

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

AMERICAN CIVIL LIBERTIES)	
UNION OF NEW JERSEY,)	
Plaintiff,	)	Judge Esther Salas
)	
v.	)	Magistrate Judge Cathy L.
	)	Waldor
)	
FEDERAL BUREAU OF	)	Civil No. 11-cv-02553
INVESTIGATION, UNITED STATES)	
DEPARTMENT OF JUSTICE,	)	MOTION DAY: March 19, 2012
)	
Defendants.)	
)	

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

TABLE OF CONTENTS

INTRODUCTION. 1

BACKGROUND. 2

ARGUMENT. 5

I. Statutory Background and Standard of Review. 5

II. Defendant FBI is Not a Proper Party to This Action.. . . . 7

III. Defendants Conducted an Adequate Search, Reasonably
Calculated to Uncover All Responsive Documents.. . . . 8

IV. Defendants' Withholdings are Proper Under the FOIA's
Exemptions.. . . . 11

 A. Defendants Properly Withheld Classified Material
 Under FOIA Exemption 1. 13

 B. Defendants Properly Withheld Material Under FOIA
 Exemption 7.. . . . 19

 1. Exemption 7(A).. . . . 21

 2. Exemption 7(C) and Exemption 6.. . . . 24

 3. Exemption 7(D).. . . . 30

 4. Exemption 7(E).. . . . 33

 C. Defendants Produced All Reasonably Segregable
 Information.. . . . 38

CONCLUSION. 40

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE (S)</u>
<u>Abdelfattah v. U.S. Dep't of Homeland Sec.,</u> 488 F.3d 178 (3d Cir. 2007)	9, 11, 19
<u>Adionser v. U.S. Dep't of Justice,</u> --- F.Supp.2d ----, 2011 WL 4346399(D.D.C. 2011).. . . .	8
<u>Allard K. Lowenstein Intern. Human Rights Project v.</u> <u>U.S. Dep't of Homeland Sec.,</u> 626 F.3d 678 (2d Cir. 2010).	33
<u>ACLU v. U.S. Dep't of Def.,</u> 628 F.3d 612 (D.C. Cir. 2011).	11, 13, 16
<u>Am. Friends Serv. Comm. v. U.S. Dep't of Def. through Def.</u> <u>Logistics Agency,</u> 831 F.2d 441 (3d Cir. 1987).	11, 13, 18, 19
<u>Arizechi v. I.R.S.,</u> 2008 WL 539058(D.N.J. Feb. 25, 2008).. . . .	23
<u>Atkins v. U.S. Dep't of Justice,</u> 946 F.2d 1563 (D.C. Cir. 1991).. . . .	5
<u>Baez v. FBI,</u> 443 F. Supp. 2d 717 (E.D. Pa. 2006).	26-27
<u>Baldrige v. Shapiro,</u> 455 U.S. 345 (1982).	6
<u>Berger v. I.R.S.,</u> 487 F. Supp. 2d 482 (D.N.J. 2007).	6
<u>Blanton v. FBI,</u> 63 F. Supp. 2d 35, 49-50 (D.D.C. 1999).. . . .	37
<u>Campbell v. U.S. Dep't of Justice,</u> 164 F.3d 20 (D.C. Cir.1998).	19
<u>Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice,</u> 331 F.3d 918 (D.C. Cir. 2003).	21
<u>Coleman v. FBI,</u> 13 F. Supp. 2d 75 (D.D.C. 1998).	35, 37
<u>Davin v. U.S. Dep't of Justice,</u> 60 F.3d 1043 (3d Cir. 1995).	19, 31, 35

FBI v. Abramson,
456 U.S. 615 (1982) 6

Fisher v. U.S. Dep't of Justice,
772 F. Supp. 7 (D.D.C. 1991) 34

Fitzgibbon v. CIA,
911 F.2d 755 (D.C. Cir. 1990) 28

Houghton v. NSA,
378 Fed. Appx. 235 (3d Cir. 2010) 18

I.B.E.W. Local Union No. 5 v. Dep't of Housing & Urban Dev.,
852 F.2d 87 (3d Cir. 1988) 25

John Doe Agency v. John Doe Corp.,
493 U.S. 146 (1989) 6, 20

Juarez v. U.S. Dep't of Justice,
518 F.3d 54 (D.C. Cir. 2008) 38-39

Krikorian v. U.S. Dep't of State,
984 F.2d 461 (D.C. Cir. 1993) 12

Landano v. U.S. Dep't of Justice,
956 F.2d 422 (3d Cir. 1992) 28-29, 30

Leadership Conf. on Civil Rights v. Gonzales,
404 F. Supp. 2d 246 (D.D.C. 2005) 6

Lee v. U.S. Dep't of Justice,
235 F.R.D. 274 (W.D. Pa. 2006) 6

Manna v. U.S. Dep't of Justice,
815 F. Supp. 789 (D.N.J. 1993) 22

Manna v. U.S. Dep't of Justice,
832 F. Supp. 866 (D.N.J. 1993) 7

Manna v. U.S. Dep't of Justice,
51 F.3d 1158 (3d Cir. 1995) passim

Marshall v. FBI,
--- F.Supp.2d ---, 2011 WL 3497801 (D.D.C. 2011) 8, 9

Mays v. DEA,
234 F.3d 1324 (D.C. Cir. 2000) 32

McDonnell v. United States,
4 F.3d 1227 (3d Cir. 1993) passim

Milner v. Department of the Navy,
 131 S.Ct. 1259 (2011) 12, 20

Nat'l Archives and Records Admin. v. Favish,
 541 U.S. 157 (2004) 24-25

NLRB v. Robbins Tire & Rubber Co.,
 437 U.S. 214 (1978) 22

Oglesby v. U.S. Dep't of Army,
 920 F.2d 57, 68 (D.C. Cir. 1990) 9

Pipko v. CIA.,
 312 F. Supp.2d 669 (D.N.J. 2004) 12

Pray v. FBI,
 No. 95-380, 1995 WL 764149 (S.D.N.Y. Dec. 28, 1995) 8

Smith v. Bureau of Alcohol, Tobacco & Firearms,
 977 F. Supp. 496 (D.D.C. 1997) 34

U.S. Dep't of Defense v. FLRA,
 510 U.S. 487 (1994) 25

U.S. Dep't of Justice v. Landano,
 508 U.S. 165 (1993) 28-29, 31

U.S. Dep't of Justice v. Reporters Comm. for Freedom
 of the Press,
 489 U.S. 749 (1989) passim

U.S. Dep't of State v. Washington Post Co.,
 456 U.S. 595 (1982) 25

Vaughn v. Rosen,
 484 F.2d 820 (D.C. Cir. 1973) 6-7

Vazquez v. U.S. Dep't of Justice,
 764 F. Supp. 2d 117 (D.D.C. 2011) 8

Voinche v. FBI,
 999 F.2d 962 (5th Cir. 1993) 5

Weisberg v. U.S. Dep't of Justice,
 745 F.2d 1476 (D.C. Cir. 1984) 9

Wolf v. CIA,
 473 F.3d 370 (D.C. Cir. 2007) 11

OTHER

5 U.S.C. § 552 (a) 6, 7

5 U.S.C. § 552 (b) passim

28 C.F.R. § 16.1 7

Exec. Order No. 13,526,
75 Fed. Reg. 707 (Dec. 29, 2009) passim

H.R. Rep. 89-1497, 89th Cong., 2d Sess., 6 (1966) 6

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

AMERICAN CIVIL LIBERTIES)	
UNION OF NEW JERSEY,)	
	)	Judge Esther Salas
Plaintiff,)	
	)	Magistrate Judge Cathy L.
v.	)	Waldor
)	
FEDERAL BUREAU OF	)	Civil No. 11-cv-02553
INVESTIGATION, UNITED STATES)	
DEPARTMENT OF JUSTICE,	)	MOTION DAY: March 19, 2012
)	
Defendants.)	
)	

