No. 12-4345

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY,

Plaintiff-Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION; UNITED STATES DEPARTMENT OF JUSTICE,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE APPELLEES

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STATEMENT OF JURISDICTION

In this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, plaintiff invoked the jurisdiction of the district court pursuant to 5 U.S.C. § 552(a)(4)(B), 28 U.S.C. § 1331, and 5 U.S.C. §§ 701-706. JA 33. The district court entered final judgment for defendants-appellees, the Federal Bureau of Investigation ("FBI") and the United States Department of Justice, on September 28, 2012. JA 4. Plaintiff filed a timely notice of appeal on November 27, 2012. JA 1; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

This appeal arises out of a FOIA request for information concerning the FBI's use of race and ethnicity in conducting criminal, national security, and counterintelligence investigations in New Jersey. The following questions are at issue on appeal:

1. Whether defendants properly withheld intelligence information being used in pending or prospective investigations pursuant to FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A).

2. Whether defendants properly withheld classified information concerning intelligence activities, sources, or methods, and/or foreign relations or foreign activities pursuant to FOIA Exemption 1, 5 U.S.C. § 552(b)(1).

3. Whether defendants properly withheld information concerning sensitive law enforcement techniques or procedures pursuant to FOIA Exemption 7(E), 5 U.S.C. § 552(b)(7)(E).

4. Whether the district court properly litigated plaintiff's claim regarding a FOIA exclusion, 5 U.S.C. § 552(c), *in camera* and *ex parte*.

STATEMENT OF RELATED CASES

This case has not previously been before this Court. A related case is currently pending before the United States Court of Appeals for the Sixth Circuit: *American Civil Liberties Union of Michigan* v. *Federal Bureau of Investigation*, No. 12-2536 (6th Cir.).

STATEMENT OF THE CASE

Plaintiff-appellant, the American Civil Liberties Union of New Jersey, submitted a Freedom of Information Act request to the FBI, seeking documents related to the FBI's "use of race and ethnicity to conduct assessments and investigations in local communities in New Jersey." JA 170. The FBI released some responsive records (in part), but withheld others as exempt from disclosure under 5 U.S.C. § 552(b).

Plaintiff filed suit, among other things, to challenge the FBI's withholdings. JA 32-33. Defendants moved for summary judgment, JA 47-92, and plaintiff opposed the motion and cross-moved for partial summary judgment, JA 645-91.

On September 28, 2012, the district court granted defendants' motion and denied plaintiff's cross-motion. JA 4. The court held that defendants adequately demonstrated that the withheld material falls within FOIA Exemption 1 (for properly classified information), Exemption 7(A) (for information that could reasonably be expected to interfere with law enforcement proceedings), and Exemption 7(E) (for information that would disclose law enforcement techniques or procedures). JA 14-24. Plaintiff appeals.

STATEMENT OF FACTS

A. Statutory Background

The Freedom of Information Act, 5 U.S.C. § 552, generally provides access to certain agency records and other information unless exempted by the statute. Section 552(a) provides that "[e]ach agency shall make available to the public" records in its possession unless the information is specifically exempted by one of section 552(b)'s nine statutory exemptions. Three of those exemptions are at issue in this appeal.

FOIA Exemption 1, 5 U.S.C. § 552(b)(1), "protects matters '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.'" *Larson* v. *Department of State*, 565 F.3d 857, 861 (D.C. Cir. 2009) (quoting 5 U.S.C. § 552(b)(1)). As is relevant here, Executive Order 13,526 provides that information may be considered for classification if it concerns: "intelligence activities (including special activities), intelligence sources or methods, or cryptology" or "foreign relations or foreign activities of the United States, including confidential sources." Exec. Order No. 13,526, § 1.4(c), (d), 75 Fed. Reg. 707, 709 (Dec. 29, 2009); *see also Wolf* v. *CIA*, 473 F.3d 370, 375 (D.C. Cir. 2007). If the information falls into one of these categories, it may be properly classified if it is

determined that "the unauthorized disclosure of the information could be expected to result in damage to the national security." Exec. Order No. 13,526, § 1.1(a)(4).[1]

FOIA Exemption 7(A) permits an agency to withhold "records or information compiled for law enforcement purposes" if the production of such records or information "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

FOIA Exemption 7(E) allows an agency to withhold "records or information compiled for law enforcement purposes" that "would disclose techniques and procedures for law enforcement investigations or prosecutions." 5 U.S.C. § 552(b)(7)(E). Exemption 7(E) does not apply to routine techniques and procedures that are already well-known to the public, such as fingerprinting or ballistic tests. *Davin* v. *U.S. Dep't of Justice*, 60 F.3d 1043, 1063 (3d Cir. 1995).

B. The FBI's Domestic Investigations And Operations Guide

In 2008, the Department of Justice issued revised Attorney General Guidelines governing the FBI's domestic operations. "The general objective" of those guidelines is to ensure "the full utilization of all authorities and investigative methods, consistent

[1] Executive Order 13,526 also imposes certain procedural requirements for classification (i.e., the information is owned or controlled by the United States Government and is classified by an original classification authority). Exec. Order 13,526, § 1.1(a). There is no dispute that those requirements are satisfied in this case. *See* JA 113-14 (declarant in this case has original classification authority and determined that information is under the control of the United States).

with the Constitution and laws of the United States, to protect the United States and its people from terrorism and other threats to national security, to protect the United States and its people from victimization by all crimes in violation of federal law, and to further the foreign intelligence objectives of the United States." *See* U.S. Dep't of Justice, Attorney General's Guidelines for Domestic FBI Operations at 5 (2008), *available at* http://www.justice.gov/ag/readingroom/guidelines.pdf. The guidelines were intended "to establish consistent policy in such matters." *Id.*

In December 2008, the FBI issued the "Domestic Investigations and Operations Guide" ("DIOG") to implement the Attorney General's guidelines. As is relevant to this appeal, the FBI's 2008 guidelines explain when the FBI may use race and ethnic identity in investigations. Those guidelines provide that the FBI may "identify locations of concentrated ethnic communities in the Field Office's domain, if these locations will reasonably aid the analysis of potential threats and vulnerabilities, and, overall, assist domain awareness for the purpose of performing intelligence analysis." JA 718. For example, if "intelligence reporting reveals that members of certain terrorist organizations live and operate primarily within a certain concentrated community of the same ethnicity, the location of that community is clearly valuable – and properly collectible – data. Similarly, the locations of ethnic-oriented businesses and other facilities may be collected if their locations will

reasonably contribute to an awareness of threats and vulnerabilities, and intelligence collection opportunities." *Id.*

The FBI may also collect "[f]ocused behavioral characteristics reasonably believed to be associated with a particular criminal or terrorist element of an ethnic community." JA 719. "For example, if it is known through intelligence analysis or otherwise that individuals associated with an ethnic-based terrorist or criminal group conduct their finances by certain methods, travel in a certain manner, work in certain jobs, or come from a certain part of their home country that has established links to terrorism, those are relevant factors to consider when investigating the group or assessing whether it may have a presence within a community." *Id.* The FBI is also authorized to "map" community demographics that it has collected in accordance with the DIOG. *Id.* Such mapping "visually depicts lawfully collected information and can assist in showing relationships among disparate data." *Id.*

C. Plaintiff's FOIA Request And Proceedings Below

On July 27, 2010, plaintiff submitted a FOIA request to the FBI, seeking records "concerning the FBI's implementation of its authority to collect information about and 'map' racial and ethnic demographics, 'behaviors,' and 'life style characteristics' in local communities [in New Jersey]." JA 170. Specifically, plaintiff requested, *inter alia*, "[l]egal memoranda, procedures, policies, directives, practices, guidance, or guidelines created since December 16, 2007 pertaining to the types of

racial and ethnic information * * * the FBI can or cannot collect information about, map, or otherwise use in the course of assessments and investigations," as well as "[r]ecords created since December 16, 2008 describing or listing the types of racial and ethnic information * * * the FBI Field Office has collected information about or mapped[.]" JA 171.

The FBI conducted a search, which identified 782 pages of records subject to the FOIA that were potentially responsive to plaintiff's FOIA request. JA 108. As is relevant to this appeal, the responsive records consisted of four categories of material:

(1) Domain intelligence notes ("DINs"). A domain intelligence note is an "analyst's method of recording data and analysis when studying the activities and actions of a particular group or element." JA 117. The notes at issue here analyze potential threats (including terrorist and foreign intelligence threats) in the Newark Field Office's areas of responsibility, discuss the reliability of intelligence sources, cite targets of concern and specific threats, discuss vulnerabilities and intelligence gaps, review current investigatory activities, and include maps and data tables compiled as part of the analysis. JA 126-41.

