**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.
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**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON COUNTS II AND III 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 Counts II and III 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 Declaration of David M. Hardy, Section Chief of the Record/Information Dissemination Section ("RIDS"), Records Management Division ("RMD"), in Winchester, Virginia.

**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 9/11 Commission)."[1] The FBI 9/11 Review Commission released its Final Report on March 25, 2015.[2]

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.[3] Only Plaintiff's request for records of any disciplinary action taken by the FBI against the FBI Special Agent was fully processed by the FBI before Plaintiffs filed this

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[1] 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.

[2] 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.

[3] 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 ¶ 6.

lawsuit on June 15, 2016. Plaintiff's other two FOIA requests, which more broadly sought approximately ten categories of records related to the FBI 9/11 Review Commission's work, were still pending when this lawsuit was filed. Since the filing of this lawsuit, the FBI has completed processing one of those two requests. The FBI, however, is still processing the other request. The government now moves for summary judgment on the two FOIA requests it has fully processed. These correspond to Counts II and III of Plaintiff's Complaint (DE 1).

## STANDARD ON A MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In making this assessment, the Court "view[s] all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party," *Stewart v. Happy Herman's Cheshire Bridge, Inc*., 117 F.3d 1278, 1285 (11th Cir.1997), and "resolve[s] all reasonable doubts about the facts in favor of the non-movant." *United of Omaha Life Ins. Co. v. Sun Life Ins. Co. of Am*., 894 F.2d 1555, 1558 (11th Cir.1990).

## 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).

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).[4] 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 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). As demonstrated herein and in the supporting Declarations, Defendants are entitled to summary judgment in this case because they have not improperly withheld any records from Plaintiffs.

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

Count II of Plaintiffs' Complaint asserts that Defendants have violated FOIA Plaintiffs' by failing to satisfy their request for certain memoranda and other records identified in, or related to, the Final Report of the FBI 9/11 Review Commission.

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[4] 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).

On July 4, 2015, Plaintiffs submitted to the FBI a FOIA request for the following records:

(1) the "Memorandum for the Record [dated] April 30, 2015, cited in footnotes 356-359 in the review commission's final report";

(2) Personal Services Contracts between the FBI and the three 9/11 Review commissioners, executive director and three additional staff members, cited in footnote 5" of the final report;

(3) the "Memorandum for the Record [dated] October 24, 2014, cited in footnote 337" of the final report;

(4) the "2012 FBI summary report, cited in footnote 330" of the final report; and

(5) the "Memorandum for the Record [dated] November 10, 2014, cited in footnote 321" of the final report.

A copy of the request is attached to the Complaint as Exhibit 6. In a letter dated August 26, 2015, the FBI acknowledged its receipt of the request and assigned it FOIPA Request No. 1335424-000. A copy of the FBI's August 26, 2015 letter is attached to the Complaint as Exhibit 7.

To locate the records responsive to Plaintiffs' request, the FBI Records/Information Dissemination Section contacted the FBI Director's Office (DO), as it reasonably judged the DO to be the entity within the FBI most likely to possess the records sought by Plaintiffs.[5] *See* Hardy Decl. at ¶ 28. The DO was able to locate the responsive records pertaining to the 9/11 Commission Report and provided them to the Records/Information Dissemination Section for processing. *Id.* On or about October 31, 2016, the FBI produced to Plaintiffs approximately 220

[5] The report of the Congressionally directed 9/11 Review Commission was specifically addressed to the Director of the FBI; and therefore, RIDS determined it was logical that records relating to the 9/11 Commission Report would reside with the DO. *See* Hardy Decl. at fn. 7.

pages of records. *See* Hardy Dec. at ¶¶ 5, 11. Of these pages, 148 were released in full and 72 pages were released in part, that is, redacted of certain information exempt from disclosure under FOIA. *Id*. Plaintiffs were advised that although their request was in litigation, they could appeal the FBI's determination by filing an administrative appeal with the Department of Justice, ("DOJ"), Office of Information Policy, ("OIP") within ninety days. *See* Hardy Decl. at ¶ 11. No appeal has been filed. *Id*.

**a. The FBI has properly invoked FOIA Exemptions to withhold certain information**

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 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.

