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**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.
	)	Waldor
v.)	
	)	Civil No. 11-cv-02553
FEDERAL BUREAU OF)	
INVESTIGATION, UNITED STATES	)	MOTION DAY: May 7, 2012
DEPARTMENT OF JUSTICE,)	
)	
Defendants.)	
)	

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that, on May 7, 2012, or as soon thereafter as counsel may be heard, Defendants the United States Department of Justice and its component, the Federal Bureau of Investigation, will bring on for hearing the within Motion for Summary Judgment before the Honorable Esther Salas.

Defendants respectfully move this Court for an Order

entering judgment in favor of Defendants pursuant to Federal Rule of Civil Procedure 56. The bases for this Motion are set forth in the accompanying Memorandum, its supporting declaration of David M. Hardy and exhibits, and any further arguments, evidence, and grounds as may be advanced in the future.

DATED: March 16, 2012

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

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**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AS TO DEFENDANTS' FEBRUARY 22, 2012
SUPPLEMENTAL RELEASE**

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INTRODUCTION

Defendants, the United States Department of Justice ("DOJ") and its component, the Federal Bureau of Investigation ("FBI"), hereby move the Court for entry of Summary Judgment as to one additional document released by the FBI on February 22, 2012, in response to 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 FBI on July 27, 2010. The document at issue is an Electronic Communication ("EC") from the FBI's Newark field office that documents and authorizes the opening of an assessment on the domestic terrorist and criminal activity of groups identified therein. As demonstrated below and in the attached Second Supplemental Declaration of David M. Hardy, the FBI has released all reasonably segregable, non-exempt information from the document that is subject to the FOIA and responsive to Plaintiff's request. See Second Supp. Decl. of David M. Hardy ("Second Supp. Hardy Decl.") (attached as Ex. 1). The FBI has redacted and withheld only the portions of the document that are covered by statutory exemptions. Release of the withheld information would lead to a number of harms, including interference with open and ongoing investigations and enforcement proceedings, unwarranted invasion of the personal privacy of those FBI employees mentioned in the document, and disclosure of

sensitive law enforcement techniques and guidelines. Therefore, Defendants' partial withholdings should be upheld.

BACKGROUND

On December 12, 2011, Defendants filed a Motion for Summary Judgment - the procedural vehicle by which nearly all FOIA cases are resolved. See Dkt. # 20-1.¹ On January 20, 2012, Plaintiff filed an Opposition and Cross-Motion for Partial Summary Judgment. See Dkt. # 21-1. Plaintiff's Cross-Motion challenges the adequacy of Defendants' search for responsive documents and specifically raised a question as to whether Defendants' search should have uncovered any responsive, "two-to-three page electronic communications authorizing the opening of Domain Management investigations" like those produced by other FBI field offices in response to similar FOIA requests from other ACLU chapters. See id. at 18. In response, the FBI "reviewed its search procedures" and reevaluated all documents the FBI had previously excluded from release because the material was determined to be non-response to Plaintiff's request. Second Supp. Hardy Decl. ¶ 3. During this reevaluation, "it was determined that one previously excluded document could arguably be considered responsive" to Plaintiff's request. Id. Although the FBI does not agree that the document is responsive, it exercised its discretion to process and produce the document to

¹Additional background information is provided in Defendants' December 12, 2011 Motion.

Plaintiff on February 22, 2012. Id. Because Plaintiff, upon receiving the EC, verbally indicated that it may wish to challenge some or all of Defendants' withholdings in the document, Defendants now file this Motion for Summary Judgment and Mr. Hardy's supporting affidavit.

ARGUMENT

Defendants hereby incorporate the "statutory background" and "standard of review" provided in their December 12, 2011 Motion for Summary Judgment, as well as information and arguments as to Defendants' search for documents responsive to Plaintiff's FOIA request in the aforementioned Motion and Defendants' February 10, 2012 Opposition to Plaintiff's Cross-Motion. Defendants add the following as to the EC produced on February 22, 2012:

I. Defendants' Production Of The EC Is Not Evidence Of An Inadequate Search, But Instead, Is Evidence Of Defendants' Good Faith.