INTRODUCTION

This action arises out of a Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 552, et seq., request that Plaintiff, the American Civil Liberties Union ("ACLU") of New Jersey, submitted to the Federal Bureau of Investigation ("FBI"), a component of the United States Department of Justice ("DOJ"). Plaintiff's request seeks documents that pertain to the FBI's "implementation of its authority under the Domestic Intelligence Operations Guide [("DIOG")] to use race and ethnicity to map local communities" and "conduct assessments and investigations" in New Jersey. Compl. ¶¶ 1, 2.

As demonstrated below and in the attached Declaration of David M. Hardy, Section Chief of the Record / Information Dissemination Section, Records Management Division of the FBI, the FBI conducted a thorough search to identify documents

responsive to Plaintiff's request. See Decl. of David M. Hardy ("Hardy Decl.") (attached as Ex. 1). The FBI released all reasonably segregable information that is subject to the FOIA and responsive to Plaintiff's request, withholding only documents or portions of documents that are covered by the statutory exemptions. Plaintiff now challenges these withholdings, asking the Court to order the release of sensitive national security and law enforcement information, including information regarding the FBI's intelligence and counterintelligence activities and its investigative techniques, methods, and procedures. Yet, release of this information would undermine the FBI's efforts to investigate violations of federal criminal and national security statutes and to protect the United States from domestic and foreign threats. Such was not the intent of Congress in enacting the FOIA. Consequently, Defendants move the Court to enter summary judgment in Defendant's favor pursuant to Federal Rule of Civil Procedure 56.

BACKGROUND

On July 27, 2010, Plaintiff submitted a FOIA request to the FBI for documents related to the FBI's "use of race and ethnicity to conduct assessments and investigations in local communities in New Jersey." See Hardy Decl. ¶ 5 & Ex. A. Identical copies of the request were sent to the FBI's Newark field office and five resident agencies: Hamilton, Northfield, Red Bank, Somerset, and Woodland Park. Id.; see also Compl. ¶ 20. On August 6, 2010,

the FBI acknowledged receipt of Plaintiff's request sent to the Newark field office and Somerset resident agency and assigned a tracking number to the request. Hardy Decl. ¶ 6 & Ex. B; Compl. ¶ 28. On August 19, 2010, the FBI acknowledged receipt of the request sent to Hamilton, Northfield, and Red Bank. Hardy Decl. ¶ 6 & Ex. B; Compl. ¶ 29. By letter dated August 31, 2010, the legal office in Woodland Park indicated that it had received the request and was forwarding it to the Newark field office for its attention. Hardy Decl. ¶ 6 & Ex. B; Compl. ¶ 30.

In response to the request, the FBI conducted a search of its Central Records System for responsive documents and performed an individualized search inquiry by issuing Electronic Communications ("Ecs") to the Director's Office, the Directorate of Intelligence, the Office of the General Counsel, and to Newark's field office and resident agencies. Hardy Decl. ¶¶ 19-21. These steps identified 782 pages of records potentially responsive to Plaintiff's FOIA request. Id. ¶ 22.

On November 4, 2010, the FBI advised Plaintiff that it was "searching for, retrieving, scanning, and evaluating files that may be responsive to [the] request." Id. ¶ 7 & Ex. C; Compl. ¶ 31. Then, on December 22, 2010, the FBI released 298 of the 782 pages to Plaintiff and informed Plaintiff that some of the pages contained redactions of information withheld pursuant to exemptions established by 5 U.S.C. § 552(b). Hardy Decl. ¶ 8 & Ex. D; Compl. ¶ 32. The FBI also informed Plaintiff that

Plaintiff had "the right to appeal any denials in this release" and that Plaintiff's request for a fee waiver under FOIA "remains under consideration." Hardy Decl. Ex. D.

On February 16, 2011, Plaintiff appealed the FBI's alleged "Failure to Timely Respond, Failure to Make Promptly Available the Records Sought, Improper Withholding of Documents, and Failure to Grant Plaintiff['s] Request for a Waiver and for a Limitation of Processing Fees in Response to Request Number 1151935-000." Id. ¶ 9 & Ex. E; Compl. ¶ 35. By letter on February 22, 2011, the DOJ's Office of Information Policy acknowledged Plaintiff's appeal and assigned it tracking number AP-2011-01188. Hardy Decl. ¶ 10 & Ex. F. On March 2, 2011, the FBI informed Plaintiff that "[a]dditional material is currently being reviewed by an analyst." Id. ¶ 11 & Ex. G.

On June 20, 2011, the FBI released fourteen additional pages to Plaintiff and informed Plaintiff that some of the released pages contain redactions of information withheld pursuant to exemptions established by 5 U.S.C. § 552(b). Id. ¶ 12 & Ex. H. The FBI also informed Plaintiff that Plaintiff had "the right to appeal any denials in this release" and that Plaintiff's request for a fee waiver under FOIA "is granted," and "[n]o fee will be assessed against the materials released to [Plaintiff]."¹ Id.

¹ Accordingly, Plaintiff's claims regarding Defendants' alleged "failure to grant Plaintiff's request for a public interest fee waiver," and "failure to grant Plaintiff's request for a limitation of fees" in violation of the FOIA should be dismissed as moot. See Compl. ¶¶ 41, 42; see also Citizens for

Ex. H. Thus, of the 782 pages of potentially responsive records, 312 were released in full or in part, 283 were withheld in full pursuant to 5 U.S.C. § 552(b), and 187 were withheld as duplicates.² See id. ¶¶ 4, 8, 12.

On May 4, 2011, Plaintiff filed this lawsuit, challenging the FBI's actions in response to its FOIA request. See generally Compl. Defendants answered the Complaint on July 25, 2011. See Doc. # 9. Subsequently, the parties agreed that discovery was not appropriate and that the case should proceed to summary judgment - the process by which nearly all FOIA cases are resolved. See Doc. # 18. On October 11, 2011, it was so ordered. See Doc. # 19.

ARGUMENT

I. Statutory Background and Standard of Review

The FOIA represents a balance struck by Congress ``between the right of the public to know and the need of the Government to

Responsibility and Ethics in Washington v. U.S. Dep't of Educ., 593 F. Supp. 2d 261, 269 (D.D.C. 2009); Long v. U.S. Dep't of Justice, 450 F. Supp. 2d 42, 84-85 (D.D.C. 2006).