In accordance with *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), the attached Declaration of David M. Hardy explains the FBI's recordkeeping system, the procedures used to search for, review, and process the responsive records, and the FBI's justification for withholding records in part pursuant to FOIA Exemptions (b)(1), (b)(3), (b)(4), (b)(5), (b)(6), (b)(7)(A), (b)(7)(C), (b)(7)(D), and (b)(7)(E). Below is a discussion of each

of the FOIA Exemptions FBI has invoked and an explanation of the agency's reasons for doing so. A copy of the records themselves, redacted in the same manner as those provided to Plaintiffs, is attached as Exhibit K to the Hardy Declaration. In consultation with Chambers, the FBI will provide a copy of the unredacted documents to the Court, in an appropriate manner for *in camera* review as contemplated under 5 U.S.C. § 552(a)(4)(B).

**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
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> (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.

As explained in the attached Hardy Declaration[6], the information designated as exempt from disclosure to Plaintiffs pursuant to FOIA Exemption (b)(1) satisfies all of the foregoing requirements. *See* Hardy Decl. at ¶¶ 34-44. Mr. Hardy personally and independently examined the information withheld from plaintiff pursuant to FOIA Exemption (b)(1). 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. *See* Hardy Decl. at ¶ 36 (citing E.O. 13526 § 1.2 (a)(2)). As a result of his examination, Mr. Hardy determined the classified information continues to warrant classification at the "Secret" level and is exempt from disclosure pursuant to E.O. 13526, § 1.4, category (c). *See* Hardy Decl. at ¶ 37. Specifically, Mr. Hardy concluded that the information pertains to "intelligence activities (including covert action), intelligence sources or methods, or cryptology." *Id*.[7] 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

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[6] 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 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.*

[7] Mr. Hardy provides a more detailed explanation of the harm posed by disclosure of the intelligence activities, sources and methods in the responsive records at paragraphs 37 – 41 of his Declaration.

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

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

> FOIA Exemption (b)(3) exempts from disclosure information which is
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> 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) 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* Hardy Decl. at ¶ 46. This statute requires the Director of National Intelligence ("DNI") to "protect from unauthorized disclosure intelligence sources and methods."[8] 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

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[8] 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).

methods, the DNI has established and 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 attached Hardy Declaration, the FBI has properly 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)(4) – Trade Secrets and Confidential or Privileged Commercial or Financial Information**

FOIA Exemption (b)(4) protects from disclosure (1) "trade secrets" and (2) "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). A "trade secret" encompasses a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort. *See United Techn. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 563 n. 9 (D.C.Cir.2010); *Herrick v. Garvey*, 298 F.3d 1184, 1190 (10th Cir.2002). For information other than "trade secrets" to

qualify as exempt from disclosure under FOIA Exemption (b)(4), an agency must show that the information is (a) "commercial or financial", (b) "obtained from a person," and (c) "privileged or confidential." *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C.Cir.1983).

The FBI has invoked FOIA Exemption (b)(4) to withhold the FBI withheld the privately negotiated salaries of the three individuals who served on the 9/11 Review Commission. Hardy Decl. at ¶ 50. Mr. Hardy explains that the FBI has invoked Exemption (b)(4) to protect this information because disclosure of these salaries would cause substantial harm to the competitive negotiation process in the future. *Id*. Specifically, Mr. Hardy found that "[r]elease of this information would enable potential government contractors the opportunity to judge how they might underbid their those that served on the 9/11 Reports Commission board, when bidding for similar contracts in the future." *Id*. Because the information is clearly "commercial or financial" in nature, was obtained from the three individuals who served on the Commission, and considered by all parties to be confidential, the FBI has properly withheld this information pursuant to Exemption (b)(4).

**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 Hardy Declaration indicates that the FBI has invoked FOIA Exemption (b)(5) to withhold information subject to the government's deliberative process privilege. 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. The information consists of drafts, unadopted rationales, policies and/or decisions, which were

preliminary to the Commission's Final Report. Hardy Decl. at ¶ 53. The information was thus "predecisional" and "deliberative," and thus subject to the government's deliberative process privilege.

**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 which was 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).[9] "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..

Hardy Decl. at ¶ 54.

Accordingly, the records discussed below, which were 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

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[9] 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 ("AGG-DOM") 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. Hardy Dec. at ¶ 54.

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 which are 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.[10]

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 their families to embarrassment, harassment, or reprisal.[11] *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

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[10] 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.

[11] 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").

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. at165-66; *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 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).

The FBI has invoked Exemptions (b)(6) and (b)(7)(C) to withhold the following:

(1) the name of a third party who was investigative interest to the FBI (*see* Hardy Decl.

at ¶ 58); and

(2) the names and identifying information[12] 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 (*see* Hardy Decl. at ¶¶ 59-60).

