

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CIVIL LIBERTIES UNION and	)	)
AMERICAN CIVIL LIBERTIES UNION	)	)
FOUNDATION,	)	)
	)	)
Plaintiffs,	)	)
	)	)
v.	)	No. 13 Civ. 9198 (AT)
	)	)
NATIONAL SECURITY AGENCY,	)	)
CENTRAL INTELLIGENCE AGENCY,	)	)
DEPARTMENT OF DEFENSE,	)	)
DEPARTMENT OF JUSTICE, and	)	)
DEPARTMENT OF STATE,	)	)
	)	)
Defendants.	)	)
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**THIRD DECLARATION OF DAVID M. HARDY**

I, David M. Hardy, declare as follows:

(1) I am the Section Chief of the Record/Information Dissemination Section (“RIDS”), Records Management Division (“RMD”), of the Federal Bureau of Investigation (“FBI”) in Winchester, Virginia. My previous declarations in this matter explains my employment history and responsibilities at the Federal Bureau of Investigation. *See* ECF Nos. 63 and 78, respectively, the Declaration of David M. Hardy dated February 26, 2016 (“First Hardy Declaration”) and Supplemental Declaration of David M. Hardy dated June 8, 2016 (“Second Hardy Declaration”). This declaration supplements, and hereby incorporates by reference, the information previously provided in my first and second declarations, and is submitted in light of the Court’s March 27, 2017 Memorandum Opinion and Order, in support of the FBI’s second Motion for Partial Summary Judgment and to address issues raised by the Plaintiffs in its July 1,

2016 “Reply Memorandum of law in Support of Plaintiffs’ Cross-Motion for Partial Summary Judgment,” and in the Court’s Memorandum Opinion and Order.

(2) In its July 1, 2016, Reply and Cross Motion, the Plaintiffs’ claimed that the FBI failed to conduct a proper search for responsive records; failed to provide any of the terms or combinations of terms it used to search its records; and improperly limited its search to only five offices. The Memorandum Opinion and Order directed the FBI to detail its search with greater specificity, and if unable to do so, to conduct and properly document additional searches. In addition, the FBI is to confirm that no other record system is likely to contain responsive documents, clarify the scope of the search conducted in the Office of the General Counsel, and address whether the Intelligence Branch is likely to produce responsive documents.

(3) The FBI is taking the necessary steps to comply with the directions of this Court, but will not complete this work by the June 12, 2017.

(4) Due to personnel turnover and insufficient records of its prior search efforts, the FBI was unable to re-create its prior searches to provide the level of detail that the Memorandum Opinion and Order directed be provided. Accordingly, the FBI determined that it should re-conduct its search to ensure that it had met its search obligations, and done so in a manner that it could properly document. Toward that end, FBI through counsel reached agreement with ACLU about an agreed-upon set of search terms and locations to be searched. Using these selected terms and locations, the FBI re-conducted its search for records responsive to the May 9, 2014 Stipulation and Order Regarding Document Searches (“Stipulation”). That search entailed numerous FBI components and employees conducting electronic searches, which generated significant amounts of non-responsive documents that need to be reviewed for responsiveness so that FBI can identify any records it has that are responsive to Plaintiffs’ FOIA requests. If FBI

possesses such documents, it will then process them to determine what if any portions can be released to Plaintiffs. Following the completion of this search and related activities, the FBI will inform Plaintiffs and the Court of the results of its search, and will provide information explaining why the search covered all FBI record systems that are likely to contain responsive records, and explaining the scope of its supplemental searches, which it is conducting in FBI's Office of the General Counsel and its Intelligence Branch.

**FBI'S ADDITIONAL SEARCH FOR RESPONSIVE RECORDS**

(5) RIDS conducted additional targeted searches of specific FBI Headquarters Divisions/Units likely to possess responsive records relating to the below categories of documents as set forth in the parties May 9, 2014, "Stipulation and Order Regarding Document Searches" (referred to herein as "Stipulation"):

- (a) Any formal regulations or policies relating to that Agency's authority under EO 12,333 to undertake "Electronic Surveillance" (as that term is defined in EO 12,333) that implicates "United States Persons" (as that term is defined in EO 12,333), including regulations or policies relating to that Agency's acquisition, retention, dissemination, or use of information or communications to, from, or about United States Persons under such authority.
- (b) Any document that officially authorizes or modifies under EO 12,333 that Agency's use of specific programs, techniques, or types of Electronic Surveillance that implicate United States Persons, or documents that adopt or modify official rules or procedures for the Agency's acquisition, retention, dissemination, or use of information or communications to, from, or about United States Persons under such authority generally or in the context of particular programs, techniques, or types of Electronic Surveillance.
- (c) Any formal legal opinions addressing that Agency's authority under EO 12,333 to undertake specific programs, techniques, or types of Electronic Surveillance that implicates United States Persons, including formal legal opinions relating to that Agency's acquisition, retention, dissemination, or use of information or communications to, from, or about United

States Persons under such authority generally or in the context of particular programs, techniques, or types of Electronic Surveillance.