²Plaintiff's claims that Defendants failed to timely respond to the request and failed to make the requested records promptly available should also be dismissed, as once records have been produced, issues regarding FOIA's time limitations become moot. See Compl. ¶¶ 36, 38, 39; see also Voinche v. FBI, 999 F.2d 962, 963 (5th Cir. 1993) (challenge to the tardiness of the FBI's response rendered moot by the FBI's response to the request); Atkins v. U.S. Dep't of Justice, 946 F.2d 1563, *1 (D.C. Cir. 1991) (same). The primary question before the Court now is whether the agency has properly withheld agency records pursuant to FOIA's exemptions. See 5 U.S.C. § 552(a)(4)(B).

keep information in confidence.'" John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) (quoting H.R. Rep. 89-1497, 89th Cong., 2d Sess., 6 (1966)). While the FOIA generally requires agencies to search for and release documents responsive to a properly submitted request, the statute also recognizes "that public disclosure is not always in the public interest."

Baldrige v. Shapiro, 455 U.S. 345, 352 (1982). Accordingly, the Act provides nine statutory exemptions to its general disclosure obligation. See 5 U.S.C. §§ 552(a)(3), (b)(1)-(b)(9). Although the nine exemptions should be "narrowly construed," FBI v. Abramson, 456 U.S. 615, 630 (1982), the Supreme Court has made clear that courts must give them "meaningful reach and application," John Doe Agency, 493 U.S. at 152.

Typically, FOIA cases are resolved on motions for summary judgment. See Berger v. I.R.S., 487 F. Supp. 2d 482, 491 (D.N.J. 2007), aff'd, 288 Fed. Appx. 829, 2008 WL 3286782 (3d Cir. 2008). To prevail, an agency must show that it satisfied its obligations under the law: (1) that it conducted a reasonable search, and (2) that any material it withheld falls within a statutory exemption from disclosure. Lee v. U.S. Dep't of Justice, 235 F.R.D. 274, 287 (W.D. Pa. 2006); see also Leadership Conf. on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 252 (D.D.C. 2005). An agency makes these showings through submissions, often referred to as Vaughn indices or Vaughn declarations, see Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), and "a district court may award

summary judgment on the basis of agency affidavits alone where the affidavits are sufficiently detailed and are submitted in good faith[,]” Manna v. U.S. Dep’t of Justice, 832 F. Supp. 866, 80 (D.N.J. 1993), aff’d, 51 F.3d 1158 (3d Cir. 1995).

As discussed below, Defendants have satisfied both elements in this case. See infra sections III, IV. Because the FBI conducted an adequate search and released all records responsive under FOIA, except those that fall within the statutory exemptions, summary judgment should be awarded to Defendants.

II. Defendant FBI is Not a Proper Party to This Action

In filing its Complaint, Plaintiff named both the DOJ and its component, the FBI, as defendants. See Compl. ¶¶ 8, 9. The proper defendant in this case, however, is the DOJ, rather than the FBI. The FOIA grants district courts “jurisdiction to enjoin the agency from withholding agency records” and the statute defines “agency” as “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . , or any independent regulatory agency.” 5 U.S.C. §§ 552(a)(4)(B), (f)(1) (emphasis added). The FBI is a component of the DOJ and not an “agency” as defined by the FOIA, and DOJ’s FOIA regulations, which are followed by the FBI, underscore this fact. See 28 C.F.R. § 16.1 (“This subpart contains the rules that [DOJ] follows in processing requests for records under the [FOIA] . . . [and as] used in this subpart,

component means each separate bureau, office, board, division, commission, service, or administration of the [DOJ]."). Thus, DOJ is the only proper defendant in this case, and the FBI should be dismissed from this action. See Adionser v. U.S. Dep't of Justice, --- F. Supp. 2d ----, 2011 WL 4346399, *1, n.1 (D.D.C. 2011) (dismissing the FBI as a defendant); Marshall v. FBI, --- F. Supp. 2d ----, 2011 WL 3497801, *1, n.1 (D.D.C. 2011) (holding that DOJ, not the FBI, is the proper party defendant); Pray v. FBI, No. 95-380, 1995 WL 764149, at *3 (S.D.N.Y. Dec. 28, 1995) (granting request to substitute DOJ for named defendant, FBI).

Moreover, dismissing the FBI has no legal effect on Plaintiff's case, as the DOJ is already a named defendant. See Vazquez v. U.S. Dep't of Justice, 764 F. Supp. 2d 117, 119 (D.D.C. 2011) (concluding that there is no "need [to] dwell on the issue" where the DOJ was also a named defendant). The relief Plaintiff seeks, i.e. prompt disclosure of the requested records, is duplicative when ordered against both the FBI and the DOJ, for the FBI's records are the DOJ's records.

III. Defendants Conducted an Adequate Search, Reasonably Calculated to Uncover All Responsive Documents³

"Under the FOIA, an agency has a duty to conduct a reasonable search for responsive records." Abdelfattah v. U.S.

³ Plaintiff's Complaint does not include a cause of action based on the adequacy of the FBI's search. See Compl. ¶¶ 36-42. Nonetheless, Plaintiff has since intimated that it challenges the FBI's search. See Doc. # 18. Therefore, Defendants address the FBI's search in this Memorandum and the Hardy Declaration.

Dep't of Homeland Sec., 488 F.3d 178, 182 (3d Cir. 2007). "The relevant inquiry is not 'whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate.'" Id. (quoting Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984)) (emphasis in original). To demonstrate the adequacy of its search, an agency "should provide a reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials . . . were searched." Id. "There is no requirement that an agency search every record system, but the agency must conduct a good faith, reasonable search of those systems of records likely to possess the requested information." Marshall v. FBI, 2011 WL 3497801 at *3 (citing Oglesby v. Dep't of Army, 920 F.2d 57, 68 (D.C. Cir. 1990)).

As described in the Hardy Declaration, the FBI's search was reasonably calculated to uncover all documents responsive to Plaintiff's request. The search included a two-day (August 9-10, 2010) electronic search of the FBI's Central Records System ("CRS") using the Automated Case Support System ("ACS"). Hardy Decl. ¶ 19. The FBI maintains indices of subject matters that are held within its CRS, and entries on those indices generally fall into two categories: (1) "main" entries describe a subject matter or the name of a file contained within the CRS; and (2) "reference" entries reflect a reference to an individual,

organization, or subject matter in another "main" file. Id.

¶ 14. The FBI searched these indices using terms such as "racial and ethnic community demographics," "racial and ethnic behaviors," "racial and ethnic characteristics," "behaviors." and "cultural traditions," but because these terms are not names of subjects or victims or a common subject, the search produced no responsive documents. Id. ¶ 19.

Having "determined that it needed to conduct additional searches outside of ACS to locate records potentially responsive to [P]laintiff's request," the FBI "performed an individualized search inquiry [] of those FBI divisions and offices most likely to maintain potentially responsive records by issuing [] Electronic Communication[s] ("EC[s]") or memorand[a]" - one on August 20, 2010 to the Director's Office, the Directorate of Intelligence, and the Office of the General Counsel, and two (November 16, 2010 and December 6, 2010) to the Newark field office and resident agencies, requesting that they conduct a thorough search in accordance with the request. Id. ¶¶ 19-21.