The potential invasion of privacy to these individuals posed by disclosure is described in the Declaration. *See* Hardy Decl. at ¶¶ 57-60. For the reasons set forth above and provided in Mr. Hardy's Declaration, 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)(A) – Pending Enforcement Proceedings**

FOIA Exemption (b)(7)(A) 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 … could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). The principal purpose of Exemption 7(A) is to prevent disclosures which might prematurely reveal the government's cases in court, its evidence and strategies, or the nature, scope, direction, and focus of its investigations, and thereby enable suspects to establish defenses or fraudulent alibis or to destroy or alter evidence. *See NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214, 227, 241-42, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978) To justify withholding information pursuant to Exemption 7(A), an agency must demonstrate that "disclosure (1) could reasonably be expected to interfere with (2) enforcement proceedings

[12] 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.

that are (3) pending or reasonably anticipated." *Mapother v. U.S. Dep't of Justice*, 3 F.3d 1533, 1540 (D.C.Cir.1993). As explained in the attached Hardy Declaration, Exemption (b)(7)(A) was invoked in this case to protect specific case information from a pending FBI investigation. Hardy Decl. at ¶ 63. Mr. Hardy explains that

> The release of information pertaining to investigative activities of third parties of an on-going FBI investigation could result not only in the acknowledgment of the existence of an investigation, but also in the identification of suspects and thus jeopardize the investigation. The FBI has concluded that this information is intertwined with other ongoing investigations of known and suspected third party terrorists. The FBI has determined that disclosure of the information, in the midst of this active and ongoing investigation, could reasonably be expected to interfere with these other investigations as well as any resulting prosecutions. As such, the release of this information would interfere with pending and prospective enforcement proceedings, including investigations and prosecutions; therefore, the FBI with[e]ld this information pursuant to FOIA exemption (b)(7)(A)

*Id*. Mr. Hardy's Declaration demonstrates how the disclosure of information at issue could reasonably be expected to interfere with enforcement proceedings that are pending or reasonably anticipated. As such, the FBI's assertion of Exemption (b)(7)(A) is lawful and appropriate.

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

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*.

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 (*see* Hardy Decl. at ¶¶ 67-68);

(2) information provided to the FBI by a local law enforcement agency that obtained the information from their own confidential sources (*see* Hardy Decl. at ¶¶ 69-70);

(3) the identify of and the information provided by foreign government agencies to the FBI under an "express" assurance of confidentiality (*see* Hardy Decl. at ¶¶ 71-72 ); and

(4) information provided to the FBI by a foreign government agency under an implied assurance of confidentiality (*see* Hardy Decl. at ¶ 73).

Mr. Hardy's 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 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 (*see* Hardy Decl. at ¶ 76);

(2) information pertaining to the types and dates of investigations referenced in the records at issue in this case (*see* Hardy Decl. at ¶ 77);

(3) methods that the FBI uses to collect and analyze the information that it obtains for investigative purposes (*see* Hardy Decl. at ¶ 78);

(4) the FBI's strategies for using a particular type of evidence gathered during its national security investigations. (*see* Hardy Decl. at ¶ 79);

(5) sensitive case file numbers (*see* Hardy Decl. at ¶ 80);

(6) 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 (*see* Hardy Decl. at ¶ 81);

(7) the investigative focus of specific FBI investigations (*see* Hardy Decl. at ¶ 82); and

(8) operational directives that provide information and instruct FBI employees on the proper use of certain sensitive FBI procedures, techniques, and strategies for conducting investigations (*see* Hardy Decl. at ¶ 83).

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

**DOCUMENTS REFFERED TO OTHER GOVERNMENT AGENCIES ("OGAs") FOR CORDINATION WITH THE FBI**

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* Hardy Decl. at ¶ 84. In accordance with DOJ regulations, specifically 28 C.F.R. § 16.4(c), the FBI consulted with the Justice Department's Civil Division and with the Central Intelligence Agency ("CIA") to allow the OGAs the opportunity to review their information pursuant to the FOIA. *Id*.

On August 26, 2016, the FBI referred 2 pages to DOJ National Security Division ("DOJ-NSD") for consultation.[13] *See* Hardy Decl. at ¶ 85 These are identifiable as Broward Bulldog-9-10. By letter dated September 9, 2016 DOJ-NSD advised the FBI that the referred information is under the purview of the Department of Justice's Civil Division ("DOJ-CD"); and therefore, the records were rerouted to DOJ-CD for a consultation. *Id*. By email dated September 29, 2016, the FBI was instructed by DOJ-CD to partially withhold their equities pursuant to FOIA exemptions (b)(5), (b)(6), and (b)(7)(C). These withholdings are addressed in DOJ-CD's *Vaughn* submission in this case, the Declaration of Angie E. Cecil, Senior Supervisory FOIA Counsel, Office of FOIA, Records, and E-discovery, Civil Division, Department of Justice, a copy of which is attached as Exhibit L to the Hardy Declaration.

