Case No. 12-4345

IN THE UNITED STATES COURT OFAPPEALS
FOR THE THIRD CIRCUIT

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY,
a New Jersey non-profit corporation,

Plaintiff-Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION, and
UNITED STATES DEPARTMENT OF JUSTICE,

Defendants-Appellees.

On Appeal from the
United States District Court for the District of New Jersey,
Case No. 2:11-cv-2553-ES-CLW

BRIEF of PLAINTIFF-APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant American Civil Liberties Union of New Jersey appeals from a district court order permitting Defendants-Appellees Federal Bureau of Investigation and Department of Justice ("Defendants") to withhold under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, publicly-available, racial and ethnic information about New Jersey communities. It also appeals from the district court's use of a secret process to determine the propriety of any reliance by Defendants on the FOIA's exclusion provision, 5 U.S.C. § 552(c). Plaintiff requests oral argument on these issues of public importance.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction over this action to enforce a request for agency records pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B), as well as 5 U.S.C. §§ 701–706, and 28 U.S.C. § 1331. On September 28, 2012, the district court granted summary judgment in favor of Defendants Federal Bureau of Investigation ("FBI") and U.S. Department of Justice ("DOJ") on all claims. On November 27, 2012, Plaintiff timely filed a Notice of Appeal of the district court's final judgment. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. This appeal is from a final order that disposes of all of the parties' claims.

STATEMENT OF ISSUES

Plaintiff's appeal presents the following issues:

1. Whether the district court made errors of law and clear errors of fact in permitting the FBI and DOJ to withhold and redact publicly-available racial and ethnic information about New Jersey communities under FOIA Exemptions 7A and 1, 5 U.S.C. § 552(b)(7)(A), *id*. § 552(b)(7)(1), even though disclosure of this limited information could not reasonably be expected to harm law enforcement investigations and will not plausibly harm national security.

   Raised in Plaintiff-Appellant's Br. in Supp. of Cross-Mot. for Partial Summ. J., Joint Appendix ("JA") 684–86, DDE # 21-1 at 34–36; objected to in Defendants-Appellees' Memo in Supp. of Defs.' Mot. for Summ. J., JA-65–76, DDE # 20-1 at 13–24, and Defendants-Appellees' Reply in Supp. of Mot. for Summ. J., JA-842–886, DDE # 22 at 11–28; replied to in Plaintiff-Appellant's Reply Br. in Supp. of Pl.'s Cross-Mot. for Partial Summ. J., JA-995–1009, DDE# 27-1 at 12–26; and ruled upon in the district court's opinion at JA-14–20, DDE # 35 at 10–16.

2. Whether the district court erred as a matter of law by permitting the FBI and DOJ to withhold and redact publicly-available racial and ethnic information about New Jersey communities under FOIA Exemption 7E, 5 U.S.C. § 552(b)(7)(E), despite their failure to file any factual submissions to support such a finding with respect to all but one of the records contested in this appeal.

   Raised in Defendants-Appellees' Memo in Supp. of Defs.' Mot. for Summ. J., JA-76, DDE #20-1 at 24 n.6, and Defendants-Appellees' Reply in Supp. of Mot. for Summ. J., JA-842–886, DDE # 22 at 12 n.2; objected to in Plaintiff-Appellant's Br. in Supp. of Cross-Mot. for Partial Summ. J., JA-673, DDE # 21-1 at 23 n.14, and Plaintiff-Appellant's Reply Br. in Supp. of Pl.'s Cross-Mot. for Partial Summ.

J., JA-1001, DDE #27-1 at 18 n.10; and ruled upon in the district court's opinion at JA-21–22, DDE #35 at 17–18.

3. Whether the district court made errors of law and clear errors of fact by failing to require the FBI and DOJ to disclose non-exempt information that is reasonably segregable from the withheld material, under the FOIA, 5 U.S.C. § 552(b).

Raised in Defendants-Appellees' Memo in Supp. of Defs.' Mot. for Summ. J., JA-47–92, DDE #20-1 at 38–39; objected to in Plaintiff-Appellant's Br. in Supp. of Cross-Mot. for Partial Summ. J., JA-668, 673–74, DDE #21-1 at 18, 23–24; replied to in Defendants-Appellees' Reply in Supp. of Mot. for Summ. J., JA-857–74, DDE #22 at 11–28; further replied to in Plaintiff-Appellant's Reply Br. in Supp. of Pl.'s Cross-Mot. for Partial Summ. J., JA-979–1021, DDE #27-1 at 10–24; and ruled upon in the district court's opinion at JA-24–25, DDE # at 20–21.

4. Whether Plaintiff's challenge to Defendants' reliance, if any, on the FOIA's exclusion provision, 5 U.S.C. § 552(c), in withholding information about the FBI's racial and ethnic mapping program should be resolved through a procedure akin to the "Glomar procedure" established by the D.C. Circuit in *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), which ensures meaningful judicial review and protects the interests of both litigants, rather than through an entirely secret process.

Raised in Plaintiff-Appellant's Reply Br. in Supp. of Pl.'s Cross-Mot. for Partial Summ. J., JA-1011–2, DDE # at 28-38; objected to in Defendants-Appellees' Reply in Supp. of their March 16, 2012 Mot. for Summ. J, JA-1053–62, DDE # at 10-19; and ruled upon in the district court's opinion at JA-14, DDE #35 at 10.

STATEMENT OF RELATED CASES OR PROCEEDINGS

This case has not previously been before this Court. A related case is pending before the U.S. Court of Appeals for the Sixth Circuit: *American Civil Liberties Union of Michigan v. Federal Bureau of Investigation*, No. 2:11-cv-13154, 2012 WL 4513626 (Sept. 30, 2012, E.D. Mich.), *docketed* No. 12-2536 (6th Cir.).

STATEMENT OF THE CASE

This litigation involves a Freedom of Information Act ("FOIA") request submitted by Plaintiff-Appellant American Civil Liberties Union of New Jersey ("Plaintiff") for records relating to Defendant FBI's collection and use of New Jersey communities' racial and ethnic information in an intelligence collection program known as Domain Management (the "Request"). Plaintiff filed the Request with six FBI field offices in New Jersey on July 27, 2010. The FBI partially released documents on December 22, 2010, July 20, 2011, and February 22, 2012.

Plaintiff exhausted administrative remedies and filed suit to enforce the Request on May 4, 2011. It sought an injunction requiring Defendants FBI and DOJ to immediately process the Request, to conduct a thorough search for responsive information, and to release information unlawfully withheld.

Defendants partially released additional records, moved to dismiss the FBI as a party to the action, and moved for summary judgment on all claims. Plaintiff opposed the motion to dismiss and cross-moved for partial summary judgment.

On September 28, 2012, the district court granted Defendants' motion and denied Plaintiff's cross-motion. Plaintiff timely appealed the district court's ruling to this Court on November 27, 2012.

On appeal, Plaintiff pursues only its challenges to Defendants' improper withholding under Exemptions 7A, 1, and 7E of publicly-available information from seventeen documents withheld in full and one document withheld in part. Plaintiff also appeals the district court's use of a secret process for adjudicating Defendants' improper reliance on the FOIA's exclusion provision, 5 U.S.C. § 552(c).

STATEMENT OF FACTS

I) The FBI's Racial and Ethnic Mapping Program

Over the past decade, three Department of Justice and FBI policies dramatically expanded the FBI's authority to investigate and collect intelligence about racial, ethnic, national origin, and religious communities in the United States. In 2003, DOJ issued its Guidance Regarding the Use of Race by Federal Law Enforcement Agencies ("Guidance on Race"), which permits racial and ethnic

profiling in national security and border integrity investigations despite prohibiting it in other contexts.[1] In December 2008, DOJ issued revised Attorney General Guidelines ("AGG"), which govern the FBI's conduct in criminal, national security, and counterintelligence investigations, and which authorized "assessments"—a new form of investigation that does not require any factual predicate suggesting that the target is involved in illegal activity or poses a national security threat.[2] That same month, the FBI issued its Domestic Investigations and Operations Guide ("DIOG"), an internal guide to implementing the AGG.[3]

The DIOG created a new intelligence program called "Domain Management," which authorizes FBI agents to collect, map, and analyze racial and ethnic demographic information, and to identify "concentrated ethnic communities" and the location of "ethnic-oriented businesses" and other facilities "if the[se] locations will reasonably contribute to an awareness of threats and vulnerabilities" and "assist in intelligence analysis." JA-718–19 (Decl. of Nusrat J.

[1] U.S. Dep't of Justice, Civil Rights Div., Guidance Regarding the Use of Race by Federal Law Enforcement Agencies 2 (2003), http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.

[2] U.S. Dep't of Justice, The Attorney General's Guidelines for Domestic FBI Operations ("2008 Attorney General Guidelines") (2008), http://www.justice.gov/ag/readingroom/guidelines.pdf.

[3] Fed. Bureau of Investigation, Domestic Investigations and Operations Guide ("DIOG") (2008), *available at* http://bit.ly/16YiAvT.

Choudhury ("Choudhury Decl.") Ex. A), DDE# 21-3 at 32–33 (Fed. Bureau of Investigation, DIOG § 4.3(C)(2)). The DIOG also allows the FBI to collect and track "[s]pecific and relevant ethnic behavior," "behavioral characteristics reasonably . . . associated with a particular criminal or terrorist element of an ethnic community," and "behavioral and cultural information about ethnic or racial communities that is reasonably likely to be exploited by criminal or terrorist groups," including "cultural tradition[s]." JA-719–20 (Choudhury Decl. Ex. A), DDE# 21-3 at 33–34 (Fed. Bureau of Investigation, DIOG § 4.3(C)(2)).

