

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, et al.,

Plaintiffs,

v.

OFFICE OF THE DIRECTOR OF NATIONAL
INTELLIGENCE, et al.,

Defendants.

Civil Action No. 10-CV-4419 (RJS)
ECF CASE

DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am currently the Section Chief of the Record/Information Dissemination Section (“RIDS”), Records Management Division (“RMD”), formerly at Federal Bureau of Investigation Headquarters (“FBIHQ”) in Washington, D.C., and currently relocated to Winchester, Virginia. I have held this position since August 1, 2002. Prior to my joining the FBI, from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act (“FOIA”) policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 276 employees who staff a total of ten (10) units and two field operational service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the FOIA; Privacy Act of 1974 ("PA"); Executive Order 13526, Presidential, Attorney General and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith. My responsibilities also include the review of FBI information for classification purposes as mandated by Executive Order ("E.O.") 13526,¹ and the preparation of declarations in support of Exemption 1 claims under the FOIA.² I have been designated by the Attorney General of the United States as an original classification authority and a declassification authority pursuant to E.O. 13526, §§ 1.3 and 3.1.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, I am

¹ The classified information in this case was reviewed in accordance with E.O. 13526 of December 29, 2009.

² 5 U.S.C. § 552 (b)(1).

aware of the treatment afforded plaintiffs' November 18, 2009 FOIA request³ seeking access to:

1. Any and all records created since July 10, 2008 indicating the number of: A. Acquisition applications submitted to the Foreign Intelligence Surveillance Court ("FISC") pursuant to Section 702 of the FISA Amendments Act of 2008, Pub. L. No. 110-261 (2008). B. Acquisition orders the FISC has issued pursuant to Section 702 of FAA. C. Acquisition orders the FISC has granted with modifications. D. Acquisition applications the FISC has granted without modifications. E. Acquisition applications the FISC has requested.
2. Any and all records created since July 10, 2008 indicating the number of: A. U.S. persons whose communications have been collected or intercepted pursuant to Section 702 of the FAA. B. U.S. persons who have been targeted by surveillance conducted pursuant to Section 702 of the FAA. C. Targets of surveillance conducted pursuant to Section 702 of the FAA who were later determined to be located in the United States. D. U.S. persons who have been identified in disseminated intelligence reports resulting from or related to surveillance conducted pursuant to Section 702 of the FAA. E. Disseminated intelligence reports resulting from or related to surveillance conducted pursuant to Section 702 of the FAA that contain a reference to a U.S. person's identity.
3. Any and all records created since July 10, 2008 pertaining to the collection, analysis, or dissemination of purely domestic communications pursuant to Section 702 of the FAA.
4. Any and all legal memoranda (including Office of the Legal Counsel memoranda), procedures, policies, directives, practices, guidance, or guidelines created since July 10, 2008 pertaining to: A. Surveillance conducted under Section 702 of the FAA. B. The scope of authority granted by Section 702 of the FAA. C. The implementation of Section 702 of the FAA. D. Targeting and minimization procedures adopted pursuant to Section 702 of the FAA. E. Interception, collection, analysis, dissemination, or analysis of U.S. persons' communication pursuant to Section 702 of the FAA (whether or not a U.S. person is the target of the interception).
5. Any and all inter or intra-agency correspondence pertaining to the scope of authority granted by Section 702 of the FAA, legal interpretations of any part of Section 702 of the FAA, or rules governing the interception, collection, analysis, or dissemination of U.S. communications.
6. Any and all reports, assessments, or reviews issued or conducted pursuant to Section 702(I) of the FAA since July 10, 2008, including any by the Attorney General, Director of National Intelligence, the head of another intelligence agency, the Inspector General of the Department of Justice, or the Inspector General of any other intelligence agency.

³ On August 13, 2010 the Court approved the parties' Joint Stipulation to further limit the scope of plaintiffs' request, see ¶ 4 *infra*.

7. Any and all records created since July 10, 2008 concerning complaints about, investigations of, or disciplinary actions related to surveillance conducted pursuant to Section 702 of the FAA.

COURT APPROVED JOINT STIPULATION NARROWING SCOPE OF PLAINTIFF'S REQUEST

(4) On August 13, 2010 the Court approved a Joint Stipulation by the parties thereby narrowing plaintiff's request as follows:

A. General Search Instructions:

- All seven parts of the plaintiff's FOIA request are limited to documents related to section 702 of the FAA Act of 2008, 50 U.S.C. §1881a.
- Only those documents created and/or dated on or after July 10, 2008 and on or before July 1, 2010 are responsive.
- The FOIA request does not seek any acquisition applications, supporting documentation, or any orders issued by the FISC. The term "acquisition applications" refers to requests or certifications made by the Attorney General or the Director of National Intelligence for FISA approval or surveillance "targeting . . . persons reasonably believed to be located outside the United States to acquire foreign intelligence information" under authority granted by section 702 of the FAA, 50 U.S.C. §1881a(a), (g).
- Draft documents are all excluded from all parts of the plaintiff's FOIA request; and only final versions of documents will be considered for release.

B. Specific Instructions Related to the Seven Part FOIA Request:

- Concerning Part 1 and 2 of the plaintiffs FOIA request, plaintiff's seek only documents that state the numbers of applications and orders as specified in subparagraphs A-E of requests 1 and 2, to the extent any such documents exist. Plaintiff does not seek underlying records (e.g., acquisition applications, orders, communications collected, targets of surveillance, etc.).
- Concerning Part 3 of the plaintiff's FOIA request, the search for and production of responsive documents are limited to final agency policy, whether contained in legal memoranda or as part of Bureau-wide guidance, guidelines, procedures, directives, rules, or practices, as well as any final Office of Legal Counsel memorandums relating to the subject matter identified in those requests.

- Concerning Part 4 of the plaintiff's FOIA request, the search for and production of responsive documents are limited to final agency policy, whether contained in legal memoranda or as part of Bureau-wide guidance, guidelines, procedures, directives, rules, or practices, as well as any final Office of Legal Counsel memorandums relating to the subject matter identified in those requests.
- Concerning Part 5 of the plaintiff's FOIA request, the search for and production of responsive documents are limited to documents which communicate final agency policies sought by Parts 3 and 4 of the FOIA request, as well as documents that further clarify those policies. Electronic mail (e-mail) messages are excluded from this FOIA request, except to the extent that such final agency policies - or clarifications of those policies - have been communicated via electronic mail message by individuals with authority. The term "individuals with authority" expressly excludes agency counsel; is limited to the General Counsel.
- Concerning Part 6 of the plaintiff's FOIA request, the search for and production of responsive documents are limited to final documents which are required to be created under Section 702(1), 50 U.S.C. § 1881a(1) (i.e., semiannual assessments, agency assessments, and annual reviews).
- Concerning Part 7 of the plaintiff's FOIA request, the search for and production of responsive documents are limited to records concerning complaints, investigations, or disciplinary actions related to allegations of abuse of the procedures set forth in Section 702. Plaintiff's agree to exclude electronic mail messages from this request, except to the extent that complaints of abuses are communicated via electronic mail messages.

(5) The FBI submits this declaration in support of its motion for summary judgment and to provide the Court and plaintiff with an explanation of the procedures used to search for records responsive to plaintiff's request, and with justifications for the withholding of information from these documents in accordance with Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), pursuant to Exemptions 1, 2, 4, 5, 6, 7(C), 7(D), and 7(E), 5 U.S.C. §§ 552 (b)(1), (b)(2),

(b)(4), (b)(5), (b)(6), (b)(7)(C), (b)(7)(D) and (b)(7)(E).⁴

PROCEDURAL HISTORY OF PLAINTIFF'S FOIA REQUEST

(6) By letter dated November 18, 2009, plaintiff submitted a request for records pertaining to the FISA Amendments Act of 2008 ("FAA") to seven addressees, including the Department of Justice ("DOJ"). The FBI was not among the addressees, and the request was never provided to the FBI. In its request, plaintiff requested expedited processing, and a waiver or limitation of all search and duplication fees. (See Exhibit A.)

(7) On June 3, 2009, plaintiff filed suit seeking injunctive and declaratory relief.