Ms. Cecil's Declaration explains that a portion of the information redacted at the request of DOJ-CD is subject to FOIA Exemption (b)(5) (discussed generally above), which protects material normally not available to a party in civil litigation with the government. The particular

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[13] These are identifiable as Bates Nos. Broward Bulldog-9-10.

information referred by the FBI to DOJ includes "assessments or legal analyses [which] are inter- and intra-agency communications between DOJ attorneys, [] specifically mention[ing] strategies in a pending investigation or litigation." *See* Cecil Decl. at ¶ 6. Ms. Cecil explains that these analyses by DOJ attorneys are protected by the attorney work product doctrine because they reveal the attorneys' thoughts, strategies and opinions in anticipation of litigation. *See* Cecil Decl. ¶ 7. Accordingly, such information is subject to FOIA Exemption (b)(5).

DOJ-CD also invoked FOIA Exemption (b)(6) and (b)(7)(C) (discussed generally above) to protect the names and immigration status of individuals who were the subject of a pending investigation. *See* Cecil Decl. at ¶ 8. DOJ-CD's review of the information found that the privacy of the individuals outweighs the public interest in disclosure, and that release of the information would be an unwarranted invasion of the individuals' privacy. *Id*. Accordingly, DOJ-CD properly invoked FOIA Exemptions (b)(6) and (b)(7)(C) to protect this information from disclosure.

On August 26, 2016, the FBI referred two pages to the CIA for consultation because the pages originated with that agency.[14] *See* Hardy Decl. at ¶ 86. The two pages comprised the "Memorandum for the Record" dated October 24, 2014, that was specifically sought by Plaintiff's request. As explained in the Declaration of Mary Wilson, attached as Exhibit M to the Hardy Declaration, the CIA determined that four paragraphs of the MFR contain information that is both classified and protected by statute. See Wilson Decl. at ¶ 5. Accordingly, the CIA instructed the FBI to redact the memorandum information pursuant to FOIA Exemptions (b)(1) and (b)(3) (relying on Section 102A of the National Security Act of 1947). *Id*. These FOIA Exemptions are discussed above. The Wilson Declaration justifies the CIA's invocation of these

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[14] These are identifiable as Bates Nos. Broward Bulldog-5-6.

exemptions (see id. at ¶¶ 6-14) and is incorporated herein by reference.

**COUNT III – AGENT DISCIPLINARY RECORDS**

Count III of Plaintiffs' Complaint asserts that Defendants have violated FOIA Plaintiffs' by failing to produce records reflecting any disciplinary action taken by the FBI against a certain, but unidentified, FBI Special Agent who had participated in a particular post-9/11 investigation (FOIPA Request No. 1332564-000). Plaintiffs request sought "all documents regarding any disciplinary action taken against the agent [who had authored an earlier report indicating the existence of connections between the Sarasota Family and the 9/11 hijackers] as a result of this matter."[15] A copy of the request is attached to the Complaint as Exhibit 8.

In a letter dated July 15, 2015, the FBI acknowledged its receipt of the request, but noted that the requested records concerned one or more third party individuals and that the FBI recognizes an important privacy interest in the requested information. The FBI's letter indicated that, absent the express authorization and consent of the Special Agent at issue, proof of that individual's death, or a demonstration that the public interest in disclosure of the information sought outweighed the individual's right to privacy, the FBI would neither confirm nor deny the existence of responsive records. The FBI's response invoked FOIA Exemptions (b)(6) and (b)(7)(C), 5 U.S.C. §§ 552 (b)(6) and (b)(7)(C),

By letter dated August 6, 2015, Plaintiffs appealed the FBI's response to the Request to the Department of Justice's Office of Information Policy (DOJ OIP). A copy of Plaintiff's

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[15] Plaintiffs submitted their request by email and by letter dated July 4, 2015. Specifically, the request referred to the Commission's "findings regarding a special agent who wrote an FBI electronic communication ("EC") dated April 16, 2002." The request noted that "[t]he report says the FBI informed the commission the EC was 'wholly unsubstantiated' and that when questioned later by others in the FBI, the agent was 'unable to provide any basis for the document or explain why he wrote it as he did.'" Hardy Decl. at ¶ 12.