These policy changes loosened restrictions on FBI domestic investigative authority originally established in 1976 in response to revelations of widespread abuses, and raise grave civil rights and civil liberties concerns.[4] In particular, the FBI's authority to map ethnic communities, collect and use information about "ethnic behavior[s]" and "cultural tradition[s]," and conduct race- and ethnicity-based investigations may lead to the illegal and unconstitutional profiling of communities, including through suspicionless assessment investigations. *See* JA-

[4] The 1976 Attorney General Guidelines prohibited domestic investigations absent "specific and articulable facts" indicating criminal activity, and were instituted after Senate investigations chaired by Senator Frank Church revealed the FBI's unlawful targeting of people for exercising their First Amendment rights. *See* U.S. Dep't of Justice, Office of the Inspector Gen., The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines 33–37 (2005), http://www.justice.gov/oig/special/0509/final.pdf.

34–35 (Compl.), DDE #1 ¶ 12); JA -115–19 (Decl. of David M. Hardy ("Hardy Decl.")), DDE # 20-2 ¶ 32. This concern is concrete because the FBI uses the information about racial and ethnic communities collected through the Domain Management program to target further intelligence collection. JA-116 (Hardy Decl.), DDE #20-2 ¶ 32 n.10 ("Domain management is the systematic process by which the FBI . . . leverages its knowledge to enhance its ability to . . . discover new opportunities for needed intelligence collection . . . .").[5] FBI officials themselves have expressed concern about the civil rights and civil liberties impact of investigating communities on the basis of race or ethnicity.[6] Similar "mapping" programs by local law enforcement agencies have faced legal challenges and

[5] *See also* John S. Pistole, Deputy Director, Fed. Bureau of Investigation, Statement Before the Senate Select Committee on Intelligence (Jan. 25, 2007), *available at* http://tinyurl.com/brmhv9u ("domain management . . . provides the basis for investigative, intelligence, and management direction").

FBI documents obtained through the FOIA show that the Bureau has used biased and erroneous counterterrorism training materials portraying Arabs and Muslims as backwards, violent, and supporters of terrorism, heightening concerns about illegal profiling. *See* Am. Civil Liberties Union, Eye on the FBI: The FBI's Use of Anti-Arab and Anti-Muslim Training Materials (Oct. 20, 2011), http://tinyurl.com/are4vfe.

[6] Scott Shane & Lowell Bergman, *FBI Struggling to Reinvent Itself to Fight Terror*, N.Y. Times, Oct. 10, 2006, available at http://tinyurl.com/bljk6t9.

staunch public opposition due to concerns that the programs lead to illegal profiling.[7]

In 2009, the FBI's General Counsel acknowledged to Congress that the DIOG's expansion of FBI powers raises civil liberties concerns. S. Rep. No. 111-6, at 34 (2009). She stated that the FBI would reassess its racial and ethnic mapping authority after a year based on its implementation and "comments and suggestions" from Congress and others. *Id*.

II) The FOIA Request

In 2010, Plaintiff filed the FOIA requests at issue in this case with six FBI New Jersey field offices in order to inform New Jersey communities about the FBI's use of its DIOG authority in their state, and to foster the public comment on the DIOG invited by the FBI. JA-673–94 (Choudhury Decl.), DDE # 21-2 ¶ 3; JA-170–71 (Hardy Decl. Ex. A.), DDE # 20-3 at 1–2. The Request seeks records concerning the FBI's collection, mapping, and use of New Jersey communities'

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[7] A New York Police Department program to map and create dossiers on Muslims' places of work and worship without suspicion of criminal activity is currently the subject of a federal lawsuit challenging the program for unconstitutional and discriminatory religious profiling. First Am. Compl. ¶¶ 1–7, *Hassan v. New York*, No. 2:12-cv-03401, ECF No. 10 (D.N.J. Oct. 3, 2012). The Los Angeles Police Department abandoned a plan to "map" Muslim communities by race and religion due to public concern that the program would lead to profiling. Richard Winton & Teresa Watanabe, *LAPD's Muslim Mapping Plan Killed*, L.A. Times, Nov. 15, 2007, available at http://tinyurl.com/nyjwe9.

racial or ethnic information, and the maps themselves. *Id.* After receiving a partial release of records and exhausting administrative remedies, Plaintiff filed this action to enforce the Request. JA-41–42 (Compl.), DDE #1 ¶¶ 27–35.

III) The Cross-Motions for Summary Judgment

On December 12, 2011, Defendants moved for summary judgment and submitted the Declaration of David M. Hardy and Supplemental Declaration of David M. Hardy to support their claims. JA-45–46 (Defs.' Mot. for Summ. J.), DDE # 20; JA-93–168 (Hardy Decl.), DDE# 20-2; JA-887–919 (Suppl. Declaration of David M. Hardy ("Suppl. Hardy Decl.")), DDE #22-1. Plaintiff cross-moved for partial summary judgment, challenging the FBI's specific refusal to release seventeen documents withheld in full. JA-645–91 (Pl.'s Br. in Supp. of Cross-Mot. for Partial Summ. J. ("Pl.'s Br.")), DDE # 21-1; JA-979–1021 (Pl.'s Reply Br. in Supp. of Pl.'s Cross-Mot. for Partial Summ. J. ("Pl.'s Reply")), DDE #27-1.

In total, the FBI withheld in full: ten Domain Intelligence Notes ("DINs"), which analyze threats in the FBI Newark Division's area of responsibility; a 2009 Newark Annual Baseline Domain Assessment ("Baseline Assessment"), which draws on the DINs to provide a threat analysis for the Newark Division; one Domain Program Management Electronic Communication ("EC"), which

memorializes the Baseline Assessment; and five maps. JA-124–46, 617–33 (Hardy Decl. ¶ 40 & Ex. J), DDE ## 20-2, 20-19.[8]

In their summary judgment motion, Defendants argued that they could withhold all of the contested material, including any publicly-available racial and ethnic information, under Exemption 7A as protected law enforcement records. JA-71–76 (Defs.' Memo in Supp. of Defs.' Mot. for Summ. J. ("Defs.' Br."), DDE# 20-1 at 19–24; JA-865–66, 875–76 (Defs.' Reply in Supp. of Mot. for Summ. J. ("Defs.' Reply"), DDE #22 at 19–20, 29–30; JA 1046–52 (Defs.' Reply in Supp. of their March 16, 2012 Mot. for Summ. J ("Defs.' Surreply")), DDE #29 at 2–9. Defendants also asserted Exemption 7E to withhold this information, but did not explain the basis for that claim and asked to brief those arguments for the district court's in camera, ex parte review only if Defendants did not prevail on Exemption 7A. JA-76 (Defs.' Br.), DDE #20-1 at 24 n.6. Defendants additionally invoked Exemption 1 to withhold certain information in eight DINs, the Baseline Assessment, and the EC, on the ground that it is classified. JA-65–71 (Defs.' Br.),

[8] Plaintiff did not challenge the redaction of information from one partially released DIN analyzing the MS-13 gang. JA-627 (Hardy Decl. Ex. J), DDE # 20-19 at 10 (DIN 9 concerning MS-13)). Although the parties briefed, and the district court adjudicated, Defendants' redactions from certain DIOG training materials and a February 2009 memo, Plaintiff does not appeal those rulings and they are not before this Court. JA-22–23 (Dist. Ct. Op.), DDE #35 at 18–19; JA-618 (Hardy Decl. Ex. J.) DDE #20-19 at 1 (DIOG Training Materials)); JA- 964–70 (Second Supp. Decl. of David M. Hardy ("Second Suppl. Hardy Decl."), Ex. A), DDE # 26-2 (February 2009 memo).

DDE #20-1 at 13–19; JA 858, 875 (Defs.' Reply), DDE #22 at 12 n.2, 29 n.5.[9] Defendants asserted that they could not segregate and disclose any more non-exempt material. JA-90–91 (Defs.' Br.), DDE# 20-1 at 38–39; JA-857–74 (Defs.' Reply), DDE #22 at 11–28.

In its cross-motion and opposition to Defendants' motion, Plaintiff principally argued that because the FBI determined that the contested records are responsive to the Request, they likely use and rely on publicly-available racial or ethnic information about New Jersey communities that cannot be kept secret under FOIA Exemptions 7A, 7E, or 1, and therefore must be segregated and disclosed. JA-673–86 (Pl.'s Br.) DDE #21-1 at 23–36; JA-995–1009 (Pl.'s Reply), DDE #27-1 at 12–26. Plaintiff contended that the Hardy Declarations failed to show that Defendants could not further segregate and disclose any non-exempt racial and ethnic information from the records, and that Defendants' prior release of precisely this type of information demonstrated that Defendants could do so. JA-668,673–84 (Pl.'s Br.), DDE #21-1 at 18, 23–34; JA-993–1007 (Pl.'s Reply), DDE #27-1 at 10–24. Plaintiff objected to Defendants' proposed submission of Exemption 7E arguments for in camera, ex parte review, and requested permission to present additional briefing if Defendants proceeded with their proposal. JA-673 (Pl.'s Br.),

[9] The FBI also asserted Exemptions 6, 7C, and 7D over certain portions of records. Plaintiff did not object to those withholdings in the court below.

DDE # 21-1 at 23 n.14; JA-1001 (Pl.'s Reply), DDE #27-1 at 18 n.10. Finally, Plaintiff raised their concern that Defendants had improperly relied on the FOIA's exclusion provision, 5 U.S.C. § 552(c)(3), to withhold responsive records, and requested that the district court adjudicate this claim. JA-669–73 (Pl.'s Br.), DDE #21-1 at 19–22; JA-1011–21 (Pl.'s Reply), DDE #27-1 at 28–38.