(2) The 2009 Newark Baseline Domain Assessment ("2009 Baseline Assessment"). An assessment is a compilation of the work product of a large number of domain intelligence notes and other research materials created to provide an overall analysis of, among other things, potential threats, vulnerabilities, knowledge gaps,

priorities, and tools available to address those threats. JA 117. The specific assessment here, the 2009 Newark Annual Baseline Domain Assessment, "provides a comprehensive analysis of Newark's area of operations, specifically threats and vulnerabilities both domestic and foreign, criminal and intelligence, key concerns, and assists in the prioritization of operations." JA 142. "All threats appearing in this Assessment are of significant importance to the Newark Division and are continuing threats in Newark today." JA 904.

(3) The October 30, 2009 Electronic Communication ("2009 EC"). Electronic communications generally "document the intelligence analysis and work product that has been used to create" an assessment and are "the primary vehicle of correspondence" within the FBI. JA 117, 908. The specific electronic communication at issue here documents the analysis and work product used to create the 2009 Baseline Assessment. JA 117, 142-43. The information contained in the 2009 EC is substantively the same as that in the 2009 Baseline Assessment. JA 908.

(4) Maps created by the Newark Domain Management Team. Maps depict the intelligence data collected and compiled by an analyst in a visual format and "often provide a 'layered' view of the intelligence data." JA 117. Maps may be "used as a tool by special agents to pinpoint areas of concern and further investigation, used by analysts to establish areas of focus and further analysis, and by the Newark field office to properly allocate its investigative resources[.]" JA 144. The five maps at issue here

concern threats to the Newark area of responsibility and are linked to ongoing investigations. JA 143-44; *see also* JA 910-12.

After reviewing all the documents found in its search, the FBI withheld in full 10 domain intelligence notes (DINs # 1-8, 10, and 11), the 2009 Baseline Assessment, the 2009 EC, and 5 maps (totaling 284 pages withheld). JA 96, 118, 126-44, 903-12. The FBI partially released 312 pages of material, including DIN # 9, with exempt material redacted. JA 99-100, 144-46. The FBI also withheld 186 pages as duplicates. JA 96. The FBI relied on Exemptions 1, 6, 7(A), 7(C), 7(D), and 7(E) for its withholdings. JA 97.

On May 4, 2011, plaintiff brought the instant action, challenging the FBI's response to its FOIA request. JA 32-44. Defendants moved for summary judgment, arguing, *inter alia*, that they properly withheld only documents or portions of documents that are exempt under 5 U.S.C. § 552(b). JA 47-92. In support of that motion, defendants filed a declaration by David M. Hardy, Section Chief, Record/Information Dissemination Section, Records Management Division, Federal Bureau of Investigation. JA 94-168.[2]

The Hardy declaration explains that the FBI "thoroughly reviewed" all the responsive documents "to achieve maximum disclosure consistent with" the FOIA.

[2] Defendants subsequently filed two supplemental declarations by Mr. Hardy to support their withholdings. *See* JA 888-913, 948-63.

JA 109. "Every effort was made to provide plaintiff with all reasonably segregable portions of releasable material." *Id.* The declaration provides a detailed description of each document withheld in full or in part pursuant to FOIA exemptions 1, 7(A) and/or 7(E), JA 126-46; *see also* JA 903-12, and also includes a *Vaughn* index summarizing the documents withheld (both in full and in part) and the applicable exemptions.[3] JA 618-33, 917.

As the Hardy declaration explains, the FBI withheld in full DINs # 1-8 and 10-11, the 2009 Baseline Assessment, the 2009 EC, and the five maps under Exemption 7(A). That decision was made after the Newark field office confirmed that those documents "contain information that is currently being used by intelligence analysts ("IAs") and Special Agents for current, ongoing, and prospective investigations." JA 125; *accord* JA 907, 909-11. As a result, "release of the information could reasonably be expected to interfere with the ongoing investigation and prosecution of cases" by making the subjects of such investigations aware of those activities, thereby enabling them to "change their behavior and/or the 'players' to avoid detection and/or further investigation." JA 125-26; *accord* JA 906-12. Releasing these documents, therefore, would impair the FBI's ability to track these specific threats, understand the

[3] The *Vaughn* index is a document in which the agency describes the documents that are responsive to a FOIA request and indicates the applicable exemptions to each document for any redactions or withholdings. *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

vulnerabilities and intelligence gaps related to those threats within the Newark area, and allocate resources to prevent the criminal activities, terrorist acts, and espionage activities described in the records. JA 125, 906-12.

The declarations describe in detail each document withheld in full under Exemption 7(A), and explain why release of those documents would interfere with enforcement proceedings. JA 126-44; *see also* JA 903-12 (supplemental declaration addressing the 2009 Baseline Assessment, the 2009 EC, and the maps). For example, the Hardy declaration summarizes DIN # 1, which relates to a current threat posed by an extremist group or terrorist organization within the Newark field office's area of responsibility. That document "characterizes the presence, activities, strength, and threat posed" by the group, discusses the FBI's assessment of the group, including a discussion of the reliability of intelligence sources, and discusses specific threats and targets. JA 126-27. The document also reviews "current, ongoing, and potential investigatory activities that may be related to the threats." JA 127. The declaration also specifically notes that although DIN # 1 includes public source material, release of that information in this context "would clearly reveal the target of the investigatory effort," so that "no information was able to be segregated for release." JA 127.

The Hardy declaration also addresses the FBI's withholdings under Exemption 1, explaining that the FBI withheld classified material from responsive records that (1)

reveals intelligence activities or intelligence sources or methods and/or (2) would damage foreign relations or foreign activities if released. JA 115-22.

Hardy states that the FBI withheld three specific categories of information relating to intelligence activities and/or sources or methods: (1) case information that identifies the specific type of intelligence activity directed at a specific target and the identity of the target of national security interest; (2) identities of targets of foreign counterintelligence investigations; and (3) identities of intelligence sources. JA 120. As the declaration elaborates, such information "consists of classified methods and procedures of intelligence-gathering" and "highly sensitive research analysis," which includes "a review of past, present and pending cases as well as intelligence information supplied by confidential sources, witnesses, FBI intelligence information intertwined with public source information, [and] classified information received from the intelligence community." JA 116. As the declaration further explains, if the subjects of such research and analysis were to know the sources and methods used by the analyst "to determine the division's vulnerabilities, to make recommendations, to discuss trends and warn of any threats, and note any intelligence gaps," JA 116, "those subjects would easily be able to change their behaviors and go undetected." JA 117-18. Disclosure of those sources and methods would also "reveal which sources the FBI finds credible and how the FBI reaches their intelligence conclusions." JA 118.

Because the information concerning intelligence activities "is very specific in nature and known to very few individuals," the FBI concluded that its disclosure "could reasonably be expected to cause serious damage to national security" for three reasons: (1) disclosure would reveal current intelligence activities; (2) disclosure would reveal the criteria used in, and priorities assigned to, current intelligence or counterintelligence activities; and (3) disclosure would reveal the targets of such activities and investigations. JA 119. Those disclosures would therefore enable hostile entities to develop countermeasures, which "could severely disrupt the FBI's intelligence-gathering capabilities" and impair the FBI's ability to protect national security and pursue violations of criminal law. JA 120.

For those reasons, the FBI classified and withheld information in DINs # 1-8, the 2009 Baseline Assessment, and the 2009 EC, to protect from disclosure "the actual lawful intelligence sources or methods utilized by the FBI against specific targets of foreign counterintelligence investigations" and "the FBI's knowledge of the intelligence gathering capabilities of foreign entities within the United States" that are directed at specific targets within the Newark office's domain. JA 118.

The FBI also withheld pursuant to Exemption 1 "sensitive intelligence information gathered by the United States either about or from a foreign country," disclosure of which would damage the United States' foreign relations or foreign activities. JA 120. As Mr. Hardy explains, the unauthorized release of such

information could reasonably be expected to "lead to diplomatic or economic retaliation against the United States; identify the target, scope, or time frame of intelligence activities of the United States in or about a foreign country, which may result in the curtailment or cessation of these activities; enable hostile entities to assess United States intelligence gathering activities in or about a foreign country, and devise countermeasures against these activities; or compromise cooperative foreign sources which may jeopardize their safety and curtail the flow of information from these sources." JA 121-22. The Hardy declaration explains that such information was withheld from DINs # 2, 4, 6, and 7, the 2009 Baseline Assessment, and the 2009 EC. JA 120.

The Hardy declaration also describes in detail the documents in which information was withheld pursuant to Exemption 7(E) "to protect investigatory and intelligence gathering procedures and techniques used by FBI agents and intelligence analysts." JA 157. The declaration explains that release of information about the FBI's investigatory and intelligence-gathering procedures "could enable criminals to educate themselves about the law enforcement investigative techniques and procedures employed for the location and apprehension of individuals and therefore allow these individuals to take countermeasures to circumvent the effectiveness of these techniques and procedures and to continue to violate the law." JA 158. For that reason, the FBI withheld certain information from DINs # 1-11, the 2009

Baseline Assessment, the 2009 EC, and the maps. JA 126-45, 158-59, 619-33, 911-12.[4] Specifically, the FBI withheld: (1) information that would reveal the types of devices, methods, and/or tools used in surveillance, monitoring, and/or mapping of any accumulated data; (2) information describing the methods the FBI uses to collect and analyze investigative information; (3) highly sensitive research analysis; and (4) overviews of specific threats, to include vulnerabilities, intelligence gaps, and priorities. JA 159-65, 903-12.