Overall, the search employed thoughtful, broad search terms in an electronic search of ACS records as well as a more individualized, targeted search at the locations most likely to house responsive documents - including (but not limited to) the field office and resident agencies to whom Plaintiff's request was directed. The steps the FBI took to locate the information sought by Plaintiff, as documented in additional detail in the

Hardy Declaration, were logical, adequate, and reasonable and should be upheld. See Abdelfattah, 488 F.3d at 182.

IV. Defendants' Withholdings are Proper Under the FOIA's Exemptions

When an agency makes a withholding pursuant to a FOIA exemption, the agency must explain the exemptions claimed and the applicability of the exemptions. See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 753 (1989). Again, an agency can meet its burden by filing an affidavit that "describe[s] the withheld information and the justification for withholding with reasonable specificity, demonstrating a logical connection between the information and the claimed exemption[.]" Am. Friends Serv. Comm. v. U.S. Dep't of Def. through Def. Logistics Agency, 831 F.2d 441, 444 (3d Cir. 1987). If this showing is not "contradicted by contrary evidence in the record or by evidence of the agency's bad faith, then summary judgment is warranted on the basis of the affidavit alone." ACLU v. U.S. Dep't of Def., 628 F.3d 612, 619 (D.C. Cir. 2011); see also Am. Friends, 831 F.2d at 444.

Furthermore, an agency's declaration or Vaughn index is entitled to a presumption of good faith and, in cases involving national security matters such as this one, courts "must accord substantial weight to an agency's affidavit[.]" Wolf v. CIA, 473 F.3d 370, 374 (D.C. Cir. 2007) (quotations omitted); see also Pipko v. CIA., 312 F. Supp.2d 669, 674 (D.N.J. 2004). This is

because courts “lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case.”

Krikorian v. Dep’t of State, 984 F.2d 461, 464 (D.C. Cir. 1993).

Here, the agency submitted both the Hardy Declaration and a Vaughn index in order to effectively and efficiently discuss the FBI’s withholdings and the nexus to the statutory exemption under which the material falls. See Hardy Decl. & Ex. J (Vaughn index). The withheld information in this case can be divided into five categories: (1) DIOG Training Material; (2) eleven Domain Intelligence Notes from Domain Management concerning threats to Newark’s area of responsibility, which include maps and data tables; (3) a 2009 Newark Baseline Domain Assessment; (4) an October 30, 2009 FBI EC memorializing the Newark 2009 Baseline Domain Assessment; and (5) additional maps. Id. ¶ 25. The FBI withheld this information, in full or in part, pursuant to three of the nine FOIA exemptions.⁴ Because the exemptions over this material have been validly invoked, all reasonably segregable information from the responsive records has been

⁴In light of the Supreme Court’s recent decision in Milner v. Department of the Navy, 131 S.Ct. 1259 (2011), in which the Court clarified the scope of Exemption 2 and held that it only exempts from disclosure internal records “relating to issues of employee relations and human resources,” id. at 1271, the FBI is no longer withholding materials pursuant to Exemption 2. See Hardy Decl. ¶ 4, n.2. Nonetheless, because the material over which the FBI invoked Exemption 2 at the time of its release is also covered by Exemptions 7(A) and/or 7(E), Defendants’ decision to no longer invoke Exemption 2 does not necessitate the production of any new material.

released, and the Hardy Declaration and Vaughn index are not “controverted by either contrary evidence in the record nor by evidence of agency bad faith,” Defendants are entitled to summary judgment. Am. Friends, 831 F.2d at 444.

A. Defendants Properly Withheld Classified Material Under FOIA Exemption 1

A significant portion of the responsive material withheld in this case is withheld pursuant to Exemption 1, also known as the National Security Exemption. See McDonnell v. United States, 4 F.3d 1227, 1242 (3d Cir. 1993). Exemption 1 “protects from disclosure matters that are specifically authorized under criteria established by Executive Order to be kept secret in the interests of national defense or foreign policy, and are in fact properly classified pursuant to such Executive Order.” Id. (citing 5 U.S.C. § 552(b)(1)).⁵

In this case, the withheld information was classified under Executive Order 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009) (amended at 75 Fed. Reg. 1013). Information may be classified pursuant to E.O. 13,526 if:

- (1) an original classification authority is classifying

⁵Importantly, the standard of review under Exemption 1 is “somewhat different from that applied to documents withheld under other FOIA exemptions[.]” McDonnell, 4 F.3d at 1242-43. This Circuit has held that courts are to accord substantial weight to an agency’s affidavit concerning the details of the classified status of material. See Am. Friends, 831 F.2d at 444 (adopting standard); ACLU v. DoD, 628 F.3d at 614 (“[T]he government’s burden is a light one,” as “plausible” and “logical” arguments for nondisclosure will be sustained.).

the information;

(2) the information is owned by, produced by or for, or is under the control of the United States Government;

(3) the information falls within one or more of the categories of information listed in § 1.4 of this order;

(4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

Exec. Order No. 13,526 § 1.1(a). Several procedural requirements must also be met. See id. §§ 1.5, 1.7, 3.1, 3.3. Information may be classified at different levels ranging from "Confidential" to "Top Secret," depending on the degree of harm to national security that unauthorized disclosure could cause. Id. § 1.2.

The Hardy Declaration demonstrates that the FBI adhered to the mandated procedures in determining that the information withheld under Exemption 1 is classified. Mr. Hardy - an original classification authority - personally reviewed the withheld information and determined that the information was under the control of the United States Government, was classified, and required the classification marking of "Secret." Hardy Decl. ¶¶ 27, 30, 31. Mr. Hardy made certain that all of the procedural and administrative requirements of the Executive Order were followed, including proper identification and marking of documents. Id. ¶ 30. Substantively, Mr. Hardy determined

that the information is exempt from disclosure pursuant to E.O. 13,526 because it falls within one or more of the categories in § 1.4 of the Executive Order: the information involves intelligence activities, sources, or methods, Exec. Order No. 13,526 § 1.4©), and/or relates to foreign relations or foreign activities of the United States, including confidential sources, id. § 1.4(d). Id. ¶¶ 31, 35. Finally Mr. Hardy determined that disclosure of this information could cause serious harm to national security. Id. ¶¶ 33, 35-36.

More specifically, three of the five categories of documents previously mentioned (supra at p. 12) contain information that relates to intelligence activities, sources, and methods or foreign relations or foreign activities of the United States:

Intelligence Notes 1-8: Documents NK GEOPMAP 229-332, 333-53, 354-78, 379-98, 399-417, 418-28, 536-61, 703-17 are intelligence notes created by the Newark Division's Domain Management Team. These notes are FBI analysts' method of collecting and recording information gathered on a particular group or element through various intelligence techniques. Hardy Decl. ¶ 32. 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 intelligence gaps in understanding and addressing the threat posed by the group or element. Id.; see also id. ¶ 63. The maps included with these reports consist of the same intelligence

information derived from the same activities and methods, but provide a visual format of the information. Id. ¶¶ 32, 65. Indeed, the maps themselves are a method of utilizing the highly sensitive information obtained by FBI agents and analysts. See id. Consequently, disclosure of these notes and their maps would not only reveal the "intelligence in and of itself, [but] certainly may reveal the sources and methods of the government's acquisition." ACLU v. DoD, 628 F.3d at 623; Hardy Decl. ¶ 32 & Ex. J; Exec. Order No. 13,526 § 1.4©).

