Nos. 17-13787, 17-14264

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

BROWARD BULLDOG, INC. and DAN CHRISTENSEN,

Plaintiffs-Appellants/Cross-Appellees,

v.

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

Defendants-Appellees/Cross-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

# PRINCIPAL AND RESPONSE BRIEF OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

In compliance with Fed. R. App. P. 26.1, 11th Cir. R. 26.1-1, and 11th Cir. R. 26.1-2(a), the undersigned hereby certifies that the following persons and entities may have an interest in the outcome of the case.

Altonaga, The Hon, Cecilia

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## STATEMENT REGARDING ORAL ARGUMENT

The United States respectfully requests oral argument. Although the district court correctly resolved most of the issues in this case, its error in ordering disclosure of personal information in FBI records under Exemptions 6 and 7(C) reflects a misunderstanding of the governing legal standards and the weight of the law-enforcement and privacy interests at stake.

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**Other Authorities:**

## INTRODUCTION

This Freedom of Information Act (FOIA) case involves a request for documents relating to the 9/11 Review Commission. The Federal Bureau of Investigation (FBI) went to great lengths to identify and review responsive documents. It detailed its search process and its reasons for withholding certain materials, providing the district court with extensive declarations, a detailed *Vaughn* Index, and *in camera* submissions. The district court correctly concluded that the FBI's search was adequate and upheld the vast majority of the redactions after reviewing the material *in camera*. Plaintiffs' arguments on appeal are insubstantial and should be rejected.

However, the district court did make one important error, ordering the government to disclose the personal information of individuals discussed in the FBI's files, including names, dates of birth, addresses, phone numbers, and other identifying details. These individuals have a strong privacy interest in their personal information; and it is well established that they would be injured were FBI files identifying them to be publicly released. This strong privacy interest easily outweighs any countervailing public interest that would be served by release of this personal information. The district court also ordered disclosure of the identity of, and information provided by, a confidential source of law-enforcement

information. In our cross-appeal, we urge reversal of the district court's order requiring disclosure of this sensitive information.

## STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. DE-1 at 3. On July 26, 2017, the district court entered final judgment. DE-112. Plaintiffs filed a notice of appeal on August 18, 2017. DE-114. Defendants filed a notice of appeal on September 22, 2017. DE-119. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

**Plaintiffs' Appeal**

1. Whether the district court in this FOIA case correctly concluded that the government's search was adequate.

2. Whether the district court correctly upheld the government's redactions under FOIA Exemptions 1, 3, 5, 7(A), 7(D), and 7(E).

**Government's Cross-Appeal**

3. Whether the district court erred in ordering the government to disclose personal information regarding individuals named in FBI files, including persons of interest, suspects, witnesses, and government employees involved in the investigation, as well as information concerning a confidential source.

## STATEMENT OF THE CASE

### A. Factual Background

This FOIA case involves a request for release of FBI records reviewed by the 9/11 Review Commission ("the Commission"), which was created pursuant to a Congressional mandate to conduct a comprehensive external review of the FBI's implementation of the recommendations made by an earlier commission (the 9/11 Commission). One of the issues that the Commission was charged with reviewing was the FBI's investigation of a Saudi family that once lived in Sarasota, Florida. A 2002 FBI electronic communication ("EC") reported that an investigation of the "family revealed many connections between the [redacted family name] and individuals associated with the terrorist attacks on 09/11/2001." DE-1-3 at 2. Plaintiffs believe that this report suggests that the FBI was engaged in a cover-up when it subsequently asserted that there was no connection between the Sarasota family and the 9/11 attacks. However, the Commission concluded that the 2002 EC was "poorly written and inaccurate." DE-1-2 at 24 (Commission Report 107).[1] It concluded that there was no "credible evidence linking the Sarasota, Florida, family to the hijackers" and that press reports to the contrary were based on "inaccurate information." *Id*.

[1] The full report is available at https://www.fbi.gov/news/pressrel/press-releases/the-fbi-releases-final-report-of-the-9-11-review-commission.

Plaintiffs filed a FOIA request in 2015, asking for information reviewed by the Commission regarding the 2002 EC, as well as other information relating to the Commission. DE-1-4 at 2-3. Plaintiffs subsequently filed a more targeted request for, *inter alia*, specific materials cited by the Commission. DE-1-7 at 2-3. This case involves these two requests for Commission documents.[2]

FBI employees process many thousands of FOIA requests each year, searching for and reviewing responsive documents. DE-17-1 at 9. The enormous volume of such requests results in a substantial backlog. *Id*. Nevertheless, the FBI processed plaintiffs' requests and reviewed responsive documents promptly, releasing information on an ongoing basis as the agency identified responsive records that were not protected from disclosure by FOIA's statutory exemptions.

In this case, because plaintiffs sought materials reviewed by the Commission, the FBI reviewed the documents in the Commission's storage site. DE-75-2 at 4-6; DE-27-1 at 11. The FBI "performed a document-by-document search of all records on the site." DE-75-2 at 5. It located 896 pages of responsive records, which were released to plaintiffs to the extent possible. *Id.*; DE-66-1 at 4-5. Shortly after these documents were released, the FBI realized that copies of

[2] In a prior FOIA request, not at issue in this suit, plaintiffs requested the FBI's documents from the investigation of the Sarasota family. A separate lawsuit relating to that FOIA request remains pending in district court. *Broward Bulldog v. U.S. Dep't of Justice*, No. 12-61735 (S.D. Fla.).

contracts that it had believed to be exact duplicates of previously released material actually had slight differences, and released the additional pages. DE-34 at 2. The government also released the names of two FBI employees whose identities had been withheld pursuant to FBI practice, but whose names had been published by the Commission. *Id.* at 3.

Plaintiffs responded with a list of items that they believed the FBI had missed during its search. DE-75-2 at 5-6. The FBI conducted additional searches. In particular, it performed a document-by-document search of material indexed to the Commission in the Sentinel database (FBI's case management system), but found (as the Commission liaisons had believed) that this material was entirely duplicative of the material in the Commission's storage site. *Id.* at 5 n.6, 9. However, in reviewing the records a second time, the FBI reconsidered four records, totaling eleven pages, that had previously been identified as nonresponsive. In an abundance of caution, it processed these materials for release, although it has subsequently determined that it had correctly categorized them initially. *Id.* at 9-10.

The FBI also discovered and reviewed working files and transitory records that had been created in the course of the Commission's work and had been sent to FBI's Records Storage and Maintenance Unit to be purged. DE-75-2 at 6-7. Pursuant to FBI Records Management Policy Guide 0769PG and 44 U.S.C.

Chapter 31, transitory records need only be "kept for short periods of time until a specific action has occurred, after which the file or document no longer has value." DE-66-1 at 7 n.8; DE-75-2 at 6 n.9. The FBI discovered that the Records Storage and Maintenance Unit had not yet purged these transitory documents, so it obtained them and "immediately conducted a document-by-document search." DE-75-2 at 7. This search uncovered two drafts of the Commission Report and eleven additional pages reviewed by the Commission in connection with the Sarasota family. *Id.* at 7. The FBI processed these additional pages and released the portions not exempt under FOIA, completing release of this information on March 24, 2017. *Id.* at 7, 9.

### B. Prior Proceedings

**1.** Once the FBI had concluded the search and released responsive materials to the extent possible, the district court found that "the Government—through detailed declarations—has met its burden of showing the search was adequate and reasonable." DE-99 at 14. The court reasoned that the government declarations "describ[ed] every step the FBI took to identify responsive records." *Id*. at 17. It reasoned that these declarations must be "accorded 'a presumption of good faith'" and that plaintiffs' "conclusory statements" asserting government bad faith were not sufficient to call them into question. *Id*.

The district court rejected plaintiffs' contention that it should draw an adverse inference from the FBI's late production of records. It reasoned that the FBI had explained the delay and also demonstrated its good faith by "conducting a third search upon Plaintiffs' request." DE-99 at 18.

The district court also rejected plaintiffs' argument that "many records still appear to be missing." DE-99 at 18. It reasoned that plaintiffs had not specified "which records are missing or where the FBI should search to find them" and, in any event, "[p]erfection is not now, and never has been, the relevant standard" under FOIA. *Id.* (quoting *Schoenman v. FBI*, 764 F. Supp. 2d 40, 50 (D.D.C. 2011)). The FBI had already performed a third search in response to plaintiffs' concerns. *Id.* In the view of the district court, the FBI's willingness to do so "substantially undercut[s] any suggestion of bad faith." *Id.*

The district court also upheld most of the government's withholdings of information pursuant to FOIA's statutory exemptions. After reviewing the redacted material *in camera*, in conjunction with the declarations and *Vaughn* Index, the district court concluded that the government had carried its burden for most of the materials redacted under Exemptions 1, 3, 5, 7(A), 7(D), and 7(E). DE-58 at 15-35; DE-99 at 23-40; *see also* DE-108 at 4 (granting reconsideration and upholding redactions, pursuant to Exemption 7(E), in powerpoint presentation). The district court declined to consider documents that were already

being litigated in plaintiffs' separate FOIA suit (which remains pending before another district judge), reasoning that "[t]o do so could potentially result in inconsistent findings in the two actions with respect to the duplicate records." DE-99 at 20.

**2.** However, the district court rejected the government's withholding of personal information, pursuant to Exemptions 6 and 7(C), of individuals named in the FBI's reports, including persons of interest in the investigation, as well as FBI agents and other government employees involved in the investigation. The district court held that the government had not demonstrated that "disclosure of the names would constitute an invasion of privacy." DE-58 at 13, 24-25, 36. It reasoned that some of the redacted names were already in the public domain. *Id.* at 14; DE-99 at 21. It also concluded that the FBI could not demonstrate a privacy interest in redacting names because some other individuals' names were not redacted from the reports. DE-58 at 24, 36. Finally, the court asserted that the privacy interests of individuals connected to the September 11 attacks should not be protected. DE-99 at 23; DE-58 at 25.[3] It did not separately address the interests of individuals who had not been named in press reports, or the privacy interest in other personal information such as birth dates, addresses, and phone numbers. *See generally* DE-58, 99.