- (d) Any formal training materials or reference materials (such as handbooks, presentations, or manuals) that expound on or explain how that Agency implements its authority under EO 12,333 to undertake Electronic Surveillance that implicates United States Persons, including its acquisition, retention, dissemination, or use of information or communications to, from, or about United States Persons under such authority.
- (e) Any formal reports relating to Electronic Surveillance under EO 12,333 implicating United States Persons, one of whose sections or subsections is devoted to (1) the Agency's compliance, in undertaking such surveillance, with EO 12,333, its implementing regulations, the Foreign Intelligence Surveillance Act, or the Fourth Amendment; or (2) the Agency's interception, acquisition, scanning, or collection of the communications of United States Persons, whether "incidental" or otherwise, in undertaking such surveillance; and that are or were:
  - i. Authored by the Agency's inspector general or the functional equivalent thereof;
  - ii. Submitted by the Agency to Congress, the Office of Director of National Intelligence, the Attorney General, or the Deputy Attorney General; or
  - iii. Maintained by the office of the Agency's director or head.

(6) On May 15, 2017, RIDS prepared and circulated an Electronic Communication to the FBI's Internal Policy Office, Counterintelligence Division, Counterterrorism Division, its Office of the General Counsel Discovery Processing Units, Training Division and the Directorate of Intelligence requesting each office conduct a search of database systems, shared drives, stand-alone CPU's/storage drives, paper records and manual files, for records responsive to the Stipulation. In addition, RIDS recommended that each recipient division/unit send to each of its employees an e-mail seeking all relevant records pertaining to this request. The EC provided a

base set of search terms and a list of examples of “any agency” records. Each recipient was advised that variations of the search terms may be used, as well as, any other terms known by the recipient given his/her area of expertise in the requested subject matter. The base search terms and examples of “any agency” records identified in the Search EC are as follows:

Search Terms:

12333<sup>1</sup> and electronic surveillance  
12333 and ELSUR  
12333 and ELSUR and USPER  
12333 and Electronic surveillance and USPER  
12333 and domestic surveillance  
12333 and acquire and electronic surveillance and United States Person  
12333 and collect and electronic surveillance and United States Person  
12333 and intercept and electronic surveillance and United States Person

Examples of “any agency” records include:

- All records or communications preserved in electronic or written form, including, but not limited to, correspondence, documents, data, faxes, files, guidance, evaluations, instructions, analysis, memoranda, agreements, notes, rules, technical manuals, technical specifications, training manuals or studies;
- Electronic records maintained on computers or audio or video tapes;
- E-mails;
- Any other portable media (CD-ROMS, diskettes, etc.); and
- Other stand-alone databases created for the purpose of any particular investigation.

(7) Each Division/Unit was advised that when responding to the Search EC, to include in its response a list of each term/terms searched and a brief description of the locations searched in an effort to locate records responsive to the Stipulation and subject to the FOIA.

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<sup>1</sup> Searches for “12333” will also capture documents containing “12,333” with a comma.

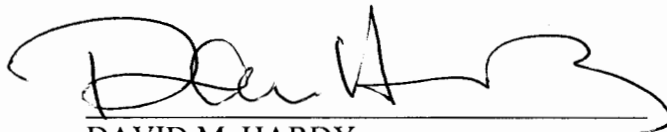
(8) The search cut-off date for records responsive to Plaintiffs' request is June 6, 2013, the date on which the FBI conducted its initial search for potentially responsive material.

**CONCLUSION**

(9) The FBI understands that Plaintiffs would like FBI's supplemental search and any associated processing to be completed as soon as possible, and FBI is doing its utmost to honor that request. The FBI intends to complete its search for records responsive to the Stipulation and subject to the FOIA on June 30, 2017 and file a further supplemental Hardy declaration on or before Friday, July 7, 2017.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14<sup>th</sup> day of June, 2017.



DAVID M. HARDY  
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Records Management Division  
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