Plaintiff cross-moved for summary judgment. JA 645-90. As is relevant to this appeal, plaintiff argued that defendants failed to show that they disclosed all non-exempt, reasonably segregable information. JA 673-90. In addition, plaintiff suggested that defendants may have invoked FOIA's exclusion provision, 5 U.S.C. § 552(c), and sought judicial review of any such invocation. JA 669-73.[5]

D. District Court Decision

The district court reviewed the Hardy declarations and the accompanying *Vaughn* index and upheld the Government's withholdings under Exemptions 1, 7(A), and 7(E).

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[4] Plaintiff did not challenge the redaction of information from DIN # 9. *See* Br. at 11 n.8.

[5] In the district court, plaintiff opposed the FBI's dismissal from the action and argued that defendants' search for FOIA material was inadequate. JA 661-69. Those issues have not been raised on appeal. *See* Br. at 14 n.10.

The district court held that the Government properly invoked Exemption 7(A) to withhold intelligence information being used in pending or prospective investigations, and affirmed the Government's withholding in full of DINs # 1-8, 10-11, the 2009 Baseline Assessment, the 2009 EC, and the five maps. JA 18-20. The court explained that "[t]he Hardy declaration avers that all of the DINs # 1-8, 10, and 11, the 2009 [Baseline Assessment] and the October 2009 EC withheld contain information currently being used for ongoing and prospective investigations and concern a 'current/ongoing' threat," and describes each of those documents in detail. JA 19. Similarly, the court observed that the Hardy declaration explains that the withheld maps concern threats related to the Newark area and "are used as a tool by special agents to pinpoint areas of concern, by analysts to establish areas of focus and by the field office to allocate resources." JA 20.

The district court likewise upheld the Government's reliance on Exemption 1 to withhold information in DINs # 1-8, the 2009 Baseline Assessment, and the 2009 EC. JA 14-18. The court reasoned that the Hardy declaration thoroughly describes each of these documents, all of which pertain to ongoing threats (both domestic and foreign) to the Newark area and which are used by agents to plan and conduct operations against those threats. JA 16-17. "A description of operations, including threats and vulnerabilities to Newark area operations logically falls into Ex[em]ption

One." JA 17. The court, therefore, held that the Hardy declaration adequately demonstrated that the information withheld was classified. JA 16-17.[6]

The district court also upheld the Government's withholding of certain information from DINs # 1-8, 10-11, the 2009 Baseline Assessment, the 2009 EC, and the five maps pursuant to Exemption 7(E). JA 21-22. As the district court noted, defendants withheld such material to protect "'investigative, intelligence-gathering technique[s],'" disclosure of which would permit hostile entities "'to take advantage of identified vulnerabilities and adjust their behavior to avoid detection.'" JA 21. The district court acknowledged the specific categories of law enforcement procedures or techniques, described in the Hardy declaration, that were withheld, to include: surveillance, monitoring, and mapping information, and collection and analysis of information. JA 21-22.

The district court rejected plaintiff's argument that the FBI improperly withheld public information relating to race and ethnicity that could have been segregated and released. JA 24-25. The district court noted that defendants' supplemental declaration explains that "the public information in these documents is 'intermingled' with non-public information which could 'tip off adversaries as to the

[6] The district court concluded that it could not determine whether the Government properly withheld one map (NK GEOMAP 450) pursuant to Exemption 1, JA 17-18, but the Government withdrew its assertion of Exemption 1 over that document, JA 911, 917. In any event, the district court held that that map was properly withheld pursuant to Exemption 7(A). JA 18, 22.

focus of Newark's attention and resources.'" JA 25. In addition, defendants addressed each document plaintiff contended was segregable and explained why each one was not. *Id.* As a result, the district court concluded that defendants "have met their burden to demonstrate why the materials at issue are not segregable." *Id.*

The district court also addressed plaintiff's claim that defendants may have relied on 5 U.S.C. § 552(c) to exclude documents that otherwise would have been responsive to plaintiff's FOIA request. The district court noted that defendants had filed an *in camera* declaration explaining whether or not an exclusion was invoked, as plaintiff had requested in its cross-motion for summary judgment. JA 14. "Based on that declaration, without confirming or denying the existence of any exclusion," the court "conclude[d] that if an exclusion was invoked, it was and remains amply justified." *Id.*

SUMMARY OF ARGUMENT

I. In this appeal, plaintiff challenges the withholding of records created by the FBI for use in analyzing potential threats (including threats from terrorism and foreign intelligence) in the State of New Jersey. Although plaintiff refers to the records as consisting of "publicly available" information concerning the race and ethnicity of local populations, the records at issue in fact consist of analyses of threats and vulnerabilities, used in the course of sensitive FBI investigations. While some of the information in those records was compiled by FBI analysts from publicly available

information, the records themselves – which include intelligence notes, a domain assessment, and maps – were created by FBI personnel for use in investigations, and their release would reveal sensitive and/or classified information concerning those investigations.

The district court, therefore, correctly held that the FBI properly withheld the records under FOIA Exemption 1, for classified information, Exemption 7(A), for records the release of which could reasonably be expected to interfere with law enforcement proceedings, and Exemption 7(E), for records the release of which could reasonably be expected to reveal sensitive investigative techniques or procedures. As the district court recognized, the FBI's detailed declarations, accompanied by a *Vaughn* index, demonstrate that the FBI released all reasonably segregable, responsive information that is not exempt under FOIA.

The district court correctly held that all of the documents withheld in full – Domain Intelligence Notes, the 2009 Baseline Assessment, the 2009 Electronic Communication, and five maps – were properly withheld pursuant to Exemption 7(A). As explained in defendants' declarations, because these records concern ongoing FBI investigations, their disclosure could reveal the target or focus of the FBI's investigatory and intelligence-gathering efforts, which would enable hostile entities to avoid detection, investigation, and/or prosecution.

The district court also properly upheld defendants' withholding of certain classified information from Domain Intelligence Notes # 1-8, the 2009 Baseline Assessment, and the 2009 Electronic Communication pursuant to Exemption 1. As the district court explained, defendants' declarations describe the subject of those documents (threats posed by an extremist/terrorist group and by a foreign country's intelligence-gathering activities), "provide[] a thorough description of the information contained in each section" of each document, including information concerning ongoing and potential investigatory activities, and explain how that information would reveal classified information pertaining to intelligence activities, sources, or methods, and/or foreign activities of the United States.

The district court also correctly concluded that defendants properly withheld portions of the documents withheld in full – Domain Intelligence Notes # 1-8 and 10-11, the 2009 Baseline Assessment, the 2009 Electronic Communication, and the five maps – pursuant to Exemption 7(E). As the court noted, defendants' declarations explain that those documents reveal enumerated categories of investigative or intelligence-gathering techniques, disclosure of which would allow hostile or criminal groups or entities to change their behavior to avoid detection and/or investigation.

On appeal, plaintiff does not challenge the bulk of the material withheld by the FBI. Rather, plaintiff challenges only the FBI's redaction or withholding of "public

source" information relating to the FBI's use of race or ethnicity. As the district court correctly recognized, however, the FBI properly withheld such information pursuant to Exemptions 1, 7(A), and 7(E) because any such public information is "'"intermingled' with non-public information which could 'tip off adversaries as to the focus of Newark's attention and resources.'" This Court should therefore affirm the district court's grant of summary judgment for defendants.

II. Plaintiff also challenges the district court's consideration of an *in camera*, *ex parte* declaration filed by the FBI to address plaintiff's claim that defendants might have invoked a FOIA exclusion, 5 U.S.C. § 552(c) (permitting agencies to treat certain law enforcement and national security records "as not subject to the requirements" of FOIA), to withhold additional documents that would otherwise be responsive to plaintiff's FOIA request. Plaintiff suggests that it was reversible error for the district court to accept the *in camera* declaration, and urges this Court to adopt a new procedure governing the use of exclusions. Plaintiff's argument lacks merit.

Courts have routinely recognized that it is appropriate to review *in camera*, *ex parte* submissions from the Government in FOIA cases where a public description would disclose the very information that the Government asserts is exempt under FOIA. FOIA, in fact, expressly contemplates *in camera* filings. The district court, therefore, properly accepted the Government's *in camera*, *ex parte* declaration, and

ruled on plaintiff's exclusion claim. Plaintiff's proposed new procedure is unnecessary. This Court should affirm the district court's ruling.