As Defendants have already established, Defendants made a "good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 68 (D.C. Cir. 1990). The steps the FBI took to locate the information sought by Plaintiff, as documented in detail in the previous declarations of Mr. Hardy, were logical, adequate, and reasonable and should be upheld by the Court. See Abdelfattah v. U.S. Dep't of Homeland Sec., 488 F.3d 178, 182 (3d Cir. 2007). In addition, the additional, discretionary steps taken by the FBI

more recently - including reviewing its search procedures and reevaluating previously excluded material - are also a demonstration of the agency's good faith efforts to provide Plaintiff the documents it seeks. See Second Supp. Hardy Decl. ¶ 3.

The later release of the EC, in response to those voluntary steps, cannot be considered evidence of an inadequate search for at least two reasons. First, the EC produced on February 22 was identified by Newark when the FBI conducted its original search for documents responsive to Plaintiff's FOIA request, see Supp. Hardy Decl. ¶¶ 4-21, but was determined to be non-responsive, Second Supp. Hardy Decl. ¶ 3. While Defendants continue to believe this document is not responsive, the FBI, as a matter of discretion, processed and released the document in part after Plaintiff expressed an interest in "two-to-three page electronic communications . . . authorizing the opening of Domain Management investigations" in its Cross-Motion for Partial Summary Judgment. Dkt. # 21-1 at 18. All other documents that were re-reviewed, however, were again determined to be non-responsive. Second Supp. Hardy Decl. ¶ 3. Moreover, the FBI confirmed with the Newark field office that no additional responsive material exists. Id.

Second, and more fundamentally, courts have "'emphatically reject[ed]' the notion that an agency's disclosure of documents it had previously withheld renders its affidavits suspect,"

recognizing that agencies should not be penalized for continued efforts to produce information responsive to a FOIA request. Meeropol v. Meese, 790 F.2d 942, 953 (D.C. Cir. 1986) (quoting Military Audit Project v. Casey, 656 F.2d 724, 754 (D.C. cir. 1981)). Thus, Defendants' production of the EC, in addition to its efforts to confirm that no additional responsive material exists, are evidence of nothing more than Defendants' good faith. See Lechliter v. Rumsfeld, 182 Fed. Appx. 113, *117 (3d Cir. 2006) (holding that the Department of Defense's additional efforts, during the pendency of the litigation, to locate other responsive records was evidence of good faith). Defendants have clearly fulfilled their statutory duties. See Abdelfattah, 488 F.3d at 182.

II. Defendants' Withholdings In The EC Are Proper Under FOIA's Exemption 7.

All of the material redacted from the EC is withheld pursuant to 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).

Here, there is no question the information in the EC was compiled for law enforcement purposes. See Abdelfattah, 488 F.3d at 186 (holding that an agency must only “demonstrate a relationship between its authority to enforce a statute or regulation and the activity giving rise to the requested documents”). The FBI “is an intelligence agency as well as a law enforcement agency and is authorized to engage in intelligence analysis and planning[.]” Second Supp. Hardy Decl. ¶ 7. This document, created by the FBI’s Newark field office, “pertains to a request to initiate intelligence analysis, planning, and investigation in the area of Domestic Terrorism (both criminal and intelligence related)[.]” Id. Thus, because the document is related to the FBI’s law enforcement duties and intelligence gathering duties to combat criminal activity and domestic terrorism, id., it meets Exemption 7’s threshold requirement, 5 U.S.C. § 552(b) (7); Abdelfattah, 488 F.3d at 185-86.

A. Exemption 7(A)

Exemption 7(A) authorizes the withholding of “records or 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 v. U.S. Dep’t of Justice, 51 F.3d

1158, 1164 (3d Cir. 1995). 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). Indeed, "[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).