Mr. Hardy also 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 used to monitor 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. Hardy Decl. ¶ 33.

Furthermore, Intelligence Notes 2, 4, 6, and 7 contain sensitive intelligence information about "foreign relations or the foreign activities of the United States," and consequently, are also covered by E.O. 13,526, § 1.4(d). Id. ¶ 35. These notes pertain to the "intelligence gathering efforts of a foreign country" within the Newark area of responsibility. Id. p. 38-48 & Ex. J. They discuss those efforts, the status of the United

States' current relations with the foreign country at issue, and "intelligence gaps" of the FBI when it comes to assessing the foreign country's intelligence efforts in New Jersey. *Id.* Disclosure of this sensitive 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. *Id.* ¶¶ 35, 36.

Newark 2009 Annual Baseline Assessment: This document, NK GEOMAP 583-627, is a written intelligence report and a compilation of some of the domain analyses contained in the Intelligence Notes. *See id.* ¶ 32 & Ex. J. It discusses the threats and vulnerabilities, key concerns, and priorities for the Newark area of operations. *Id.* Like the Intelligence Notes, it contains information that pertains to 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. *Id.* ¶ 32; Exec. Order No. 13,526 § 1.4©). 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. Hardy Decl. ¶ 32 & p. 53-54. Its disclosure could jeopardize foreign relations, and, ergo, the nation's security. *Id.* ¶¶ 35-36; Exec. Order No. 13,526 § 1.4(d). Therefore, the FBI properly

classified this material pursuant to E.O. 13,526. See Houghton v. NSA, 378 Fed. Appx. 235, 238 (3d Cir. 2010) (information on "intelligence targeting, priorities, and capacities [] falls within the category of classified information found in Section 1.4(c)").

The October 30, 2009 EC: The EC, NK GEOMAP 628-663, documents the analyses and work product of the FBI agents and analysts involved in the intelligence activities that gathered the information on various threats. Hardy Decl. ¶ 32. It contains information that is the basis for the Baseline Assessment at NK GEOMAP 583-627. *Id.* Ex. J. Consequently, it too contains information that pertains to 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. *Id.* ¶ 32 & Ex. J; Exec. Order No. 13,526 § 1.4(c). Like the Assessment, the EC 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, ergo, the nation's security. Hardy Decl. ¶¶ 32, 35-36 & p.54; Exec. Order No. 13,526 § 1.4(d). Thus, the Court should affirm these withholdings as classified material pursuant to E.O. 13,526. See Am. Friends, 831 F2d at 444; Houghton v. NSA, 378 Fed. Appx. at 238.

Overall, Mr. Hardy has established compliance with E.O. 13,526's procedural and substantive requirements as well as "the nexus between the disclosure of this information and the asserted damage to national security[.]" *McDonnell*, 4 F.3d at 1243. Affording substantial weight to the FBI's determinations on classified materials, the Court should affirm these withholdings pursuant to Exemption 1. See *Am. Friends*, 831 F.2d at 444.

B. Defendants Properly Withheld Material Under FOIA Exemption 7

Exemption 7 requires an agency to satisfy the Court of two questions: (1) was the information withheld "compiled for law enforcement purposes," 5 U.S.C. § 552(b)(7), and (2) would disclosure "produce one of the [six] specified harms enumerated in the statute," *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1054 (3d Cir. 1995). Where an agency "specializes in law enforcement, its decision to invoke [E]xemption 7 is entitled to deference." *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 32 (D.C. Cir. 1998).

To answer the threshold question - whether the information was compiled for law enforcement purposes - an agency "does not have to identify a particular individual or incident as the object of an investigation into a potential violation of law or security risk." *Abdelfattah*, 488 F.3d at 185. It must only "demonstrate a relationship between its authority to enforce a statute or regulation and the activity giving rise to the

requested documents[.]” Id. at 186.

Here, these is no question Defendants’ withholdings pursuant to Exemption 7 consist of documents compiled for law enforcement purposes. Charged with enforcing federal criminal law, including laws on terrorism, the FBI is authorized to engage in intelligence analysis and planning to prevent attacks of any kind against the citizens of the United States. See Hardy Decl. ¶¶ 32, 38. In fact, the FBI is the “lead federal agency” in federal crimes of terrorism, non-terrorist federal crimes, counterintelligence and espionage, and criminal investigations. Id. ¶ 38. The Intelligence Notes, Domain Assessment, EC, and maps are a collection of intelligence information gathered through various means and sources, intended to assess the security threat posed by certain groups and assist the FBI in thwarting those threats. Id. ¶ 32 & Ex. J; see also John Doe Agency, 493 U.S. at 153 (“A compilation, in its ordinary meaning, is something composed of materials collected and assembled from various sources or other documents.”). These notes and reports are used by the FBI to carry out both its criminal law enforcement and intelligence work. See Hardy Decl. ¶ 38; see also Milner, 131 S.Ct. at 1272 (Alito, J., concurring) (“The ordinary understanding of law enforcement includes not just the investigation and prosecution of offenses that have already been committed, but also proactive steps designed to prevent criminal activity and to maintain security.”). Similarly, the DIOG

materials, DIOG PPD 1-298, are non-public training slides and related materials that discuss FBI intelligence activities, planning of investigations (both criminal and intelligence related), and how the FBI can carry out these activities and investigations successfully and constitutionally. Hardy Decl. ¶ 38. Thus, because these materials relate to the FBI's responsibilities and assist the FBI in prioritizing and addressing various threats to national security, they clearly meet Exemptions 7's threshold requirement. 5 U.S.C. § 552(b)(7).

1. Exemption 7(A)

Exemption 7(A) authorizes the withholding of information "compiled for law enforcement purposes" whose release "could be reasonably expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). Thus, the government must show that the records (1) relate to "a law enforcement proceeding [that] is pending or prospective[,]" and that (2) "release of the information could reasonably be expected to cause some articulable harm." Manna, 51 F.3d at 1164. Exemption 7(A) "does not require a presently pending 'enforcement proceeding.' Rather, . . . it is sufficient that the government's ongoing [] investigation is likely to lead to such proceedings." Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 926 (D.C. Cir. 2003). 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. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 236 (1978); see also Reporters Comm., 489 U.S. at 776-80. Consequently, courts may accept affidavits that specify the distinct but generic categories of documents at issue and the harm that would result from their release, rather than requiring extensive, detailed itemizations of each document. See Manna v. U.S. Dep't of Justice, 815 F. Supp. 789, 805-06 (D.N.J. 1993) ("[A]n agency may rely on a generic approach by grouping documents into categories that are sufficiently distinct to allow a court to grasp how each [] category of documents, if disclosed, would interfere with the investigation.") (internal quotation omitted), aff'd, 51 F.3d 1158.

In invoking this exemption, the FBI carefully reviewed all responsive information in this case to determine if the information was current intelligence information being used in pending or prospective investigations or prosecutions. Hardy Decl. ¶ 40. The FBI's Record / Information Dissemination Section consulted with the Newark Field Office and confirmed that Intelligence Notes 1-8 and 10-11, the Domain Assessment, the EC, and the maps are all being used by intelligence analysts and special agents for ongoing investigations. Id. As the Hardy Declaration and Vaughn explain in detail, these documents contain information that reveals the FBI's current targets of investigation. Id. The documents include information from various sources and "open [and] pending" criminal files. Id. p.