(8) The FBI first officially became aware of plaintiff's FOIA request on June 9, 2010 when a copy of the Complaint was forwarded to the FBI by the Office of the United States Attorney, for the Southern District of New York ("USAO/SDNY"). Exhibit A of the Complaint was a copy of plaintiff's November 18, 2009 FOIA request. Using this copy of plaintiff's FOIA request, the FBI opened a FOIA case on June 17, 2010. The FBI then began searching the indices to the Central Records System at FBI Headquarters for information pertaining to plaintiff's request. Subsequently, the parties modified the request through a Joint Stipulation.⁵

(9) By letter dated July 20, 2010 the FBI advised plaintiff that its request for expedited processing associated with its November 18, 2009 request had been granted. Plaintiff

⁴ Although the FBI asserted Exemptions on Bates-pages between FAA 656-748 of the original FOIA release, it was later determined that these 92 pages of documents belonged to DOJ/National Security Division ("NSD"), and so the FBI forwarded these documents to DOJ/NSD for appropriate action. See Exhibit D for Bates-pages 1-655.

⁵ See ¶ 4 supra.

was also informed that FOIA request number 1149723-000 was assigned to its request. (See Exhibit B.)

(10) By separate letter, also dated July 20, 2010, the FBI advised plaintiff that its request for a waiver of any duplication fee costs associated with its November 18, 2009 request had been granted. (See Exhibit C.)

(11) The FBI reviewed 748 pages and released 239 pages in full or part, asserting Exemptions 1, 2, 3, 4, 5, 6, 7(C), 7(D), and 7(E), 5 U.S.C. §§ 552 (b)(1), (b)(2), (b)(3), (b)(4), (b)(5), (b)(6), (b)(7)(C), (b)(7)(D) and (b)(7)(E). Each page was Bates-stamped on the bottom center of each page. The FBI withheld in full 509 pages. Deleted page inserts were inserted at the location of each deleted page in the release to give the plaintiff an explanation, why, pursuant to the use of Exemptions, no segregable material was available for release for those particular pages.⁶ The FBI made its last release to date to plaintiff through the USAO/SDNY on November 30, 2010. (See Exhibit D.)

HOW A FOIA REQUEST IS PROCESSED IN RIDS

(12) Over the years, FOIA management at FBIHQ has continuously re-engineered the process of responding to FOIA/Privacy Act requests in an effort to better serve the needs of requesters who seek information from the FBI. In 2002, reorganization of various divisions at FBIHQ resulted in the formation of the RMD, which now handles all FOIA/Privacy Act requests through the RIDS. These most recent re-engineering efforts have resulted in a new

⁶ The FBI will address only Bates-pages FAA 1-655 in this Declaration and Exhibit D. See footnote 4, supra.

organizational plan which will be discussed in more detail below.

(13) The mission of RIDS is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information. RIDS provides program and policy management that pertains to the research, review, analysis, processing, and classification/declassification work related to the FOIA and Privacy Act; Executive Order 13526; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. RIDS also provides prepublication review of material written by current and/or former FBI employees concerning FBI matters as mandated by the FBI's employment agreement, executes the FBI's historic declassification program, and assists in managing defense discovery efforts in large counterterrorism criminal trials. RIDS currently employs 276 personnel, most of whom are Legal Administrative Specialists ("LASs"), and who are assigned among the ten (10) units and two field operational service center units within RIDS. RIDS employees intake, review, process, and release information in response to FOIA and Privacy Act requests. To accomplish this mission, RIDS consists of the following 12 Units: one Service Request Unit ("SRU"), one Work Process Unit ("WPU"), three Classification Units ("CU"), six FOIA/Privacy Act Units ("FOIPA Disclosure Units"),⁷ and the Litigation Support Unit ("LSU").

(a) Service Request Unit: the Service Request Unit ("SRU") includes the Negotiation Team, which works with individuals whose requests generate a large volume of

⁷ Two of the six FOIA/Privacy Act Disclosure Units are field operational service center units that operate at off-site locations in Savannah, Georgia and Butte, Montana.

records in an attempt to narrow the scope of responsive records and facilitate a more rapid response. Since 1995, this team has eliminated over 13 million pages from FOIA/Privacy Act requests. The Unit also has a RIDS Public Information Official, who is responsible for assisting requesters with issues concerning their request. The Government Response Team (“GRT”), also a part of SRU, provides timely feedback to other federal agencies and other DOJ components with regard to referrals of documents which are either FBI-originated or contain FBI-originated information. Referred documents are sent to the FBI for consultation or for direct response to the requester. Finally, SRU handles administrative appeals.

(b) Work Process Unit

(i) The Work Process Unit (“WPU”) is responsible for reviewing and sorting all correspondence/incoming requests for information from the public, Congress, Presidential Libraries, foreign governments, other federal and state agencies, and other FBI entities (i.e., FBI field offices, Legats). The WPU handles various initial tasks required to “perfect” a FOIA/Privacy Act request, including sending letters to acknowledge requests, advising a requester to provide identifying data so that an accurate records search can be made and/or to submit a notarized signature/Privacy Act waiver, and advising a requester when no responsive records are located. The WPU also opens new requests, assigns a FOIA/Privacy Act (“FOIPA”) Request Number, and enters the perfected requests into the FOIPA Document Processing System (“FDPS”) tracking system. The WPU is responsible for preparing “perfected” requests for transfer to the six FOIPA Disclosure Units. As previously explained, a request is considered “perfected” when all administrative tasks have been completed and all responsive

documents have been scanned into FDPS. Once a request has been perfected, it is placed in the backlog for assignment to a FOIPA Disclosure Unit for processing. The WPU conducts searches of the general indices for identifiable records,⁸ confirms responsive documents, stamps files for retention, addresses fee issues (other than fee waiver reviews), expedites requests, retrieves and forwards files for scanning into FDPS, responds to status inquiries, and maintains requests prior to their transfer to the FOIPA Disclosure Units.

(ii) After the WPU perfects a request, it is sent to the “perfected backlog.” To ensure fairness to all requesters and to equitably administer the deluge of FOIA/Privacy Act requests received by the FBI, a request is assigned based on the date of receipt on a “first-in, first-out” basis from within each of three queues according to sound administrative practices.⁹ The FBI uses a three-queue system as a way to fairly assign and process new requests.¹⁰ The three-queue system established “multi-track” processing for requests, based on the amount of time and work involved in handling a particular request.¹¹ The system

⁸ At times, when a standard search of the general indices does not produce anticipated results, WPU drafts an electronic communication called a “search EC” and directs it to those divisions most likely to house potentially responsive material. The search EC then requires a specific point of contact from those divisions to respond to WPU within a specific time period, and provide WPU with copies of any potentially responsive documents they have located within their division. Searches that involve this level of coordination with other divisions are far more complex than the searches conducted on the average request and therefore often require additional time.

⁹ See 28 C.F.R. § 16.5(a).

¹⁰ This system went into effect on July 10, 1997, superseding the previous system of two queues (one for 100 pages or less, the other for requests greater than 100 pages).

¹¹ See 5 U.S.C. § 552(a)(6)(D)(I) and 28 C.F.R. § 16.5(b).

nevertheless preserves the principle that, within the three queues, requests are still assigned and processed on a first-in/first-out basis. The placement of a request in one of the three queues depends on the total amount of material responsive to that request - 500 pages or less ("small queue"), 501 to 2,500 pages ("medium queue"), or more than 2,500 pages ("large queue"). This standard operating procedure, coupled with the FBI's "first-in, first-out" policy, permits requests to be addressed in the order in which they are received, while obviating the inequities to other requesters whose interests relate only to a small number of documents. As described earlier, individuals whose requests have been placed in the large queue are given the opportunity, through contact with SRU's Negotiation Team, to reduce the scope of their requests and accelerate assignment of their requests by relocating them to a more advantageous queue.

(c) Classification Units: The three Classification Units ("CUs") are responsible for complying with the classification/declassification review of FBI records under Executive Order 13526 and for conducting mandatory declassification review consistent with Executive Order 13526. The CUs review documents responsive to FOIA/Privacy Act requests, criminal and civil discovery requests, Congressional and Presidential mandates, Presidential Library requests, mandatory declassification requests, Office of Inspector General Reports, and other federal agency requests in order to determine whether such material should remain classified or be declassified. In addition, the CUs review and prepare classified material for review by the Department of Justice Review Committee ("DRC").¹²

¹² The DRC is the FBI's appellate authority with regard to the implementation and administration of Executive Order 13526 and related directives and guidelines concerning classified information. See 28 C.F.R. § 17.14.