In opposition to Plaintiff's cross-motion, Defendants requested in camera, ex parte review of their declaration addressing the propriety of their possible reliance on the FOIA's exclusion provision. JA-882–85 (Defs.' Reply), DDE #22 at 36–39. Plaintiff, in its reply brief, requested adjudication of the Section 552(c) claim through a procedure akin to the "Glomar procedure" established by the D.C. Circuit in *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), in order to ensure meaningful judicial review and to protect the interests of both litigants and the public. JA-1018–21 (Pl.'s Reply), DDE #27-1 at 35–38. In a surreply, Defendants objected to this proposal and requested in camera, ex parte adjudication of the Section 552(c) claim. JA-882–85 (Defs.' Reply), DDE #22 at 36–39; JA-1053–62 (Defs.' Surreply), DDE #29 at 10–19.

On September 28, 2012, the district court granted Defendants' motion for summary judgment and denied Plaintiff's cross-motion. JA-4 (Dist. Ct. Order), DDE #34; JA-5 (Dist. Ct. Op.), DDE #35. It upheld Defendants' Exemption 7A

and 7E withholdings over all of the contested information. JA-18–22 (Dist. Ct. Op.), DDE #35 at 14–18. The district court also affirmed Defendants' Exemption 1 withholdings, with the exception of one map, without specifying whether Defendants properly kept secret publicly-available racial and ethnic information under this exemption. JA-14–18 (Dist. Ct. Op.), DDE #35 at 10–14. Finally, the district court rejected Plaintiff's proposal for use of a Glomar-like procedure to resolve the parties' Section 552(c) dispute without discussion. JA-14 (Dist. Ct. Op.), DDE #35 at 10. It reviewed in camera Defendants' ex parte affidavit, and ruled that any reliance on a FOIA exclusion was justified. *Id.* Plaintiff timely appealed. JA-1 (Notice of Appeal), DDE #36.[10]

SUMMARY OF THE ARGUMENT

At stake in this Freedom of Information Act case are two simple yet critically important questions concerning FBI claims of secrecy regarding its use of expanded domestic surveillance powers. The first is whether the FBI may keep secret publicly-available information about New Jersey racial and ethnic groups. This information would shed necessary light on whether the FBI is using its

[10] The district court also ruled on Defendants' motion to dismiss the FBI as a party to the action; the parties' cross-motions for summary judgment on Plaintiff's search claim; the propriety of Defendants' withholding of portions of records pursuant to Exemptions 6, 7B, and 7C; and the propriety of Defendants' redaction of information from certain DIOG training materials under Exemption 7E. JA-10–13, 18, 20–24 (Dist. Ct. Op.), DDE #35 at 6–9, 14, 16–20. Plaintiff has not appealed these rulings, and they are not before this Court.

expanded powers to illegally profile entire racial, ethnic, national origin, and religious communities. The second concerns whether the FBI may secure a secret process to adjudicate a challenge to its possible reliance on the FOIA's exclusion provision, 5 U.S.C. § 552(c), to improperly keep secret information about this same surveillance program. The answer to both questions is "no."

In the proceedings below, the district court accepted, without discussion, Defendants' sweeping claims to shield public source information from public view under FOIA Exemption 7, which applies to law enforcement records, and Exemption 1, which applies to classified information. In doing so, the district court failed to account for—or even discuss—the nature of the information Plaintiff seeks. Plaintiff seeks disclosure of *only* public source information used by the FBI concerning New Jersey communities, including their census data, population statistics, and demographics. While disclosure of this information would inform the public about which communities are subject to FBI intelligence collection, it cannot be reasonably expected to harm current or pending investigations of specific individuals or groups, and cannot be kept secret under Exemption 7A. Nor can Defendants keep this public source information secret under Exemption 1 because it does not constitute foreign relations information or intelligence sources or methods that, if disclosed, could plausibly cause national

security harms. Additionally, Defendants cannot shield this information from public view under Exemption 7E because they expressly failed to provide any evidence to show that disclosure of such information from the contested records would reveal protected law enforcement techniques, procedures, or guidelines. Finally, contrary to Defendants' claims, Exemptions 7A, 1, and 7E do not apply to the limited public source information Plaintiff seeks because evidence in the record shows that Defendants have disclosed precisely this type of information from documents released in response to this Request and similar FOIA requests in other states.

The district court's decision to affirm Defendants' broad Exemption 7A, 1, and 7E claims of secrecy over publicly-available racial and ethnic information were thus based on errors of law and clearly erroneous factual findings. Indeed, the district court did not specifically address in its opinion whether any of these exemptions permit Defendants to withhold and keep secret the information Plaintiff seeks: discrete racial and ethnic data that is already publicly-available. The district court's implicit conclusion that public source information may be kept secret under Exemptions 7A and 1, was based on incorrect an incorrect reading of the factual record; and its parallel conclusion that this information may be withheld under Exemption 7E lacked any factual basis.

Because the public source information that Plaintiff seeks is not exempt, the key issue is whether Defendants properly justified their refusal to segregate and disclose it, as the FOIA requires. 5 U.S.C. § 552(b). The district court clearly erred by accepting Defendants' vague and sweeping assertions in the face of plain evidence showing that segregation is possible. This Court should thus reverse the district court's Exemption 7A, 1, and 7E rulings as to any publicly-available racial and ethnic information in the withheld documents, and remand for a determination as to whether Defendants properly segregated and disclosed non-exempt information.

Finally, this case provides this Court with a necessary occasion to fashion fair and transparent procedures for adjudicating Plaintiff's claim that Defendants possibly relied improperly on the FOIA's exclusion provision, 5 U.S.C. § 552(c). Section 552(c) permits the government to avoid confirming or denying the very existence of responsive records. In the absence of circuit authority establishing procedures for resolving this claim, Plaintiff proposed use of a procedure akin to the well-known "Glomar" procedure, which was established by the D.C. Circuit in *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), and is routinely followed by courts around the country to accommodate the narrow circumstances in which an agency may properly refuse to confirm or deny the existence of records.

Under Plaintiff's proposal, Defendants would file a public statement indicating whether they interpret all or part of the Request as seeking records that, if they exist, are excludable under Section 552(c). If Defendants file a statement indicating that they *do* interpret portions of the Request to seek excludable records and therefore, have not processed those portions, the parties would then brief—and the district court would resolve—whether the type of information Plaintiff seeks, if it exists, is excludable. The district court would then set forth its conclusion and supportive reasoning in a public opinion. Defendants opposed this process and requested an entirely secret, ex parte one.

Despite the parties' extensive briefing concerning Plaintiff's proposal, the district court rejected it without acknowledgement or discussion. The district court instead conducted in camera review of Defendants' ex parte declaration, and issued a public ruling stating that if Defendants' relied on any exclusion, such reliance was proper. In contrast to Plaintiff's proposed Glomar-like procedure, this one-sided and secret process prevented the district court from conducting meaningful judicial review after adversarial briefing, prohibits this Court from conducting meaningful appellate review, and for the reasons set forth below, fails to protect the government's interest in the secrecy of any reliance on a FOIA exclusion pending appeal in the event of an adverse judicial ruling.

This case therefore squarely calls for this Court to adopt procedures for adjudicating Section 552(c) disputes that accommodate both a FOIA plaintiff's ability to test the government's claim that Section 552(c) applies to a FOIA request and the government's interest in refusing to confirm or deny that it has relied on Section 552(c). Plaintiff respectfully asks this Court to vacate the district court's Section 552(c) ruling and remand for adjudication consistent with Plaintiff's proposal.

ARGUMENT

I) Standard of Review

This Court conducts plenary review of issues of law in reviewing a district court's grant of summary judgment in FOIA proceedings. *McDonnell v. United States*, 4 F.3d 1227, 1242 (3d Cir. 1993). It determines whether as a matter of law, the permissible factual findings entitle the government to invoke FOIA's exemptions and avoid the disclosure otherwise required by statute. *Lame v. U.S. Dep't of Justice*, 767 F.2d 66, 69 (3d Cir. 1985).

This Court reviews the lower court's factual findings according to a two-tiered standard of review. *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 488 F.3d 178, 182 (3d Cir. 2007). First, it reviews de novo "whether the district court had an adequate factual basis for its determination." *Id.* This test requires the Court to

examine the affidavits below to determine "whether the agency's explanation was full and specific enough to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1049 (3d Cir. 1995). Second, if this threshold is met, this Court assesses whether the district court's factual findings are clearly erroneous because they are "unsupported by substantial evidence, lack adequate evidentiary support in the record, are against the clear weight of the evidence" or because "the district court has misapprehended the weight of the evidence." *Id*.

II) The Freedom of Information Act

Congress enacted the Freedom of Information Act, 5 U.S.C. § 552, "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also Davin*, 60 F.3d at 1049 (FOIA was enacted "to create an expedient tool for disseminating information and holding the government accountable."). FOIA requires federal agencies to respond to requests for information and to disclose their records to the public, 5 U.S.C. § 552(a)(3)(A), (a)(6), subject to nine enumerated exemptions, *id.* § 552(b). Because disclosure rather than secrecy is the

dominant objective of the Act, FOIA exemptions are "narrowly construed," *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976), and agencies must release any reasonably segregable portion of a withheld record. 5 U.S.C. § 552(b).