36-55. The documents discuss the current threats from the targets of investigation and recommend "potential investigatory activities" to meet those threats. Id. And the FBI determined that the information in these documents will likely be utilized in potential enforcement proceedings. Id.

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. I.R.S., 2008 WL 539058, *6 (D.N.J. Feb. 25, 2008). The information withheld by Defendants pursuant to 7(A) is precisely that type of information. See Hardy Decl. ¶ 40 & p. 36-55. Because disclosure would reveal the "focus" and "scope" of the 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. Thus, these pages

should be withheld in full pursuant to 7(A).⁶

2. Exemption 7(C) and Exemption 6

The FBI properly withheld names and identifying information of FBI agents and support personnel, a local law enforcement officer, and third parties pursuant to Exemption 7(C) and Exemption 6. See 5 U.S.C. §§ 552(b)(6), (b)(7)(C). Exemption 7(C) shields "records or information compiled for law enforcement purposes" that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Id. § 552(b)(7)(C). Thus, information is exempt from disclosure if: (1) it was "compiled for law enforcement purposes," (2) it implicates one's personal privacy interests, and (3) after balancing the privacy interest involved and the public interest in disclosure, it is determined that the invasion of one's privacy by disclosure would be unwarranted. Id.; Nat'l Archives and Records Admin. v.

⁶ Because release of any of the information in Intelligence Notes 1-8 and 10-11, the Domain Assessment, the EC, and the stand-alone maps would reveal the targets and scope of ongoing investigations, these documents have been withheld in full pursuant to 7(A). In addition, underlying exemptions (such as Exemptions 7(C), (D), and (E)) for these "withheld in full" documents have been noted but not discussed in detail in either the Hardy Declaration or this Memorandum, because providing detailed explanations in some instances would give away the very information the agency seeks to protect. See Hardy Decl. ¶ 23 n.8. Should the Court uphold the FBI's invocation of 7(A) over these documents, the Court need not consider whether the information is properly withheld under any other exemptions. If, however, the Court rejects Defendants' 7(A) claims, Defendants request the opportunity to submit a supplemental declaration and Vaughn in camera to provide additional information on all underlying exemption claims. See Patterson by Patterson v. F.B.I., 893 F.2d 595, 599 (3d Cir. 1990).

Favish, 541 U.S. 157, 171-72 (2004).

Similarly, Exemption 6 permits the government to withhold all information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); see also U.S. Dep't of State v. Washington Post Co., 456 U.S. 595, 599-600 (1982) ("[T]he primary concern of Congress in drafting Exemption 6 was to provide for the confidentiality of personal matters.").

For either exemption, after the agency has demonstrated that a personal privacy interest is threatened by a requested disclosure, the burden shifts to the plaintiff to show there is a public interest in disclosure of that particular information. See I.B.E.W. Local Union No. 5 v. Dep't of Housing & Urban Dev., 852 F.2d 87, 89 (3d Cir. 1988). The Supreme Court has made clear that "the only relevant public interest in the FOIA balancing analysis" under Exemptions 6 and 7(C) is "the extent to which disclosure of the information sought would 'shed light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" U.S. Dep't of Def. v. FLRA, 510 U.S. 487, 497 (1994) (quoting Reporters Comm., 489 U.S. at 773). If such an interest is established, a court then balances the public interest against the harm from the

invasion of privacy. Id.⁷

Because the FBI employees and others involved with the intelligence activities discussed in the materials have a privacy interest in the non-disclosure of their names, telephone numbers, and other identifying information, and because this interest is not outweighed by any interest in open government, these withholdings should be upheld.

Names and/or Identifying Information of FBI Special Agents and Support Personnel: In several instances (DIOG PPD 150, 153, 156 and NK GEOPMAP 743, 752), the FBI asserted Exemptions 6 and 7©) to protect the identities of FBI special agents and support personnel. See Hardy Decl. ¶¶ 43-45. Such withholdings are repeatedly upheld by courts. See, e.g., Manna, 51 F.3d at 1166; McDonnell, 4 F.3d at 1255; Baez v. FBI, 443 F. Supp. 2d 717, 725

⁷The balancing analyses required by Exemption 6 and Exemption 7©) are similar but not exact:

Exemption 7(C)'s privacy language is broader than the comparable language in Exemption 6 in two respects. First, whereas Exemption 6 requires that the invasion of privacy be 'clearly unwarranted,' the adverb 'clearly' is omitted from Exemption 7©). . . . Second, whereas Exemption 6 refers to disclosures that 'would constitute' an invasion of privacy, Exemption 7©) encompasses any disclosure that 'could reasonably be expected to constitute' such an invasion. . . . Thus, the standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files.

Reporters Comm., 489 U.S. at 756.

(E.D. Pa. 2006). Release of the names and personal information of FBI special agents and support personnel is a serious matter, for it may not only subject those individuals to embarrassment or harassment, but also danger, as "individual[s] targeted by [] law enforcement actions [may] carry a grudge which may last for years[, and] may seek revenge on the agents and other federal employees involved in a particular investigation." Hardy Decl. ¶¶ 43-44. Public disclosure of FBI agents' identities can also undercut their work, crippling their "effectiveness in conducting other investigations." Id. ¶ 43.

Furthermore, the public interest is not served by revealing the employees' identities, as release of the employees' identities would not contribute to any general knowledge regarding the FBI or its practices. Id. ¶¶ 43, 45. In fact, as Plaintiff's Complaint in this matter states, Plaintiff and the public are interested in the alleged "expansion of FBI surveillance powers and its conduct of assessments and investigations in ways that violate civil rights and civil liberties[.]" Compl. ¶ 10. Yet, knowing the names of the particular agents conducting interviews and gathering intelligence will not advance this interest. See McDonnell, 4 F.3d at 1256 ("[I]t is difficult to see how the disclosure of the identities of persons . . . will further McDonnell's scrutiny of governmental action in this case."). Consequently, because there is no recognized interest in disclosure to outweigh the privacy

interest of these FBI employees, Exemption 6 and 7©) were properly applied to protect their identities.

Names and/or Identifying Information of Third Parties: The FBI also withheld information to protect the identities of third parties who (1) provided information to the FBI that was collected and incorporated into an Intelligence Note for the purpose of assessing a particular threat in the Newark area of responsibility, (NK GEOMAP 747-48, 750-51), or (2) are of investigative interest (NK GEOMAP 744-45, 745, 748, 749). Hardy Decl. ¶¶ 46-50.

It is axiomatic that anything that would associate a third party with a criminal or national security investigation would invade the third party's privacy and potentially damage his/her reputation. See Reporters Comm., 489 U.S. at 770-71. Individuals have a "strong interest . . . in not being associated unwarrantedly with alleged criminal activity." Fitzgibbon v. CIA, 911 F.2d 755, 767 (D.C. Cir. 1990) (internal quotation marks omitted). As the Third Circuit has recognized,

[s]uspects of the investigation have the most obvious privacy interest in not having their identities . . . revealed. However, disclosure of the names of interviewees and witnesses may result in embarrassment and harassment to them as well. Criminal investigations turn up a myriad of details about the personal lives of witnesses and interviewees and for some, disclosure of the fact of cooperation with the investigation may itself result in reprisals or strained personal relationships.