(d) FOIPA Disclosure Units: The six FOIPA Disclosure Units perform the actual processing of records pursuant to the provisions of the FOIA and Privacy Act. “Processing” involves a page-by-page, line-by-line review of the responsive documents to determine which, if any, FOIA and/or Privacy Act exemptions may apply. This includes redaction of the exempt material and notation of the applicable exemption(s) in the margin of each page and/or preparation of deleted page information sheets when pages are withheld in their entirety, which is now done electronically in FDPS. During the course of their review, the FOIPA Disclosure Units consult with other government agencies, as necessary, for their determination as to the releasability of the other agency's information contained within FBI records, or refer non-FBI documents to those originating agencies for processing and direct response to the requester. The FOIPA Disclosure Units ensure that FOIA and/or Privacy Act exemptions have been applied properly, no releasable material has been withheld, no material meriting protection has been released, all necessary classification reviews have been completed by transferring applicable cases to the CUs, and other government agency information and/or entire documents originating with other government agencies have been properly handled.

(e) Litigation Support Unit: The Litigation Support Unit (“LSU”) is responsible for providing legal support and administrative assistance to the FBI’s Office of the General Counsel and Chief Division Counsels and Associate Division Counsels in the FBI’s field offices, in all FOIA/Privacy Act requests that result in federal litigation. The LSU coordinates the progress of the FBI’s response to a particular FOIA/Privacy Act request as it progresses through the units described above, the receipt of substantive litigation-related information from

involved FBI Special Agents in the field offices and operational Divisions at FBIHQ, and the referral of documents to other DOJ components and/or government agencies. The LSU prepares the administrative record, drafts both procedural and substantive declarations, codes documents processed by the FOIPA Disclosure Units,¹³ and drafts detailed declarations justifying the assertion of all applicable FOIA/Privacy Act exemptions.

(14) To promote administrative efficiency, LAS's in RIDS work on more than one request at a time. Certain cases may require that the usual processing be halted midstream. This can occur for a variety of reasons, including the resolution of classification issues, the location of additional records, or consultation with other government agencies as to the nature and propriety of releasing certain information. In the interest of efficiency during this waiting period, the LAS may fully process other requests. Large requests are often processed on parallel tracks with smaller requests in an attempt to ensure that one requester does not consume a disproportionate share of RIDS resources.

(15) Consistent with standard administrative procedure, any records referred to the FBI from other DOJ components or other government agencies in response to a particular request are

¹³ A coded format is used in cases to assist the Court and parties in reviewing information which the FBI withholds within the context of processed documents. Each instance of information withheld pursuant to the FOIA is accompanied by a coded designation that corresponds to specified categories. For example, if “(b)(7)(C)-1” appears on a document, the “(b)(7)(C)” designation refers to Exemption (b)(7)(C) of the FOIA, which concerns “Unwarranted Invasion of Privacy.” The numerical designation “-1” following the “(b)(7)(C)” narrows the main category to the more specific subcategory of “Names and/or Identifying Information of FBI Special Agents and Support Personnel.” Although adding codes is a time-consuming process, it helps the Court and the parties in those jurisdictions that accept coded declarations to explain more clearly the nature of the withheld material.

added to that pending FOIA/Privacy Act request. This process is an equitable way for RIDS to maintain administrative control of FOIA/Privacy Act requests. Under this system, the same LAS assigned to process a particular request will also handle the review of records referred by other DOJ components or government agencies. By ensuring continuity in the processing of FOIA/Privacy Act requests, this system is not only fair to all persons seeking information under the FOIA/Privacy Act, but is also administratively efficient.

HOW EXPEDITED REQUESTS ARE HANDLED

(16) An agency will process a FOIA request on an expedited basis when a requestor has shown a compelling need or urgency for the records that warrants prioritization of his or her request over other earlier requests. 28 C.F.R. 16.5(d) describes four circumstances under which requests and appeals will be taken out of order and given expedited treatment whenever it is determined that they involve the following:

- (i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;
- (ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information;
- (iii) The loss of substantial due process rights; or
- (iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence.

(17) Decisions to expedite under this fourth standard are made by DOJ's Director of Public Affairs. Pursuant to 28 C.F.R. 16.5(d)(4), within 10 calendar days of its receipt of a request for expedited processing, the proper component shall decide whether to grant it and shall notify the requester of the decision. If a request for expedited treatment is granted, the request

shall be given priority and shall be processed as soon as practicable.

(18) In its November 18, 2009 FOIA request, the plaintiff asked for expedited processing.¹⁴ On July 12, 2010 the FBI forwarded the request to DOJ's Director of Public Affairs. Approval of the request for expedited processing was granted on July 20, 2010. The FBI notified plaintiff by letter dated July 20, 2010, of the decision to approve its request.

(19) WPU's normal process is to wait until all results from the search EC in a particular request are received before forwarding the potentially responsive material to the appropriate place in the queue system. Generally, an item cannot be placed "in queue" until there is material available for processing. This remains true even when a case has received approval for expedited status. Once placed in the proper queue, however, an expedited case moves to the front of that queue unless another expedited or court ordered case is placed in front of it.

(20) The first material potentially responsive to plaintiff's November 18, 2009 request, consisting of 13 pages, was received and forwarded to the small queue by WPU on September 2, 2010, where it was highlighted as an expedited case in the FBI's FOIA Document Processing System ("FDPS"). That very same day a FOIA analyst was assigned to the case to begin processing the material. Since September 2, 2010, the November 18, 2009 request has received constant and immediate attention. The FBI received a total of 748 pages of responsive material, processing 239 pages for release in full or in part to plaintiff on November 30, 2010.¹⁵

¹⁴ See ¶ 8 supra for details on why the FBI did not receive notice of plaintiff's November 18, 2009 FOIA request until June 9, 2010.

¹⁵ The total of 748 pages includes the pages later determined to belong to DOJ/NSD. See footnote 4, supra.

EXPLANATION OF THE FBI'S CENTRAL RECORDS SYSTEM

(21) The Central Records System ("CRS"), which is utilized to conduct searches in response to FOIA and Privacy Act requests, enables the FBI to maintain all information which it has acquired in the course of fulfilling its mandated law enforcement responsibilities. The records maintained in the CRS consist of administrative, applicant, criminal, personnel, and other files compiled for law enforcement purposes. This system consists of a numerical sequence of files broken down according to subject matter. The subject matter of a file may relate to an individual, organization, company, publication, activity, or foreign intelligence matter (or program). Certain records in the CRS are maintained at FBIHQ. Records that are pertinent to specific field offices of the FBI are maintained in those field offices. Although the CRS is primarily designed to serve as an investigative tool, the FBI utilizes the CRS to conduct searches that are likely to yield documents responsive to FOIA and Privacy Act requests. The mechanism that the FBI uses to search the CRS is the Automated Case Support System ("ACS").

(22) Access to the CRS is obtained through the General Indices, which are arranged in alphabetical order. The General Indices consist of index cards on various subject matters that are searched either manually or through the automated indices. The entries in the General Indices fall into two categories:

(a) A "main" entry – A "main" entry, or "main" file, carries the name corresponding with a subject of a file contained in the CRS.

(b) A "reference" entry – A "reference" entry, sometimes called a "cross-reference," is generally only a mere mention or reference to an individual, organization, or other subject matter, contained in a document located in another "main" file on a different subject matter.

(23) Access to the CRS files in FBI field offices is also obtained through the General Indices (automated and manual), which are likewise arranged in alphabetical order, and consist of an index on various subjects, including the names of individuals and organizations. Searches made in the General Indices to locate records concerning a particular subject, such as FISA Amendments Act (“FAA”) of 2008, are made by searching the subject requested in the index. FBI field offices have automated indexing functions.

(24) On or about October 16, 1995, the ACS system was implemented for all field offices, Legal Attaches (“Legats”), and FBIHQ in order to consolidate portions of the CRS that were previously automated. Because the CRS cannot electronically query the case files for data, such as an individual’s name or social security number, the required information is duplicated and moved to the ACS so that it can be searched. Over 105 million records from the CRS were converted from automated systems previously utilized by the FBI. Automation did not change the CRS; instead, automation has facilitated more economic and expeditious access to records maintained in the CRS.

(25) ACS consists of three integrated, yet separately functional, automated applications that support case management functions for all FBI investigative and administrative cases:

(a) Investigative Case Management (“ICM”) – ICM provides the ability to open, assign, and close investigative and administrative cases as well as set, assign, and track leads. The Office of Origin (“OO”), which sets leads for itself and other field offices, as needed, opens a case. The field offices that receive leads from the OO are referred to as Lead Offices (“LOs”) – formerly known as Auxiliary Offices. When a case is opened, it is assigned a Universal Case File Number (“UCFN”), which is utilized by all FBI field offices, Legats, and FBIHQ that are conducting or assisting in the investigation. Using a fictitious file number “111-

HQ-12345” as an example, an explanation of the UCFN is as follows: “111” indicates the classification for the specific type of investigation; “HQ” is the abbreviated form used for the OO of the investigation, which in this case is FBIHQ; and “12345” denotes the individual case file number for the particular investigation.