Release of certain portions of the EC would do just that: reveal the focus of FBI investigations. The EC at issue here authorizes the opening of a Domestic Domain Terrorism Assessment pertaining to certain groups. The FBI's Record/Information Dissemination Section ("RIDS"), charged with processing FOIA requests, confirmed with the Newark field office that the groups at issue in the EC are the subjects of current, active investigations and proceedings. Second Supp. Hardy Decl. ¶ 9. In addition, RIDS confirmed with Newark that information being collected pursuant to the EC is being used by intelligence analysts in these open investigations. Id. Consequently, the FBI has determined, in its expertise, that information such as the group names and types, descriptions of the groups, background information on the groups, and related file numbers for those

groups must be redacted. Id. Release the this information would reveal the identities of the groups and cause harm to the FBI's ability to track the targets, as it would notify the targets not only of the existence of the Domain Assessment, but also of the fact that there are ongoing investigations. In addition, because redacted information discusses details or facts of interest about the groups, disclosure would reveal the angle of the FBI's assessment or the FBI's approach to the investigations. Once the targets are aware of the existence and details of the investigations, they can change their behavior to avoid detection and/or further investigation. Id. Thus, because release of this information would interfere with these investigations, the information should be withheld pursuant to 7(A). See Arizechi v. I.R.S., 2008 WL 539058, *6 (D.N.J. Feb. 25, 2008).

B. Exemption 7(C) and Exemption 6

The FBI properly withheld names and identifying information of FBI agents and support personnel 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 if it implicates one's personal privacy interests and, 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.² Id.; Nat'l Archives and Records Admin. v. Favish, 541 U.S. 157, 171-72 (2004). 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 U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 773 (1989)).

Here, the FBI asserted Exemptions 6 and 7(C) to protect the identities of FBI special agents and support personnel. Second Supp. Hardy Decl. ¶¶ 12-14. As noted in Defendants' December 12, 2011 Motion for Summary Judgment, such withholdings are repeatedly upheld by courts. See, e.g., Manna, 51 F.3d at 1166; McDonnell v. United States, 4 F.3d 1227, 1255 (3d Cir. 1993); Baez v. FBI, 443 F. Supp. 2d 717, 725 (E.D. Pa. 2006). Release

² Defendants assert both Exemption 6 and Exemption 7(C) as to the names and other identifying information of FBI employees. Second Supp. Hardy Decl. p. 8 n.2. Exemption 6 permits the government to withhold 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). The balancing analyses required by Exemption 6 and Exemption 7(C) are similar but not exact. U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 756 (1989). "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." Id.

of the names and personal information of FBI special agents mentioned in this EC will tie these individuals to this assessment and possibly subject them to "unnecessary, unofficial questioning as to the conduct of this or other investigations, whether or not they are currently employed by the FBI." Second Supp. Hardy Decl. ¶ 12. It is also possible identified agents can be subject to harassment or even threats, as "individual[s] targeted by [] law enforcement actions [may] carry a grudge which may last for years[, and] may seek revenge on [] agents and other federal employees[.]" Id. Similarly, release of the names and contact information of FBI support personnel (namely, an Intelligence Analysts, a Collection Manager, and a Support Services Technician) may cause these individuals to become "targets of harassing inquiries for unauthorized access to investigations and intelligence[.]" Id. ¶ 13.

Overall, release of these individuals' information can undercut their effectiveness as FBI employees and possibly place them in harms way. Id. ¶¶ 12-13. Such an invasion of their personal privacy is unwarranted, and even clearly unwarranted, given that the public interest is not served by disclosure of their identities. See id. ¶¶ 12-13. Release of employees' identities would not shed light on the performance of the FBI's statutory duties, id. ¶ 14, or contribute to any general knowledge regarding the FBI or its practices, Hardy Decl. ¶¶ 43, 45; see also 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(C) were properly applied to protect their identities.