[3] The government did not redact names of the 9/11 hijackers. DE-99 at 23.

As to the public interest, the district court held that there was a "significant public interest in information about who may have been involved in the September 11 attacks" and that the documents might be useful in litigation against Saudi Arabia brought by victims of 9/11. DE-99 at 24. While it permitted the redaction of some names of people who were "merely mentioned" in the reports, *id.* at 37, it held that the "public interest in learning about" "suspects and subjects of interest" in the 9/11 investigation "outweighs any privacy interest they may have," *id.* at 37-38. The court also concluded that there was a significant public interest in finding out who briefed the Commission, because this would "likely reveal much about the diligence of the FBI's investigation." DE-58 at 25.

The district court also ruled against the government as to Exemption 7(D), which protects confidential sources, in Document 27, stating that it was "unable to determine what specific information the Government seeks to protect under Exemption 7(D)." DE-99 at 43-44.

### C. Standard of Review

This Court "reviews a district court's grant of summary judgment in a FOIA case de novo, viewing all facts and reasonable inferences in the light most favorable to the non-moving party, and applying the same standard used by the district court." *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1243 (11th Cir. 2008).

The district court's denial of discovery is reviewed for abuse of discretion. *Miscavige v. IRS*, 2 F.3d 366 (11th Cir. 1993). Likewise, the district court's decision to inspect withheld information *in camera* is reviewed for abuse of discretion. *See Currie v. IRS*, 704 F.2d 523, 530 (11th Cir. 1983).

## SUMMARY OF ARGUMENT

**I.** The FBI performed an extensive search in response to plaintiffs' FOIA requests and reviewed documents with an eye to releasing as much information as possible, consistent with the need to protect certain sensitive information. It justified each withholding with a *Vaughn* Index and detailed declarations, and the district court correctly upheld the majority of these redactions after conducting *in camera* review.

**A.** Plaintiffs' challenge to the FBI's search is without merit, as the FBI's detailed declarations demonstrate. The FBI conducted a document-by-document review of every document located on the Commission's electronic storage site. DE-75-2 at 4-5. It also revisited its search after plaintiffs raised concerns that documents were missing, and has exhausted every lead for locating Commission-related documents. *Id*. at 6-9, 11. Plaintiffs' assertions that the FBI acted in bad faith are without foundation. As the district court found, the FBI's good faith was demonstrated by its detailed declarations and by its willingness to engage in repeated searches and respond to plaintiffs' concerns. DE-99 at 17-18.

**B.** The district court correctly held that the government's withholdings of specific categories of information were permitted under FOIA. The government provided detailed declarations that established the basis for each withholding. Moreover, the district court conducted *in camera* review, which "provide[s] an adequate factual basis for the district court's decision and obviate[s] the need for further Vaughn indices." *Maynard v. CIA*, 986 F.2d 547, 558 (1st Cir. 1993). The district court properly gave deference to the executive's national security determinations under Exemptions 1 and 3. *See, e.g.*, *CIA v. Sims*, 471 U.S. 159, 179 (1985). The district court reasonably decided not to interfere with a pending proceeding before another district judge, who was considering plaintiffs' first, and overlapping, FOIA request. *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982). And both the district court and the government complied with all legal requirements regarding segregability by striving to make public as much information as possible.

**II. A.** The district court erred, however, in requiring disclosure of personal information withheld under FOIA Exemptions 6 and 7(C), which protect personal privacy absent unusual circumstances demonstrating an overwhelming public interest. Serious privacy interests are at stake here. FBI documents that could be interpreted as linking an individual to the 9/11 terrorist attacks could have potentially devastating effects on that person's life. DE-66-1 at 20. And the

privacy interest of government agents in their work on high-profile investigations is well established. *See, e.g., Lahr v. National Transp. Safety Bd.*, 569 F.3d 964, 977 (9th Cir. 2009).

The district court erroneously disregarded these weighty privacy interests because some individuals have been the subject of media speculation, and some other government employees (whose names were not redacted) made their involvement public. This was in error. An individual's privacy interest is unabated, even if information becomes available from another source, *see, e.g.*, *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 545 (6th Cir. 2001), and cannot be waived by the government, *Lakin Law Firm, P.C. v. FTC*, 352 F.3d 1122, 1124 (7th Cir. 2003). Additionally, the district court failed to consider the privacy interests of individuals who have not been named in the media or the unique privacy interests in driver's license numbers and other sensitive information.

The district court also erred in concluding that disclosure of this personal information was justified by the public interest in learning about the activities of private individuals and by the potential value of the information in other litigation. Those interests are not cognizable under FOIA. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989); *L & C Marine Transport, Ltd. v. United States*, 740 F.2d 919, 923 (11th Cir. 1984). The personal information at issue in this case has little, if any, value in shedding light on the

government's activities. The government's redaction of that sensitive information should, therefore, be upheld.

**B.** The district court also erred in ordering disclosure of material summarizing information received from a jail-house informant that is protected under Exemption 7(D), which protects the identities of, and information furnished by, confidential informants. The government submitted an *ex parte* submission linking each redaction in this document to the information provided by the informant here. DE-76-18 at 20-27.

## ARGUMENT

### I. The district court correctly upheld the government's search and the vast majority of the material withheld.

#### A. The FBI's searches were reasonably calculated to locate responsive records.

**1.** Plaintiffs contend that FBI did not conduct an adequate search in response to the FOIA request. Opening Br. 25-33. That argument is refuted by the case law and the record here, as the district court correctly recognized in rejecting it below. DE-99 at 13-19. The agency searched every document in the Commission's storage site, and then engaged in further searches in response to plaintiffs' concerns.

An agency's search for documents under FOIA need only be "reasonably calculated to uncover all relevant documents." *Karantsalis v. U.S. Dep't of*

*Justice*, 635 F.3d 497, 500 (11th Cir. 2011) (per curiam). "Under this standard, the agency need not show that its search was exhaustive." *Ray v. U.S. Dep't of Justice*, 908 F.2d 1549, 1558 (11th Cir. 1990), *rev'd on other grounds*, 502 U.S. 164 (1991) (quoted in *Pavlenko v. Dep't of Treasury Internal Revenue Serv.*, 356 F. App'x 293, 294 (11th Cir. 2009) (per curiam); and in *DelVecchio v. IRS*, 360 F. App'x 104, 108 (11th Cir. 2010) (per curiam)). This is because "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Trentadue v. FBI*, 572 F.3d 794, 797-98 (10th Cir. 2009) (quoting *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)); *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 547 (6th Cir. 2001) ("The question focuses on the agency's search, not on whether additional documents exist that might satisfy the request."). A search, "under FOIA, 'is not unreasonable simply because it fails to produce all relevant material.'" *Mobley v. C.I.A.*, 806 F.3d 568, 583 (D.C. Cir. 2015) (quoting *Meeropol v. Meese*, 790 F.2d 942, 952-53 (D.C. Cir. 1986)).

**2**. The fifth Hardy declaration explains in detail how the search was conducted. *See* DE-75-2 at 4-11. Because the request sought documents viewed by the Commission, the FBI performed a document-by-document search of all of the records in the electronic storage site where documents relating to the

Commission are maintained.[4] *Id.* at 4-5. Because the employees most familiar with the Commission's work believed that all of the documents sought by plaintiffs were stored on this site, the agency had no need to look elsewhere. *Id.* at 5.

After plaintiffs indicated that they believed certain records were missing, the records unit made a second attempt to verify that it had located all available responsive documents. DE-75-2 at 6. At that point, the FBI discovered that copies of some of the same documents were kept in a second location, and that some working papers slated to be purged pursuant to FBI policy were still in existence. *Id.* at 6-7. The FBI determined that the documents in the second location were identical to those already reviewed, but it discovered transitory documents, including draft Commission reports, in the documents slated to be purged. *Id.* at 7. Following review of these materials, the FBI released the transitory documents to the extent possible. *Id*. at 9. It also processed and released, in an abundance of caution, an additional 11 pages that it had previously classified as non-responsive, although it subsequently confirmed that those pages were not actually responsive to plaintiffs' requests. *Id.* at 9-10.

[4] Plaintiffs suggest that there is something suspicious in the Commission files being stored in a separate site within the Director's Office system. Opening Br. 31-32. But there is no basis for this assertion. It is reasonable for a group like the Commission to have its own document repository. In any event, as the FBI discovered, the documents were also duplicated in the central computer system. DE-75-2 at 6.

In sum, as the district court found, the government's "detailed and non-conclusory" declarations "describing every step the FBI took to identify responsive records," together with its "willingness to address Plaintiffs' concerns" by conducting a third search, demonstrate that the search was reasonable and conducted in good faith. DE-99 at 17-18.

While plaintiffs now criticize FBI's "piecemeal productions," Opening Br. 29, the FBI acted responsibly by turning over documents as soon as they were ready, instead of waiting to complete review of all materials. *See* DE-66 at 12 (explaining that some documents were ready and others were in progress). The FBI acted promptly and reasonably. Two and a half months after receiving plaintiffs' letter asserting that documents were missing, the FBI located additional repositories of documents, completed a record-by-record review of each document, processed the relevant documents for FOIA exemptions, and completed release of all materials. DE-75-2 at 7-10; DE-34 at 1. There is no basis for drawing an adverse inference under these circumstances, and doing so would deter agencies from engaging in this type of constructive back-and-forth communication with FOIA requesters. *See Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1257 (11th Cir. 2008) (declining to draw adverse inference from multiple productions where agency "offered a reasonable explanation for the late production").