(b) Electronic Case File (“ECF”) – ECF serves as the central electronic repository for the FBI’s official text-based documents. ECF supports the universal serial concept, in that only the creator of a document serializes it into a file. This provides a single-source entry of serials into the computerized ECF system. All original serials are maintained in the OO case file.

(c) Universal Index (“UNI”) – UNI continues the universal concepts of ACS by providing a complete subject/case index to all investigative and administrative cases. Only the OO is required to index; however, the LOs may index additional information as needed. UNI, an index of approximately 110.2 million records, functions to index names to cases, and to search names and cases for use in FBI investigations. Names of individuals or organizations are recorded with identifying applicable information such as date or place of birth, race, sex, locality, Social Security number, address, and/or date of event.

(26) The decision to index names other than subjects, suspects, and victims is a discretionary decision made by the FBI Special Agent (“SA”) assigned to work on the investigation, the Supervisory SA (“SSA”) in the field office conducting the investigation, and the SSA at FBIHQ. The FBI does not index every name in its files; rather, it indexes only that information considered to be pertinent, relevant, or essential for future retrieval. Without a “key” (index) to this enormous amount of data, information essential to ongoing investigations could not be readily retrieved. The FBI files would thus be merely archival in nature and could not be effectively used to serve the mandated mission of the FBI, which is to investigate violations of federal criminal statutes. Therefore, the General Indices to the CRS files are the means by which the FBI can determine what retrievable information, if any, the FBI may have in its CRS files on a particular subject matter i.e., in this case, the FISA Amendments Act (“FAA”) of 2008.

SEARCH FOR RECORDS RESPONSIVE TO PLAINTIFF'S REQUEST

(27) The FBI's policy at the time of plaintiffs' request was to search for, and identify only "main" files responsive to FOIA/PA requests at the initial administrative stage. In response to plaintiff's FBI Headquarters FOIA request dated November 18, 2009,¹⁶ the FBI conducted a manual and automated search of the CRS beginning June 17, 2010 using the search terms "FISA Amendments Act of 2008" and "FAA." No main files responsive to the plaintiff's FOIA request were located.¹⁷

(28) The FBI subsequently determined that a more individualized inquiry (outside of the CRS system) of certain FBI divisions and FBI offices which were reasonably likely to have potentially responsive records was necessary. RIDS circulated an Electronic Communication ("EC")(internal memorandum) on August 17, 2010 to FBIHQ divisions and offices most likely to possess responsive records. The EC incorporated the language of the request as modified by the Joint Stipulation, and requested that the personnel of the designated divisions conduct a thorough search for any potentially responsive documents in their possession in response to plaintiff's FOIA request.

EXPLANATION OF THE CODED FORMAT USED FOR THE JUSTIFICATION OF DELETED MATERIAL

¹⁶ See ¶ 8 supra for details as to when and how the FBI found out about this request.

¹⁷ Because plaintiffs have informed counsel for the Government that they do not challenge the adequacy of the agencies' searches for documents in this matter, the Government has not included details of the searches conducted, including explanation of search terms. To the extent that plaintiff challenges any aspect of the search at a later date, the Government reserves the right to submit supplemental declarations in response.

(29) All documents were processed to achieve maximum disclosure consistent with the access provisions of the FOIA. Every effort was made to provide plaintiff with all material in the public domain and with all reasonably segregable portions of releasable material. No reasonably segregable, nonexempt portions were withheld from plaintiff. Any further description of the information withheld could identify the very material which the FBI seeks to protect.

(30) The FBI has processed a total of 748 pages, and has released 239 pages in full or in part, and has withheld 509 pages in full. The FBI has inserted deleted page sheets as a substitute for the 509 pages withheld in full. Copies of the pages released are attached as Exhibit D. Each page of Exhibit D is consecutively Bates-stamped at the bottom center of each page. The exemptions asserted by the FBI as grounds for non-disclosure of portions of documents are FOIA Exemptions (b)(1), (b)(2), (b)(3), (b)(4), (b)(5), (b)(6), (b)(7)(C), (b)(7)(D) and (b)(7)(E).¹⁸

(31) Copies of the documents include coded categories of exemptions which detail the nature of the information withheld pursuant to the provisions of the FOIA. The coded categories are provided to aid the Court's and plaintiff's review of the FBI's explanations of FOIA exemptions used to withhold the protected material. Accordingly, a review of this information will reveal that all material withheld is exempt from disclosure pursuant to FOIA Exemptions.

(32) Each withholding of information is accompanied by a code that corresponds to the categories listed below. For example, if "(b)(7)(C)-1" appears on the page, the "(b)(7)(C)" designation refers to "Exemption (b)(7)(C)" of the FOIA concerning "Unwarranted Invasion of

¹⁸ See footnote 4 supra regarding the FBI's position regarding why the FBI will address only Bates-pages FAA 1-655 in this Declaration.

Personal Privacy." The subcategory "-1" narrows the main category into the more specific subcategory "Names and/or Identifying Information of FBI Special Agents and FBI support personnel." Listed below are the categories used to explain the FOIA exemptions asserted to withhold the protected material.

SUMMARY OF JUSTIFICATION CATEGORIES

CODED CATEGORIES	INFORMATION WITHHELD
Category(b)(1)	Classified Material Covered Under Classification Guidelines
(b)(1)-1	Information Properly Classified by an FBI Official Pursuant to Executive Order 13526, As Amended
(b)(1)-2	FBI File Numbers Assigned to Specific Intelligence Activities Properly Classified by an FBI Official Pursuant to Executive Order 13526, As Amended
Category (b)(2)	Information Related to the Internal Personnel Rules and Practices of an Agency
(b)(2)-1	Telephone Numbers Assigned to FBI Special Agents and Support Personnel. Cited in conjunction with (b)(6)-1 and (b)(7)(C)-1.
Category(b)(4)	Trade Secrets and Commercial or Financial Information
(b)(4)-1	Trade Secrets. Cited in conjunction with (b)(7)(D)-1.
Category(b)(5)	Privileged Information
(b)(5)-1	Deliberative Process Privilege
Categories (b)(6) and (b)(7)(C)	Clearly Unwarranted and Unwarranted Invasion of Personal Privacy

(b)(6)-1 and (b)(7)(C)-1	Names and/or Identifying Information of FBI Special Agents and Support Personnel. Sometimes cited in conjunction with (b)(2)-1.
(b)(6)-2 and (b)(7)(C)-2	Names and/or Identifying Information of Third Parties of Investigative Interest
Category (b)(7)(D)	Confidential Source Information
(b)(7)(D)-1	Names, Identifying Data and/or Information Provided by a Corporate Entity Under an "Implied" Assurance of Confidentiality. Cited in conjunction with (b)(4)-1.
Category (b)(7)(E)	Investigative Techniques and Procedures
(b)(7)(E)-1	Information Pertaining to Investigative Techniques and Procedures.
Outside the Scope	Information That is Outside the Scope of Request.

JUSTIFICATION FOR NON-DISCLOSURE UNDER FOIA

EXEMPTION (b)(1)

CLASSIFIED MATERIAL COVERED UNDER CLASSIFICATION GUIDELINE

(33) The FBI's analysis of the withholding of classified information contained in these documents is based on the standards articulated in the FOIA statute, 5 U.S.C. § 552 (b)(1). Exemption (b)(1) protects from disclosure those records that are:

- (A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy; and
- (B) are in fact properly classified pursuant to such Executive Order.

(34) The FBI's analysis of whether Exemption (b)(1) permits the withholding of agency records consists of two significant steps. First, the FBI must determine whether the information contained in the records is information that satisfies both the substantive and procedural criteria

of the applicable Executive Order governing the classification and protection of national security information; and second, complies with the various substantive and procedural criteria of the Executive Order ('E.O.'). E.O. 13526, as amended, governs the classification and protection of information that affects the national security, and prescribes various substantive and procedural criteria. I am bound by the requirements of E.O. 13526, as amended, when making classification determinations.