C. 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). Exemption 7(E) is comprised of two clauses: the first relates to law enforcement "techniques or procedures," and the second relates to "guidelines." 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). While "guidelines" may be withheld upon a showing of reasonably possible risk of "circumvention of the law," no such showing of harm is required for the withholding of law enforcement "techniques or procedures." Allard K. Lowenstein, 626 F.3d at 681-82.

Here, the FBI withheld lines or phrases of the EC that would

reveal "operational direction and guidance on what criteria to look for in determining what constitutes a specific type of domestic terrorism group and evaluating that group." Second Supp. Hardy Decl. ¶ 16. The redactions cover information such as questions and criteria used for evaluation of the domestic terrorist groups and discussion of specific factors to be analyzed to assess the level of threat posed by the groups. Id.; see also id. Ex. A (EC stating that the Newark "Domain Team will consider the following questions in this Assessment"). Information such as file numbers, descriptions of the groups, and other descriptive information were also redacted, as it reveals not only the targets of the investigation, but also what the FBI knows about the groups and the angle the FBI is taking in its investigations of the groups. Id. ¶ 16. As explained in Defendants' December 12, 2011 Motion for Summary Judgment, the FBI's assessments of certain groups are themselves an intelligence gathering technique. See Dkt. # 20-1 at 34. This EC documents and authorizes such an assessment. The EC is utilized by the field office to guide its compiling of information on the threats discussed therein. Id. In other words, it provides a "checklist" or blueprint for the assessment that should be protected from release. See Mayer Brown LLP v. I.R.S., 562 F.3d 1190, 1192 (D.C. Cir. 2009).

As Mr. Hardy attests, release of this information on the techniques, procedures, and guidelines for this assessment would

risk circumvention of the law in several ways. First, disclosures on what knowledge the FBI has on these groups and the parameters of its investigations would allow the groups to "alter their behavior and go undetected." Second Supp. Hardy Decl.

¶ 16. Second, describing the resources devoted to the assessment and investigations "would allow the groups to gather their own resources to exceed those of the field office and thus circumvent the law." Id. And the relative benefit of the FBI's investigative techniques and procedures would diminish if "criminals, terrorists, and spies [are] educate[d] about the techniques employed for the collection and analysis of information" Id. For example, if it is made public that the FBI is interested in "How do the groups do X?" or "How often do the groups visit Y?", the groups under investigation would know such information is being collected and scrutinized by the FBI, which would cause them to change their behavior to avoid detection or foil the FBI's investigation. This EC contains precisely such sensitive, target-specific information that guides the open, ongoing investigations into these groups. It must be protected to prevent circumvention of the FBI's efforts.

III. Defendants Produced All Reasonably Segregable Information From The EC.

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). Here, Mr. Hardy asserts that the FBI reviewed the EC line-by-line and released all reasonably segregable information from it. Second Supp. Hardy Decl. ¶ 17. Disclosure of any additional information would reveal information exempt from release pursuant to 5 U.S.C. § 552(b). Id.

Because, overall, the FBI made a good faith effort to achieve maximum disclosure both with the production of the EC itself and with its withholdings of information in the EC, and because Defendants' withholdings pursuant to 5 U.S.C. § 552(b) are proper, Defendants are entitled to summary judgment.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment with respect to the EC produced to Plaintiff on February 22, 2012 should be granted.

Dated: March 16, 2012

Respectfully submitted,

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

_____)	
American Civil Liberties Union)	
of New Jersey,)	
)	
Plaintiff,)	
)	
v.	)	Civil A. No. 2:11-CV-2553
)	
Federal Bureau of Investigation,)	
Department of Justice,)	
)	
Defendants.)	
)	
_____)	

SECOND SUPPLEMENTAL DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am currently the Section Chief of the Record/Information Dissemination Section ("RIDS"), Records Management Division, formerly at Federal Bureau of Investigation ("FBI") Headquarters in Washington, D.C., and currently relocated to Winchester, Virginia.