Landano v. U.S. Dep't of Justice, 956 F.2d 422, 426 (3d Cir.

1992) (citations omitted), vacated in part on other grounds and remanded, 508 U.S. 165 (1993); see also Manna, 51 F.3d at 1166.

Here, the FBI determined that the individuals to whom the information pertains maintain a substantial privacy interest in not having their identities disclosed. See Hardy Decl. ¶¶ 47-48, 49-50. Those that have provided information to the FBI, such as the individual identified in Intelligence Note #9 on Mara-Salvatrucha-13 ("MS-13"), may reasonably fear that release of his/her identity will subject him/her to harassment, intimidation, or possible physical harm or even death. Id. ¶ 47. Those mentioned in Intelligence Notes 9-11 may also suffer harassment or criticism and the consequences of the "derogatory inferences and suspicion" or stigma from being associated with these investigations. Id. ¶¶ 49-50. The FBI balanced these privacy interests against the public's interest in disclosure, determined that the information withheld would not enlighten the public on how the FBI conducts its internal operations and investigations, and therefore concluded that the disclosure of this identifying information would constitute an unwarranted invasion, even a clearly unwarranted invasion, of their personal privacy. Id. ¶¶ 48, 50. These withholdings should be upheld pursuant to Exemption 6 and 7©).

Name of a Local Law Enforcement Employee: The same rationale that applies to FBI agents and support personnel applies to the name and identifying information of a state law enforcement

employee mentioned in Intelligence Note #9 (NK GEOMAP 744) because he/she assisted in the prosecution of an MS-13 gang member. See Hardy Decl. ¶ 51; Manna, 51 F.3d at 1166; Landano, 956 F.2d at 426-431. The FBI found that this individual has a personal privacy interest in the disclosure of his/her identity and that disclosure can cause him/her to suffer harassment or to become the "prime target for compromise[.]" Hardy Decl. ¶ 51. Furthermore, there is no public interest in disclosure of his/her identity, so release of this information would constitute an unwarranted invasion, even a clearly unwarranted invasion, of his/her personal privacy. Id.

3. Exemption 7(D)

In addition to Exemption 6 and 7©), the identity of FBI informants is entitled to protection under Exemption 7(D), which permits the redacting of information in law enforcement records that "could reasonably be expected to disclose the identity of a confidential source[.]" 5 U.S.C. § 552(b)(7)(D). Exemption 7(D) also protects from disclosure information "furnished by a confidential source" if it was "compiled by a criminal law enforcement authority in the course of a criminal investigation [or] lawful national security intelligence investigation[.]" Id. Unlike 7©), Exemption 7(D) requires no balancing of public and private interests. See McDonnell, 4 F.3d at 1257. Instead, Exemption 7(D) applies if the agency establishes that a source has provided information under either an express or implied

promise of confidentiality. Id.; see also U.S. Dep't of Justice v. Landano, 508 U.S. 165, 172 (1993). When an agency claims a source spoke under an express assurance of confidentiality, the agency must "come forward with probative evidence that the source did in fact receive an express grant of confidentiality[.]" Davin, 60 F.3d at 1061-62. For assertions of implied promises of confidentiality, and agency must "describe circumstances that can provide a basis for inferring confidentiality." Id. at 1063. In other words, an implied assurance of confidentiality can be found when an agency points to "narrowly defined circumstances that will support the inference [of confidentiality,]" such as the nature of the crime or the source's relation to the crime. Landano, 508 U.S. at 172.

In this case, much of the information found in Intelligence Notes 1-8 and 10-11, the Domain Assessment, the EC, and the stand-alone maps is information supplied by sources under either express or implied assurances of confidentiality. See Hardy Decl. Ex. J. Because this same information is protected under Exemption 7(A), this Memorandum and the Hardy Declaration detail only the 7(D) withholdings in Intelligence Note # 9 (NK GEOMAP 745, 747, 748, 749, 750-51). See supra p. 24 n.6.

First, information at NK GEOMAP 748 and 749 has been withheld due to an implied assurance of confidentiality. Hardy Decl. ¶ 53. Page 748 includes the name and location of a former member of MS-13, as well as information from this source. Id. A

promise of confidentiality can be implied here given the "violent propensity of the MS-13 gang, [which] even extends to prison," and the inmate's "proximity to the violent gang," as demonstrated by the supply of first-hand knowledge. *Id.*; see also, e.g., *Landano*, 58 U.S. at 179-80 (suggesting that a source's relation to gang activity and gang-related crimes may support inference of confidentiality); *Mays v. DEA*, 234 F.3d 1324, 1337 (D.C. Cir. 2000) (inferring grant of confidentiality for sources to conspiracy to distribute cocaine, which "is typically a violent enterprise"). Given the information the source was supplying, as well as the source's connection to the gang, "the inmate would reasonably assume that . . . this identity would not be divulged." *Hardy Decl.* ¶ 53. Information gathered from other individuals either belonging to or formerly affiliated with MS-13 has been protected at NK GEOMAP-749. *Id.*

Second, information was withheld at NK GEOMAP 745, 747, and 750-51 because of an express assurance of confidentiality given to the sources. *Hardy Decl.* ¶ 53. For 747, 750-51, the information used in the Intelligence Note originated in several Intelligence Information Reports that discuss the meetings of FBI Special Agents with these individuals and the fact that the sources were speaking after being assured that their identity would not be divulged. *Id.* For 745, the information was received in confidence from a state law enforcement agency, as noted in footnote ii of the Intelligence Note. *Id.*

Receiving information from sources is vital to the work of the FBI. Revealing the identity of a source may not only eliminate that source as a future means of obtaining information and subject the source to possible reprisal, but it may chill the cooperation of other potential sources. Id. Because of this, and because the Hardy Declaration provides probative evidence that this source-based information meets the requirements of 7(D), these withholdings should be upheld.

4. 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, or would disclose guidelines for law enforcement investigation or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). This exemption is comprised of two clauses: the first relates to law enforcement "techniques or procedures," and the second relates to "guidelines for law enforcement investigations or prosecutions." Id.; see also Allard K. Lowenstein Intern. Human Rights Project v. U.S. Dep't of Homeland Sec., 626 F.3d 678, 681-82 (2d Cir. 2010) (finding both the text and legislative history support reading of Exemption 7(E) as two separate clauses). The latter category of information may be withheld only if "disclosure could reasonably be expected to risk circumvention of

the law." 5 U.S.C. § 552(b)(7)(E). No such showing of harm is required for the withholding of law enforcement "techniques or procedures," however; these materials receive categorical protection from disclosure. See Smith v. Bureau of Alcohol, Tobacco & Firearms, 977 F. Supp. 496, 501 (D.D.C. 1997) (citing Fisher v. U.S. Dep't of Justice, 772 F.Supp. 7, 12 n.9 (D.D.C. 1991), aff'd, 968 F.2d 92 (D.C. Cir. 1992)).