(35) In order for information to be properly classified, and thus properly withheld from disclosure pursuant to Exemption (b)(1), the information must meet the requirements set forth in E.O. 13526, as amended, §1.1 (a):

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

(36) Explained in further detail below, in my role as an original classification authority, I have determined that the information withheld pursuant to Exemption (b)(1)-1, and (b)(1)-2 is under the control of the United States Government, is classified and requires a classification marking at the "Secret" level, since the unauthorized disclosure of this information

reasonably could be expected to cause serious damage to national security. See E.O. 13526, as amended, §1.2(a)(2). In addition to these substantive requirements, certain procedural and administrative requirements of E.O. 13526, as amended, must be followed before information can be considered to be properly classified, such as, proper identification and marking of documents. In particular, I made certain that all procedural requirements of E.O. 13526, as amended, were followed:

- (1) each document was marked as required and stamped with the proper classification designation;¹⁹
- (2) each document was marked to indicate clearly which portions are classified, which portions are exempt from declassification as set forth in E.O. 13526, as amended, §1.5 (d), and which portions are unclassified;²⁰
- (3) the prohibitions and limitations on classification specified in E.O. 13526, as amended, § 1.7, were adhered to;
- (4) the declassification policies set forth in E.O. 13526, as amended, §3.1 and §3.3 were followed; and
- (5) any reasonably segregable portions of these classified document that did not meet the standards for classification under E.O. 13526, as amended, were declassified and marked for release, unless withholding was otherwise warranted under applicable law.²¹

¹⁹ E.O. 13526, as amended, §§ 1.6 (a)(1) - (5).

²⁰ E.O. 13526, as amended, § 1.6 (a)(5)(c).

²¹ 5 U.S.C. § 552(b) provides, in part, that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” In this case, the information at issue has been carefully re-examined. Based on its re-review, the FBI determined that no additional reasonably segregable

FINDINGS OF DECLARANT

(37) With the above requirements in mind, I personally and independently examined the FBI information withheld pursuant to Exemption (b)(1)-1, and (b)(1)-2. As a result of this examination, I determined that this classified information continues to warrant classification at the "Secret" level, and is exempt from disclosure pursuant to E.O. 13526, as amended, §3.3, categories (b)(1), and (b)(6). The unauthorized disclosure of the information reasonably could be expected to cause serious damage to the national security.

INTELLIGENCE ACTIVITIES AND METHODS

(38) E.O. 13526, as amended, §3.3 (b)(1), exempts from automatic declassification certain intelligence activities, including special activities, that may reveal information about the application of intelligence methods. An intelligence activity or method includes any intelligence action or technique utilized by the FBI against a targeted individual or organization that has been determined to be of national security interest. An intelligence method is used to indicate any procedure (human or non-human) utilized to obtain information concerning such individual or organization. An intelligence activity or method has two characteristics. First, the intelligence activity or method – and information generated by it – is needed by U.S. intelligence/counterintelligence agencies to carry out their missions. Second, confidentiality must be maintained with respect to the activity or method if the viability, productivity and

portions may be declassified and released, as represented in Exhibit D.

usefulness of its information is to be preserved.

(39) Classified information pertaining to the procedures for targeting certain persons outside the United States other than United States persons (“Non-USPERs”), acquisition training, retention, analyzation, and dissemination of this information pursuant to Section 702 of the FAA is withheld to protect intelligence methods utilized by the FBI to gather intelligence data. All information appearing in these documents has been appropriately classified pursuant to E.O. 13526, as amended, and withheld pursuant to FOIA Exemption (b)(1)-1, and (b)(1)-2.²²

(40) The classification redactions were made to protect from disclosure information that would reveal the actual intelligence activities and methods used by the FBI against specific targets to acquire foreign intelligence, or disclose the intelligence gathering capabilities of the activities or methods directed at specific targets. The intelligence activities or methods detailed in the withheld information are effective means for the FBI to gather, store, analyze or disseminate intelligence information. The criteria utilized by the FBI in these instances to decide what actions by an individual or organization warranted the commencement of an FAA investigation, or caused a certain activity to be given investigative attention over others, could be revealed through disclosure of these intelligence methods. The criteria applied and priorities

²² Exemption (b)(1)-1 has been asserted to protect an intelligence method and procedure utilized for gathering intelligence data on the following pages of Exhibit D: FAA 11-13, 16, 18-19, 21-22, 24-25, 29-34, 36-47, 49-58, 60-70, 72-76, 79-86, 88, 91-95, 97-153, 155-193, 195-233, 235-273, 275-313, 315-354, 356-395, 397-436, 438-528, 530-535, 539-540, 543, 546-550, 552-553, 555-564, 567-579, 581-589, 590-603, 605-609, 611-617, 620-629, 631-634, and 636-640.

assigned in these records are used in the FBI's present intelligence or counterintelligence investigations, and are in accordance with the Attorney General's guidelines on FBI intelligence or counterintelligence investigations, and under authority granted by Section 702 of the FAA.

(41) The information in these documents concerning activities and methods is very specific in nature and known to very few individuals. Disclosure of the specific information which describes these intelligence activities and methods could reasonably be expected to cause serious damage to the national security for the following reasons: (1) disclosure would allow hostile entities to discover the current methods and activities used; (2) disclosure would reveal current specific targets of the FBI's national security investigations; and (3) disclosure would reveal or determine the criteria used and priorities assigned to current intelligence or counterintelligence investigations. Hostile entities could then develop countermeasures which could severely disrupt the FBI's intelligence-gathering capabilities. This would severely damage the FBI's efforts to detect and apprehend violators of the United States' national security and criminal laws.

EXEMPTION (b)(1)-2
FBI FILE NUMBERS RELATED TO SPECIFIC INTELLIGENCE INVESTIGATIONS

(42) The FBI protected the specific FBI case file numbers related to intelligence investigations because disclosure reasonably could be expected to cause serious damage to the national security.

(43) The classified information withheld on certain pages includes FBI file numbers assigned to specific intelligence activities, including channelization and dissemination

instructions. Their release would lead to exposure of the particular intelligence activities and methods at issue. Individual file numbers are assigned by FBIHQ and field offices and contain a geographical prefix or the originating office and case number, which includes the numerical characterization of the type of investigation followed by a chronological number assigned to a specific investigation or activity.

(44) The disclosure of an intelligence file number in the aggregate will enable a hostile analyst to attribute any information released from the documents containing such a file number to that particular file. A hostile analyst can identify the specific intelligence activity by supplying further missing pieces. Hence, a partial mosaic of the activity begins to appear as more information is identified with the file, leading to the exposure of actual current activities or methods. Disclosure of this file number will allow a hostile analyst, or anyone not privileged to this information, to patch bits and pieces of information together until the actual use of the application of the source or method can be determined. The identification of these intelligence sources or methods, which continues to furnish positive intelligence information to date, will severely limit its application. In addition, disclosure will inform hostile intelligence of the possible range of our intelligence capabilities, as well as the probable intelligence that the FBI has gathered, or can collect, concerning them. This knowledge provides potential or actual violators of the United States' national security laws a means of deflection or avoidance of lawful regulations. Disclosure will allow countermeasures to be implemented, making future operations more difficult, or compromise other ongoing planned intelligence operations. Accordingly, the release of the file numbers can lead to the exposure of the actual intelligence activity or method

utilized in FBI investigations, and can reasonably be expected to cause serious damage to national security. Thus, the file numbers are properly classified at the “Secret” level and withheld pursuant to E.O. 13526, as amended, §3.3, categories (b)(1), (b)(6), and are exempt from disclosure pursuant to Exemption (b)(1)-2.²³

DEFENDANT'S BURDEN OF ESTABLISHING
EXEMPTION (b)(1) CLAIMS

(45) The information withheld in this case pursuant to Exemption 1 was examined in light of the body of information available to me concerning the national defense and foreign relations of the United States. This information was not examined in isolation. Instead, each piece of information was evaluated with careful consideration given to the impact that disclosure of this information will have on other sensitive information contained elsewhere in the United States intelligence community's files, including the secrecy of that other information. Equal consideration was given to the impact that other information either in the public domain or likely known or suspected by present or potential adversaries of the United States, would have upon the information I examined, and upon attempts by a hostile entity to analyze such information.

(46) In those instances where, in my judgment, the disclosure of this information could reasonably be expected to cause serious damage to the national security, and its withholding

²³ Exemption (b)(1)-2 has been asserted to protect file numbers on the following pages of Exhibit D: FAA 72-77, 101-104, 106-108, 110, 113, 124, 138, 149, 164, 178, 189, 205, 218, 229, 245, 258-259, 269, 285, 298-299, 309, 325, 338-339, 350, 365, 379-380, 391, 406, 420, 447, 462, 490, 505, 555-556, 558-561, 563, 572-576, 584-587, 591-593, 597, and 604-641.

outweighed the benefit of disclosure, I exercised my prerogative as an original classification authority and designated that information as classified in the interest of national security at the Secret level, and invoked FOIA Exemption (b)(1)-1, and (b)(1)-2 to prevent disclosure.