(2) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a, and I am aware of the FBI's responses to the FOIA request made by plaintiff, the American Civil Liberties Union of New Jersey ("ACLU"), seeking access to records

pertaining to the FBI's use of race and ethnicity to collect information about and "map" racial and ethnic demographics, "behaviors," and "life style characteristics" in local communities in New Jersey. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) With the filing of its memorandum in support of its Opposition to Defendants' Motion for Summary Judgment and Cross-Motion for Partial Summary Judgment, Plaintiff raised concerns regarding the thoroughness of the FBI's search for responsive material and the fact that short, two-to-three page electronic communications ("EC") regarding domain intelligence assessments were not located and produced to plaintiff. The FBI herein incorporates and references my first declaration, filed with the Court on December 12, 2011, and my first supplemental declaration, filed on February 10, 2012. However, in response to the plaintiff's concerns, the FBI reviewed its search procedures. The review included confirming with the Newark field office that no additional responsive material exists and conducting a page-by-page re-evaluation of all documents which RIDS previously excluded as non-responsive to the plaintiff's request. As a result of the FBI's additional efforts, it was

determined that one previously excluded document could arguably be considered responsive to plaintiff's request. Although the FBI believes the document is not responsive, as a matter of discretion, the FBI is treating the document in question as responsive and producing it, in part, to plaintiff. All other documents re-reviewed remain unresponsive. The FBI produced the one arguably responsive document to plaintiff on February 22, 2012.

(4) The purpose of this declaration is to provide justification for the withholding of exempt material in the one additional document, attached as "Exhibit A." The individual pages of the document are labeled NK GEOMAP SUPP-783 through 788. Exempt information within the six pages was withheld from disclosure pursuant to FOIA Exemptions (b)(6), (b)(7)(A), (b)(7)(C), and (b)(7)(E).

(5) The December 12, 2011 Hardy Declaration divided responsive materials into five categories of documents: (1) DIOG Training Material; (2) Domain Intelligence Notes from Domain Management concerning threats to Newark's Area of Responsibility, including maps and data tables; (3) 2009 Newark Baseline Domain Assessment; (4) October 30, 2009 FBI EC memorializing the Newark 2009 Baseline Domain Assessment; and (5) Maps created by the Newark Domain Management Team. The inclusion of this document would necessitate the need for a

sixth category: (6) an EC documenting and authorizing the opening of an Assessment or DIN. The EC in category six differs from the EC in category four in that unlike the EC memorializing the 2009 Baseline Domain Assessment, the newly processed EC merely authorizes the initiation of an assessment in Domestic Terrorism. This EC provides far less substantive information than the EC in category four. The difference being that the category four EC is an "end-product" of analytical research; the EC in category six is an "opening" item. The amount of detail and information are worlds apart. For this reason, the FBI is able to make a partial release of information in the category six EC.

EXEMPTION (b) (7) THRESHOLD

(6) Exemption (b) (7) of the FOIA protects from mandatory disclosure records or information compiled for law enforcement purposes, but only to the extent that disclosure could reasonably be expected to cause one of the harms enumerated in the subpart of the exemption. See 5 U.S.C. § 552 (b) (7). In this case, the harm that could reasonably be expected to result from disclosure of the information includes interference with pending law enforcement proceedings; unwarranted invasions of personal privacy and the clearly unwarranted invasion of personal privacy; and the revelation of sensitive law enforcement techniques and procedures.