Here, the FBI has withheld significant portions of Intelligence Notes # 1-8 and 10-11, the Baseline Assessment, the EC, and the stand-alone maps pursuant to Exemption 7(E). Hardy Decl. ¶¶ 55, 62-63. These documents themselves are an investigative, intelligence-gathering technique to allow Newark to "better understand its own domain." Id. ¶ 62. 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 vulnerabilities of the United States and its interests to them. Id. Public disclosure would allow the threats to take advantage of identified vulnerabilities and adjust their behavior to avoid detection. Id.

The FBI has also withheld information in the pages released in part (the DIOG materials and Intelligence Note # 9) under 7(E), as they contain information on the following techniques or procedures:

Surveillance, Monitoring, and Mapping Information/Tools:
Information of this nature is found in the Intelligence Notes,

Baseline Assessment, the EC, all maps, and at DIOG PPD 14-15, 138, 149-156, 158, 259, 265-266, and 298. This material identifies the types of devices, methods, and/or tools used in surveillance, monitoring, and mapping, as part of the FBI's investigations. Hardy Decl. ¶ 57. Some of these techniques are unknown by the public, while others may be generally known. The 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. See id.; see also Davin, 60 F.3d at 1064 (Exemption 7(E) does not protect routine techniques and procedures already well-known to the public); but see 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 crime and terrorist activity, as it would educate the criminals themselves on the FBI's devices, methods, and tools. Hardy Decl. ¶ 57. Criminals can then devise

countermeasures to avoid detection. Id.

Unaddressed Work: Some withheld portions of the DIOG materials (DOIG PPD 56, 114, 199, 287) contain "descriptions of procedures with respect to the treatment and storage of . . . work that the FBI has not yet completed." Hardy Decl. ¶ 58. In other words, it details internal procedures related to the yet-to-be-completed investigatory and prosecutorial duties of the FBI. This information is not public, and its release "would reveal how the FBI deals with internal resource limitations and also identifies a place where information useful to potential lawbreakers is maintained" - providing a target for intelligence exploitation and undermining crime deterrence efforts. Id.

Collection and/or Analysis of Information: Similar to Surveillance, Monitoring, and Mapping Information/Tools, the DIOG contains information that discusses the FBI's methods and techniques for collecting and analyzing information for investigatory purposes (DIOG PPD 151-52). Id. ¶ 59. Although the fact that the FBI collects certain types of information is known to the public, the manner in which the FBI does so is not publicly known, and the utility of the methods discussed would be diminished by their publication. Id.

Specific Scenarios in Which Particular Activities or Techniques are Authorized: Some DIOG pages (DIOG PPD 65-66, 123-24, 139-42, 209-211, 239-40, 267-68, 291-92) contain hypotheticals about when particular investigatory techniques may

be used or certain procedures must be followed. Id. ¶ 60. This information is not public and its release would allow criminals to have specific examples of actions that would or would not trigger authority for particular investigative activities, crippling the technique's effectiveness. See id.; Coleman, 13 F. Supp. 2d at 83.

Approval Limitations & Technical or Practical Limitations on Particular Investigative Techniques: At DIOG PPD-8, 10, 12, 14, 15, 78, 136-38, 149, 174, 223-24, 252-53, and 298, the FBI has withheld information that discusses a technique or procedure and some kind of limitation on that technique or procedure - whether a limitation in getting it authorized or a practical or technical limitation in carrying it out. Hardy Decl. ¶ 61. These limitations are generally not known but would be of interest to those seeking to circumvent the law, for knowing the limitations on a technique allows one to evade it. Id.; Coleman, 13 F. Supp. 2d at 83. For example, some documents discuss the approval of investigative methods and list techniques such as "polygraph examinations" that are generally known, but redacts information on when those generally known techniques may be approved. This information is not shared with the public, for if it were, then criminals and terrorists would know the triggering events for these techniques, allowing them to circumvent them. See Blanton v. FBI, 63 F. Supp. 2d 35, 49-50 (D.D.C. 1999) (upholding FBI's withholding of information pertaining to

polygraph examination because the information touched upon the specific methods employed, which were not generally known to the public).

Undisclosed Participation: DIOG PPD 8,9,10 contain information on circumstances under which FBI personnel and confidential sources may or may not engage in undisclosed participation in the activities of third parties and the extent to which participation is permitted. Hardy Decl. ¶ 64. Were this information to be made public, it would not only “undermine the effectiveness of the technique, but it could also place FBI agents or sources in physical jeopardy.” Id.

Identification and Contents of File Numbers, Identifying Symbols, Forms and Databases, Terms and Definitions: DIOG PPD 9-10, 12, 56, 223-24, 252-53, 256, 259, 263, 265-66, and 298 contain information including filing numbers and procedures for the FBI’s non-public databases. Id. ¶ 65. This information is not public, and if it were released, it could be used by those seeking to subvert the activities of the FBI or “cover their tracks.” Id. Thus, this information has been properly withheld.

C. Defendants Produced All Reasonably Segregable Information

Under FOIA, “any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of portions which are exempt.” 5 U.S.C. § 552(b); see also Juarez v. U.S. Dep’t of Justice, 518 F.3d 54, 61 (D.C. Cir.

2008) (A court “may rely on government affidavits that show with reasonable specificity why documents withheld . . . cannot be further segregated.”) (internal citation omitted). Here, Mr. Hardy has attested to the fact that “[a]ll documents [were] reviewed to achieve maximum disclosure consistent with the access provisions of FOIA[,]” and that “[e]very effort was made to provide [P]laintiff with all reasonably segregable portions of releaseable material.” Hardy Decl. ¶ 23. As the Vaughn index reveals, however, much of the information deemed response to Plaintiff’s request is highly sensitive law enforcement and intelligence information that is covered by more than one FOIA exemption. See id. Ex. J; see also Manna, 51 F.3d at 1167 n.10 (recognizing overlap between 7(A) and 7(D)). And in many instances, release of this information would cause more than one of the ills the FOIA exemptions were designed to prevent, such as disclosure of techniques and procedures for law enforcement investigations and, consequently, interference with ongoing investigations and future prosecutions. Moreover, the agency conducted a segregability analysis not only for each page of each document, but also for the release as a whole. Hardy Decl. ¶ 66. For example, the release of one Intelligence Note sheds light on the type of information in the others, so withholdings must be considered in the larger context of the release and information available to the public. Overall, the FBI made a good faith effort to achieve maximum disclosure, and Defendants’ actions

should be upheld.

CONCLUSION

Defendants, after conducting reasonable searches in response to Plaintiff's request, released all non-exempt, segregable, and responsive materials subject to the FOIA. For this reason, and the reasons set forth above, this Court should grant Defendants' Motion for Summary Judgment with respect to all claims.

Dated: December 12, 2011

Respectfully submitted,

TONY WEST
Assistant Attorney General

PAUL J. FISHMAN
United States Attorney

JOHN TYLER
Assistant Director
Federal Programs Branch

/s/ Deanna L. Durrett
DEANNA L. DURRETT (NY BAR)
U.S. Dept. of Justice,
Civil Division, Federal
Programs Branch
26 Federal Plaza, Room 346
New York, NY 10278
(212) 264-9232 phone
(212) 264-1916 fax
Deanna.L.Durrett@usdoj.gov

Attorneys for Defendants