FOIA requires courts to undertake de novo review of an agency's decision to withhold documents. 5 U.S.C. § 552(a)(4)(B). The agency bears the burden of proving that it properly withheld information under a FOIA exemption. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7–8 (2001). To satisfy this burden, the agency must submit what are now referred to as a *Vaughn* declaration and *Vaughn* index setting forth the bases for each claimed FOIA exemption. *See Vaughn v. Rosen*, 484 F.2d 820, 826–28 (D.C. Cir. 1973); *Davin*, 60 F.3d at 1047 n.1. Because federal agencies tend to "claim the broadest possible grounds for exemption for the greatest amount of information," the indices must provide "a relatively detailed analysis" of the withheld material "in manageable segments" without resort to "conclusory and generalized allegations of exemptions." *Vaughn*, 484 F.2d at 826; *see also McDonnell*, 4 F.3d at 1241.

Three FOIA exemptions are at issue in this appeal: Exemptions 7A, 1, and 7E. 5 U.S.C. § 552(b)(7)(A); *id*. § (b)(1); *id*. § (b)(7)(E). Exemption 7A allows an agency to withhold law enforcement records or information, but only to the extent that disclosure "could reasonably be expected to interfere with enforcement

proceedings." *Id*. § 552(b)(7)(A). The agency must show that "release of the information could reasonably be expected to cause some articulable harm" to current or pending enforcement proceedings. *Manna v. U.S. Dep't of Justice*, 51 F.3d 1158, 1164 (3d Cir. 1995). An agency may establish the application of Exemption 7A based on categories of withheld records, rather than specific documents. *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986). But, it must demonstrate, "by more than [a] conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding." *Campbell v. Dep't of Health & Human Servs.*, 682 F.2d 256, 259 (D.C. Cir. 1982).

Exemption 1 allows an agency to withhold records that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy," and "are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Here, the FBI relies upon the Executive Order on Classified National Security Information, Exec. Order No. 13,526, 3 C.F.R. 298 (2009) § 1.1(4), which governs how and what information federal agencies may classify as secret. The Executive Order provides that information may be classified if it falls within an authorized withholding category. *Id.* § 1.1(a)(3). In this case, the FBI relies upon the categories that

permit the classification of "intelligence sources or methods," *id.* § 1.4(c), and information pertaining to foreign relations, *id.* § 1.4(d).

Exemption 7E provides for the withholding of two categories of law enforcement records: those that, if released, "would disclose techniques and procedures"; and those that concern "guidelines for law enforcement investigations or prosecutions," which, if disclosed, would reasonably risk circumvention of the law. 5 U.S.C. § 552(b)(7)(E); *see Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec.*, 626 F.3d 678, 680–82 (2d Cir. 2010). The agency must provide evidence to substantiate its assertion of Exemption 7E over specific records. *Davin*, 60 F.3d at 1064. It must also show that any law enforcement techniques or procedures it seeks to withhold are not well known to the public. *See id.* at 1064 (recognizing routine-technique exception); *accord Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 815 (9th Cir. 1995).

III) The District Court Erred in Allowing the FBI to Keep Secret Publicly-Available Racial and Ethnic Information About New Jersey Communities

The heart of this dispute is Defendants' effort to keep secret publicly-available racial and ethnic information about New Jersey populations that would reveal whether the FBI is using its expanded surveillance authority to illegally profile communities for enhanced law enforcement scrutiny. Defendants concede

that their withholdings include public source material, but advance sweeping Exemption 7A, 1, and 7E claims to entirely shield this information from public view.[11] As explained below, however, Defendants failed to show that these exemptions apply to the discrete public source information Plaintiff seeks, and that they discharged their responsibility to segregate and disclose non-exempt information. The district court erred in holding otherwise, for the reasons set forth below.

A) Exemption 7A does not permit withholding publicly-available racial and ethnic information about New Jersey communities.

FOIA case law makes clear that Exemption 7A only permits the government to keep secret law enforcement records or information that cause "articulable" harm to current or pending enforcement proceedings. *Manna*, 51 F.3d at 1164. But disclosure of the specific category of information that Plaintiff seeks—public source information about New Jersey's racial and ethnic communities, including census data, population statistics, and demographic information—cannot

[11] *See, e.g.*, JA-124–46 (Hardy Decl.), DDE # 20-2 ¶ 40 (identifying eleven records that contain "public source material" and three records that discuss "population and locations"); JA-907, 909–10 (Suppl. Hardy Decl.), DDE #22-1 ¶¶ 31, 33 (identifying two records that contain "public source data" or "public information"); JA-910–11(Suppl. Hardy Decl.), DDE # 22-1 ¶ 34 (identifying four maps that "detail the location of a specific population type in various parts of New Jersey" and acknowledging that the "population type is an ethnic based population"); JA-911–12 (Suppl. Hardy Decl.), DDE #22-1 ¶ 35 (describing a map that "documents a certain visiting population type").

reasonably be expected to cause any of the harms that Exemption 7A is designed to prevent. *See, e.g.*, *id.* at 1165 (intimidation of witnesses, victims, and cooperators); *Grasso v. Internal Revenue Serv.*, 785 F.2d 70, 76 (3d Cir. 1986) (witness intimidation); *Boyd v. Criminal Div. of U.S. Dep't of Justice*, 475 F.3d 381, 386 (D.C. Cir. 2007) (revelation of "size, scope, and direction" of investigations, "destruction or alteration of relevant evidence," and "fabrication of fraudulent alibis").[12]

The district court erred in implicitly holding otherwise. JA-19–20 (Dist. Ct. Op.), DDE #35 at 15–16 (accepting Exemption 7A claim over all of the contested information). Although Defendants presented adequate factual submissions for the court to adjudicate this claim, the district court made an error of fact by granting undue deference to Defendants' "inadequately supported" and sweeping assertion that disclosure of *any* material from records that contain *some* information consulted for current or prospective investigations could reasonably be expected to cause harm. *King v. U.S. Dep't of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987); *see* JA-125 (Hardy Decl.), DDE # 20-2 ¶ 40 at 32 (claiming that "none of the information" can be released because the documents "contain information"

[12] Plaintiff does not dispute that the withheld records were compiled for law enforcement purposes or that Defendants may have identified current or pending investigations in some instances. *See Manna*, 51 F.3d at 1164 (requiring pending or prospective law enforcement proceeding for Exemption 7A to apply).

consulted for investigations); JA-19 (Dist. Ct. Op.), DDE #35 at 15 (citing Hardy Decl. ¶ 40).

Plaintiff does not seek information about the identities or conduct of individual targets or subjects of investigations, or any information from witness or informant statements—a fact the district court failed to acknowledge or factor into its analysis. *See* JA-19–20 (Dist. Ct. Op.), DDE #35 at 15–16. Absent disclosure of this information, release of the limited public source information that Plaintiff *does* seek—the names of New Jersey racial or ethnic communities, and their publicly-available census data and demographic information—cannot reasonably be expected to tip off targets or permit them to circumvent investigations, as a matter of law. This is particularly so because the information sought is public to begin with. *Cf. Dickerson v. U.S. Dep't of Justice*, 992 F.2d 1426, 1433–34 (6th Cir. 1993) (government disclosed *public* source information from active investigation files and asserted Exemption 7A only over *non-public* information).

The district court thus reached an erroneous legal conclusion when it sustained Defendants' Exemption 7A claim over all of the withheld information in the contested records, and thereby implicitly held that release of even limited public demographic information and population data would endanger specific law enforcement investigations. JA-19 (Dist. Ct. Op.), DDE #35 at 15. Unless race or

ethnicity is the sole or principal basis for the FBI's interest in a target (which would be prohibited under the DIOG), release of discrete information about the racial or ethnic communities tracked by the FBI cannot be reasonably expected to alert specific targets or permit them to circumvent investigations.[13]

Moreover, the district court made an error of fact when it granted undue deference to the Defendants' assertions of harm. It is true that an agency's declarations may merit deference in a national security-related FOIA case. *See Jones v. FBI.*, 41 F.3d 238, 244 (6th Cir. 1994); *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982). But the government's declarations do not merit deference when they lack "reasonable specificity of detail" or are "called into question by contradictory evidence." *Gardels*, 689 F.2d at 1105.[14] The Hardy Declarations fail to meet both requirements.

The Hardy Declarations do not explain why disclosure of the limited and specific category of public information that Plaintiff seeks will cause articulable

[13] Such targeting of investigations solely or principally on the basis of race or ethnicity is impermissible according to the FBI's own policies. DOJ's Guidance on Race prohibits the use of race, ethnicity, national origin, or religion as the sole basis for investigation, and the DIOG itself prohibits "dominant" or "primary" reliance on these factors as a matter of FBI policy. JA-716–17 (Choudhury Decl. Ex. A), DDE # 21-3 at 30–31(Fed. Bureau of Investigation, DIOG § 4.3(A)-(B))).

[14] *See also Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987) (even in the national security context, courts must not "relinquish[] their independent responsibility" to review an agency's withholdings).

harm when information about target identities and conduct, and from informant and witness statements, will remain secret. *See* JA-124–126 (Hardy Decl.), DDE # 20-2 ¶ 40; JA-953–55 (Second Suppl. Hardy Decl.), DDE #26-2 ¶ 9). The assertion that disclosure of any of the specific information sought by Plaintiff will harm investigations is conclusory and inadequate to sustain their claim of secrecy. *See Campbell*, 682 F.2d at 259 (Exemption 7A requires more than a conclusory statement concerning harm resulting from disclosure of "particular kinds . . . of records").