(7) Before an agency can invoke any of the harms enumerated in Exemption (b)(7), it must first demonstrate that the records or information at issue were compiled for law enforcement purposes. Law enforcement agencies such as the FBI must demonstrate that the records at issue are related to the enforcement of federal laws and that the enforcement activity is within the law enforcement duty of that agency. The EC pertains to a request to initiate intelligence analysis, planning, and investigation in the area of Domestic Terrorism (both criminal and intelligence related). It contains information in support of that request concerning the investigative activity proposed. The FBI is an intelligence agency as well as a law enforcement agency and is authorized to engage in intelligence analysis and planning, using all lawful sources of information.¹ The FBI is the "lead federal agency" in Federal Crimes of Terrorism, non-Terrorism federal crimes, Counterintelligence and Espionage, and Criminal Investigations. The EC was written for law enforcement purposes to combat domestic terrorism and is therefore in furtherance of the FBI's law enforcement and intelligence mission. It is related to the enforcement of federal laws and the enforcement activity is within the law enforcement duty of the FBI to combat domestic terrorism.

¹DIOG Section 2 General Authorities and Principles.

EXEMPTION (b) (7) (A)
PENDING LAW ENFORCEMENT PROCEEDINGS

(8) 5 U.S.C. § 552 (b) (7) (A) exempts from disclosure:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings.

(9) Application of this exemption requires: the existence of law enforcement records; a pending or prospective law enforcement proceeding; and a determination that release of the information could reasonably be expected to interfere with the enforcement proceeding or prosecution. The FBI carefully reviewed the EC to determine what information within the EC constituted current intelligence information being used in pending or prospective investigations or prosecutions. As part of the review process, RIDS confirmed with the Newark field office that the groups identified in the EC are subject to current, active investigations. In addition, the collected information is currently being used by intelligence analysts ("IAs") and Special Agents for ongoing investigations of the groups discussed in the EC, and Newark also confirmed that release of the information could reasonably be expected to interfere with the ongoing investigations of these cases. Until these investigations, potential and pending enforcement proceedings, which will likely utilize the intelligence gathered

as a result of the authorized assessment discussed in the EC, are concluded and resolved, the identity of the groups, the file numbers (which include the identity of the groups), descriptions of the groups, the background and supporting information which would identify the group, the criteria and characteristics being evaluated concerning the group which would identify the group, cannot be revealed and the information remains exempt under FOIA Exemption (b)(7)(A). To reveal this information would alert the groups that they are under investigation and, consequently, cause harm to the FBI's ability to track specific current and future threats from these groups, as the groups may change their behavior and/or the "players" to avoid detection and/or further investigation. Release of the redacted information would cause harm to the FBI's ability to effectively understand the specific vulnerabilities and intelligence gaps related to the current and pending threats within the Newark area of responsibility as a result of the activities of these groups, and thereby directly harm Newark's ability to properly allocate its resources to thwart and prevent the criminal activities and domestic terrorist acts. For these reasons, exempt information that includes file numbers and serial numbers, domestic terrorism group names and types, group descriptions, descriptive group background information and history, criteria and characteristics of the groups, and related file numbers - all of which could

reveal the identities of the groups under investigation - has been withheld pursuant to FOIA Exemption (b) (7) (A) on NK GEOMAP SUPP-783-788.

EXEMPTIONS (b) (6) AND (b) (7) (C)
CLEARLY UNWARRANTED AND UNWARRANTED
INVASION OF PERSONAL PRIVACY²

(10) 5 U.S.C. § 552 (b) (6) exempts from disclosure

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

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

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

(11) When withholding information pursuant to these exemptions, the FBI is required to balance the privacy interests of the individuals mentioned in these records against any public interest in disclosure. In asserting these exemptions, each

² The practice of the FBI is to assert Exemption (b) (6) in conjunction with Exemption (b) (7) (C). Although the balancing test for Exemption (b) (6) uses a "would constitute a clearly unwarranted invasion of personal privacy" standard and the test for Exemption (b) (7) (C) uses the lower standard of "could reasonably be expected to constitute an unwarranted invasion of personal privacy," the analysis and balancing required by both exemptions is sufficiently similar to warrant a consolidated discussion. The privacy interests are balanced against the public's interest in disclosure under the analysis of both exemptions.

item of information was examined to determine the degree and nature of the privacy interest of every individual whose name and/or identifying information appears in these records. The public interest in disclosure of this information is determined by whether the information in question would inform plaintiff and the general public about the FBI's performance of its mission to enforce federal criminal statutes and protect the national security of the United States and/or how the information would shed light on the FBI's performance of its mandated statutory duties. In each instance where the FBI withheld information, it determined that individual privacy rights outweighed the public interest. Every effort has been made to release all segregable information contained in these records without invading the privacy interests of these individuals.