STANDARD OF REVIEW

"[A] two-tiered test governs this Court's review of an order granting summary judgment in proceedings seeking disclosure under the FOIA." *McDonnell* v. *United States*, 4 F.3d 1227, 1242 (3d Cir. 1993). This Court must first decide "whether the district court had an adequate factual basis for its determination." *Id; see also King* v. *U.S. Dep't of Justice*, 830 F.2d 210, 217-18 (D.C. Cir. 1987) (court of appeals determines "from inspection of the agency affidavits submitted, 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"). If this Court concludes that the affidavits presented a sufficient factual basis, this Court then determines whether the district court's decision was clearly erroneous. *McDonnell*, 4 F.3d at 1242.

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR DEFENDANTS BECAUSE DEFENDANTS RELEASED ALL REASONABLY SEGREGABLE, RESPONSIVE INFORMATION THAT IS NOT EXEMPT UNDER FOIA.

The FOIA generally mandates disclosure of Government records unless the requested information falls within an enumerated exemption. *See* 5 U.S.C. § 552(b).

Notwithstanding the FOIA's "liberal congressional purpose," the statutory exemptions must be given "meaningful reach and application." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989). "Requiring an agency to disclose exempt information is not authorized[.]" *Minier* v. *CIA*, 88 F.3d 796, 803 (9th Cir. 1996).

At the outset, it is important to clarify the nature of the records at issue here. Although plaintiff repeatedly describes the records as containing "publicly-available racial and ethnic information," the records at issue here are not simply a collection of public source documents or raw census data. Rather, the records at issue were created by FBI personnel for use in analyzing existing and emerging threats and vulnerabilities, and recommending possible steps to prevent or respond to those threats. JA 126-44, 903-12. To the extent these records contain "publicly-available information," that information was compiled selectively by FBI analysts in the context of intelligence and law enforcement investigations, and its release would reveal the particular focus or scope of sensitive FBI investigations, specific law enforcement techniques or procedures, and/or classified information.

A. Defendants Properly Invoked Exemption 7(A) To Withhold Information That Could Reasonably Be Expected To Interfere With Law Enforcement Proceedings.

Exemption 7(A) authorizes the withholding of information that is (1) "compiled for law enforcement purposes" and (2) whose release "could be reasonably expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). "In

originally enacting Exemption 7, Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their case." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978).

To answer the threshold question – whether the information was compiled for law enforcement purposes – an agency must "demonstrate [] the relationship between its authority to enforce a statute or regulation and the activity giving rise to the requested documents." *Abdelfattah* v. *U.S. Dep't of Homeland Security*, 488 F.3d 178, 186 (3d Cir. 2007).[7] To satisfy the second element – interference with enforcement proceedings – the Government must establish that the relevant law enforcement proceeding is "pending or prospective." *Manna* v. *U.S. Dep't of Justice*, 51 F.3d 1158, 1164 (3d Cir. 1995). In addition, "[i]nterference" need not be established on a document-by-document basis; instead, courts may determine the exemption's applicability "generically," based on the categorical types of records involved. *Robbins Tire*, 437 U.S. at 236; *see also U.S. Department of Justice* v. *Reporters Comm. For Freedom of Press*, 489 U.S. 749, 776-80 (1989). Consequently, courts may accept affidavits that specify the distinct but general categories of documents at issue and the harm that would result from their release, rather than requiring extensive, detailed itemization of

[7] Plaintiff does not dispute that the withheld records were compiled for law enforcement purposes. *See* Br. at 25 n. 12.

each document. *Manna* v. *U.S. Dep't of Justice*, 815 F. Supp. 798, 805-06 (D.N.J. 1993), *aff'd*, 51 F.3d 1158. And where, as here, national security is implicated, the Government's declarations are entitled to substantial deference. *Center for National Security Studies* v. *U.S. Department of Justice*, 331 F.3d 918, 927-28 (D.C. Cir. 2003) ("Just as we have deferred to the executive when it invokes FOIA Exemptions 1 and 3, we owe the same deference under Exemption 7(A) in appropriate cases, such as this one.").

In invoking Exemption 7(A), the FBI carefully reviewed all responsive information to determine if the records contained current intelligence information being used in pending or prospective investigations or prosecutions. JA 124-25, 907, 910, 912. The FBI's Record/Information Dissemination Section consulted with the Newark Field Office and confirmed that DINs # 1-8 and 10-11, the 2009 Baseline Assessment, the 2009 EC, and the five maps are all being used by intelligence analysts and special agents for ongoing investigations, and that the release of that information could reasonably be expected to interfere with investigations and prosecutions. JA 124-25, 909-12

As the Hardy declaration explains, all of these documents contain information that reveals the FBI's current targets of investigation. JA 124-44. The documents contain information from various sources, including "open [and] pending" criminal files. JA 126-44. The documents discuss current threats from targets of investigation

and recommend "potential investigatory activities" regarding those threats. *Id.* And the FBI determined that the information in these documents will likely be utilized in potential enforcement proceedings. JA 125. Disclosing these documents, therefore, would reveal the FBI's investigative activities, thereby enabling hostile entities to "change their behavior and/or the 'players' to avoid detection and/or further investigation." JA 126. As a result, the FBI's ability to: (1) track specific current and pending threats; (2) understand vulnerabilities and intelligence gaps within the Newark Field Office's area of responsibility; and (3) allocate resources to prevent the criminal, terrorist, and espionage activities described in the withheld documents, would be harmed. JA 125.

These explanations are sufficient by themselves to satisfy the agency's burden regarding Exemption 7(A). *See Dickerson* v. *Department of Justice*, 992 F.2d 1426, 1431 (6th Cir. 1993) (determining that an affidavit that made overall claims about interference with enforcement proceedings was adequate); *Shannahan* v. *IRS*, 672 F.3d 1142, 1150 (9th Cir. 2012) ("'Under Exemption 7(A) the government is not required to make a specific factual showing with respect to each withheld document that disclosure would *actually interfere* with a particular enforcement proceeding.'"). But here, the agency provided much more, including a detailed description of each document withheld in full under Exemption 7(A). JA 126-44.

For example, one intelligence note (DIN # 1) concerns a "[c]urrent ongoing/growing threat by an Extremist Group/Terrorist Organization" within the Newark Field Office's area of responsibility. JA 126. That document includes "a review of current, ongoing, and potential investigatory activities that may be related to" specific, ongoing, or upcoming threats and pulls information from, *inter alia*, "open, pending and closed criminal and intelligence FBI investigatory files." JA 127. Releasing such information would impair the FBI's ability to track this current and pending threat. JA 125. Similarly detailed explanations accompany the other withheld documents. *See* JA 126-44, 903-12. Such a detailed description of the documents withheld, and the risk that would be posed to enforcement proceedings by releasing such documents, more than satisfies the agency's burden to show the applicability of Exemption 7(A).

As courts have recognized, "[t]he principal purpose of Exemption 7(A) is to prevent disclosures which might prematurely reveal the government's * * * focus of its investigations, and thereby enable suspects to establish defenses or fraudulent alibis or to destroy or alter evidence." *Maydak* v. *U.S. Dep't of Justice*, 218 F.3d 760, 762 (D.C. Cir. 2000). The Exemption "protects against disclosure of documents which would * * * reveal[] the identities of potential witnesses, the nature, scope, direction, and limits of [an] investigation[.]" *Arizechi* v. *IRS*, 2008 WL 539058, *6 (D.N.J. Feb. 25, 2008). The information withheld by defendants pursuant to Exemption 7(A) is

precisely that type of information. JA 124-44, 906-07, 910-12. Because disclosure would reveal the "focus" and "scope" of FBI investigations, it is more than reasonable to expect that its release would interfere with ongoing investigations and the development of future cases by arming the very groups and people under investigation with information that will allow them to alter their behavior to avoid detection. *Maydak*, 218 F.3d at 762. Thus, the district court correctly held such information was appropriately withheld pursuant to Exemption 7(A).

The district court also correctly rejected plaintiff's argument (Br. at 24-25) that some of the information withheld is public source information that cannot reasonably be expected to interfere with enforcement proceedings within the meaning of FOIA Exemption 7(A). As the district court recognized, the Hardy declaration explains that DINs # 1-8 and 10-11, the 2009 Baseline Assessment, the 2009 EC, and the maps "'concern investigatory focuses of which the mere acknowledgment of intelligence gathering and investigative activity would cause serious damage to the National Security' and harm to ongoing and anticipated future investigations." JA 25. More specifically, as the district court acknowledged, the public information in these documents cannot be released because it is "intermingled" with non-public investigatory information such that its disclosure would tip off targets or other adversaries as to the investigatory focuses of the Newark Field Office. JA 25; *accord* JA 907, 909-12. Defendants also explain that any public information in DINs # 1-8

and 10-11 cannot be released because such disclosure, in the context of an intelligence note "would clearly reveal the target of the investigatory effort." JA 127; *see also* JA 128-41. Similarly, the 2009 Baseline Assessment, the 2009 EC, and the maps cannot be released because "any public information was determined to be so intertwined with classified and/or pending investigative or intelligence investigative efforts that to release any would tip off adversaries as to the focus of Newark[']s attention and resources thus resulting in the ability of hostile entities to evade capture, target Newark's vulnerabilities, and modify their behaviors to avoid further detection." JA 907, 909-12

Plaintiff's argument on appeal is premised upon the notion that public source information must be released under FOIA as a matter of course. But there is no support for that proposition. To the contrary, it is well-established that an agency may properly withhold public source information contained within its records where, for example, such information is inextricably intertwined with exempt material. *See Juarez* v. *Department of Justice*, 518 F.3d 54, 61 (D.C. Cir. 2008). More importantly, the fact that the agency is compiling and analyzing particular public source information could itself reveal intelligence or law enforcement activities by disclosing areas of interest to the agency. *See CIA* v. *Sims*, 471 U.S. 159, 176-77 (1985) ("A foreign government can learn a great deal about the Agency's activities by knowing the public sources of information that interest the Agency."); *Blackwell* v. *FBI*, 680 F. Supp. 2d

79, 92 (D.D.C. 2010) (the fact that the FBI used a database "contain[ing] information derived from public sources" that "relates solely to the FBI's internal practices" was exempt because "disclosure potentially would aid others in circumventing future FBI investigations"), *aff'd*, 646 F.3d 37 (D.C. Cir. 2011). That is precisely the case here. As the Hardy declaration amply demonstrates, disclosing the information in the records here would reveal the focus or scope of FBI investigations.