Plaintiffs complain that the government's affidavits are inadequate to explain the agency's search for responsive documents, but plaintiffs' arguments misconstrue the relevant requirements.[5] Plaintiffs assert that the affidavits do not include "the search terms the FBI used." Opening Br. 30. But there was no need for the FBI to use search terms to identify the responsive records. The FBI conducted a document-by-document review of *every* document located in the relevant repositories, rather than using search terms to identify a subset of those documents. DE-75-2 at 4-5, 7, 9. Plaintiffs also argue that responsive information may have been located in the Sentinel system, an agency repository of documents that are organized by "subjects of investigative interest." *Id.* at 4. Because plaintiffs sought the working papers of the Commission, "not investigative records," there was no reason to believe that responsive records would be found in the Sentinel system. *Id*. In any event, that system has now been searched and the only responsive records were duplicates of records the FBI had already located. *Id.* at 6-9.

Finally, plaintiffs are simply wrong to assert that the declarations did not "identif[y] the person in the Director's Office who searched for documents."

[5] Moreover, plaintiffs rely on a district court case from the District of Columbia. Opening Br. 26-27, 30-31 (citing *National Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 152 (D.D.C. 2013)). But this Court "has not imposed the specific requirements set forth in the D.C. Circuit." *Miccosukee Tribe*, 516 F.3d at 1247.

Opening Br. 30. The fifth Hardy declaration explained that the request was handled by two employees in the Director's office who were "liaisons to the Commission" and "directly involved with the Commission's works." DE-75-2 at 4. These were the employees "most familiar with the 9-11 Commission material." DE-75-2 at 6. The government is not required to disclose the names of these individuals. *See infra* Section II.A (explaining that FOIA protects personal information, including names, of government personnel).

Plaintiffs also appear to believe that any search should have produced more notes and transcripts of the interviews conducted by the Commission. Opening Br. 30. But there is no reason, other than plaintiffs' bare speculation, to believe that additional notes or transcripts exist. *See DiBacco v. U.S. Army*, 795 F.3d 178, 190 (D.C. Cir. 2015). Even if the documents once existed, "the [agency] is not required by [FOIA] to account for documents which the requester has in some way identified if it has made a diligent search for those documents in the places in which they might be expected to be found." *Ray*, 908 F.2d at 1559 (alterations in original) (quoting *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1385 (8th Cir. 1985)). The agency has pursued all of its leads for locating responsive documents, DE-75-2 at 11, and plaintiffs do not point to any other place that the FBI should have searched, DE-99 at 18. Detailed agency declarations, like those submitted here, "are accorded a presumption of good faith, which cannot be rebutted by

purely speculative claims about the existence and discoverability of other documents." *Mobley*, 806 F.3d at 581 (internal quotation marks omitted).

**3.** Plaintiffs also complain about the time it took the FBI to respond to their first request. Opening Br. 28. However, the FBI processed this request promptly and explained the backlog of FOIA requests. DE-17-1 at 9 (explaining that FBI received over 17,000 FOIA requests in 2015 alone and has a backlog estimated at 5.1 million pages). In any event, "initial delays in responding to a FOIA request are rarely, if ever, grounds for discrediting later affidavits by the agency." *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003).

**4.** Finally, plaintiffs seek to depose the FBI agent who briefed the Commission, in an asserted effort to uncover irregularities with the search and the disclosures. Opening Br. 56-57. But discovery is not generally available in FOIA litigation because detailed, non-conclusory, good-faith affidavits are sufficient to carry the government's burden. *Karantsalis*, 635 F.3d at 500. And the district court's denial of discovery was within its discretion. *Miscavige v. IRS*, 2 F.3d 366, 369 (11th Cir. 1993). As explained above, the government's affidavits are quite detailed, and plaintiffs offer nothing but bare speculation in asserting that the government acted in bad faith in conducting the search or processing responsive records. In any event, plaintiffs' discovery request is pretextual; their primary reason for requesting the deposition is not to discover what happened in the course

of the FOIA search, but to obtain additional information regarding the FBI's investigation of the Sarasota family. Opening Br. 13 (citing DE-35 at 4). FOIA provides access to documents, not explanations. The district court upheld the FBI's search and reviewed the redactions *in camera*, assuring that the agency did not withhold information improperly.

### B. The FBI properly withheld information subject to statutory exemptions.

The district court correctly rejected plaintiffs' arguments seeking to overcome the effect of FOIA Exemptions 1, 3, 5, 7(A), 7(D), and 7(E). In enacting FOIA, Congress "'balance[d] the public's need for access to official information with the Government's need for confidentiality,' by exempting nine categories of records from disclosure." *DiBacco*, 795 F.3d at 183 (alteration and citation omitted) (quoting *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 144 (1981)). Congress did so because it "realized that legitimate governmental and private interests could be harmed by release of certain types of information." *DiBacco*, 795 F.3d at 183 (quoting *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988)).

Plaintiffs raise a number of arguments as to the adequacy of the FBI's explanation of its reasons for invoking the exemptions. Although we respond to each contention in detail below, this Court need not consider these arguments because in addition to considering the government's declarations and *Vaughn*

Index, the district court conducted an *in camera* review of each document. DE-58 at 9; DE-99 at 13. This *in camera* review obviates any concern that the district court lacked a factual basis for its decision.

An adequate factual basis for withholdings under FOIA can "be provided through a singular method—such as affidavits, a *Vaughn* Index, or an *in camera* review, *or* a combination of these methods." *Miccosukee Tribe*, 516 F.3d at 1259; *see also, e.g., Judicial Watch, Inc. v. Food & Drug Administration*, 449 F.3d 141, 146 (D.C. Cir. 2006) (an agency may "submit other measures in combination with or in lieu of the index itself," such as supporting affidavits, or an agency may seek *in camera* review of the documents). Conducting *in camera* review "provide[s] an adequate factual basis for the district court's decision and obviate[s] the need for further Vaughn indices." *Maynard v. CIA*, 986 F.2d 547, 558 (1st Cir. 1993). It is a "rare case" in which "the government provides all three—affidavits, a *Vaughn* Index, and *in camera* review," as occurred in this case, and where it does so there is no basis to complain about the inadequacy of one portion of the record as a whole. *Miccosukee Tribe*, 516 F.3d at 1259-60.

Plaintiffs correctly observe that the district court has an obligation to proceed on the public record to the extent possible. Opening Br. 45, 50 (quoting *Ely v. FBI*, 781 F.2d 1487 (11th Cir. 1986)). But the agency and the court did so here. There were extensive declarations and a *Vaughn* Index. Plaintiffs had ample

information to present legal and factual arguments about the withholdings at issue here, as their brief demonstrates and the record below confirms. In any event, this Court has not understood *Ely* to prohibit *in camera* review altogether. On the contrary, it has reasoned that where the number of documents is small, "an *in camera* inspection might be the preferred procedure." *Miscavige*, 2 F.3d at 368. Resort to *in camera* review is discretionary, *Miccosukee Tribe*, 516 F.3d at 1258, and plaintiffs have not provided any basis for concluding that the district court abused its discretion in reviewing documents *in camera* here. Indeed, plaintiffs themselves requested that the district court review some materials *in camera*. DE-58 at 23.

Moreover, the government's detailed declarations and *Vaughn* Index provided ample record support for the conclusion that the withholdings challenged by plaintiffs were properly deemed to be within the scope of FOIA's statutory exemptions. Plaintiffs' primary assertion is that the government's declarations are insufficient because the same justification applies to multiple documents. *See, e.g.,* Opening Br. 50. But, as the D.C. Circuit recently explained, there is nothing wrong with agencies' using "the same or similar language" as to different redactions because, "when the potential harm . . . is the same, it makes sense that the agency's stated reasons for nondisclosure will be the same." *Larson v. Department of State*, 565 F.3d 857, 868 (D.C. Cir. 2009); *see also, e.g., Judicial*

*Watch, Inc*., 449 F.3d at 147 ("We have never required repetitive, detailed explanations for each piece of withheld information—that is, codes and categories may be sufficiently particularized to carry the agency's burden of proof."). Indeed, this Court held that an agency declaration was sufficient under Exemption 5 where it stated that the information in two documents was predecisional and deliberative and involved comments on approaches to a particular issue. *Miccosukee Tribe*, 516 F.3d at 1261.

### 1. The district court applied the correct standard of review for Exemptions 1 and 3.

Plaintiffs, without citing any relevant case law, assert that FOIA does not allow the district court to defer to the agency's classification decisions and assessments of national-security risk when reviewing redactions under Exemptions 1 and 3. Opening Br. 52, 54-55. That argument is directly and categorically refuted by ample precedent from the Supreme Court and multiple courts of appeals.

Determinations by executive branch officials "familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake" in Exemption 1 and Exemption 3 as applied to the National Security Act. *CIA v. Sims*, 471 U.S. 159, 179 (1985); *Center for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003) ("[I]n the FOIA context, we have consistently deferred to

executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review."); S. Rep. No. 1200, 93d Cong., 2d Sess. 12 (1974) (Conf. Rep.), as reprinted in 1974 U.S.C.C.A.N. 6285, 6287 (Conference Report on the FOIA Amendments). Thus, while courts have a role in ensuring that withholdings under Exemptions 1 and 3 are proper, the decision can be made based on affidavits. *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 78 (D.C. Cir. 1987). In this review, "an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Larson*, 565 F.3d at 862 (considering Exemptions 1 and 3) (quoting *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007)); *see also id*. at 865 ("[W]e have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review."); *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 774 (9th Cir. 2015); *Maynard*, 986 F.2d at 555-56 (upholding CIA's redaction under Exemptions 1 and 3 because it was "at very least 'arguable'" that disclosure "could reveal intelligence methods").