Defendants' disclosure of publicly-available racial and ethnic information from documents released in identical or similar contexts also contradicts the Hardy Declarations' assertions of harm. For example, as a result of Plaintiff's FOIA request in this litigation, the FBI partially disclosed a chart of "New Jersey's top five Hispanic populated counties" and a map of populations from "El Salvador, Honduras, Guatemala" from a memorandum concerning the MS-13 gang. *See* JA-601, 604–05, 611 (Hardy Decl. Ex. I), DDE #20-18 at NK GEOMAP 743, 746–47, 753. If the FBI had withheld the name "MS-13" and other information describing the gang or its conduct, disclosure of the fact that the FBI was tracking New Jersey Central American and Hispanic populations would not have revealed that MS-13 was the particular investigation target. To conclude otherwise would be to assume

that ethnicity or national origin was the *only* or *principal* basis for the FBI's interest in MS-13.[15]

Likewise, in response to a similar FOIA request, the FBI disclosed a memorandum documenting the opening of a suspicionless Domain Assessment investigation of Michigan's "Middle-Eastern and Muslim population" based on its "large" size and the (unsupported) assertion that these communities are "prime territory for attempted radicalization and recruitment" by unspecified terrorist groups "originat[ing] in the Middle-East and Southeast Asia." JA-825 (Choudhury Decl. Ex. K), DDE #21-5 at 2.[16] The San Francisco FBI disclosed an analogous

[15] In the court below, Defendants sought to distinguish this document by arguing that it concerns a closed investigation. JA-864–65 (Defs.' Reply), DDE # 22 at 18-19). But this argument does not address the fact that absent release of information about the target's identity or conduct, disclosure of information about the Central American and Hispanic communities identified in the memorandum would not have informed the particular target of any unknown investigations or investigatory methods.

[16] "Domain Assessments" are FBI investigations that involve the collection and use of communities' racial and ethnic information, but do not require a factual predicate. JA-718–20, 725–26, 731 (Choudhury Decl. Ex. A), DDE #21-3 at 32–34, 39–40, 45 (Fed. Bureau of Investigation, DIOG §§ 4.3(C)(2), 5.1, 5.4(A)(4)) (describing Type 4 domain assessments)); 2008 Attorney General's Guidelines, *supra* n.2, at 7 (authorizing FBI to open Domain Assessments without objective information suggesting the possibility of misconduct).

The FBI's reasoning in opening this investigation into Michigan's Muslim and Middle Eastern communities raises concern about unlawful profiling because it ascribes criminal propensity to communities without any credible evidence to support reasonable suspicion. And this improper targeting of communities may

memorandum documenting the opening of a Domain Assessment investigation of Chinese and Russian populations based on the large size of the communities and the fact that Chinese and Russian organized crime syndicates exist in that area. JA-770–73 (Choudhury Decl. Ex. D), DDE #21-5. None of these disclosures reveal the identities or conduct of targets, or any other information that would alert unsuspecting targets about an investigation. Nor do they inform targets of any unknown investigatory methods because it is already widely known that the FBI uses Domain Assessment investigations to collect, analyze, and map information about racial and ethnic communities. *See* JA-718–19 (Choudhury Decl. Ex. A), DDE #21-3 at 32–33 (Fed. Bureau of Investigation, DIOG § 4.3). Yet, the disclosures *do* reveal information of critical importance to the public: the fact that the FBI has targeted entire communities for suspicionless intelligence collection because they share race, ethnicity, national origin, or religion with suspected criminal or terrorist organizations.

The district court ignored the import of these disclosures when it endorsed Defendants' assertion of Exemption 7A over all of the information in the contested records and failed to address whether disclosure of publicly-available racial and ethnic information could reasonably cause articulable harm to enforcement

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lead to even further profiling in light of the FBI's use of collected information for targeting purposes and its expanded power to conduct race- and ethnicity-based investigations.

proceedings. *See Gardels*, 689 F.2d at 1105. As a result, its implicit ruling that Exemption 7A applies to the specific public source information Plaintiff seeks is incorrect as a matter of law and based on clearly erroneous findings of fact.

B) Exemption 1 cannot justify withholding publicly-available racial and ethnic information about New Jersey communities.

Plaintiff does not dispute that Defendants may withhold properly classified portions of certain contested documents under Exemption 1.[17] But Defendants do not explain whether their specific Exemption 1 withholdings include public source information, and Exemption 1 does not allow the withholding of entire records or portions of records simply because they contain *some* classified information. *See Krikorian v. Dep't of State*, 984 F.2d 461, 467 (D.C. Cir. 1993); *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 553 (6th Cir. 2001).[18] Because Defendants fail to

[17] Defendants invoke Exemption 1 over material in ten of the seventeen documents at issue on appeal: DINs 1-8, the Baseline Assessment and the EC. *See* JA-124–46 (Hardy Decl.), DDE #20-2 ¶ 40; JA-911–12 (Suppl. Hardy Decl.), DDE #22-1 ¶ 35 n.2 (withdrawing Exemption 1 claim over one map).

[18] Defendants' descriptions make clear that the documents they seek to keep secret under Exemption 1 include public source information. JA-124–46 (Hardy Decl.), DDE #20-2 ¶ 40 (identifying eight DINs withheld under Exemption 1 that contain "public source material," three of which discuss "population and locations")); JA-907, 909–10 (Suppl. Decl. of David M. Hardy ("Suppl. Hardy Decl."), DDE #22-1 ¶¶ 31, 33 (discussing two records withheld under Exemption 1 that contain "public source data" or "public information")).

In the court below, Defendants did not squarely assert that the publicly-available information in the contested documents or the FBI's use of such

show that disclosure of publicly-available racial and ethnic information from records will plausibly cause national security harm, Exemption 1 simply does not apply to this information. The record is thus clearly inadequate to support Defendants' Exemption 1 claim of secrecy over this material. Although the district court did not specifically address the fact that Plaintiff seeks *only* public source information contained in the documents, to the extent that its Exemption 1 holding permitted Defendants to keep this information secret, that holding was based on the clear errors of fact detailed below.

The Executive Order governing classified national security information permits classification only if disclosure is reasonably expected to result in damage to national security. Exec. Order No. 13,526, 3 C.F.R. 298 (2009) § 1.1(4). Damage to the national security is defined as "harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information." *Id*. § 6.1(1). FOIA case law makes clear that to withhold classified information under Exemption 1, the government must show a logical or plausible justification for why disclosure of the information in question is likely to harm national security. *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 73 (2d Cir. 2009).

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information are, in and of themselves, classified. Rather, Defendants contended that publicly-available information and its use "can be" classified and that the public information is so intertwined with classified information as to be protected. JA-869 (Defs.' Reply), DDE #22 at 23; JA-115–19, 120 (Hardy Decl.), DDE #20-2 ¶¶ 32, 34; JA-907, 909–10 (Suppl. Hardy Decl.), DDE #22-1 ¶¶ 31, 33.

The government's affidavits must describe the justification in sufficient detail and not be contradicted by evidence in the record. *Id*. Where, as here, the government seeks to keep secret information that is already in the public domain in whole or in part, it must explain how additional disclosure could damage national security. *See Wash. Post v. U.S. Dep't of Defense*, 766 F. Supp. 1, 9 (D.C. Cir. 1991) ("It is a matter of common sense that the presence of information in the public domain makes the disclosure of that information less likely to 'cause damage to the national security.'") (citation omitted).

Defendants catalog a series of national security harms that purportedly will result from disclosure of any further material, including (presumably) public source racial and ethnic information, from the records kept secret under Exemption 1. But the asserted harms lack any logical connection to the information Plaintiff seeks for three principal reasons.

First, as a factual matter, Plaintiff does not seek foreign relations information or intelligence sources or methods that are properly withheld under Exemption 1. Plaintiff seeks only information about New Jersey communities that is derived from domestic public sources, including the U.S. Census—not "intelligence information gathered by the United States *about, or from a foreign country*." JA-

120–21 (Hardy Decl.), DDE # 20-2 ¶ 35 (emphasis added).[19] Nor does Plaintiff seek the FBI's intelligence-gathering procedures, analysis of intelligence information, identities of targets and intelligence sources, or information identifying intelligence activities that Defendants want to keep secret as intelligence sources and methods. JA-115–20 (Hardy Decl.), DDE #20-2 ¶¶ 32, 34. Defendants fail to describe with the required specificity how public source information about New Jersey communities would reveal any foreign relations information or intelligence sources or methods. *See id*.; *Wilner*, 592 F.3d at 73 (agency affidavits must contain sufficient specificity and demonstrate that information "logically falls within the claimed exemptions"). The district court's failure to recognize these deficiencies in Defendants' submissions was a clear error of fact.

Second, for similar reasons, the district court also made a clear error of fact in deferring to the Hardy Declaration's assertion that further disclosures would harm foreign relations and foreign activities of the United States. *See* JA-16 (Dist.

[19] Even if the public source racial or ethnic information concerns citizens of foreign countries, that information is not gathered "about or from a foreign country," and Defendants have shown that they can disclose exactly this type of information without causing harm. JA-604–05 (Hardy Decl. Ex. I), DDE #20-18 at NK GEOMAP 746–47 (disclosing statistics for foreign born populations from El Salvador, Guatemala, Honduras); JA-819–22 (Choudhury Decl. Ex. J), DDE #21-5 at 2–5 (same for foreign born populations from El Salvador, Guatemala, Honduras, and Nicaragua).