On appeal, plaintiff raises two challenges to defendants' withholdings under Exemption 7(A). First, plaintiff contends (Br. at 26) that because it is not specifically seeking information about targets of investigations, any disclosures of public source information about racial or ethnic communities in New Jersey cannot reasonably be expected to tip off targets of FBI investigations. Second, plaintiff asserts (Br. at 27) that the Hardy declaration is not sufficiently specific for the district court to have credited the FBI's assertions of harm. Neither argument has merit.

Although plaintiff may not seek information about targets or subjects of FBI investigations, that is irrelevant as to whether the information at issue is properly withheld under Exemption 7(A). *See Consumers' Checkbook Center for the Study of Services* v. *U.S. Dep't of Health and Human Services*, 554 F.3d 1046, 1051 (D.C. Cir. 2009) ("The requesting party's intended use for the information is irrelevant[.]"). As the FBI explained, releasing information that is currently being used in ongoing investigations, to include public-source information relating to race or ethnicity, could reasonably be

expected to interfere with those investigations. JA 125, 907, 909-12. Releasing such information would reveal what information is or is not relevant to an ongoing investigation, which might reveal the "focus" or "scope" of an investigation, *Maydak*, 218 F.3d at 762, as well as "what investigative leads the FBI is pursuing." *Dickerson*, 992 F.2d at 1433; *see* JA 911 ("release of any specific public source information which the FBI has selected to analyze, even if it could be segregated, would reveal the specific target and focus of the FBI's investigatory and intelligence gathering efforts"). Such information would assist suspects in thwarting the FBI's investigation. JA 909-10, 912.

Plaintiff's argument that the Hardy declaration is not sufficiently specific to support the FBI's reliance on Exemption 7(A) is fundamentally flawed. The seventy-five page declaration describes in detail each and every document withheld in full under Exemption 7(A), summarizes the content of those documents, and explains why disclosure would interfere with law enforcement proceedings. JA 94-168. And the supplemental declaration provides additional specifics about the 2009 Baseline Assessment, 2009 EC, and the maps. JA 902-12. Indeed, the Hardy declarations go far beyond the general, categorical description of documents withheld that courts have held to be adequate in the context of Exemption 7(A). *See Robbins Tire*, 437 U.S. at 236; *Maydak*, 218 F.3d at 765; *Dickerson*, 992 F.2d at 1431. Nor is there any

contradictory evidence that could undermine the presumption of good faith that is accorded to agency declarations.

At bottom, plaintiff simply disagrees with the FBI's judgment that releasing these records could reasonably be expected to interfere with law enforcement investigations. But plaintiff's disagreement is not a sufficient basis upon which to conclude that the records were improperly withheld under Exemption 7(A).

Plaintiff next argues (Br. at 28-30) that this Court should reject the FBI's judgment of the harm that likely would result from release of the records because the FBI has released similar information in response to other, similar FOIA requests.[8] But the court have uniformly rejected arguments such as the one plaintiff makes here, noting that such arguments are based on "the perverse theory that a forthcoming agency is less to be trusted in its allegations than an unyielding agency." *Military Audit Project* v. *Casey*, 656 F.2d 724, 753-54 (D.C. Cir. 1981); *see also Public Citizen* v. *Department of State*, 11 F.3d 198, 203 (D.C. Cir. 1993). The fact that the FBI may have been able in some specific instances to disclose public source material contained in law enforcement records without risk of harm to ongoing or prospective investigations or prosecutions says nothing about the risk in these particular circumstances and context. *See ACLU* v. *U.S. Dep't of Defense*, 628 F.3d 612, 625 (D.C.

[8] As the Hardy declaration notes, plaintiff's FOIA request was one of 48 similar requests by various ACLU affiliates to 43 different FBI offices. JA 99.

Cir. 2011) ("we have repeatedly rejected the argument that the government's decision to disclose some information prevents the government from withholding other information about the same subject").

For example, public information might exist in one field office's files because it is relevant to the subject matter of an investigation and provides general background information. That public information, in the context of those files, might be releasable without risk of harm to that office's ongoing investigations. That same information in another field office's files, however, might reveal the scope or focus of an investigation by that field office, or it might demonstrate investigative interest or awareness of a particular group or organization in that field office's area of responsibility. In that context, the public source information may be properly withheld. *See* JA 909 ("If similar information was released in another location, it was based on a decision specific to that domain and the relevance of the information to that domain at [that] time."). Alternatively, public source material might be inextricably intertwined with material that is exempt under FOIA so that it cannot be released in that particular context, but might be releasable in another. *See Juarez*, 518 F.3d at 61.

As the Hardy declaration notes, all of the records withheld in this case pertain to active or prospective investigations – a fact verified by the Newark field office – so that none of the information plaintiff seeks, including public source information, may

be released. JA 125, 907, 909-12. Indeed, the fact that the FBI has released publicly-available information when it does *not* pose a risk to ongoing investigations rebuts any suggestion that the FBI is acting improperly. *See Military Audit Project*, 656 F.2d at 754 (noting that the release of other documents by the agency "suggests to us a stronger, rather than a weaker, basis for the classification of those documents still withheld"). This Court therefore should reject plaintiff's attempt "to effectively penalize" the FBI for its voluntary disclosure of information. *See, e.g., Public Citizen*, 11 F.3d at 203 (holding that "to effectively penalize an agency for voluntarily declassifying documents would work mischief by creating an incentive against disclosure"); *see also Public Citizen* v. *Department of State*, 276 F.3d 634, 645 (D.C. Cir. 2002).

Nor is plaintiff able to establish that any prior disclosures of public information regarding race or ethnicity constitute a waiver of any applicable protection under FOIA. *See Assassination Archives and Research Center* v. *CIA*, 334 F.3d 55, 59-60 (D.C. Cir. 2003) ("agency may waive its claim that information is exempt from disclosure if a FOIA plaintiff carries his 'burden of pointing to specific information in the public domain that appears to duplicate that being withheld'"); *see also Students Against Genocide* v. *Department of State*, 257 F.3d 828, 836 (D.C. Cir. 2001). Other than its general description of public information relating to race or ethnicity, plaintiff offers no evidence that the public information previously released in response to other FOIA requests is the same public information that the FBI is withholding here. But

even if it were the same information, releasing such information in the context of this FOIA request might disclose new information about the Newark Field Office's investigatory interests or activities; information which is properly withheld pursuant to Exemption 7(A). *See Afshar* v. *Department of State*, 702 F.2d 1125, 1130-31 (D.C. Cir. 1983) ("In many cases, the very fact that a known datum appears in a certain context or with a certain frequency may itself be information that the government is entitled to withhold.").

B. Defendants Properly Withheld Classified Information Concerning Intelligence Activities, Sources, And Methods, And Foreign Relations And Activities Pursuant To Exemption 1.

If this Court upholds defendants' withholdings pursuant to Exemption 7(A), the Court need not address Exemption 1, which defendants have relied upon as an alternative ground to withhold certain information from a subset of the records withheld in full pursuant to Exemption 7(A). If this Court does address the Exemption 1 withholdings, however, the district court's decision on this issue should be affirmed.

FOIA Exemption 1 permits an agency to withhold "matters 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 an Executive order." 5 U.S.C. § 552(b)(1). As the district court recognized, in determining the applicability of Exemption 1, "[c]ourts must

afford 'substantial weight to an agency's affidavit concerning the details of the classified status'" of the information at issue. JA 15. Such deference is owed to the agency because "weigh[ing] the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising" national security is a task best left to the Executive Branch. *CIA* v. *Sims*, 471 U.S. 159, 180 (1985); *see also Center for National Security Studies* v. *Department of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003) ("[T]he judiciary is in an extremely poor position to second-guess the executive's judgment in [the] area of national security."); *Halperin* v. *CIA*, 629 F.2d 144, 148 (D.C. Cir 1980) ("Judges * * * lack the expertise necessary to second-guess * * * agency opinions in the typical national security FOIA case."). As a result, "[o]nce satisfied that proper procedures have been followed and that the information logically falls into the exemption claimed, the courts 'need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.'" *Gardels* v. *CIA*, 689 F.2d 1100, 1104-05 (D.C. Cir. 1982); *accord McDonnell*, 4 F.3d at 1243.