The government redacted the majority of a two-page document and portions of a second four-page document under Exemptions 1 and 3. *See* DE-27-2 at 41-42 (Document 3); DE-27-2 at 45-48 (Document 5). The government's declaration explained that the redacted material would reveal classified national security information that was "very specific in nature, provided during a specific time

period, and known to very few individuals." DE-27-1 at 17-18. Additionally, "specific information describing the intelligence activities or methods withheld in this case are still used by the FBI today to gather intelligence information." *Id.* at 18. Disclosure would "reveal current specific targets of the FBI's national security investigations" and "the current intelligence gathering methods used," thereby allowing hostile entities to "develop countermeasures which would, in turn, severely disrupt the FBI's intelligence gathering capabilities." *Id.* at 18; *see also id.* at 18-19 (material would "(a) reveal the actual intelligence activity or method utilized by the FBI against a specific target; (b) disclose the intelligence-gathering capabilities of the method; and (c) provide an assessment of the intelligence source penetration of a specific target during a specific period of time."); *id.* at 21. These declarations are more than sufficient to demonstrate that the national security information at issue here was properly withheld. Any concerns about the factual basis for these redactions is, moreover, resolved by the district court's *in camera* review of the material. *See Maynard*, 986 F.2d at 558.

### 2. The FBI properly withheld information regarding its internal deliberations and attorney work product under Exemption 5.

Exemption 5 "incorporates into FOIA the statutory and common law privileges normally available to a party in civil discovery." *Miccosukee Tribe*, 516 F.3d at 1257. This includes attorney work product, attorney-client privilege, and the deliberative process privilege. *Moye, O'Brien, O'Rourke, Hogan, & Pickert v. National R.R. Passenger Corp.*, 376 F.3d 1270, 1273, 1277 (11th Cir. 2004). The district court correctly upheld redactions to three documents on the ground of privilege under Exemption 5.

**a.** One paragraph, captioned "Gaps/Possible Issues/Recommendations," was redacted from a document summarizing an April 30, 2014 Commission briefing on the Sarasota family (Document 2). DE-27-2 at 40. The government explained that it withheld, pursuant to Exemption 5 and the deliberative process privilege, information "containing or prepared in connection with the formulation of policies regarding another government agency's pretrial proceedings of a third party individual" and "preliminary recommendations on FBI policies that have not been implemented." DE-27-1 at 24, 25 n.14. Plaintiffs' assertion (Opening Br. 50) that this language is too "broad" because it also applies to other documents is baseless.[6]

[6] Plaintiffs assert in a footnote that the district court erred for the same reason in upholding redactions to several other documents under Exemption 5.

It is entirely reasonable that the same explanation might apply to multiple documents. *Larson*, 565 F.3d at 868; *Judicial Watch, Inc.*, 449 F.3d at 147. Moreover, the district court reviewed the material *in camera* and confirmed that this paragraph "involves information concerning the FBI's deliberative process." DE-58 at 23.

**b.** The district court correctly recognized that information in the October 5, 2012 document titled "Updates and Initiatives" (Document 5) was properly withheld. The Department of Justice (DOJ) declaration explains that this information is privileged under the attorney work product doctrine because "[t]he statements withheld by the Division are the attorneys' strategies and assessments in anticipation of litigation" and would "reveal the thoughts, strategies, and opinions of Division attorneys handling the matters." DE-27-2 at 260-61. The district court reviewed the information *in camera* and concluded that it related to the agency's decisional process. DE-58 at 34.

Plaintiffs present no basis for challenging that conclusion. They assert only that the declaration is "inadequate for the reasons set forth in" their discussion of the April 30th Commission briefing. Opening Br. 55. However, plaintiffs'

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Opening Br. 50 n.28. This argument is waived because it appears only in a footnote. *Asociacion de Empleados del Area Canalera (ASEDAC) v. Panama Canal Comm'n*, 453 F.3d 1309, 1315-16 (11th Cir. 2006). In any event, it is without foundation, as explained above.

argument about that briefing is directed to a different declaration. *See* 27-2 at 260-61 (Cecil Decl., explaining redaction); DE-27-1 at 44 (Hardy Decl., explaining that these redactions are addressed in the DOJ declaration); DE-27-2 at 45-46 (redactions labeled "b5-1 per DOJ"). Plaintiffs provide no basis for questioning either the government's declaration regarding this document or the district court's conclusion that the information is properly withheld as privileged.

**c.** The government also provided ample basis for the withholdings under Exemption 5 from the powerpoint overview of the FBI's 9/11 investigation (Document 22, DE-73-3 at 4-55). The government labeled each redaction in this document with a label that mapped to the explanations provided in the declarations. *Id.* at 3-55. This was sufficient to carry its burden. Any concerns regarding the declarations are, in any event, addressed by the district court's *in camera* review.[7]

Plaintiffs argue that the district court may have applied the deliberative process privilege to agency "decisions." *See* Opening Br. 44-45 (discussing DE-99 at 38). However, the district court repeatedly and correctly recognized that the deliberative process exemption applies to "predecisional and deliberative"

[7] In a footnote, plaintiffs make the same argument as to the Exemption 3 material in this document. Opening Br. 35 n.24. This argument is waived, as it appears only in a footnote. *ASEDAC*, 453 F.3d at 1315-16. It is, in any event, meritless for the same reasons explained here.

materials. DE-99 at 8, 36. In context, the court's passing mention of protecting "decisions" is best read as shorthand for what it described two pages earlier as protecting the "'process by which governmental decisions and policies are formulated.'" DE-99 at 36 (quoting *Moye, O'Brien*, 376 F.3d at 1277).

Plaintiffs also mistakenly contend that the district court and the FBI described the withheld information as factual, as opposed to deliberative, in nature. The government's declaration explains that these pages discuss "investigative leads," which is consistent with the deliberative process privilege. DE-105-1 at 10-11. The district court explained that "it is readily discernible the information is properly withheld under Exemption 5." DE-99 at 38.

### 3. The FBI properly withheld confidential source information protected by Exemption 7(D).

**a.** The FBI withheld information from two confidential informants in the April 30, 2014 Commission briefing document under FOIA Exemption 7(D), which protects from disclosure information that "could reasonably be expected to disclose the identity of a confidential source" and "information furnished by a confidential source." 5 U.S.C. § 552(a)(7)(D). The FBI explained that it received information from "third party sources" with "ready access to and/or knowledge about targets" and individuals who "volunteered information to the FBI related to terrorism." DE-27-1 at 32; DE-27-2 at 38-39. The FBI inferred that these individuals provided information with an implied expectation of confidentiality

because disclosure could have "disastrous consequences" and "sources providing information to the FBI about extremist activities do so at great peril to themselves." DE-27-1 at 32-33.

Plaintiffs assert (Opening Br. 48-49) that the identity of one informant has been released by Florida law enforcement and so Exemption 7(D) does not apply. This is incorrect. There is a "per se limitation on disclosure under 7(D)" that "does not disappear if the identity of the confidential source later becomes known through other means." *See L & C Marine Transport, Ltd. v. United States*, 740 F.2d 919, 925 (11th Cir. 1984). This Court has expressly rejected the argument that disclosure by local law enforcement waives Exemption 7(D). *Edwards v. Executive Office for U.S. Attorneys*, 436 F. App'x 922, 923 (11th Cir. 2011).

Plaintiffs also assert (Opening Br. 49) that, to the extent that the FBI is protecting the identity of an individual who spoke to the press, his on-the-record statements and declaration would raise a question of material fact as to whether he expected his identity to be kept confidential. But making public statements does not mean that an individual is comfortable with everything in an FBI file becoming public. *Fiduccia v. U.S. Dep't of Justice*, 185 F.3d 1035, 1047 (9th Cir. 1999).

**b.** Plaintiffs also assert, in one sentence, that the government's declaration does not explain how any specific redaction to the October 4, 2012 "Updates and Initiatives" report (Document 5) satisfies Exemption 7(D). Opening Br. 55. This

unexplained assertion is puzzling. As with the other material that was withheld, each redaction under Exemption 7(D) was labeled and explained. For example, two pieces of information were redacted to "withhold the identity of foreign government agencies, their personnel, and their information because this particular foreign government agency requested . . . that their identity, information, and relationship with the FBI remain confidential." DE-27-1 at 35; DE-27-2 at 46. This was ample explanation.

Plaintiffs' unexplained assertion (Opening Br. 55) that the government also failed to support redactions under Exemption 7(A), which protects information where disclosure would interfere with an ongoing investigation, fails for the same reason. For example, one piece of information was withheld "to protect specific case information from a pending FBI investigation[]" that could result "in the identification of suspects and thus jeopardize the investigation." DE-27-1 at 29-30 & n.18; DE-27-2 at 46. Plaintiff provides no basis for concluding that this declaration is insufficient.

#### 4. The FBI properly withheld its techniques and procedures under Exemption 7(E).

Exemption 7(E) applies where release of information (1) "would disclose techniques and procedures for law enforcement investigations or prosecutions," or (2) "would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."

5 U.S.C. § 552(b)(7)(E). The government explained its redactions under Exemption 7(E) in detailed declarations. The district court correctly upheld redactions to the powerpoint overview of the FBI's 9/11 investigation (Document 22), the April 30, 2014 Commission briefing (Document 2), and the October 5, 2012 "Updates and Initiatives" document (Document 5) on the basis of Exemption 7(E).