Ct. Op.), DDE #35 at 12. Because Plaintiff does not seek "intelligence information gathered . . . about, or from a foreign country," disclosure of the limited information about New Jersey communities that Plaintiff does want would not plausibly "injure diplomatic relations between the U.S. and *those* countries," cause "diplomatic or economic retaliation against the United States," subvert U.S. intelligence activities regarding foreign countries, or "compromise cooperative foreign sources." JA-120–22 (Hardy Decl.), DDE #20-2 ¶¶ 35–36. Indeed, disclosure of comparable publicly-available racial and ethnic information from documents released in this litigation or in response to similar FOIA requests has not caused any such harms. *See, e.g.*, JA-601, 604 (Hardy Decl. Ex. I), DDE #20-18 at NK GEOMAP 743, 746 (statistics for populations from Mexico, Cuba, the Dominican Republic, Colombia, El Salvador, Guatemala, and Honduras).[20]

Third, the record makes apparent that disclosure of public source information about New Jersey's racial and ethnic communities will not cause the national security harms that Defendants associate with release of intelligence sources and methods, absent the release of information Plaintiff *explicitly* does not seek—information about target identities or conduct, or intelligence sources or

[20] *See also* JA-802–03 (Choudhury Decl. Ex. I), DDE #21-5 at ACLURM 11388–89 (statistics for populations from El Salvador, Guatemala, Honduras); JA-819–22 (Choudhury Decl. Ex. J), DDE #21-5 at 2–5 (same for El Salvador, Guatemala, Honduras, Nicaragua).

activities, as discussed above. *See supra* discussion at 34; *see, e.g.*, JA-119–20 (Hardy Decl.), DDE #20-2 ¶ 33 (claiming that further disclosures will permit targets to "develop countermeasures"). As a result of the FBI's release of the DIOG and documents responsive to this Request and other similar FOIA requests, the public is already well aware that the FBI collects and analyzes data about racial and ethnic communities through its Domain Management program. *See* JA-601–10 (Hardy Decl. Ex. I), DDE #20-5 at 1–10 (Newark's Salvadoran, Guatemalan, and Honduran populations); JA-823–26 (Choudhury Decl. Ex. K), DDE #21-5 (Michigan's Middle Eastern and Muslim populations); JA-770–73 (Choudhury Decl. Ex. D), DDE #21-5 (San Francisco's Chinese and Russian populations); JA-788–800 (Choudhury Decl. Ex H), DDE #21-5 (Georgia's African-American population). The weight of this evidence is clear: it is implausible that further evidence of this practice in New Jersey will cause national security harm by tipping off specific investigation targets. *See Lamont v. Dep't of Justice*, 475 F. Supp. 761, 772 (S.D.N.Y. 1979) (recognizing that if the subject of a FOIA request has "already been specifically revealed to the public . . . there is no reason such material cannot now be disclosed to [the plaintiff]."). Because the record fails to show that disclosure of the public source information Plaintiff seeks would plausibly harm national security, the district court clearly erred in endorsing

Defendants' assertion of secrecy over this information under Exemption 1. *See Wilner*, 592 F.3d at 73.

C) Exemption 7E cannot justify withholding publicly-available racial and ethnic information.

Under the controlling precedent of this Court, to secure summary judgment on an Exemption 7E claim, the government must provide evidence—and the district court must find—that the law enforcement records the government seeks to keep secret will, if disclosed, reveal non-routine law enforcement techniques or procedures, or guidelines that would reasonably risk circumvention of the law. *See Davin*, 60 F.3d at 1064 (remanding and requiring government to provide proof to support Exemption 7E claims).

The district court's endorsement of Defendants' invocation of Exemption 7E over the contested records cannot pass muster under even the first step of this Court's two-tiered review; de novo review of the record confirms that the determination lacks *any* factual basis, much less an adequate one. Neither the Hardy Declarations nor Defendants' briefs address, much less explain, why Exemption 7E applies to *any* information in these records.[21] This was not an

[21] The Hardy Declarations address only Defendants' Exemption 7E claim over information withheld from documents not at issue in this motion. *See* JA-157–59 (Hardy Decl.), DDE #20-2 ¶ 55 (DIOG training materials and DIN 9); JA-959–62 (Second Suppl. Hardy Decl.), DDE #26-2 ¶¶ 15–16 (partially redacted FBI

unintentional omission. Defendants conceded in the proceedings below that their submissions did not "discuss[] in detail" their assertion of Exemption 7E over these records, and requested "the opportunity to submit a supplemental declaration and *Vaughn in camera*" on this issue *only if* the court rejected their Exemption 7A arguments. JA-76 (Defs.' Br.), DDE #20-1 at 24 n.6. Plaintiff objected to Defendants' proposal for adjudication of the Exemption 7E issue through an ex parte process, and reserved the right to respond to Defendants' future Exemption 7E arguments, if any were made. JA-673 (Pl.'s Br.), DDE #21-1 at 23 n.14; JA-1001 (Pl.'s Reply), DDE #27-1 at 18 n.10. Plaintiff also argued that public source census data or demographics in the records withheld in full cannot be kept secret as protected law enforcement techniques or procedures because the FBI's use of such information in Domain Management activities is well known. JA-1001 (Pl.'s Reply), DDE #27-1 at 18 n.10 (discussing routine-technique exception to Exemption 7E and citing *Rosenfeld*, 57 F.3d at 815; *Davin*, 60 F.3d at 1064).[22] Based on this record, the district court lacked an adequate factual basis to conclude that Exemption 7E applies to the withheld-in-full records. *See Davin*, 60 F.3d at

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memorandum). Plaintiff does not appeal the district court's rulings with respect to these withholdings. *See supra* note 8.

[22] The district court thus incorrectly stated that Plaintiff did not dispute Defendants' assertion of Exemption 7E over the withheld-in-full records. *See* JA-22 (Dist. Ct. Op.), DDE #35 at 18.

1046, 1064 (reversing grant of summary judgment on Exemption 7E where government failed to provide proof to support claim).

D) Defendants failed to meet their burden to segregate and disclose non-exempt, publicly-available racial and ethnic information.

This Court's controlling precedent is clear: an agency cannot withhold an entire document simply because it contains some exempt material, and the agency must show that it has followed the FOIA's directive to disclose "any reasonably segregable" portions of a record. *Davin*, 60 F.3d at 1049 (discussing 5 U.S.C. § 552(b)). To make that showing, the agency must offer a detailed justification for why non-exempt information may not be segregated and disclosed, and indicate "what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document." *Abdelfattah*, 488 F.3d at 187 (quoting *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977)) (internal quotation marks omitted). The district court concluded that Defendants met these standards. JA-24–25 (Dist. Ct. Op.), DDE #35 at 20–21. That determination was erroneous for two reasons.

First, the publicly-available racial and ethnic information Plaintiff seeks is not withholdable under Exemption 7A, 1, or 7E, and Defendants' declarations do not provide the "factual recitation" required to show that this information is not reasonably segregable. *Abdelfattah*, 488 F.3d at 186. The Hardy Declarations do

not address what proportion of each document contains non-exempt, public source information, how such information is dispersed, or why it cannot be segregated and disclosed. JA-617–33 (Hardy Decl. Ex. J), DDE #20-19; JA-902–25 (Suppl. Hardy Decl.), DDE #22-1 ¶¶ 22–35. Defendants assert that the contents of these documents are sensitive, but they never explain why public source census data or population statistics cannot be isolated and released, as Section 552(b) requires.[23] JA-167–68 (Hardy Decl.), DDE #20-2 ¶ 66; JA-902–25 (Suppl. Hardy Decl.), DDE #22-1 ¶¶ 22–35; *see Mead Data Cent., Inc.*, 566 F.2d at 261. The district court erred when it failed to recognize this deficiency and permitted Defendants' withholdings.

Second, evidence in the record demonstrates that Defendants have segregated and disclosed public source racial and ethnic information, including census data and population statistics, from documents released in this litigation and in response to similar FOIA requests. *See* JA-601, 604–05, 611 (Hardy Decl. Ex. I), DDE #20-18 at NK GEOMAP 743, 746–47, 753); JA-824–26 (Choudhury Decl. Ex. K), DDE #21-5; JA-771–73 (Choudhury Decl. Ex. D), DDE #21-5. This

[23] This failure is particularly notable with respect to lengthy documents that Defendants acknowledge contain public source information. *See*, *e.g.*, JA-126–27 (Hardy Decl.), DDE #20-2 ¶ 40 (describing 33-page DIN containing public source material); JA-903, 906–07 (Suppl. Hardy Decl.), DDE #22-1 ¶¶ 23, 30 (describing 45-page Domain Assessment incorporating open source information and detailing "specific populations").

evidence shows that the public source information Plaintiff seeks is reasonably segregable. *Cf. Dickerson*, 992 F.2d at 1434 (recognizing segregation and disclosure of public source information from active investigation files). It also refutes Defendants' claim to the contrary. *See Powell v. U.S. Bureau of Prisons*, 927 F.2d 1239, 1242 (D.C. Cir. 1991) (finding agency affidavit inadequate where evidence contradicted agency's assertions that no further non-exempt information could be segregated and disclosed). By ignoring the import of this evidence, the district court erroneously deferred to Defendants' assertion that public source material is so inextricably "intertwined" with exempt material that it cannot be reasonably segregated and disclosed. *See Elec. Privacy Info. Ctr. v. Dep't of Justice*, 584 F. Supp. 2d 65, 74 (D.D.C. 2008) (rejecting "blanket declaration that all facts are so intertwined [as] to prevent disclosure").

To be clear, Plaintiff does not object to Defendants' withholding under Exemption 7A, 1, or 7E of particular portions of records that could reasonably be expected to harm investigations, would plausibly harm national security, or would disclose properly withheld law enforcement techniques, procedures, or guidelines. But the protection afforded to these discrete materials does not justify Defendants' sweeping secrecy claims over all of the contested information.

This Court should thus reverse the district court's Exemption 7A, 1, and 7E holdings as to the publicly-available racial and ethnic information in the withheld records and remand with instructions that the district court determine whether Defendants carried out their burden to segregate and disclose all non-exempt information.