Likewise, the justifications for the withheld classified information were prepared with the intent that they be read with consideration given to the context in which the classified information is found. This context includes not only the surrounding unclassified information, but also other information already in the public domain, as well as information likely known or suspected by hostile intelligence entities. It is my judgment that any greater specificity in the descriptions and justifications set forth herein with respect to the intelligence activities (including special activities), intelligence methods, and interagency interaction and cooperation could reasonably be expected to jeopardize the national security of the United States, and as a result, all information appearing in these documents has been appropriately classified pursuant to E.O. 13526, as amended, and withheld pursuant to FOIA Exemption (b)(1)-1, and (b)(1)-2.

EXEMPTION (b)(2)
TELEPHONE NUMBERS ASSIGNED TO FBI SPECIAL AGENTS AND SUPPORT
PERSONNEL

(47) 5 U.S.C. § 552 (b)(2) exempts from disclosure information "related solely to the internal personnel rules and practices of an agency." Until March 6, 2011, Exemption 2 encompassed two distinct categories of internal agency records: those involving trivial administrative matters of no public interest ("Low 2"), and those more substantial in nature, the disclosure of which would risk circumvention of a statute or regulation ("High 2"). In this case, the FBI had asserted Exemption 2 ("High") -- in conjunction with Exemptions (b)(6), and

(b)(7)(C) to protect the following information: Secure/Non-Secure Telephone Numbers of FBI Personnel. The FBI also had asserted Exemption 2 ("High") -- in conjunction with Exemption (b)(7)(E) to protect the following information: Information pertaining to investigative techniques and procedures. The U.S. Supreme Court's March 7, 2011, decision in Milner v. Department of the Navy (562 U.S. ____), eliminates the distinction between Low 2 and High 2, and narrows the application of Exemption 2 to those records which relate to employee relations and human resource issues. As a result, the FBI has re-reviewed all of the documents in this case, and has determined the following: it will continue to assert Exemption 2, in conjunction with (b)(6)-1, and (b)(7)(C)-1, solely for telephone numbers associated with particular individuals on Bates-pages FAA 13, 47, 52-53, 59, 64, 66, 71-72, 92-93, 529, 604, 611, 615, 620, 624, 631, and 636. The FBI will no longer assert Exemption 2 for information pertaining to investigative techniques and procedures. To the extent that Exemption 2 had been asserted in conjunction with Exemption 7E, and is now withdrawn, the FBI will refrain from removing the (b)(2) markings on Bates-pages FAA 19, 22, 24-25, 29-31, 33, 38-47, 51, 56-57, 61-76, 91-153, 155-193, 195-233, 235-273, 275-313, 315-354, 356-395, 397-436, 438-523, 525-603, 605-609, 611-617, 619-629, and 631-640 due to the administrative burden of re-processing all of the affected documents.

EXEMPTION (b)(4)
TRADE SECRETS AND COMMERCIAL OR FINANCIAL INFORMATION

(b)(4)-1 Confidential Commercial Information

(48) Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a corporation or electronic communication service providers [that are]

privileged or confidential.” See 5 U.S.C. § 552(b)(4). This exemption is intended to protect the interests of both the government and submitters of information. Its very existence encourages submitters to voluntarily furnish useful commercial or financial information to the government and provides the government with an assurance that required submissions will be reliable. The exemption also affords protection to those submitters who are required to furnish commercial or financial information to the government by safeguarding them from the competitive disadvantages that could result from disclosure.

(49) For purposes of Exemption 4, commercial information required to be furnished to the government receives an “Implied” assurance of confidentiality if disclosure is likely to: 1) impair the government’s ability to obtain necessary information in the future; or 2) cause substantial harm to the competitive position of the person from whom the information was obtained. In this case, the FBI withheld the identities of the electronic communication service providers that have provided information, or are listed as potentially required to provide information, to the FBI as part of its national security and criminal investigations under authority granted by Section 702 of the FAA. Exemption (b)(4)-1, cited in conjunction with (b)(7)(D)-1, has been asserted because disclosure of the identities of electronic communication service providers would cause substantial harm to their competitive position. Specifically, these businesses would be substantially harmed if their customers knew that they were furnishing information to the FBI. The stigma of working with the FBI would cause customers to cancel the companies’ services and file civil actions to prevent further disclosure of subscriber information. Therefore, the FBI has properly withheld this information pursuant to Exemption (b)(4), in

conjunction with (b)(7)(D)-1.²⁴

EXEMPTION (b)(5)
PRIVILEGED INFORMATION

(50) Exemption (b)(5) allows the FBI to protect information contained in “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” This exemption has been construed to exempt those documents or information normally privileged in the civil discovery context, including, as in this case, the deliberative process privilege. Generally, the attorney-client privilege protects confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice. This privilege encompasses any opinions given by an attorney to his client based upon and reflecting those facts, as well as communications between attorneys that reflect client-supplied information. The deliberative process privilege protects the internal deliberations of the government by exempting from release recommendations, opinions, analyses, speculation and other non-factual information prepared in anticipation of decision-making. Exemption (b)(5) allows for withholding of material that contains or was prepared in connection with the formulation of opinions, advice, evaluations,

²⁴ Exemption (b)(4)-1, in conjunction with (b)(7)(D)-1, has been asserted on the following pages of Exhibit D: FAA 38, 43-46, 56, 61, 65, 68, 70-75, 102-104, 106, 113, 122-132, 137-138, 141-142, 162-172, 177-178, 180-182, 203-212, 217-218, 243-252, 257-259, 283-292, 297-299, 301, 323-333, 337-339, 363-372, 374, 378-380, 383, 404-415, 419-420, 428-429, 445-455, 457, 461-462, 488-498, 500, 504-505, 524, 527, 555-556, 558-561, 563, 572-576, 584-587, 591-593, 597, 611-614, 626, 632, and 636-640.

deliberations, policy formulation, proposals, conclusions or recommendations.

(51) The general purpose of the deliberative process privilege is to prevent injury to the quality of agency decisions. Thus, material that contains or was prepared in connection with the formulation of opinions, advice, evaluations, deliberations, policy formulation, proposals, conclusions, or recommendations may properly be withheld. Release of this type of information would have an inhibitive effect upon the development of policy and administrative direction of an agency because it would chill the full and frank discussion between agency personnel regarding a decision. If agency personnel knew that their preliminary opinions, evaluations and comments would be released for public consumption, they might be more circumspect in what they put in writing, and thereby, impede a candid discussion of the issues surrounding a decision.

(52) The material withheld under FOIA exemption (b)(5)-1 in this case includes internal dialogue that is both (a) “predecisional” - antecedent to the adoption of agency policy, and (b) “deliberative” - the numerous draft documents, and e-mail trails and exchanges reflect a continuous set of deliberations, including the give and take of the consultative process, with regard to the shaping and evaluation of the FBI’s use of the FISA Amendments Act (“FAA”) of 2008, specifically Section 702. All of the material withheld pursuant to Exemption (b)(5)-1 –whether withheld in full or in part – reflects a fluid, continuous and on-going deliberative set of discussions among agency decision makers and contributors related to 50 United States Code, § 1881a, §§ 701-708. Thus, the FBI has properly withheld material during the deliberative process

pursuant to (b)(5)-1.²⁵

Exemption (b)(7) Threshold

(53) Exemption (b)(7) of the FOIA protects from mandatory disclosure records or information compiled for law enforcement purposes, but only to the extent that disclosure could reasonably be expected to cause one of the harms enumerated in the subpart of the exemption. See 5 U.S.C. § 552(b)(7). In this case, the harm that could reasonably be expected to result from disclosure concerns the invasion of personal privacy.

(54) Before an agency can invoke any of the harms enumerated in Exemption (b)(7), it must first demonstrate that the records or information at issue were compiled for law enforcement purposes. Law enforcement agencies such as the FBI must demonstrate that the records at issue are related to the enforcement of federal laws and that the enforcement activity is within the law enforcement duty of that agency.