Applying these standards, the district court correctly held that the Hardy declaration establishes that defendants properly invoked Exemption 1 to withhold information in DINs # 1-8, the 2009 Baseline Assessment, and the 2009 EC because those documents contain classified information that relates to intelligence activities, sources, and methods, and/or to foreign relations or foreign activities of the United

States. Information that is properly classified under Executive Order 13,526 is exempt from disclosure under Exemption 1. 5 U.S.C. § 552(b)(1).[9]

Exemption 1 protects information specifically authorized by an Executive Order to be kept secret in the interest of national defense, and that the matters are properly classified as such. Here, sections 1.4(c) and (d) of Executive Order 13,526 specifically authorize information to be classified if it concerns intelligence activities or intelligence sources or methods, or foreign relations or foreign activities of the United States (including confidential sources). Hardy identifies three categories of records from which information was withheld pursuant to Exemption 1: DINs # 1-8, the 2009 Baseline Assessment, and the 2009 EC. JA 111-22. Specifically, he explains the type of classified information in those records, and how disclosure of such information could reasonably be expected to cause serious damage to national security:

DINs # 1-8: As the Hardy declaration explains, DINs # 1-8 were created by FBI analysts in Newark, New Jersey to collect and record information gathered on particular groups or elements using various intelligence techniques. JA 116-17. They include a review of relevant past, present, and pending cases, information supplied by confidential sources, discussion of the threat posed by the group or element, and

[9] With the exception of public source information, plaintiff does not dispute that the information at issue was properly classified. *See* Br. at 31-32.

intelligence gaps in understanding and addressing that threat. JA 116, 165. The maps included within these reports consist of the same intelligence information, derived from the same activities and methods, but presented in a visual format. JA 117, 164. Disclosure of these materials, therefore, would reveal sensitive intelligence information, as well as the sources and methods used to gather that intelligence. JA 118-20.

As Hardy further explains, "the information in these documents concerning intelligence activities is very specific in nature and known to very few individuals," so that disclosure "would reveal that [these intelligence activities] are still used by the FBI today." JA 119. Hardy therefore determined that disclosure of these notes could reasonably be expected to cause serious damage to national security because it would reveal the FBI's intelligence activities and methods for monitoring certain targets, as well as the priority assigned to current intelligence or counterintelligence investigations, thereby allowing hostile entities to evade detection and apprehension by altering their activities and behavior in light of this information. JA 119-20.

DINs # 2, 4, 6, and 7, also contain "sensitive intelligence information gathered by the United States either about or from a foreign country," JA 120, and are therefore also covered by section 1.4(d) of Executive Order 13,526 (permitting classification of information about "foreign relations or the foreign activities of the United States"). These notes pertain to the "intelligence gathering efforts of a foreign

country" within the Newark area of responsibility. JA 123-44, 619-25. They discuss those efforts, the status of the United States' current relations with the foreign country at issue, and "intelligence gaps" of the FBI in assessing the foreign country's intelligence efforts in New Jersey. JA 123-44. As Hardy explains, disclosure of such information could, *inter alia*, inflame relations with the foreign countries at issue, lead to diplomatic or economic retaliation against the United States, and assist foreign countries to devise countermeasures against the FBI's counterintelligence activities. JA 120-22.

2009 Baseline Assessment: This document is a written intelligence report and a compilation of some of the analyses contained in the DINs. JA 117, 630, 903. It discusses the threats and vulnerabilities, key concerns, and priorities for the Newark area. JA 142, 903-06. Like the intelligence notes, it contains information that pertains to the FBI's intelligence activities and methods in that area, and its disclosure would cripple the FBI's efforts to stay ahead of perpetrators that threaten national security. JA 115-19, 905-06. This assessment also contains sensitive intelligence information about foreign relations, as it discusses foreign threats, including a foreign country's intelligence-gathering efforts and the FBI's counterintelligence activities. JA 118-19, 142. Disclosure of that information could jeopardize foreign relations and therefore national security. JA 120-22. Therefore, the FBI properly classified this material pursuant to Executive Order 13,526. *See Houghton* v. *NSA*, 378 Fed. Appx. 235, 238

(3d Cir. 2010) (information on "intelligence targeting, priorities, and capabilities * * * falls within the category of classified information found in Section 1.4(c)").

2009 EC: The EC documents the analyses and work product of the FBI agents and analysts involved in the intelligence activities that gathered the information on various threats. JA 117, 908. It contains information that is the basis for the 2009 Baseline Assessment. JA 117, 908. Consequently, it too contains information that pertains to the FBI's intelligence activities and methods in Newark's area of operations, and its disclosure would cripple the FBI's efforts to stay ahead of perpetrators that threaten national security. JA 116-19, 908-10. Like the assessment, the 2009 EC also contains sensitive intelligence information about foreign relations, as it discusses foreign threats, including a foreign country's intelligence-gathering efforts, and the FBI's counterintelligence activities, and its disclosure could jeopardize those relations and therefore national security. JA 116-22, 142-43. Thus, such information in these documents was properly withheld as classified information pursuant to Executive Order 13,526. *See Houghton*, 378 Fed. Appx. at 238.

In sum, the Hardy declaration describes in detail the information withheld pursuant to Exemption 1 and explains why such information is properly classified under Executive Order 13,526. Affording that declaration "substantial weight," and in light of the fact that there is no evidence contradicting the declaration or establishing bad faith, the district court properly upheld the FBI's invocation of

Exemption 1 to withhold information contained in DINs # 1-8, the 2009 Baseline Assessment, and the 2009 EC. JA 16-17.

Indeed, on appeal, plaintiff does not challenge the withholding of any of the information discussed above pursuant to Exemption 1. *See* Br. at 31 ("Plaintiff does not dispute that Defendants may withhold properly classified portions of certain contested documents under Exemption 1."); Br. at 33 ("Plaintiff does not seek foreign relations information or intelligence sources or methods that are properly withheld under Exemption 1."). Rather, plaintiff's sole argument is that, to the extent defendants have relied on Exemption 1 to withhold public source information, such withholding is improper. *See* Br. at 32 ("Plaintiff seeks *only* public source information contained in the documents"); *id.* (arguing that disclosure of publicly-available racial and ethnic information cannot "plausibly cause national security harm").

The record, however, fully supports defendants' withholdings under Exemption 1. As the Hardy declaration explains, Hardy exercised his original classification authority to classify information in these documents because, in his judgment, "the disclosure of this information could reasonably be expected to cause serious damage to the national security, and its withholding outweighed the benefit of disclosure." JA 112. Hardy explains his calculus in determining how much information required classification: he evaluated each piece of information to consider the impact of its disclosure on other sensitive intelligence information, as

well as "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" he examined. JA 111. He also considered "the context in which the classified information is found," to include "the surrounding unclassified information," as well as "other information already in the public domain." JA 112. In addition, Hardy explains that because these documents "concern investigatory focuses of which the mere acknowledgment of intelligence gathering and investigative activity would cause [] serious damage to the National Security," any information in those documents, to include publicly-available information cited or relied upon, that would reveal the focus of the investigatory activities described in these documents was withheld. JA 167-68.

Moreover, as plaintiff's FOIA request makes clear, plaintiff does not seek public records that merely happen to reside in FBI files. Plaintiff seeks disclosure of public source material that is being used or relied upon by the FBI in conjunction with its law enforcement efforts. But Exemption 1 broadly protects intelligence activities, sources, and methods. If release of the fact that the FBI may use certain publicly-available information as part of its intelligence-gathering activities may cause harm to national security, such information is properly withheld. *See ACLU* v. *U.S. Dep't of Defense*, 628 F.3d 612, 625 (D.C. Cir. 2011).

C. Defendants Properly Withheld Information Revealing Sensitive Law Enforcement Techniques Or Procedures Pursuant To Exemption 7(E).

Exemption 7(E) protects from disclosure "records or information compiled for law enforcement purposes" where release of such information "would disclose techniques and procedures for law enforcement investigations or prosecutions." 5 U.S.C. § 552(b)(7)(E). Here, the FBI has withheld significant portions of DINs # 1-8 and 10-11, the 2009 Baseline Assessment, the 2009 EC, and five maps, pursuant to Exemption 7(E). JA 157-59, 164-65.[10] Because the FBI invoked Exemption 7(E) only for portions of these documents (which were withheld in full pursuant to Exemption 7(A)), this Court need not address the 7(E) withholdings unless the Court holds that Exemption 7(A) does not justify the withholding of the particular document at issue.