August 6, 2015 letter to DOJ OIP is attached to the Complaint as Exhibit 10. The appeal argued that the request did not seek the identity of the FBI special agent at issue, but only records reflecting any disciplinary action taken against the agent. DOJ OIP denied Plaintiffs' appeal in a letter dated September 4, 2015. A copy of DOJ OIP's September 4, 2015 letter is attached as Exhibit 11 to the Complaint.

On or about November 21, 2016, the FBI sent Plaintiff Dan Christiensen an amended response to the request for records of any disciplinary action taken against the FBI Special Agent at issue. The amended response withdrew the agency's earlier response, which had invoked FOIA Exemptions based on the Special Agent's right to privacy. The amended response advised Plaintiff Christiensen that the FBI had performed a search for records concerning alleged disciplinary action taken on the case agent at issue and found no responsive records. *See* Hardy Decl. at ¶ 18.

**a. The FBI conducted a reasonable search for records responsive to Plaintiffs' FOIA request,**

In responding to a FOIA request, an agency is required to conduct a reasonable search for responsive records. *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). In an action under FOIA, 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).[16]

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 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*.

As explained in the attached Hardy Declaration, the FBI conducted a search that was reasonably calculated to uncover all relevant and responsive documents, but did not locate any responsive records. Specifically, the Declaration explains that the FBI's Record/Information Dissemination Section searched for records responsive to Plaintiff's request in its Central Records System ("CRS"). The CRS is an extensive system of records consisting of applicant,

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[16] 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).

investigative, intelligence, personnel, administrative, and general files compiled and maintained by the FBI in the course of fulfilling its integrated missions and functions as a law enforcement, counterterrorism, and intelligence agency to include performance of administrative and personnel functions. *See* Hardy Decl. at ¶ 19. The CRS spans the entire FBI organization and encompasses the records of FBI Headquarters, FBI Field Offices, and FBI Legal Attaché Offices worldwide. *Id*. Using the methodology more particularly described in the Hardy Declaration, the FBI did not locate any records responsive to Plaintiff's request. *See* Hardy Decl. at ¶¶ 19-27. Specifically, the FBI searched the CRS for the name of the specific FBI Special Agent who drafted the EC, referenced in the March 2015 9/11 Commission Report, Page 105.1. *See* Hardy Decl. at ¶ 27. The FBI also searched for the term "Disciplinary Action Taken Against an FBI Agent who Wrote an EC." *Id*. In addition to searching its CRS system, the FBI's Record/ Information Dissemination Section also contacted the Office of Professional Responsibility ("OPR") via email to verify if any records exist concerning disciplinary actions taken against the FBI Special Agent at issue. *Id*. The OPR located no responsive records. *Id*. Defendants submit that the foregoing efforts by the FBI satisfy the requirements of FOIA because they were undertaken in good faith and were reasonably expected to uncover any responsive records.

Previously, Plaintiffs have asked Defendants to certify that, in fact, no records responsive to their request exist, i.e., to certify that the Special Agent at issue was not, in fact, disciplined. Such a request, however, is inappropriate under FOIA. "FOIA imposes no duty on [an] agency to create records." *Forsham v. Harris*, 445 U.S. 169, 186, 100 S.Ct. 977, 63 L.Ed.2d 293 (1980) (citing *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 161–62, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975)); accord *Yeager v. DEA*, 678 F.2d 315, 321 (D.C.Cir.1982) ("It is well settled that an

agency is not required by FOIA to create a document that does not exist in order to satisfy a request."). Instead, FOIA requires an agency to conduct a search "reasonably calculated to uncover all relevant documents." *Miccosukee Tribe of Indians*, 516 F.3d at 1248. As demonstrated above, the FBI conducted an adequate search for responsive records, but found none. The mere fact that Plaintiff suspects that responsive records *should* exist does not indicate that the FBI failed to make a good faith effort, using methods which could reasonably be expected to uncover the requested information or documents. Although Plaintiffs may never be satisfied with the FBI's response to their request for records, the FBI has conducted a reasonable search and is entitled to summary judgment.

**CONCLUSION**

Because the FBI has undertaken a search reasonably calculated to uncover all relevant documents and is not improperly withholding any documents or information responsive to the two FOIA requests discussed above, Defendants are entitled to summary judgment as to Counts II and III of Plaintiff's Complaint.

Dated: December 30, 2016
Miami, Florida

Respectfully submitted,

WIFREDO A. FERRER
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**CERTIFICATE OF SERVICE**

I hereby certify that on December 30, 2016, I filed the foregoing document with the Clerk of the Court, using the CM/ECF system.

/s/ Carlos Raurell
CARLOS RAURELL
Assistant United States Attorney