**a.** The government properly withheld information in an "overview" of the FBI's investigation into the 9/11 attacks (Document 22) that would reveal law enforcement techniques and procedures for obtaining and analyzing information in counterterrorism cases. DE-99 at 37.

The sixth Hardy declaration explains in detail that this document discloses "sensitive investigatory techniques and procedures authorized for use by the FBI." DE-105-1 at 5. The material in this document would disclose "the FBI's 'playbook' for apprehending criminals" and "allow[] criminals to place themselves a step ahead of law enforcement." *Id.* at 6-7. Plaintiffs are mistaken to characterize the sensitive information here as simply "al-Qaeda's techniques and procedures," or other factual information. *See* Opening Br. 40, 42. This material would reveal the data considered relevant by the FBI, the specific factors considered in the investigation, and the commonalities and patterns detected (and not detected) by the FBI when analyzing the data. DE-105-1 at 9.

Plaintiffs argue that information regarding terrorist financing and terrorist travel should not be redacted because much information on these topics is already public. Opening Br. 39. But "[o]ur intelligence and law-enforcement agencies are awash in a sea of data, much of it public, so a choice to focus on a particular slice of that data directly reveals a targeting priority, and indirectly reveals the methodologies and data used to make that selection." *American Civil Liberties Union of Mich. v. FBI*, 734 F.3d 460, 466 (6th Cir. 2013). The record here explains that "disclosure of the specific factors captured in [the FBI's] analysis, including any commonalities and patterns detected, would reveal to a criminal the very things they must avoid in the future to remain undetected." DE-105-1 at 9.

Plaintiffs assert that the FBI must demonstrate that release of techniques and procedures "could reasonably be expected to risk circumvention of the law." Opening Br. 37-38. That argument is incorrect. Exemption 7(E) includes two distinct clauses: the first refers to law enforcement "techniques or procedures," and the second to "guidelines for law enforcement investigations or prosecutions." 5 U.S.C. § 552(b)(7)(E).[8] As the Second Circuit explained, "[t]he sentence structure of Exemption (b)(7)(E) indicates that the qualifying phrase ('if such disclosure

[8] The relevant text protects information that "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).

could reasonably be expected to risk circumvention of the law') modifies only 'guidelines' and not 'techniques and procedures.'" *Allard K. Lowenstein Int'l Human Rights Project v. Department of Homeland Sec.*, 626 F.3d 678, 681 (2d Cir. 2010). Although the latter category ("guidelines for law enforcement investigations or prosecutions") may be withheld only if "disclosure could reasonably be expected to risk circumvention of the law," 5 U.S.C. § 552(b)(7)(E), no such showing is required for the withholding of law enforcement "techniques and procedures." *Hamdan*, 797 F.3d at 778; *Allard K. Lowenstein*, 626 F.3d at 681-682. Instead, information that would disclose law enforcement "techniques and procedures" receives categorical protection from disclosure. *See Hamdan*, 797 F.3d at 778.[9] This understanding of the statute is supported by the legislative history. *See Allard K. Lowenstein Int'l Human Rights Project*, 626 F.3d at 681-82.

Even if a showing of circumvention were required, the government has demonstrated that such a risk is present here. The sixth Hardy declaration explains

[9] Plaintiffs assert that the D.C. Circuit reached the opposite result in *Blackwell v. FBI*, 646 F.3d 37, 41 (D.C. Cir. 2011). But that case, like *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1064 (3d Cir. 1995), did not expressly parse the statutory language as the Second and Ninth Circuits did. The D.C. Circuit has, more recently, declined to address the issue. *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 746 F.3d 1082, 1102 n.8 (D.C. Cir. 2014). The D.C. Circuit has also explained that, "given the low bar posed by the 'risk circumvention of the law' requirement, it is not clear that the difference matters much in practice." *Public Emps. for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n*, 740 F.3d 195, 205 n.4 (D.C. Cir. 2014).

in detail how disclosure would allow criminals, terrorists, and spies to circumvent current security measures. DE-105-1 at 7-11. For example, the declaration explains that disclosure of a particular photo "would allow future subjects to know where to find [a] security camera" so that they could "circumvent[] detection."[10] *Id.* at 7. Seeing the FBI's analysis of weapons obtained by the hijackers would reveal the types of weapons to purchase when attempting to avoid detection. *Id.* at 9. Information in this document about how the 9/11 conspirators entered the country would "reveal the sources the FBI obtains this information from, the specific types of data the FBI finds most useful, and provide insight into the FBI's strategy for apprehending other criminals." *Id.* at 8. Similarly, information regarding vulnerabilities in U.S. airports and types of weapons "would provide a criminal with insight into how to successfully plan future criminal acts without detection." *Id.* at 9. Disclosure of certain financial information would reveal "how much money one can move around, what form is more or less detectable, through

[10] Plaintiffs assert for the first time in a footnote to their opening brief that the location of a camera cannot be protected under Exemption 7(E) because its placement is a technique for crime prevention or security maintenance, not a technique for investigations or prosecutions. Opening Br. 41 n.26. This argument is waived because it appears only in a footnote. *ASEDAC*, 453 F.3d at 1316 n.7. In any event, it is meritless. Even if plaintiffs were correct about the scope of Exemption 7(E), the security camera's placement was an investigative technique. Indeed, the image captured by the security camera was used in the FBI's investigation of the 9/11 attacks in this very case. Plaintiffs also assert that the FBI has not stated that the camera location is hidden, but that fact is apparent from the declaration. DE-105-1 at 7.

what means, and where to avoid so as not to attract attention." *Id.* at 8, 10. The withheld information would also "enable criminals, terrorists, and spies to take countermeasures to avoid detection by techniques employed for the collection and analysis of information as well as educate themselves about the types of information selected, collected and analyzed." *Id.* at 7. "Armed with this knowledge, others who plan to cause harm to the United States could alter their behaviors and patterns, allowing them to go undetected." *Id.* at 10. The district court correctly upheld the government's withholding of this sensitive law enforcement information.

**b.** The government properly withheld limited information from the April 30, 2014 Commission briefing (Document 2, DE-27-2 at 40, DE-68-1 at 22) because the redacted information would disclose techniques and procedures used in FBI counterterrorism investigations. The FBI declarations provide ample basis for the district court's conclusion that those redactions were consistent with Exemption 7(E).

The majority of the information in this document subject to Exemption 7(E) was withheld to protect "the type of investigation, whether it is a 'preliminary' or 'full' investigation, and the date it was initiated." DE-27-1 at 38; DE-27-2 at 38-39. The declaration thus explains the specific type of information redacted. It further explains that this information would disclose "the types of activities that

would trigger a full investigation as opposed to a preliminary investigation, and the particular dates that the investigation covers, allowing criminals to adjust their behavior accordingly." DE-27-1 at 38.

The government also explained that it withheld "techniques and procedures used by the FBI to conduct international terrorism investigations" 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." DE-27-1 at 37; DE-27-2 at 38-39. Finally, the government withheld information that would reveal "how and from where the FBI collects information and the methodologies employed to analyze" it because this information "highlight[s] the types of activities, facts, or occurrences that are of particular interest to the FBI in international terrorism investigations" and would enable investigative targets to "employ countermeasures to circumvent detection." DE-27-1 at 38, 39.[11]

Plaintiffs do not seem to dispute that this information could be withheld under Exemption 7(E). Rather, they contend that the government did not explain

[11] Plaintiffs assert in a footnote that the declaration was also insufficient as to Document 3. Opening Br. 52 n.31. Because this argument is made only it a footnote, it is waived. *ASEDAC*, 453 F.3d at 1315-16. In any event, the declarations are sufficient for the reasons given above, and *in camera* inspection of the documents provided the district court with an additional, sufficient basis to conclude that the withholdings were permitted by FOIA.

what procedures were involved or how they would be disclosed. Opening Br. 51-52. But the government need not publicly disclose materials that would "reveal 'the very information the agency hopes to protect'" and, as explained above, the district court vitiated any concern regarding these documents by conducting *in camera* review. *Prison Legal News v. Samuels*, 787 F.3d 1142, 1149 (D.C. Cir. 2015); DE-27-1 at 37.

**c.** The government redacted information from the October 5, 2012 document titled "Updates and Initiatives" (Document 5) to protect FBI file numbers, the locations and identities of FBI units, and "the investigative focus of a specific FBI investigation." DE-27-1 at 40-43; DE-27-2 at 45-47. The government's declaration explained that disclosing this information would give hostile analysts insight into the FBI's investigation—including where and on whom the FBI is focusing its investigative resources—that could be used to evade detection. DE-27-1 at 41-43.

Plaintiffs offer no specific reasons to dispute the district court's holding that the redacted information in this document was within the scope of Exemption 7(E). Instead, they assert only that the FBI's declaration is "inadequate for the reasons set forth" in their discussion of the April 30, 2014 Commission briefing (Document 2). Opening Br. 55. But the FBI gave different justifications for withholding

information from this document than for the April 30, 2014 briefing, and plaintiffs do not address the actual justifications. DE-27-2 at 45-47.

**5. The district court did not abuse its discretion in deferring to another district judge who is overseeing plaintiffs' separate FOIA suit and considering plaintiffs' arguments about the Sarasota family case file.**

Plaintiffs assert that the district court erred in declining to consider plaintiffs' request for the Sarasota family case file (Document 1), which was already at issue in a separate, previously filed FOIA suit involving the same parties. *See Broward Bulldog v. U.S. Dep't of Justice,* No. 12-61735 (S.D. Fla. filed Sept. 5, 2012) (*Broward*, No. 12-61735).