In invoking Exemption 7(E), the Hardy declaration explains that these documents are the "work product" of investigation, intelligence-gathering, and analysis to allow Newark to "better understand its own domain." JA 164. These reports and maps are utilized by the FBI to compile and convey information on particular threats in the New Jersey area, track those threats, and understand the

[10] Defendants also invoked Exemption 7(E) to partially withhold DIN # 9 and DIOG materials, but plaintiff does not challenge those withholdings on appeal. *See* Br. at 37 & n.21; *id.* at 11 n. 8.

vulnerabilities of the United States. JA 164-65. Public disclosure would allow potential perpetrators to take advantage of identified vulnerabilities and adjust their behavior to avoid detection. *Id.*

Specifically, the Hardy declaration explains that the information was withheld because it would reveal the following techniques or procedures:

Surveillance, Monitoring, and Mapping Information/Tools: Information of this nature is found in the intelligence notes, the 2009 Baseline Assessment, the 2009 EC, and the maps. This material identifies the types of devices, methods, and/or tools used in surveillance, monitoring, and mapping, as part of the FBI's investigations. JA 159-60. Some of these techniques are unknown to the public, while others may be known as a general matter, but without the context of the specific investigation or circumstances in which they are, or can be, used. Discussion of the generally known techniques and tools should nonetheless be protected from release because the information includes details that are unknown, such as the techniques' limitations, their planned expansion in future operations, the specifics of their capabilities, or the manner in which the FBI uses this information in its investigations, and release would diminish their utility. *Id.*; *see also Davin* v. *United States Dep't of Justice*, 60 F.3d 1043, 1064 (3d Cir. 1995) (Exemption 7(E) does not protect routine techniques and procedures already well-known to the public); *Coleman* v. *FBI*, 13 F. Supp. 2d 75, 83 (D.D.C. 1998) (information covered by 7(E) despite the fact

that "the techniques themselves have already been identified by the FBI," because "the documents in question involve the manner and circumstances of the various techniques that are not generally known to the public"). Furthermore, release of information of this type would be extremely detrimental to the FBI's efforts to gather intelligence necessary to prevent crimes and terrorist activity, as it would educate the criminals on the FBI's devices, methods, and tools. JA 159-60. Criminals could then devise countermeasures to avoid detection. *Id.*

Collection and/or Analysis of Information: These documents also reveal numerous methods that the FBI uses to collect and analyze information that it obtains for investigative purposes. JA 160-61. Although the public is aware that the FBI collects certain types of information, the manner in which the FBI applies and analyzes this information for use in investigations and for intelligence purposes is not publicly known. JA 161. Disclosing the precise methods used for collection and/or analysis would enable subjects of FBI investigations to circumvent those techniques, which would diminish their utility to the FBI. JA 161.

Highly Sensitive Research Analysis Work/End Product: Because the FBI is an intelligence agency as well as a law enforcement agency, its functions include broad-based intelligence collection and analysis. JA 163. Although these documents "were created for Newark to better understand its own domain," the information used in the documents can be used more broadly for intelligence purposes, to include intelligence

analysis and planning, and dissemination to other intelligence or law enforcement entities. JA 164. The "very detailed and highly sensitive analytical product" contained in these documents was therefore withheld to prevent not only criminals in the Newark domain from circumventing the law by understanding the known intelligence about them, but also to prevent them from evading detection elsewhere, where that same intelligence may be used. JA 164-65.

Vulnerabilities, Ranking Threats, Intelligence Gaps, Conclusory Outlooks, Emerging Threats, Priorities: The FBI is authorized to develop overviews and analyses of threats to the United States, to include domestic and international criminal threats and threats to national security. JA 165. These overviews and analyses may include "present, emergent, and potential threats, vulnerabilities, their contexts and causes, and identification and analysis of means of responding to them." JA 165. Portions of each of these documents were withheld pursuant to Exemption 7(E) because they discuss these items, the release of which would allow hostile entities to adjust their behavior to avoid detection and render useless the FBI's current intelligence capabilities. JA 165.

The district court, therefore, properly upheld the Government's withholdings under FOIA Exemption 7(E), based on the Hardy declaration's descriptions of the harms to law enforcement techniques and procedures that would result from disclosure. JA 21-22.

Plaintiff contends (Br. at 37-38) that the district court had no factual basis to affirm the withholding of these documents pursuant to Exemption 7(E) because the Government's declarations do not address the rationale for withholding these specific documents. Given the discussion above, based on the Hardy declaration, plaintiff's argument is baseless.

In any event, plaintiff challenges only the withholding pursuant to Exemption 7(E) of public source material, asserting that "the FBI's use of such information in Domain Management activities is well known." *See* Br. at 38. As the Hardy declaration explains, however, even if some of the techniques or procedures used by the FBI are publicly known, these documents reveal more specifics about those techniques or procedures and discuss them in specific contexts. JA 159-60. Releasing that more specific information would reveal information that is not publicly known. *Id.* For example, although the public may know that the FBI may use census data, the public is not aware of precisely how such public source data may be used by the FBI either generally, in its intelligence gathering or analysis functions, or in a specific investigation.

D. Defendants Produced All Reasonably Segregable Information.

Plaintiff's contention that the agency did not release segregable information is without merit. As defendants explain in the Hardy declaration, "[a]ll documents have been thoroughly reviewed to achieve maximum disclosure consistent with the access

provisions of FOIA[,]" and "[e]very effort was made to provide plaintiff with all reasonably segregable portions of releasable material." JA 109; *see also Juarez* v. *U.S. Dep't of Justice*, 518 F.3d 54, 61 (D.C. Cir. 2008) (court "may rely on government affidavits that show with reasonable specificity why documents withheld * * * cannot be further segregated") (citation omitted). The agency conducted a segregability analysis for each page of every document. JA 167. As the *Vaughn* index demonstrates, however, much of the information deemed responsive to plaintiff's request is highly sensitive law enforcement and intelligence information that is covered by more than one FOIA exemption. JA 618-33. Moreover, as the district court recognized, the Hardy declaration "provides detailed explanations of the varying types of information withheld from each document in question, and explains why that particular type of information would not be subject to disclosure, or is not reasonably segregable from otherwise exemption information." JA 24. Overall, the FBI made a good faith effort to achieve maximum disclosure, and defendants' actions should be upheld. *See Juarez*, 518 F.3d at 185 (upholding DEA's withholding of documents, in full, based on affidavit stating "that it had conducted a page-by-page review of all investigative records contained in the requested documents, and determined that each document, and each page of each document, contained information subject to law enforcement withholding exemptions.").

Despite the Hardy Declaration's explanation regarding segregability, plaintiff nevertheless contends that defendants failed to meet their burden to segregate and disclose all non-exempt, publicly-available racial and ethnic information about New Jersey communities. At bottom, however, plaintiff's segregability argument is simply a reiteration of its argument that the defendants have improperly withheld public-source information that is not exempt. That argument should be rejected for all of the reasons explained above.

II. THIS COURT SHOULD REJECT PLAINTIFF'S REQUEST TO CREATE A NEW PROCEDURE GOVERNING FOIA EXCLUSIONS.

In the district court, plaintiff suggested that the FBI may have excluded information under 5 U.S.C. § 552(c), and requested that the court order the FBI to submit an *ex parte*, *in camera* declaration. JA 669-73. In response, the FBI did as plaintiff requested, submitting an *in camera*, *ex parte* affidavit. Plaintiff now contends that the district court erred in accepting the affidavit. Br. at 43.[11] Plaintiff proposes that this Court adopt a novel procedure for adjudicating disputes over potential uses of exclusions. Such a procedure is contrary to the FOIA statute and would require

[11] Only it its reply brief in support of its cross-motion for summary judgment did plaintiff ask the district court to handle the possible exclusion issue differently. See JA 1013 (proposing that the district court adopt a new procedure "akin to the Glomar response"). The district court ordinarily will not accept arguments raised for the first time in a reply brief. *See, e.g., Mudey* v. *United States*, 2011 WL 2936781, at *1 (D.N.J. 2011).

this Court to delve into hypothetical questions. This Court, therefore, should reject plaintiff's proposed approach.

In 1986, Congress determined that three categories of especially sensitive law enforcement records – certain records concerning (1) ongoing criminal investigations where the subject of the investigation is not aware of its pendency, (2) confidential informants whose status has not been officially confirmed, and (3) FBI records pertaining to foreign intelligence, counterintelligence, or international terrorism, the existence of which is classified – were not sufficiently protected by the nine enumerated exemptions and amended FOIA to *exclude* those three categories of records from FOIA's coverage. Congress specifically authorized an agency to "treat the records as not subject to the requirements" of FOIA. 5 U.S.C. § 552(c)(1), (c)(2), (c)(3). Where such law enforcement records are thus treated as "not subject to" FOIA because of an exclusion, there is no obligation to disclose such records or the "existence" of such records to a FOIA requester. 5 U.S.C. § 552(c); *see also* 5 U.S.C. § 552(f)(1) (defining "record" for purposes of FOIA as "any information that would be an agency record subject to the requirements of [FOIA]").