(12) In this case, Exemptions (b)(6) and (b)(7)(C) have been asserted to protect the names and identifying information of FBI Special Agents ("SAs") who were responsible for conducting, supervising, and/or maintaining the investigative activities discussed in the document, as well as FBI support personnel. SAs conduct interviews and compile the resulting information, as well as report on the status of investigations. Assignments of SAs to any particular investigation are not by choice. Publicity (adverse or otherwise) regarding any

particular investigation to which they have been assigned may seriously prejudice their effectiveness in conducting other investigations. The privacy consideration is also to protect FBI SAs, as individuals, from unnecessary, unofficial questioning as to the conduct of this or other investigations, whether or not they are currently employed by the FBI. FBI SAs conduct official inquiries into various criminal and national security violation cases. They come into contact with all strata of society, conducting searches and making arrests, both of which result in reasonable but nonetheless serious disturbances to people and their lives. It is possible for an individual targeted by such law enforcement actions to carry a grudge which may last for years, and these individuals may seek revenge on the agents and other federal employees involved in a particular investigation. The publicity associated with the release of an agent's identity in connection with a particular investigation could trigger hostility toward a particular agent. Thus, SAs have a substantial, real interest in not having their names and other personal identifying information disclosed.

(13) The names of FBI support employees, particularly Intelligence Analysts, a Collection Manager, and a Support Services Technician, are also withheld pursuant to Exemptions (b) (6) and (b) (7) (C). Support personnel are assigned to handle tasks related to the highly sensitive research that goes into

intelligence notes and domain maps as reflected in the documents responsive to plaintiff's request. They were, and possibly are, in positions of access to information regarding official law enforcement investigations and intelligence, and therefore could become targets of harassing inquiries for unauthorized access to investigations and intelligence if their identities were released, similar to those harms articulated previously for SAs. These support employees maintain substantial privacy interests in not having their identities disclosed.

(14) The FBI balanced the privacy interests of the FBI SAs and support employees against the public interest in disclosure. Disclosure of the names and related identifying information of FBI agents and support employees in the EC would not shed light on the performance of the FBI's statutory duties. It would not educate plaintiff or the general public on the operations of the FBI and its fulfillment of its mission. Accordingly, after balancing the competing interests, the FBI concluded that no public interest would be served by disclosing the identities of these FBI employees to the general public and disclosure of the names and related identifying information would constitute a clearly unwarranted and an unwarranted invasion of their personal privacy. The FBI withheld the names of FBI special agents and other support personnel at NK GEOMAP SUPP-783 and 788.

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

(15) Exemption (b) (7) (E) provides for the withholding of:

"law enforcement records that would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."

5 U.S.C. § 552 (b) (7) (E) .

Exemption (b) (7) (E) has been asserted to protect from disclosure investigatory and intelligence gathering procedures, techniques, and guidelines in this EC, used by FBI agents and intelligence analysts to analyze, evaluate, and conduct criminal and Domestic Terrorism Assessments and related investigations where release could reasonably be expected to give anyone with that particular knowledge the ability to circumvent the law.