But plaintiffs offer no basis to undermine the authority of another court merely because they seek two bites at the same apple. Here, principles of comity and judicial efficiency support the district court's reluctance to trench on another court's consideration of identical issues. Relatedly, courts routinely prohibit litigants from pursuing a claim in two separate actions. "Normally sound judicial administration would indicate that when two identical actions are filed in courts of concurrent jurisdiction, the court which first acquired jurisdiction should try the lawsuit and no purpose would be served by proceeding with a second action." *Pacesetter Sys., Inc. v. Medtronic, Inc*., 678 F.2d 93, 94-95 (9th Cir. 1982). "The most basic aspect of the first-to-file rule is that it is discretionary; 'an ample degree

of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts.'" *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 628 (9th Cir. 1991) (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183-84 (1952)). Those same considerations counsel against requiring the same parties to litigate the applicability of FOIA exemptions to the same document in two currently pending cases before two different judges.

The district court was well within its discretion to defer to the court in which plaintiffs' first FOIA case was proceeding. The documents at issue in both cases are documents relating to the Sarasota family that are stored in the 9/11 investigation file from the Tampa field office. DE-61 at 1-2, DE-68-1 at 2-3, *Broward*, No. 12-61735 (describing file). In the first-filed case, plaintiffs requested all reports, memos, or correspondence regarding the FBI's investigation into the Sarasota family. DE-1-5 at 2, *Broward*, No. 12-61735. In this case, plaintiffs requested the Sarasota family case file reviewed by the Commission. DE-1-4 at 2. The FBI explained that it had released information regarding the Sarasota family not contained in the file already under review in the first case, but did not release information that was duplicative of the first request. DE-83 at 10; DE-75-2 at 10-11. As the district court explained, deciding the issue here "could potentially result in inconsistent findings in the two actions with respect to the duplicative records." DE-99 at 20.

Additionally, duplicative review would be extremely wasteful of judicial resources. The district court in the first-filed case ordered the government to produce the entire 9/11 investigation file from the Tampa field office—a classified file of over 80,000 pages—for *in camera* review. DE-60, *Broward*, No. 12-61735 (Apr. 4, 2014). The judge in that case took three years to "carefully review[] the entire court file" and has now set a briefing schedule for summary judgment on that material. DE-91 at 1, DE-94, *Broward*, No. 12-61735 (Oct. 2, 2017). There is nothing to be gained by requiring a second court to consider this same material.

**6. The government did not withhold any segregable information.**

FOIA requires disclosure of information reasonably segregable from material properly withheld under statutory exemptions. *Krikorian v. Department of State*, 984 F.2d 461, 466-67 (D.C. Cir. 1993). The FBI complied with that obligation. DE-75-2 at 11.

The segregability doctrine exists to prevent agencies from "withholding an entire document simply by showing that it contains some exempt material." *Krikorian*, 984 F.2d at 467. An agency must "correlat[e] those claims with the particular part of a withheld document to which they apply," and the district court cannot approve withholding of an entire document without considering whether there are portions to which the claimed exemptions do not apply. *Id.* (emphasis omitted).

Here, "[n]o reasonably segregable, nonexempt portions have been withheld from plaintiffs." DE-75-2 at 11. The agency redacted specific information from the disputed documents, rather than withholding them in full, and provided an explanation for each exemption. *See, e.g.*, DE-27-2 at 37-48; DE-66-1 at 9-11. The district court reviewed the exemptions *in camera*, and separately addressed each exemption in each disputed document in its lengthy decisions. DE-58, DE-99, DE-108. Although the district court did not use the word segregability, its entire opinion was addressed to ensuring that the redactions in each document were as limited as possible. If there were any reason to doubt the district court's determination, there would nevertheless be no need for a remand because this Court may assess that question independently based on the existing record. *See Juarez v. DOJ*, 518 F.3d 54, 60 (D.C. Cir. 2008) (concluding that, based on appellate court's review of agency affidavits, "no part of the requested documents was improperly withheld," and finding no remand necessary).

## II. The district court erred in its treatment of personal information.

Although, as explained above, the district court's opinion largely reflects careful and correct analysis of the applicable FOIA exemptions, the district court erred in its treatment of some sensitive personal information.

### A. The district court improperly ordered disclosure of personal information protected by Exemptions 6 and 7(C).

The district court neglected to accord due weight to the privacy interests of individuals whose names and other identifying information appear in the law enforcement records at issue here. The "disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 765 (1989) (emphasis added). The "core purpose" of FOIA is to require disclosure of agency records that can "contribut[e] significantly to public understanding of the operations or activities of the government" and thereby "inform[] [citizens] about what their government is up to." *United States Dep't of Def. v. Federal Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (DoD)(quoting *Reporters Comm.*, 489 U.S. at 773, 775) (emphasis omitted). "That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Id*. at 496 (quoting *Reporters Comm.*, 489 U.S. at 773).

Congress therefore tempered FOIA's general policy of public disclosure by enacting Exemptions 6 and 7(C) to protect the "equally important" right of personal privacy. *See* S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965); *see also DoD*, 510 U.S. at 497 n.6. To that end, Exemption 7(C) exempts from mandatory

disclosure under FOIA records or information "compiled for law enforcement purposes" if their public disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). Determining whether a disclosure could reasonably be expected to be unwarranted requires courts to "balance the competing interests in privacy and disclosure." *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).[12]

### 1. Individuals mentioned in FBI files have a strong privacy interest in their personal information.

**a.** The Supreme Court has repeatedly emphasized that the "concept of personal privacy" in Exemption 7(C) does not reflect a "limited or 'cramped notion' of that idea." *Favish*, 541 U.S. at 165 (quoting *Reporters Comm.*, 489 U.S. at 763). Rather, Exemption 7(C) affords broad protection to a wide range of privacy interests that includes "'the individual's control of information concerning his or her person'" as well as "other personal privacy interests," *Favish*, 541 U.S. at 165 (quoting *Reporters Comm.*, 489 U.S. at 763), that extend well beyond an interest in preventing disclosure of "intimate" or "highly personal" details, *see United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982).

[12] Because the redactions at issue in this case are justified under Exemptions 6 and 7(C), we focus on the more protective standard under Exemption 7(C). *See Favish*, 541 U.S. at 165-66.

People involved in an investigation, whether witnesses, suspects, persons of interest, or government agents, have a protected privacy interest in their connection to the investigation. *Favish*, 541 U.S. at 166. Indeed, "'exemption 7(C) takes particular note of the "strong interest" of individuals, whether they be suspects, witnesses, or investigators, "in not being associated unwarrantedly with alleged criminal activity."'" *Nadler v. U.S. Dep't of Justice*, 955 F.2d 1479, 1489 (11th Cir. 1992), *abrogated by U.S. Dep't of Justice v. Landano*, 508 U.S. 165 (1993) (quoting *Dunkelberger v. Department of Justice*, 906 F.2d 779, 781 (D.C. Cir. 1990)); *Rimmer v. Holder*, 700 F.3d 246, 257 (6th Cir. 2012) ("[T]his circuit, along with many others, has recognized that 'people who were investigated for suspected criminal activity or who were otherwise mentioned therein . . . could [be] subject[ed] . . . to embarrassment, harassment and even physical danger.'" (second, third, and fourth alterations in original); *Neely v. FBI*, 208 F.3d 461, 465 (4th Cir. 2000); *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894, 896 (D.C. Cir. 1995); *Librach v. FBI*, 587 F.2d 372, 373 (8th Cir. 1978) (per curiam). The individual's control of his personal information is particularly important in this context because there is significant "potential for harassment, intrusion, and stigmatization resulting from disclosure of an individual's connection with a criminal investigation." *Nadler*, 955 F.2d at 1489.

The privacy interest does not depend on whether the individual is guilty or innocent. The Supreme Court has acknowledged that there is "special reason" to give protection to "information about persons interviewed as witnesses or initial suspects but whose link to the official inquiry may be the result of mere happenstance." *Favish*, 541 U.S. at 166; *Lahr v. National Transp. Safety Bd.*, 569 F.3d 964, 975 (9th Cir. 2009) (redacting names of witnesses of plane crash). But FOIA also protects the privacy interest of individuals who arguably or actually engaged in wrongdoing. *O'Kane v. U.S. Customs Serv.*, 169 F.3d 1308, 1310 (11th Cir. 1999) (per curiam) ("[I]ndividuals have a substantial privacy interest in their criminal histories."); *see also Reporters Comm.*, 489 U.S. at 749, 757-58, 766 n.18 (protecting privacy interest of reputed Mafia crime boss in his rap sheet).

As to private individuals named in the documents, the government's declarations explain that "[a]ny association or presumed association with" the 9/11 terrorist attacks would "cast[] these individuals in an extremely negative light." DE-66-1 at 20. Even where individuals have already been associated in press reports with the attacks or the investigation, release of FBI records "would constitute an official acknowledgment by the FBI" and "absolutely has a negative connotation, whether or not these individuals ever actually committed crimes." *Id.* at 21. Indeed, an individual may wish to avoid the stigma resulting from "release of additional non-public material tying these individuals to these events" because it

"could cause additional serious disruptions of their lives by reigniting old suspicions, sustaining any existing negative inferences into their character, and/or subjecting them to additional harassing inquiries and/or negative reporting in the press." *Id.* at 20. These potential harms illustrate why the individual's interest in controlling personal information in FBI files is so important and broadly recognized.