Section 552(c) thus differs from 552(b) as it allows the government to "exclude" certain highly sensitive information from the scope of the FOIA, not simply "exempt" information from production. *Steinberg* v. *U.S. Dep't of Justice*, No. 93-2409, 1997 WL 349997, at *1 (D.D.C. June 18, 1997). "An 'exclusion' is different

from an exemption in that the Government need not even acknowledge the existence of excluded information. Rather, the Government is permitted to file an *in camera* declaration, which explains either that no exclusion was invoked or that the exclusion was invoked appropriately." *Id.*

That conclusion is compelled not only by the statutory language, but also by the statute's legislative history, which shows that Congress created the 1986 exclusions to offer greater protection to certain classes of law enforcement records than provided by the FOIA exemptions. *See, e.g.,* 132 Cong. Rec. 26763, 26770 (1986) ("the withholding of information on the basis of one of the enumerated exemptions can often be ineffective in avoiding the anticipated harms that would accompany disclosure because invoking the exemption itself becomes a piece of the mosaic") (Sen. Hatch); 132 Cong. Rec. 27142, 27142 (1986) ("in some cases the response to a FOIA request amounts to an acknowledgment by the FBI that a file exists on a specific subject and alerts hostile intelligence services that an investigation is underway or has taken place") (Sen. Denton).

The Attorney General's memorandum explaining the 1986 FOIA amendments that created the exclusions reflects this purpose and effect; it explains that, if records are covered by a statutory exclusion, "the records will be treated, as far as the FOIA requester is concerned, as if they did not exist." Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act, at 22 ("Attorney General

Memo"), *available at* www.justice.gov/oip/86agmemo.htm#exclusions. The Attorney General also explained that, "in order to maintain the effectiveness of the exclusion mechanism, agencies of course must, wherever the question arises, refuse to confirm or deny that an exclusion was employed in any particular case; to do otherwise could allow requesters, by process of elimination, to determine those cases in which records are excluded, thereby defeating the exclusion's very purpose." *Id.* at 27.

Accordingly, the Attorney General stated, "it shall be the government's standard litigation policy * * * that wherever a FOIA plaintiff raises a distinct claim regarding the suspected use of an exclusion, the government routinely will submit an *in camera* declaration addressing that claim, one way or the other." *Id.* at 30. In such event, the Government attorney "will of course urge the court to issue a public decision which does not indicate whether it is or is not an actual exclusion situation." *Id.* If a court is satisfied with the government's submission, a public decision may not confirm or deny that an exclusion was actually invoked, but may state only that "a full review of the claim was undertaken and that, if an exclusion in fact was employed, it was, and continues to remain, amply justified." *Id.*; *Beauman* v. *FBI*, Civ. No. 92-7603 (C.D. Cal. Apr. 28, 1993). The Attorney General's interpretation is entitled to deference. *See Barnhart* v. *Walton*, 535 U.S. 212, 221-22 (2002). Courts have regularly relied upon similar Attorney General memoranda in interpreting other provisions of

the FOIA. *See, e.g., NARA* v. *Favish*, 541 U.S. 157, 169 (2004) (relying upon Attorney General's memoranda in interpreting Exemption 7(C)).

Moreover, that is exactly the procedure that was followed in this case. In response to plaintiff's suggestion that defendants might have invoked an exclusion, defendants filed an *in camera*, *ex parte* declaration. That declaration explained whether or not defendants were relying on an exclusion to withhold documents. The district court reviewed that declaration and, "without confirming or denying the existence of any exclusion," "conclude[d] that if an exclusion was invoked, it was and remains amply justified." JA 14. Plaintiff's proposed procedure was unnecessary, therefore, because the court could, and did, review defendants' *in camera*, *ex parte* filing.

Courts have routinely recognized that it is appropriate to review *ex parte*, *in camera* submissions from the Government to determine whether the Government has complied with FOIA's disclosure requirements where "the government's public description" would otherwise "reveal the very information that the government" seeks to protect from disclosure. *See Lion Raisins Inc.* v. *USDA*, 354 F.3d 1072, 1083 (9th Cir. 2004) (internal quotation marks omitted). Indeed, FOIA explicitly contemplates that courts may review documents *in camera*. *See* 5 U.S.C. § 552(a)(4)(B); *see also Islamic Shura Council* v. *FBI*, 635 F.3d 1160, 1169 (9th Cir. 2011) (*in camera* proceedings are "a necessary consequence of a procedure designed to protect secret information from being improperly disclosed").

In addition, under plaintiff's proposal, defendants would have to respond affirmatively to the question of whether they interpret the FOIA request to seek records that, if in existence, would fall under one or more of the exclusions. If defendants did not always state than an exclusion could be at play, then their actions would imply when an exclusion was at play and when it was not. Thus, plaintiff's "hypothetical" question would be briefed in every case in which a plaintiff alleges that defendants have invoked an exclusion. And, in their briefs, defendants could do nothing more than parrot the language of the exclusion provision, lest they reveal either the information they seek to exclude or the fact that no such information exists. An *in camera* submission, however, adequately allows the court to determine the correctness of any reliance on the exclusion provisions in a concrete, rather than hypothetical, context.

Plaintiff argues (Br. at 51-55) that the existing procedure for litigating exclusions is deficient because there is no meaningful judicial review or appellate review, and both the public's and the litigants' interests are not properly protected. Those claims lack merit. Just as the district court did here, courts can conduct meaningful judicial review in exclusion cases by reviewing plaintiff's exclusion claim and defendant's *in camera*, *ex parte* briefing. *See Meridian International Logistics, Inc.* v. *United States*, 939 F.2d 740, 745 (9th Cir. 1991) ("We find that the procedure [declarations sealed and subject to *ex parte* and *in camera* review] used by the court in

the instant case was proper; it adequately balanced * * * [t]he Government's interest in having FBI documents, which relate to an ongoing investigation, remain confidential * * * and although [plaintiff] did not have the opportunity to conduct discovery and cross-examine the Government's witnesses, its interests as a litigant are satisfied by the ex parte/in camera decision of an impartial district judge."); *Pollard* v. *FBI*, 705 F.2d 1151, 1153-54 (9th Cir. 1983) ('the practice of *in camera*, *ex parte* review remains appropriate in certain FOIA cases" even though "[*i*]*n camera* proceedings * * * are usually non-adversarial"); *Campbell* v. *Department of Health and Human Services*, 682 F.2d 256, 258-59 & n.8, 265 (D.C. Cir. 1982) (approving *ex parte/in camera* review of unclassified affidavits in FOIA action to protect ongoing agency investigation and "subsequent enforcement proceedings").

In any event, it is well-established that national security interests permit *ex parte* submissions, even if such a procedure precludes plaintiff's participation. *See Jifry* v. *FAA*, 370 F.3d 1174, 1184 (D.C. Cir, 2004) (rejecting plaintiffs' due process argument that, without access to the "specific evidence" upon which the Government relied, "they are unable to defend against the charge that they are security risks"); *Solar Sources, Inc.* v. *United States*, 142 F.3d 1033, 1040 (7th Cir. 1998) ("[W]e have not required disclosure of documents properly withheld under the FOIA in order to ensure the proper functioning of the adversary process."); *Vaughn* v. *Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973) (recognizing that i*n camera* proceedings are "necessarily

conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure," but may nevertheless be "necessary," "particularly in national security cases"); *Heine* v. *Raus*, 399 F.2d 785, 791 (4th Cir. 1968) ("Disclosures *in camera* are inconsistent with normal rights of a plaintiff of inquiry and cross-examination, of course, but if the two interests cannot be reconciled, the interest of the individual litigant must give way to the government's privilege against disclosure of its secrets of state.").

Nor is appellate review impaired by such procedures because the appellate court may review the same materials as the district court, including the *in camera*, *ex parte* declaration, to determine whether an exclusion was properly invoked. It is of no matter in such circumstances that there is not a public district court opinion discussing whether the exclusion, if invoked, was proper.

For all of these reasons, the district court properly rejected plaintiff's proposed procedure and reviewed defendants' *ex parte*, *in camera* declaration to hold that defendants, if they invoked an exclusion, fully complied with the FOIA. This Court can simply affirm on that basis. In the alternative, this Court may also review the Government's *ex parte*, *in camera* declaration.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,015 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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CERTIFICATE OF BAR MEMBERSHIP,
E-BRIEF COMPLIANCE, AND VIRUS CHECK

Counsel for the appellees are federal government attorneys and are not required to be members of the Bar of this Court.

The text of the hard copy of this brief and the text of the brief in electronic PDF format are identical.

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2013, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by causing an electronic copy to be filed using the appellate CM/ECF system and by causing ten paper copies to be delivered to the Court via Federal Express. Service will automatically be made on the following individuals via the CM/ECF system:

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