IV) This Court Should Establish a Fair and Transparent Process for Adjudicating Disputes Over an Agency's Possible Reliance on a FOIA Exclusion

This Court has not previously considered the procedures for adjudicating an agency's possible reliance on FOIA Section 552(c), which provides that in certain, limited circumstances, the FBI may treat otherwise responsive records "as not subject to the [FOIA] requirements"—without informing the FOIA requester. 5 U.S.C. § 552(c). Litigation over the propriety of the government's reliance on Section 552(c) has proven challenging, however, because of the seemingly competing requirements that a FOIA plaintiff be able to test the government's legal claim that Section 552(c) applies, while still allowing the government to refuse to confirm or deny that it has in fact relied on Section 552(c). In an essentially analogous situation, courts have used as a solution the so-called "Glomar"

procedure established by the D.C. Circuit in *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), and familiar to courts and litigants across the country.[24]

In the proceedings below, Plaintiff initially requested that the district court resolve the Section 552(c) claim through ex parte, in camera review of Defendants' declaration addressing their reliance, if any, on Section 552(c), and the issuance of a public opinion that neither confirms nor denies whether Defendants' invoked an exclusion and an accompanying sealed opinion explaining the court's reasoning. JA-669–73 (Pl.'s Br.), DDE #21-1 at 19–23. As briefing proceeded, however, it became apparent that such a procedure would not adequately protect the public interest in meaningful judicial review and the government's interest in secrecy. *See infra* 51–55; JA-1011–17 (Pl.'s Reply), DDE #27-1 at 28–34. Accordingly, Plaintiff's reply brief proposed that the district court use a Glomar-like procedure. JA-1011–14, 1018–21 (Pl.'s Reply), DDE #27-1 at 28–31, 35–38.[25] Defendants objected to this proposal and responded to Plaintiffs' arguments in their surreply. JA-1053–62 (Defs.' Surreply), DDE #29 at 10–19.

[24] The government's refusal to confirm or deny is known as the "Glomar response" and is named after the Hughes Glomar Explorer, an oceanic research vessel whose connection to the CIA was at issue in the case that established the doctrine. *See generally Phillippi*, 546 F.2d 1009.

[25] Plaintiff first proposed the Glomar-like procedure to Defendants, but Defendants rejected the proposal. JA-1014 (Pls.' Reply), DDE #7-1 at 31 n.17.

Despite the parties' extensive briefing, the district court's opinion did not address or consider Plaintiff's proposal for use of a Glomar-like procedure for resolving the Section 552(c) claim. JA-14 (Dist. Ct. Op.), DDE #35 at 10. The district court instead reviewed in camera Defendants' ex parte declaration addressing their possible reliance on Section 552(c) in responding to the Request and granted Defendants summary judgment. *Id*.

This Court reviews de novo the district court's method for adjudicating the Section 552(c) claim. *See McDonnell*, 4 F.3d at 1242. Plaintiff requests that the Court reverse the district court's use of an entirely secret process, and establish a transparent and fair procedure for resolving the Section 552(c) dispute in this case and future cases.

A) Adjudication of the Section 552(c) dispute through a Glomar-like process will permit meaningful judicial review and protect the interests of the litigants and the public.

FOIA Section 552(c)(3) permits the FBI to exclude records from disclosure if they are properly withholdable under Exemption 1 and pertain to a foreign intelligence, counterintelligence, or international terrorism investigation, and if the very existence of the records is properly classified. 5 U.S.C. § 552(c)(3). When a FOIA plaintiff challenges the FBI's reliance upon Section 552(c) to withhold responsive records, the court must determine "the applicability" of the exclusion to

the FOIA request. *Benavides v. Drug Enforcement Admin.*, 968 F.2d 1243, 1248–49 (D.C. Cir. 1992), *modified on reh'g*, 976 F.2d 751 (D.C. Cir. 1992).[26]

Plaintiff explained to the district court the basis for its concern that Defendants may have improperly relied on Section 552(c)(3) in responding to the Request. *See* JA-669–72 (Pl.'s Br.), DDE # 21-1 at 19–22.[27] Defendants withhold documents based on an overbroad interpretation of the categories of information that may fall within Section 552(c)(3): documents concerning "intelligence gathering efforts of a foreign country within the U.S.," JA-620, 622, 624–25 (Hardy Decl. Ex. J), DDE #20-19 at 3, 5, 7, 8; documents that if disclosed would harm foreign relations or foreign activities of the United States, JA-120–22 (Hardy Decl.), DDE #20-2 ¶¶ 35–36 (discussing DINS 2, 4, 6, 7, Newark 2009 Annual Baseline Assessment, and October 30, 2009 EC Memorializing the 2009 Annual Baseline Assessment)); and documents pertaining to foreign or international extremist groups and terrorist organizations, JA-619, 621, 623, 626 (Hardy Decl.

[26] *See also* Harry A. Hammit et al., Litigation Under the Federal Open Government Laws 336 (2008) ("[J]udicial review may occur . . . when the recipient suspects that the agency has resorted to the exclusion mechanism . . . .").

[27] Plaintiff does not concede that a FOIA requester must make any showing to support its concern that the government may be relying on a FOIA exclusion. JA-671 (Pl.'s Br.), DDE #21-1 at 21.

Ex. J), DDE #20-19 at 2, 4, 6, 9.[28] Plaintiff believes that related responsive documents concerning foreign intelligence, counterintelligence, or international terrorism investigations may exist, but Defendants improperly relied on Section 552(c)(3) to exclude them. JA-672 (Pl.'s Br.), DDE #21-1 at 22.

Plaintiff proposed that the district court adjudicate the propriety of any reliance on Section 552(c) through a procedure akin to the Glomar procedure, which is followed by circuit courts across the country to accommodate the narrow circumstances in which an agency may properly refuse to confirm or deny the existence of records. *See Phillippi*, 546 F.2d 1009; *Wilner*, 592 F.3d at 68; *Bassiouni v. CIA*, 392 F.3d 244, 246 (7th Cir. 2004); *Minier v. CIA*, 88 F.3d 796, 800–02 (9th Cir. 1996). The Glomar procedure is an exception to the normal FOIA practice, which requires an agency to search for responsive records, release non-exempt records, and then provide detailed justification for any withholdings to the requester and the court. *Vaughn*, 484 F.2d at 826–28; *cf. Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1178 (D.C. Cir. 2011) (permitting invocation of Glomar procedure in limited circumstances where agency claims that very confirmation or

[28] DINS 1, 2, 3, 5, and 8 appear to concern foreign or international extremist groups and terrorist organizations because Defendants describe these DINs as concerning "Extremist Group[s]/Terrorist Organizations[s]" as opposed "Domestic Terrorist Group[s]/Organization[s]," *Compare* JA-619, 621, 623, 626 (Hardy Decl. Ex. J), DDE #20-19 at 2, 4, 6, 9, *with* JA-628–29 (Hardy Decl. Ex. J), DDE #20-19 at 11–12.

denial of the existence of requested records would "cause harm cognizable under a FOIA exception"). In these circumstances, an agency may respond to a FOIA requester by stating publicly that it interprets all or portions of the request as seeking records that, if they exist, would be exempt, and thus that it has not processed those portions of the request. *See*, *e.g.*, *id*. at 1171–72. The parties then brief, and the court resolves, the question of whether the fact of the existence of the records sought is itself exempt from disclosure.[29]

As in the Glomar context, an agency relying on Section 552(c)(3) believes that the existence of the requested records is itself information that, if disclosed, will cause harm. *See* 5 U.S.C. § 552(c)(3). Glomar-like procedures are thus appropriately applied to preserve the government's secrecy interests while enabling adjudication of a FOIA requester's claim that the government may have improperly relied on an exclusion in responding to a request for records.[30]

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[29] *See, e.g.*, *Wolf v. CIA*, 473 F.3d 370, 375 (D.C. Cir. 2007) (addressing whether the existence of agency records "constitutes information itself protected by either FOIA Exemption 1 or Exemption 3").

[30] Explanatory statements by the sponsoring representatives directly support this view. *See* 132 Cong. Rec. H9455-05 (daily ed. Oct. 8, 1986) (statement of Rep. English and Kindness) (noting that purpose of Section 552(c) was to codify authority "to withhold the fact of the existence or nonexistence of specific records" as set forth in the Glomar case, *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976)); 132 Cong. Rec. S14270-01 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy) (same).

Following such a process, the district court should have ordered Defendants to respond to Plaintiff's concern that Defendants may have improperly relied upon Section 552(c) with a Glomar-like response: a public court filing addressing whether Defendants interpret all or part of the FOIA request as seeking records that, if they exist, are excludable under Section 552(c), and that therefore, they have not processed those portions of the Request. Just as in the Glomar context, this statement would not reveal whether Defendants invoked Section 552(c) or whether they in fact even possess responsive records. If Defendants file a statement indicating that they *do* interpret the Request to seek records that would fall under Section 552(c), if they exist, Plaintiff would be free to argue that the types of records sought, if they exist, would *not* fall within the exclusion. The district court would determine, as courts commonly do in response to Glomar invocations, whether the type of information Plaintiff seeks, if it exists, falls within Section 552(c)'s language, and would set forth its reasoning in a public opinion.

The district court ultimately reviewed in camera Defendants' ex parte declaration to determine whether any section 552(c) exclusion was properly used. JA-14 (Dist. Ct. Op.), DDE #35 at 10. The decision failed, however, to even acknowledge Plaintiff's proposed procedure, and ignored the three critically important benefits of this approach.

First, a Glomar-like procedure would permit meaningful judicial review of Defendants' Section 552(c) invocation, if any, because the district court would benefit from both parties' briefing concerning the applicability of the exclusion to the type of information requested. *See Phillippi*, 546 F.2d at 1013 (recognizing that requiring an agency to "provide a public affidavit explaining in as much detail as is possible the basis for its [Glomar] claim" permits FOIA requester to test that claim and "create[s] as complete a public record as is possible" to inform the court's determination).