The FBI agents and other lower-level government employees involved in this investigation and whose information was redacted likewise have a strong privacy interest in their information in these records. It is well-established that such "government officials have a legitimate interest in preserving the secrecy of matters that conceivably could subject them to annoyance or harassment in either their official or private lives." *Cleary v. FBI*, 811 F.2d 421, 424 (8th Cir. 1987) (quoting *Baez v. U.S. Dep't of Justice*, 647 F.2d 1328, 1339 (D.C. Cir. 1980)). In particular, courts have repeatedly "recognized that agents retain an interest in keeping private their involvement in investigations of especially controversial events." *Lahr*, 569 F.3d at 977; *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 487-88 (D.C. Cir. 1980); *Maynard*, 986 F.2d at 566; *Wood v. FBI*, 432 F.3d 78, 88-89 (2d Cir. 2005); *see also Mordenti v. U.S. Dep't of Justice*, 331 F.3d 799, 803 (11th Cir. 2003) (The fact that one is a public official "does not render her interest in preserving her personal privacy without weight.").

The government's declaration makes clear that these concerns apply in full force to this case. It explains that the assignment of a particular FBI agent to a particular investigation is "not by choice" and "[p]ublicity (adverse or otherwise) regarding any particular investigation to which they have been assigned may seriously prejudice their effectiveness in conducting other investigations." DE-27-1 at 27-28. Publishing the names of these government employees may put their safety at risk. As the declaration explains, "[i]t is possible for an individual targeted by such law enforcement actions to carry a grudge which may last for years." *Id*. at 28. In the counterterrorism context, in particular, "[r]elease would . . . result in providing violent terrorists—individuals that go to great lengths to inflict physical damage on both civilian and government targets—the identities of individuals involved in these investigations as potential targets for their violent activities." DE-66-1 at 14; *see Long v. Office of Pers. Mgmt.*, 692 F.3d 185, 196 (2d Cir. 2012) (holding that terrorism risk justified withholding employee names and duty stations). Additionally, "[r]elease of the identities of these law enforcement employees within the records at issue (records that document these individuals' investigative efforts into violent terrorist activities) could subject them as individuals to unnecessary and unwelcome harassing inquiries by private citizens seeking unofficial access to information associated with their investigations." DE-66-1 at 13-14. All of these concerns apply to FBI agents,

personnel supporting their investigative efforts, and other government employees performing similar investigative duties. *Id*. at 14.

**b.** The district court erred in disregarding the weighty privacy interests at stake here because some individuals have been subject of media speculation. *See, e.g.*, DE-99 at 22.

The district court acknowledged that the documents at issue here include the names and identifying information of some individuals whose identities have not been the subject of public speculation. *See* DE-99 at 21 ("[m]ost" names redacted under Exemption 7(C) were already in the public domain). Thus, that rationale—even if it were otherwise justified—would not support the court's decision here. But the court was fundamentally mistaken because, regardless of such speculation, it is "surely beyond dispute that 'the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation.'" *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990) (quoting *Branch v. FBI*, 658 F.Supp. 204, 209 (D.D.C. 1987)); *Schrecker v. U.S. Dep't of Justice*, 349 F.3d 657, 666 (D.C. Cir. 2003). Those concerns are particularly weighty with respect to the FBI's investigation into the 9/11 attacks since, as explained above, "[a]ny association or presumed association with" the 9/11 terrorist attacks would "cast[] these individuals in an extremely negative light" and could have serious repercussions. DE-66-1 at 20.

The strong privacy interest in controlling personal information in FBI records is not diminished merely because similar information may be available from another source. *Edwards*, 436 F. App'x at 924 (disclosure of record by local law enforcement entity does not waive application of FOIA exemption for that information); *Carpenter v. U.S. Dep't of Justice*, 470 F.3d 434, 440 (1st Cir. 2006); *Rugiero*, 257 F.3d at 545 ("[W]e have clearly held that no diminution of privacy interests occurs despite the fact that the identifying information is already publicly available."); *Neely*, 208 F.3d at 465; *Reporters Comm.*, 489 U.S. at 763-64 (finding privacy interest in rap sheets even though "events summarized in a rap sheet have been previously disclosed to the public"). Indeed, FOIA's protection for "personal privacy" even protects information as commonplace as an individual's home address, because the "privacy interest protected by Exemption[s] 6" and 7(C) "'encompass[es] the individual's control of information concerning his or her person.'" *DoD*, 510 U.S. at 500 (quoting *Reporters Comm.*, 489 U.S. at 763) (second set of brackets in original). Even though "home addresses often are publicly available through sources such as telephone directories and voter registration lists," an individual's "interest in controlling the dissemination of [such] information . . . does not dissolve simply because that information may be available to the public in some form." *Id*.

Individuals acquitted of crimes have a clear privacy interest in controlling information in their publicly available court records. The importance of this right is apparent because of "the risk—perhaps small, . . . but nonetheless real—that renewed attention would be paid to the individuals who were the subject of these prosecutions." *American Civil Liberties Union v. U.S. Dep't of Justice*, 750 F.3d 927, 934 (D.C. Cir. 2014) (citation omitted). This Court has recognized that a booking photograph "intimates, and is often equated with, guilt," and injures a privacy interest even if the individual publicly pleads guilty. *Karantsalis*, 635 F.3d at 503. Like a booking photograph, release of FBI records "absolutely has a negative connotation, whether or not these individuals ever actually committed crimes." DE-66-1 at 21.

The privacy interest persists even if the individual discloses his own involvement in the investigation. *See Jones v. FBI*, 41 F.3d 238, 247 (6th Cir. 1994) (holding that FBI agents did not waive the protection afforded their identities by Exemption 7(C) by testifying at the plaintiff's habeas proceeding); *Kiraly v. FBI*, 728 F.2d 273, 279-80 (6th Cir. 1984) (rejecting argument that, by testifying in a trial related to a police investigation, an individual waived any privacy interest in FBI investigation records protected from public dissemination by Exemption 7(C)).

This is because the interest being protected is the individual's interest in "controll[ing] . . . information concerning his or her person." *Reporters Comm.*, 489 U.S. at 763; *Ingle v. U.S. Dep't of Justice*, 698 F.2d 259, 269 (6th Cir. 1983). Thus, "Exemption 7(C) leaves the decision about publicity—whether and how much to reveal about herself—in the power of the individual whose privacy is at stake." *Jones*, 41 F.3d at 247 (citing *Reporters Comm.*, 489 U.S. at 763)). An individual may choose to make public limited information about his involvement with the investigation, without consenting to release of all information collected by the FBI about him. *Fiduccia*, 185 F.3d at 1047 (although an individual spoke to the press about the FBI's search of her home, she "might not be indifferent to whether the FBI disclosed what was in its files"). The public availability of some information regarding an individual's involvement may even weigh against disclosure of further records, because that person's role may already be "well enough known for the public interest in disclosure to have been satisfied." *Mordenti*, 331 F.3d at 804. In this case, the government hewed carefully to that line by, for example, releasing names from FBI summaries that merely described media reports that themselves included the names, but not releasing names in the description of the FBI's own investigation. *See* DE-66-1 at 19; DE-99 at 21.

Because the "privacy interest at stake in FOIA . . . belongs to the individual, not the agency holding the information," *Sherman v. U.S. Dep't of Army*, 244 F.3d

357, 363 (5th Cir. 2001), the government "cannot waive individual . . . privacy interests—whatever it does or fails to do." *Lakin Law Firm*, 352 F.3d at 1124; *Prison Legal News v. Executive Office for U.S. Attorneys*, 628 F.3d 1243, 1249 (10th Cir. 2011); *August v. FBI*, 328 F.3d 697, 701-702 (D.C. Cir. 2003); *Halpern v. FBI*, 181 F.3d 279, 297 (2d Cir. 1999) ("Confidentiality interests [under Exemption 7(C)] cannot be waived through prior public disclosure or the passage of time."). Thus, it is irrelevant that the government disclosed the identities of other employees. "[O]nly the individual whose informational privacy interests are protected by exemption 6 can effect a waiver of those privacy interests." *Sherman*, 244 F.3d at 364 & n.11 (pervasive public use of social security numbers by Army does not waive individual's right to the information); *see also Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1026 (9th Cir. 2008) (upholding redaction of names of Forest Service employees involved in fighting a fire under Exemption 6, although other employees involved in the fire had made their involvement public); *Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 904 (D.C. Cir. 1996) (recognizing that only the individual with privacy interest in information could waive that interest for purposes of Exemption 7(C)); *Massey v. FBI*, 3 F.3d 620, 624 (2d Cir. 1993) ("[W]e are not convinced that the doctrine of waiver applies to exemption (b)(7)(C).").

Petitioners could, of course, attempt to obtain "waive[rs]" of the individual's personal-privacy interest from individuals whose identities they believe they know, which would foreclose application of Exemptions 6 and 7(C). *See Reporters Comm.*, 489 U.S. at 771. But petitioners' failure to provide any such privacy waiver from any individual whose identity has been the subject of media speculation underscores the obvious: those named in FBI reports may reasonably opt to preserve their personal privacy.

**2. The specific information protected under Exemptions 6 and 7(C) would not promote any public interest cognizable under FOIA.**

Only a certain category of public interest—those interests that advance the statutory purpose underlying FOIA's disclosure requirement—can outweigh the personal privacy interests protected by Exemptions 6 and 7(C). The strong privacy interests in the information at stake here must be weighed against the value of that specific information in showing "what the[] government is up to." *See Reporters Comm.*, 489 U.S. at 773; *Mordenti*, 331 F.3d at 803. Plaintiffs bear the burden of demonstrating both the existence of a specific significant public interest and that the specific information requested is likely to advance that interest. *Favish*, 541 U.S. at 172. This requires a showing "that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake." *Id*.

**a.** The district court failed to identify a cognizable public interest justifying disclosure. The two interests on which the district court relied are outside the scope of FOIA.

