justification

²⁰ On Broward Bulldog-'Z08, the FBI inadvertently coded a portion of the information (b)(7)(D)-4 while this information actually falls under Category (b)(7)(E)-3

for claiming the exemption is set forth in paragraph 32 of the Fourth Hardy Declaration).

Mr. Hardy's Declarations demonstrate how the disclosure of the foregoing could would risk circumvention of the law. As such, the FBI's assertion of Exemption (b)(7)(E) is lawful and appropriate.

III. The FBI's Supplemental Support for Claims of Exemption over Information at Issue Under Both Count I and Count II

As indicated above, several documents responsive to the FOIA request underlying Count I of Plaintiff's Complaint were also responsive to the request underlying Count II of Plaintiffs' Complaint. On February 27, 2017, the Court entered its Order on Defendant's Motion for Summary Judgment on Count II, thus ruling upon the adequacy of FBI's justifications for the redaction of certain information within such records. Guided by the Court's rulings, the FBI will rerelease the records to Plaintiff, disclosing some—but not all—of the information previously redacted. At this time, the FBI maintains its claims of FOIA's privacy exemptions with regard to some of the information redacted from the rereleased records, notwithstanding the Court's ruling that the declaration submitted in support of the Motion for Summary Judgment on Count II did not adequately justify the FBI's redaction of the information as exempt under FOIA. *See* Fourth Hardy Decl. at ¶ 36. In addition to the reasons given in paragraphs 36-44 of the Fourth Hardy Declaration, the FBI has prepared . *See* Fourth Hardy Decl., Ex.

Subjects of Investigation

The FBI continues to withhold the identity of individuals who were the subject of FBI investigations which have not been publicly disclosed. *See* Fourth Hardy Decl. at ¶ 39. The Fourth Hardy Declaration distinguishes disclosures made by Plaintiffs and the Court in the case before Judge Zloch from disclosures made by the FBI itself. *Id.* at ¶¶ 39-40. This distinction is

important because “the waiver analysis for FOIA purposes turns upon official disclosures made by the agency” not by others. *See Energy & Environment Legal Institute v. Federal Energy Regulatory Commission*, 72 F. Supp.3d 241, 248 (D.C. Dist. 2014) *Fitzgibbon v. C.I.A.*, 911 F.2d 755, 765 (D.C.Cir.1990) (upholding an agency’s assertion of FOIA personal privacy exemptions over a requestor’s claim that the subject of the request had waived his right to privacy by publicly discussing the matters that were the subject of the FOIA request).

“A claim of official waiver in the context of FOIA requires a specific showing[:] (1) “the information requested must be as specific as the information previously released”; (2) “the information requested must match the information previously disclosed”; and (3) “the information requested must already have been made public through an official and documented disclosure.” *Id.* (citing *Afshar v. Dep’t of State*, 702 F.2d 1125, 1133 (D.C.Cir.1983)). Plaintiffs have provided no evidence that the FBI has disclosed the specific information redacted from the documents at issue.

Mr. Hardy’s Fourth Declaration also provides additional factual support for the FBI’s invocation of FOIA’s privacy exemptions to protect the identities of the subjects of the FBI’s investigations, specifically elaborating upon the potential harm that disclosure would cause to these individual ls relative to the public’s interest in learning their identities. *See* Fourth Hardy Decl. at ¶¶ 40-41. Mr. Hardy also addresses the Court’s concern that the FBI’s redaction of information in some instances but not others seemed inconsistent. *See Id* at ¶ 41.

Identity of the Special Agent Who Wrote April 2002 Electronic Communication

The FBI also continues to withhold the name of the Special Agent who wrote the April 2002 Electronic Communication which indicated “many connections” between the Sarasota family and the 9/11 terrorists. Again, the Fourth Hardy Declaration explains that, although

Plaintiffs may have published the name of a person they believe to be the Special Agent at issue, the FBI has made no such public disclosure. *See* Fourth Hardy Decl. at ¶ 42. As indicated above, a waiver of privacy is effected by an agency's disclosure – not by a disclosure by the requestor under FOIA. Plaintiffs can point to no evidence that the FBI has previously disclosed the identity of the Special Agent at issue.

Paragraph 42 of the Fourth Hardy Declaration also elaborates upon the potential harm to caused by disclosure, i.e., the invasion of the person's privacy, relative to public's interest in knowing his or her name.

Identities of Other Law Enforcement Personnel

The FBI also continues to withhold the names of personnel of the FBI and other law enforcement agencies, but only in instances where the FBI has confirmed that the identities of such individuals have not already been publicly disclosed in association with their investigative efforts, and where disclosure would not advance the public's understanding of the government's actions enough to justify the infringement upon the individuals' privacy. *See* Fourth Hardy Decl. at ¶ 43, 44. The Fourth Hardy Declaration also addresses the Court's concern over what appears to be inconsistent application of the privacy exemptions in this context. *See Id.* at fn. 32.

DOCUMENTS REFERRED TO OTHER GOVERNMENT AGENCIES (“OGAs”) FOR CORDINATION WITH THE FBI

The State Department

As part of its search for and processing of records responsive to Plaintiffs' request, the FBI identified a number of pages containing information and/or equities originating with other government agencies. *See* Fourth Hardy Decl. at ¶ 45. In accordance with DOJ regulations,

specifically 28 C.F.R. § 16.4(c), the FBI consulted with these OGAs to allow the OGAs the opportunity to review their information pursuant to the FOIA. *Id.*

On November 17, 2016, the FBI referred 45 pages to the Department of State (“DoS”) for consultation.²¹ *See* Fourth Hardy Decl. at ¶46. On December 30, 2016, DoS instructed the FBI to partially withhold records in which DoS had equities pursuant to FOIA exemption (b)(1). These records are identified as Broward Bulldog-707-709 and 1016-1017. DoS justified their assertion of Exemption 1 for the reasons explained in paragraphs 47 through 55 of the Fourth Hardy Declaration.

The National Security Agency

On November 14, 2016, the FBI referred 230 pages containing information concerning NSA equities for consultation. *See* Fourth Hardy Index, ¶ 56. On December 9, 2016, the NSA instructed the FBI to partially withhold information in which NSA has equities pursuant to FOIA exemptions (b)(1) and (b)(3). These withholdings are addressed in NSA's *Vaughn* submission in this case, which is attached as Exhibit I to the Fourth Hardy Declaration.

CONCLUSION

The Declarations of David M. Hardy and Vaughn Index submitted in support of this Motion demonstrate that the FBI has conducted a search reasonably calculated to locate all records responsive to Plaintiffs’ FOIA request and that the FBI has lawfully asserted FOIA exemptions to withhold certain information. For these reasons, Defendant, United States Department of Justice respectfully submits that summary judgment in its favor is appropriate.

Dated: March 14, 2017
Miami, Florida

Respectfully submitted,

WIFREDO A. FERRER

²¹ These are identifiable as Broward Bulldog-9-10.

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2016, I filed the foregoing document with the Clerk of the Court, using the CM/ECF system.

/s/ Carlos Raurell
Assistant United States Attorney