Second, this procedure would also permit meaningful appellate review by producing a public opinion setting forth the factual and legal basis for the district court's answer to the question of whether the requested records, if they exist, fall within Section 552(c)'s statutory language. Such an opinion would permit Plaintiff to make an informed decision as to whether, and on what grounds, to appeal the district court's ruling, and would also provide this Court sufficient information for its review. *See Farrar v. Cain*, 642 F.2d 86, 87 (5th Cir. 1981) (per curiam) (findings of fact and conclusions of law "greatly facilitate appellate review"); *Jones v. Morris*, 777 F.2d 1277, 1281 (7th Cir. 1985) (written opinion "greatly facilitates the process of appellate review").

Third, the district court's public opinion would also protect the government's interest in secrecy because it would not disclose whether the agency actually treated any records as non-responsive under Section 552(c). Rather, as in the Glomar context, the opinion would simply address whether such records, if they exist, fall within the statutory language of Section 552(c). If Defendants prevailed, the district court would issue a public opinion that states, at a minimum, "All or a portion of Plaintiff's FOIA request seeks the type of records that would be excludable under Section 552(c), if any such records exist." If Plaintiff prevailed, the district court's public opinion would state, at a minimum, "All or a portion of Plaintiff's FOIA request seeks the type of records that are not excludable under Section 552(c), and therefore the government must process Plaintiff's request to determine whether any such records exist." No matter the result, the process would protect the government's asserted interest by keeping secret any government reliance on an exclusion.

The Glomar procedure thus would have allowed adversarial testing of a critically important question—whether the Request seeks records that, if they exist, fall within Section 552(c)(3)'s terms—while permitting the government to neither confirm nor deny whether such records exist. It also would have allowed the district court to issue a public ruling on that question without disclosing any

reliance on Section 552(c), thereby preserving the government's secrecy interest pending either party's appeal.

B) The district court's use of secret proceedings prohibits meaningful judicial review and fails to protect the interests of the litigants and the public.

The district court's use of ex parte, in camera proceedings to resolve the Section 552(c) dispute in this case has launched the parties and this Court down a path of secrecy with serious, negative consequences. This Court should reject that approach in favor of alternative Glomar-like procedures.

As an initial matter, the district court could not and did not conduct meaningful judicial review of the Section 552(c) issue. Because it resolved this dispute through in camera review of Defendants' ex parte declaration, the district court did not benefit from both parties' briefing on the central legal question: whether the Request is properly interpreted to seek records that, if they exist, fall within Section 552(c)(3)'s statutory language. *See Phillippi*, 546 F.2d at 1013 ("In camera examination has the defect that it is necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure.") (internal quotation marks omitted). There was no adversarial testing because Plaintiff had no meaningful opportunity to challenge any "rationale for withholding documents" in the ex parte affidavit. *Kuzma v. IRS*, 775 F.2d 66, 69

(2d Cir. 1985). This lack of adversarial testing in turn undermined the district court's ability to conduct effective de novo review. *See Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991) (trial judge cannot be expected "to do as thorough a job of illumination and characterization as would a party interested in the case.").

The district court's use of a secret process resulted in the issuance of a bare order that does not permit meaningful appellate review because it fails to provide the factual or legal basis for the court's determination. *See* JA-14 (Dist. Ct. Op.), DDE #35 at 10 ("Based on [Defendants'] declaration, without confirming or denying the existence of any exclusion, the Court finds and concludes that if an exclusion was invoked, it was and remains amply justified."); *cf. Granite Auto Leasing Corp. v. Carter Mfg. Co.*, 546 F.2d 654, 656 (5th Cir. 1977) (appellate court has no basis to affirm summary judgment when order is "opaque and unilluminating as to either the relevant facts or the law"). Such an order also denies Plaintiff the opportunity to make an informed decision whether to exercise its right to appeal or how to do so.[31] This Court would thus have to review in camera Defendants' ex parte declaration in order to resolve an appeal, further extending the use of disfavored secret process and resolving a central, merits issue without the benefit of Plaintiff's advocacy. *See Phillippi*, 546 F.2d at 1013

[31] Such bare orders would promote unnecessary appellate litigation because they fail to provide sufficient information to permit a FOIA requester to conclude that an appeal would be meritless.

(discussing presumption in favor of resolving FOIA disputes through as public a process as possible); *Wiener*, 943 F.2d at 977 (adversary testing enables "effective judicial review"); *cf.* (FOIA's "dominant objective" is "disclosure, not secrecy").

In addition, even if this Court were to remand for issuance of a robust, sealed opinion to aid appellate review, this would promote wholly secret litigation, which is at odds with the spirit of FOIA and this Court's obligation to protect the public's right of access to the judicial process and its outcomes under the First Amendment and the common law. *See, e.g.*, *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) (common law right of access to "judicial records and documents"); *Press-Enter. Co. v. Super. Ct. of Cal.*, 464 U.S. 501, 510 (1984) (public's right of access to the activities of the judiciary under First Amendment is abridged only in the rarest and most compelling of circumstances); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659, 661 (3d Cir. 1991) (recognizing public right of access to judicial proceedings and records under common law and First Amendment, and applying common law right to summary judgment materials).[32]

Finally, the district court's secret procedure fails to protect the government's secrecy interest in the event of any adverse judicial rulings pending further appeal,

[32] *See also Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) ("strong presumption of access to . . . dispositive pleadings").

thus creating an unworkable precedent for the resolution of future Section 552(c) disputes. Had the district court ruled against Defendants after in camera review, it could not have issued *any* type of public ruling without disclosing the government's reliance on Section 552(c), thereby defeating the very interest the government sought to protect before it had an opportunity to appeal. The court could not have reached a determination of impropriety unless Defendants had in fact relied on Section 552(c). A public order parallel to the one that the district court issued would necessarily have revealed that Defendants had relied on Section 552(c), and that the reliance was improper. So would the simplest order possible: "Judgment for Plaintiff." Even if the court had taken the extraordinary step of sealing its judgment in addition to its opinion, this, too, would effectively have disclosed Defendants' reliance because there would have been no need for a sealed judgment unless Defendants had, in fact, relied on Section 552(c).[33]

These problems extend to the appellate level: if this Court determines, after in camera review, that the district court erred, any resulting public opinion would disclose Defendants' improper reliance on an exclusion, thereby failing to protect Defendants' secrecy interest in the event of any ultimate reversal by the Supreme

[33] A sealed judgment and opinion would be contrary to the First Amendment and common law presumption of public access to judicial opinions. *See, e.g.*, *Press-Enter. Co.*, 464 U.S. at 510; *Nixon*, 435 U.S. at 597.

Court.[34] And even if this Court were to review in camera Defendants' ex parte declaration and conclude that the district court reached a substantively correct determination, it should not endorse the adjudication of Section 552(c) disputes through secret procedures that fail to account for the possibility that a lower court or this Court may find the government's reliance on a FOIA exclusion improper in another case. To do so would be to abdicate the FOIA's requirement that courts engage in robust judicial review of agency decisions to keep information secret, including under Section 552(c). *See* 5 U.S.C. § 552(a)(4)(B) (granting district courts "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant); *see also* 132 Cong. Rec. H9455-05 (daily ed. Oct. 8, 1986) (statement of Rep. Kindness) ("Agency actions pursuant to 5 U.S.C. § 552(c), like agency determinations to withhold acknowledged records pursuant to 5 U.S.C. 552(b), are subject to de novo judicial review.").

Plaintiff's proposed Glomar-like procedure avoids each of these negative consequences. This Court should thus vacate the district court's Section 552(c)

[34] Although Supreme Court review of circuit court opinions is rare, this Court should not endorse a procedure for adjudicating Section 552(c) disputes that promises to always fail to permit meaningful judicial review and to protect the government's secrecy interests in the event of an adverse ruling by a district court or this Court.

determination and remand for resolution according to Plaintiff's proposed procedure.

CONCLUSION

For the foregoing reasons, the Plaintiff respectfully asks the Court to: 1) reverse the judgment of the district court and hold that Defendants improperly withhold publicly-available racial and ethnic information under Exemptions 7A and 1; 2) reverse the judgment of the district court and hold that the district court lacked an adequate factual basis for affirming Defendants' withholding of publicly-available racial and ethnic information from the withheld-in-full records under Exemption 7E; 3) reverse the judgment of the district court and hold that Defendants failed to discharge their burden to segregate and disclose all non-exempt information, including publicly-available racial and ethnic information; 4) vacate the district court's ruling that Defendants' reliance on Section 552(c)(3) in responding to the Request, if any, was justified; and 5) remand with instructions that the district court adjudicate the applicability of Section 552(c) to the Request through the Glomar-like procedure described above.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman.

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,086 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3. This brief was checked for viruses using Symantec Endpoint Protection virus software, version 12.1.1000.157 RUI1, and no virus was detected. The paper copy of this brief and the "PDF" version of this brief filed electronically with the court's ECF system are identical.

4. I, Nusrat J. Choudhury, hereby certify that I have been admitted before the bar of the United States Court of Appeals for the Third Circuit and that I am a member of good standing of the Court.

/s/ Nusrat J. Choudhury
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CERTIFICATE OF SERVICE

I hereby certify that I caused the fore-going Brief of Plaintiff-Appellant to be served through this court's CM/ECF filing system this 27th day of March, 2013 to:

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Ten copies of the Brief of Plaintiff-Appellant were mailed to the Court by UPS delivery, in accordance with Rule 31.0 of the Local Appellate Rules.

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