First, the district court relied on a "public interest in learning about" "suspects and subjects of interest in the September 11 attacks." DE-99 at 37-38; *see also id.* at 24. But "[e]nabling the public to learn about the conduct of private citizens is not the type of public interest the FOIA was intended to serve." *Nadler*, 955 F.2d at 1490. Disclosure of the requested information is in the public interest only if it furthers the public's statutorily created "right to be informed about 'what their government is up to.'" *See Reporters Comm.*, 489 U.S. at 773. The Supreme Court has held that while "there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency," that interest "falls outside the ambit of the public interest that the FOIA was enacted to serve." *Id.* at 774-75.

Second, the district court relied on the potential usefulness of the identities of particular individuals to plaintiffs in separate litigation against Saudi Arabia that remains pending in the Second Circuit. DE-99 at 24. But FOIA does not recognize a "public interest in supplementing an individual's request for discovery." *Carpenter*, 470 F.3d at 441; *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1177 (D.C. Cir. 2011). Rather, "private needs" for documents in connection

with litigation "play no part in whether disclosure is warranted." *L & C Marine Transport*, 740 F.2d at 923.

**b.** Even assuming plaintiffs were able to satisfy the heavy burden of identifying a cognizable public interest under FOIA, the reviewing court must carefully examine the nexus between the requested information and the asserted public interest. Disclosure of additional information is warranted only if that specific information would "contribute significantly to public understanding of the operations or activities of the government." *Karantsalis*, 635 F.3d at 504; *see also Favish*, 541 U.S. at 172 (The requester "must show the information is likely to advance that interest."). Additionally "the public interest . . . must be evaluated in light of all that is already known." *Mordenti*, 331 F.3d at 804. Release is only warranted if the "'marginal additional usefulness' of such information is sufficient to overcome the privacy interests at stake." *Forest Serv. Emps.*, 524 F.3d at 1027; *Rimmer*, 700 F.3d at 258 ("[T]he requester must not only present an interest that is both public and significant, but also demonstrate that disclosure of the information sought will further that interest.").

In this case, release of the personally identifying information of these individuals would add nothing of substance to all that is already publicly known about the FBI's response to 9/11; as the record here explains, the "FBI has already made great pains to be transparent in regards to its actions following 9/11." DE-

66-1 at 21. The 9/11 attacks and the FBI's actions have been investigated by both the 9/11 Commission and the 9/11 Review Commission, and the latter specifically investigated plaintiffs' allegations and found them to be meritless. The FBI itself has published a report that discloses the publicly releasable information regarding its investigative approach and "explains why the FBI pursued different investigative avenues and subjects." *Id.* at 21. Courts properly accord such "government records a 'presumption of legitimacy.'" *Forest Serv. Emps.*, 524 F.3d at 1028 (quoting *Favish*, 541 U.S. at 174). Even under Exemption 6, "strong privacy interests . . . are not overcome by the public's marginal interest in conducting another investigation of the agency's response to the tragedy." *Id.* at 1027. Exemption 7(C)'s stronger protection of personal privacy cannot be overcome by such a claim.

Especially in light of the extensive information already publicly available, there would be little or no benefit to the disclosure of the personal information protected under Exemption 7(C). As the D.C. Circuit explained, names and identifying information in FBI files are "simply not very probative of an agency's behavior or performance." *Schrecker*, 349 F.3d at 666 (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991)). As to the names of government employees, "[i]n many contexts, federal courts have observed that disclosure of individual employee names tells nothing about 'what the government

is up to.'" *Long*, 692 F.3d at 193; *Wood*, 432 F.3d at 88-89 (holding that identities of investigators was irrelevant to evaluating the FBI's investigation); *Corbett v. Transportation Sec. Admin.*, 568 F. App'x 690, 704 (11th Cir. 2014) (per curiam) (disclosure of the identities of Transportation Security Administration screeners' involved in an incident "would not shed any light" on the agency's operations). To the extent that plaintiffs believe that they are already aware of the identities of named individuals, this further undermines their argument that disclosure is necessary. *See Rimmer*, 700 F.3d at 260.

**3. The individuals' privacy interests easily outweigh any public interest in disclosure.**

Because personal information is of significant value to the individual involved, but of little value to the public interest in determining what the government is up to, the balance will tilt toward disclosure only in exceptional circumstances. The D.C. Circuit has held that "names and addresses of private individuals appearing in files within the ambit of Exemption 7(C)" are exempt from disclosure unless "necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity." *SafeCard Servs.*, 926 F.2d at 1206; *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 854 F.3d 675, 681-682 (D.C. Cir. 2017). Indeed, even under Exemption 6's less-protective standard, in a case in which disclosure would not "cause injury or embarrassment," this Court held that a "compelling public interest" would be

required to justify release of names. *News-Press v. U.S. Dep't of Homeland Sec.*, 489 F.3d 1173, 1205 (11th Cir. 2007) ("[N]ames are not necessary to determine the extent of fraud against FEMA").[13]

In this case, the privacy interest easily outweighs any FOIA-cognizable public interest in disclosure. Plaintiffs have not provided sufficiently compelling evidence of government wrongdoing to justify disclosure. Nor have they articulated how this personal information, in particular, would aid in revealing any wrongdoing by the government.

The balance tilts even more strongly against disclosure when it comes to dates of birth, driver's license numbers, addresses, phone numbers, and other such information. There is no public interest in the release of this information. "[T]he privacy interest in a home address is important" and "cannot be outweighed by a public interest in disclosure—whatever its weight or significance—that falls outside of the FOIA-cognizable public interest in permitting the people to know

[13] In *News-Press*, this Court held that press reports of FEMA's paying fraudulent claims were sufficient to justify disclosure of the addresses of individuals who received aid from FEMA, but not their names. 489 F.3d at 1192. That case was decided under Exemption 6, which is less protective of privacy than Exemption 7(C), and this Court relied on the government's "onerous" burden under Exemption 6. *Id*. at 1197-98; *Favish*, 541 U.S. at 166. *News-Press* also did not involve the serious harms from disclosure that could arise from a person's being named in an FBI investigation. DE-66-1, at 14, 20-21.

what their government is up to." *Federal Labor Relations Auth. v. U.S. Dep't of Def.*, 977 F.2d 545, 549 (11th Cir. 1992) (quotation marks omitted).

In sum, the individuals identified in these reports have a strong privacy interest in their personal information. That interest easily outweighs any marginal interest that plaintiffs have identified. The particular identifying information withheld will do nothing to increase plaintiffs' understanding of the adequacy of the FBI's investigation. Indeed, plaintiffs implicitly acknowledge as much, urging instead that they seek to invade the privacy of individuals for reasons unrelated to FOIA's statutory purpose. *See* DE-87, at 10 (arguing that disclosure of names "may shed light on the validity of the hundreds of billions of dollars of claims that are now being prosecuted by the families of the victims of the 9/11 attacks in New York federal court"). This Court "need not, therefore, dwell upon the balance between privacy and public interests: 'something . . . outweighs nothing every time.'" *Maynard*, 986 F.2d at 566 (alteration in original) (quoting *Fitzgibbon*, 911 F.2d at 768).

### B. The district court improperly ordered disclosure of information concerning a confidential source protected under Exemption 7(D).

The district court ordered disclosure of the name of a confidential source and specific information that he provided the FBI. This was error. FOIA Exemption 7(D) protects from disclosure information that "could reasonably be

expected to disclose the identity of a confidential source" and "information furnished by a confidential source." 5 U.S.C. § 552(a)(7)(D). There is a "per se limitation on disclosure under 7(D)." *See L & C Marine Transport*, 740 F.2d at 925. This protection "does not disappear if the identity of the confidential source later becomes known through other means," and balancing is not part of the 7(D) analysis. *Id.*

The document at issue here (Document 27) memorializes a discussion with a jail-house informant "in furtherance of the FBI's investigation of terrorism activities." DE-27-1 at 32; DE-75-2 at 14 n.16 (discussing BB 1572-77), 21. The source "provided specific, singular, detailed information concerning the activities of certain subjects." DE-27-1 at 32. The government's declaration explained that "in the FBI's experience, sources providing information to the FBI about extremist activities do so at great peril to themselves and have faced retaliation and threats (including death threats) when their assistance to the FBI has been publicly disclosed." DE-27-1 at 32-33; *Center for Nat'l Sec. Studies*, 331 F.3d at 929 (reasoning that a "terrorist organization may even seek to hunt down detainees (or their families) who are not members of the organization, but who the terrorists know may have valuable information about the organization"). The source also provided information regarding unsolved homicides. DE-87-1 at 28; *Landano*, 508 U.S. at 179 ("Most people would think that witnesses to a gang-related murder

likely would be unwilling to speak to the Bureau except on the condition of confidentiality.").

The district court did not dispute the validity of these concerns. Indeed, it upheld the government's redactions of related information in the April 30th Commission briefing (Document 2). DE-58 at 16-20. Instead, the district court held that it was "unable to determine what specific information the Government seeks to protect under Exemption 7(D)." DE-99 at 43-44. But there was no difficultly discerning that information here, because the government submitted for *in camera* review an extremely detailed sealed, *ex parte* submission in district court that links each redaction in this document to the relevant exemptions. DE-76-18 at 20-27. The redactions protect the identity of, and information provided by, a confidential source, and should be upheld.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed as to Exemptions 6 and 7(C), and Exemption 7(D) on Document 27, and otherwise should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 28.1(e)(2)(B)(i) because it contains 14,306 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Times New Roman 14-point font, a proportionally spaced typeface.

*s/ Dana Kaersvang*
Dana Kaersvang

## CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

*s/ Dana Kaersvang*
Dana Kaersvang

# ADDENDUM

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**5 U.S.C. § 552(b)**

(b) This section does not apply to matters that are--

(1) (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;

* * *

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute--

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

* * *

(5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (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, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention

of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

* * *

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.