(55) The FBI is a law enforcement agency whose mission is to protect and defend the United States against terrorist and foreign intelligence threats, to uphold and enforce the criminal laws of the United States, and to provide leadership and criminal justice services to federal, state, municipal, and international agencies and partners. The FBI focuses on threats that challenge the foundations of American society or involve dangers too large or complex for any local or state authority to handle alone. In executing its priorities, the FBI produces and uses intelligence to protect the nation from threats and to bring to justice those who violate the law.

²⁵ Exemption (b)(5)-1 has been asserted on the following pages of Exhibit D: FAA 72-76, 611-617, 619-623, and 636-640.

(56) The FBI collects intelligence to further case investigations, to follow threat leads, to help respond to requests from the law enforcement and Intelligence Communities, or to improve its understanding of a particular issue. These activities must have a proper purpose, and may not be initiated based solely on activities protected by the First Amendment, including speech and affiliation with a particular religion. Intelligence is collected through activities such as interviews, physical surveillance, wiretaps, searches, and undercover operations. Which techniques can be used in a particular situation depends on the type of investigation, available information justifying the investigation, and specific authorizations. This is determined by the Constitution, federal laws and regulations, Attorney General Guidelines, and internal FBI policy. A general rule is that investigators must use the least intrusive investigative techniques possible to accomplish a proper purpose.

(57) The FAA, 50 United States Code, § 1881a, et. seq., grants authority to the FBI to target certain persons outside the United States other than United States persons to acquire foreign intelligence. The collection of intelligence information as well as the investigation of potential violations of federal law fall squarely within the law enforcement duties of the FBI, and the information gathered from these efforts readily meets the threshold requirement of Exemption (b)(7). The remaining inquiry is whether disclosure of the information gathered during these investigative activities could reasonably constitute a clearly unwarranted invasion of individuals' personal privacy.

EXEMPTIONS (b)(6) AND (b)(7)(C)
CLEARLY UNWARRANTED AND UNWARRANTED
INVASION OF PERSONAL PRIVACY

(58) 5 U.S.C. § 552(b)(6) exempts from disclosure:

personnel and medical files and similar files when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.

(59) 5 U.S.C. § 552 (b)(7)(C) exempts from disclosure:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.²⁶

(60) When withholding information pursuant to these two exemptions, the FBI is required to balance the privacy interests of the individuals mentioned in these records against any public interest in disclosure. In asserting these exemptions, each item of information was examined to determine the degree and nature of the privacy interest of every individual whose name and/or identifying information appears in these records at issue.²⁷ The public interest in disclosure of this information is determined by whether the information in question would inform plaintiff and the general public about the FBI's performance of its mission to enforce federal criminal statutes and protect the national security of the United States and/or how the information

²⁶ The practice of the FBI is to assert Exemption (b)(6) in conjunction with Exemption (b)(7)(C). Although the balancing test for Exemption (b)(6) uses a "would constitute a clearly unwarranted invasion of personal privacy" standard and the test for Exemption (b)(7)(C) uses the lower standard of "could reasonably be expected to constitute an unwarranted invasion of personal privacy," the analysis and balancing required by both exemptions is sufficiently similar to warrant a consolidated discussion. The privacy interests are balanced against the public's interest in disclosure under the analysis of both exemptions.

²⁷ The FBI's policy is to release all names of high-ranking FBI officials in policy-making positions, as well as individuals who are serving as public spokespersons, as their privacy interests are diminished when they are acting in their official capacity. This policy is applied to the individual's position at the time of the creation of the document.

would shed light on the FBI's performance of its mandated statutory duties. In each instance where information was withheld, it was determined that individual privacy rights outweighed the public interest. The only recognized public interest is that which sheds light on the operations and activities of the federal government. In this case, revelation of the names and/or identifying information of individuals in the context of the records of FBI criminal investigations could reasonably be expected to cause harassment, embarrassment and/or humiliation, and thus constitute a clearly unwarranted and an unwarranted invasion of personal privacy. Therefore, the FBI concluded that the information should be withheld under Exemptions (b)(6) and (b)(7)(C), and determined that the individuals' privacy interests were not outweighed by any public interest in disclosure. Every effort has been made to release all segregable information contained in these records without invading the privacy interests of these individuals.

EXEMPTIONS (b)(6)-1 and (b)(7)(C)-1
Names and/or Identifying Information of FBI Special Agents and FBI Support Personnel

(61) Exemptions (b)(6)-1 and (b)(7)(C)-1 have been asserted to protect the names and identifying information of FBI Special Agents ("SAs") and FBI support personnel who were responsible for conducting, supervising, and/or maintaining the investigative activities reported in the documents. These responsibilities included conducting interviews, querying FBI databases after obtaining the identity or personal identifiers of a targeted individuals, retaining, analyzing, and compiling the resulting information, as well as reporting on the status of investigations to internal and external equities involved in the investigations. Assignments of SAs to any particular investigation are not by choice. Publicity (adverse or otherwise) regarding any particular investigation to which they have been assigned may seriously prejudice their

effectiveness in conducting other investigations. The privacy consideration is also to protect FBI SAs and FBI support personnel as individuals, from unnecessary, unofficial questioning as to the conduct of this or other investigations, whether or not they are currently employed by the FBI. FBI SAs conduct official inquiries into various criminal and national security violation cases. They come into contact with all strata of society, conducting searches and making arrests, both of which result in reasonable but nonetheless serious disturbances to people and their lives. It is possible for an individual targeted by such law enforcement actions to carry a grudge which may last for years. These individuals may seek revenge on the agents and other federal employees involved in a particular investigation. The publicity associated with the release of an agent's identity in connection with a particular investigation could trigger hostility toward a particular agent. The FBI can identify no discernible public interest in the disclosure of this information because the disclosure of the names and identifying information of FBI SAs and FBI support personnel would not shed light on the operations and activities of the FBI. Disclosure of this information would constitute a "clearly unwarranted" and an "unwarranted" invasion of their personal privacy. Thus, the FBI has properly protected this information pursuant to FOIA Exemptions (b)(6)-1 and (b)(7)(C)-1.²⁸

EXEMPTIONS (b)(6)-2 and (b)(7)(C)-2
Names and/or Identifying Information of Third Parties of Investigative Interest

²⁸ Exemptions (b)(6)-1 and (b)(7)(C)-1 has been asserted on the following pages of Exhibit D: FAA 13-14, 17, 20, 23, 27, 35, 42-47, 52-53, 59, 64, 66, 71-72, 92-93, 101-104, 106, 116, 122, 156, 162, 196, 203, 236, 243, 276, 283, 316, 323, 348, 357, 363, 389, 398, 404, 430, 439, 445, 472, 482, 488, 515, 527, 529, 533, 555-556, 558-561, 563, 572-576, 584-587, 591-593, 604, 611, 615, 617-618, 620, 622, 624, 631, and 636.

(62) Exemptions (b)(6)-2 and (b)(7)(C)-2 have been asserted to protect the names and identifying information of third parties who are of investigative interest to the FBI and/or other law enforcement agencies. Identifying information withheld concerning these third parties includes names and addresses where alleged criminal activities occurred. Being linked with any law enforcement investigation carries a strong negative connotation and a stigma. Release of the identities of these individuals to the public could subject them to harassment or embarrassment, as well as undue public attention. Accordingly, the FBI has determined that these individuals possess a substantial privacy interest in not having their identities disclosed. In making a determination whether to release the names and personal information concerning these third parties, the public's interest in disclosure was balanced against the individual's right to privacy. The FBI can identify no discernible public interest in the disclosure of this information because the disclosure of the third parties' names and identifying information would not shed light on the operations and activities of the FBI. Accordingly, the FBI concluded that the disclosure of this information would constitute a clearly unwarranted and an unwarranted invasion of their personal privacy. Thus, the FBI has properly withheld this information pursuant to Exemptions (b)(6)-2 and (b)(7)(C)-2.²⁹

EXEMPTION (b)(7)(D)
CONFIDENTIAL SOURCE INFORMATION

²⁹ Exemptions (b)(6)-2 and (b)(7)(C)-2 has been asserted on the following pages of Exhibit D: FAA 101-104, 106, 113, 122-124, 128-132, 137-138, 141-142, 162-164, 168-172, 177-178, 180-182, 203-205, 208-212, 217-218, 243-245, 248-252, 257-259, 283-285, 288-292, 297-299, 301, 323-325, 328-333, 337-339, 363-365, 368-372, 374, 378-380, 383, 404-406, 408-415, 419-420, 445-447, 449-455, 457, 461-462, 488-490, 492-498, 500, 504-505, 555-556, 558-561, 563, 572-577, 584-587, 591-593, and 597.

(63) 5 U.S.C. § 552 (b)(7)(D) provides protection for:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . 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 a 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.

(64) Numerous confidential sources report to the FBI on a regular basis and are “informants” within the common meaning of the term. These sources provide information under a variety of circumstances, including either an express or an implied assurance of confidentiality. Releasing the information provided by these sources may likely reveal a confidential source’s identity. The release of a source’s identity could forever eliminate that source as a future means of obtaining information, or limit the person or entities’ full cooperation in complying with a lawful order. In addition, when the identity of one source is revealed, that revelation has a chilling effect on the activities and cooperation of other sources. It is only with the understanding of complete confidentiality that full cooperation of such sources can be enlisted, and only through this confidence that these sources can be persuaded to continue to fully cooperate in providing valuable assistance in the future.

Exemption (b)(7)(D)-1
Names and Identifying Information Pertaining to Commercial/
Private Companies which Provided Information to the FBI

(65) FOIA Exemption (b)(7)(D)-1, in conjunction with (b)(4)-1, has been asserted to withhold information provided to the FBI by commercial/private companies and other non-

government entities under circumstances from which an assurance of confidentiality may be implied. During the course of the FBI's intelligence investigations, certain commercial/private companies provided information to the FBI relating to the subjects of these investigations. To disclose the fact that these companies provided information to the FBI during the course of an investigation could harm the commercial interests of these enterprises by deterring the public from employing their services. In addition, such a disclosure has wider implications. If the FBI disclosed the identities of confidential sources that provide information to the FBI on a continuing basis, that revelation would have a chilling effect on the activities and cooperation of other FBI confidential sources.

(66) Although these companies were under a legal obligation to provide information to the FBI in connection with ongoing investigations, an implied assurance of confidentiality was nevertheless critical to ensuring that these companies did not unnecessarily resist that obligation, thereby increasing the FBI's burden of obtaining important lawfully-available investigative material. For instance, given that these companies would pay a high price if it were known that they were providing information about their customers to the FBI, it is likely that companies, though lacking grounds to do so, would nevertheless avail themselves of legal options to resist cooperation, see, e.g., 50 U.S.C. § 1881a(h) (4) (allowing recipient to challenge the directive order), if their confidentiality could not otherwise be assured. It is only with the understanding of complete confidentiality that full cooperation of such sources can be enlisted, and only through this confidence that these sources can be persuaded to continue to fully cooperate in providing valuable assistance in the future. This information is also classified and to provide more detail

regarding these sources may reveal the very classified information that the FBI is attempting to protect. The FBI has released as much segregable information as possible without disclosing these sources' identities. The FBI has properly withheld this information pursuant to FOIA Exemption (b)(7)(D)-1, and in conjunction with (b)(4)-1.³⁰

FOIA EXEMPTION (b)(7)(E)
INVESTIGATIVE TECHNIQUES AND PROCEDURES

(67) 5 U.S.C. § 552 (b)(7)(E) provides for the withholding of:

law enforcement records which 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.

(68) In order for this exemption to apply, the use of the technique or procedure at issue must not be well known to the public.

Exemption (b)(7)(E)-1
Investigative Techniques and Procedures

(69) Exemption (b)(7)(E)-1 has been asserted to withhold procedures and techniques used in national security investigations.³¹ Exemption (b)(7)(E)-1 has been applied to partially

³⁰ Exemptions (b)(7)(D)-1, cited in conjunction with (b)(4)-1, has been asserted on the following pages of Exhibit D: FAA 38, 43-46, 56, 61, 65, 68, 70-75, 102-104, 106, 113, 122-132, 137-138, 141-142, 162-172, 177-178, 180-182, 203-212, 217-218, 243-252, 257-259, 283-292, 297-299, 301, 323-333, 337-339, 363-372, 374, 378-380, 383, 404-415, 419-420, 428-429, 445-455, 457, 461-462, 488-498, 500, 504-505, 524, 527, 555-556, 558-561, 563, 572-576, 584-587, 591-593, 597, 611-614, 626, 632, and 636-640.

³¹ Effective with the United States Supreme Court's March 7, 2011 decision in Milner v. Department of the Navy, the FBI will no longer rely upon Exemption (b)(2) as to internal investigative techniques and procedures.

redact or withhold in full, internal e-mails, training slides, legal opinions and interpretation of the use of techniques and procedures, Standard Operating Procedures (“SOP”) concerning the use of techniques, and procedure development that discuss the FBI’s use of Section 702 of the FAA, electronic communications concerning investigations, individual case write-ups, and other miscellaneous reports that discuss the FBI’s exercise of investigative authority under the FAA. Although the existence of FAA procedures is publicly known, their specific content, internal application and approval process are not commonly known. The revelation of these details could enable the targets of these techniques to avoid detection or develop countermeasures to circumvent the ability of the FBI to effectively use these important law enforcement techniques.

(70) Acquisition of foreign intelligence under Section 702 is conducted under certification jointly authorized by the U.S. Attorney General and Director of National Intelligence, which include targeting and minimization procedures, filed with the Foreign Intelligence Surveillance Court. Further description or elaboration in this declaration as to the information that has been withheld from release, or of the risk attendant to release, will compromise the very information which the FBI seeks to protect from disclosure. Therefore, this information has been appropriately protected from disclosure pursuant to Exemption (b)(7)(E)-1.³²

INFORMATION DEEMED OUTSIDE THE SCOPE (“O/S”)
OF THE REQUEST

³² Exemption (b)(7)(E)-1 has been asserted on the following pages of Exhibit D: FAA 19, 22, 24-25, 29-31, 33, 38-47, 51, 56-57, 61-76, 91-153, 155-193, 195-233, 235-273, 275-313, 315-354, 356-395, 397-436, 438-523, 525-603, 605-609, 611-617, 619-629, and 631-640.

(71) In processing the material responsive to plaintiffs' request, certain material was determined to be O/S of Plaintiff's request. According to the Joint Stipulation, the plaintiffs' FOIA request is limited to documents related to section 702 of the FAA, 50 U.S.C. §1881a. Certain training slides detailing the changes to electronic surveillance using FISA that dealt solely with the FISA of 1978, also called "Traditional FISA," and/or to the Protect America Act ("PAA"), were deemed O/S of Plaintiff's request. Where a document contained both responsive and non-responsive material, the FBI processed only those portions that were determined to be responsive. Non-responsive portions were redacted and marked "Out-side the Scope."³³

CONCLUSION

(72) The FBI has processed and released all reasonably segregable information from the records responsive to plaintiffs' requests to the FBI. The remaining information has been withheld pursuant to Exemptions 1, 2, 4, 5, 6, 7(C), 7(D), and 7(E), 5 U.S.C. §§ 552 (b)(1), (b)(2), (b)(4), (b)(5), (b)(6), (b)(7)(C), (b)(7)(D) and (b)(7)(E).³⁴ The FBI has carefully examined the responsive documents and has determined that the information withheld from plaintiff, if disclosed, could cause unwarranted and clearly unwarranted invasion of the personal privacy interests of third parties; disclose information provided by ISP's who had an implied assurance of confidentiality, reveal classified material covered under classification guidelines,

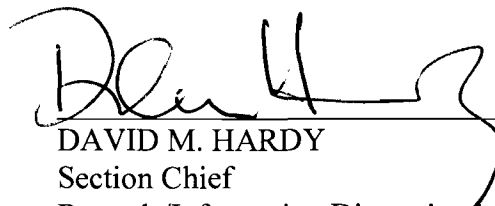
³³ Information determined to be "Out Side the Scope", was redacted from the following pages of Exhibit D: FAA 14-15, 17, 20, 23, 27-28, 32, 35-36, 38, 49, 51, 57, 58, 60, and 62-63.

³⁴ Although the FBI asserted Exemptions on Bates-pages between FAA 656-748 of the original FOIA release, it was later determined that these 92 pages of documents belonged to DOJ/National Security Division ("NSD"), and so the FBI forwarded these documents to DOJ/NSD for appropriate action. See Exhibit D for Bates-pages 1-655.

disclose information that is related solely to the internal rules and practices of the FBI, and reveal investigative techniques and procedures. Accordingly, all reasonably segregable, non-exempt information has been released to the plaintiffs in response to this litigation.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that Exhibits A through N attached hereto are true and correct copies.

Executed this 25th day of April 2011.



DAVID M. HARDY
Section Chief
Records/Information Dissemination Section
Records Management Division
Federal Bureau of Investigation
Winchester, Virginia