(16) This EC contains operational direction and guidance on what criteria to look for in determining what constitutes a specific type of domestic terrorism group and evaluating that group. FBI intelligence analysts have created this guidance in the form of analytical work product, including the questions and criteria for evaluation of the groups, based on research and analysis of multiple investigations of individuals from these groups. Release of what behaviors and knowledge are known by the FBI would allow such groups to alter their behavior and go

undetected. This information further allows the FBI to make a determination of what level of investigative activity is necessary, and how to prioritize and distribute FBI resources for this and other investigations (including those which include multiple subject areas). Describing the amount of resources devoted to a particular investigation or intelligence gathering effort could provide the subject groups with valuable insight which would allow the groups to gather their own resources to exceed those of the field office and thus circumvent the law. The information withheld includes the specific factors analyzed by the division to determine the level of threat by the domestic terrorist groups because that information determines the FBI's level of investigative activity (prioritization) and intelligence gathering efforts in specific subject matter areas. Knowing which groups or subjects upon which the FBI or the Newark field office in particular chooses to place as a priority investigatory or intelligence interest, places key information in the hands of the terrorist groups, informing the groups of when to cease and desist activities and when to proceed, thus circumventing the law. Some of the protected information includes the file numbers; descriptions; designations assigned to certain types of intelligence and/or criminal files and investigations; and Standing Requirement descriptive information which reveals the focus and extent of FBI resources and

attention. Revelation of any FBI knowledge of how these groups may work in conjunction with one another will cause such groups to alter their behaviors, and therefore result in circumvention of the law by avoiding detection, developing countermeasures. The relative benefit of the FBI's techniques and procedures could be diminished if the actual techniques and procedures were revealed in this matter. Intelligence information, analysis and conclusory work product concerning the groups which has been created, compiled, or gathered by the Newark field office to further current and prospective investigations has been withheld. While it is known that the FBI is involved in collection and analysis of information to aid its mission of detecting and preventing harm to national security before it happens, the FBI has not disclosed the precise methods used in the collection and analysis of information, as such disclosures would enable criminals, terrorists, and spies to educate themselves about the techniques employed for the collection and analysis of information. That information would improve the ability of such individuals to take countermeasures to circumvent the effectiveness of the techniques and to continue to violate the law and engage in intelligence, terrorist, and criminal activities. This EC was created in support of very detailed and highly sensitive analytical work product and portions relating to and in support of that work product have

been withheld because release of the information could not only allow criminals in the Newark domain to circumvent the law by understanding what intelligence was known on their group or organization but would also allow the group/organization to circumvent detection in other domains as well since the information is widely used elsewhere in the FBI and in the United States Intelligence Community. This information has been protected from disclosure pursuant to FOIA Exemption (b)(7)(E) at NK GEOMAP SUPP 783-788.

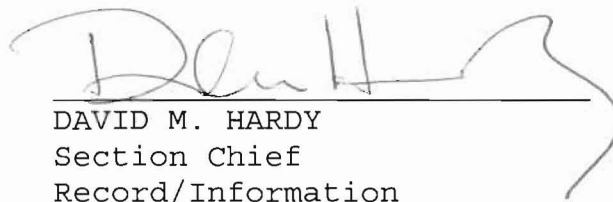
CONCLUSION

(17) The FBI has released all reasonably segregable information from the EC discussed herein. Each page of the EC was carefully reviewed, line by line, to determine if any information could be segregated for release. And as previously mentioned, the FBI has conducted a re-review of all excluded non-responsive material. All information that was responsive and segregable has now been released in part. The FBI determined that no further information could be segregated from the EC, as any further release of information within the EC would cause harm to ongoing, pending, and anticipated future investigations and prosecutions, result in an unwarranted and clearly unwarranted invasion of personal privacy, and would reveal sensitive analytical, intelligence gathering, and investigatory techniques and procedures that if known would

allow criminals to circumvent the law. Information has been withheld pursuant to FOIA Exemptions 6, 7(A), 7(C), and 7(E).

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

Executed this 16th day of March, 2012.

A handwritten signature in black ink, appearing to read "D Hardy", written over a horizontal line.

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

Exhibit A
to Second Hardy
Supplemental Declaration

(Rev. 05-01-2008)

UNCLASSIFIED

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE

Date: 02/20/2009

To: Intelligence Directorate Attn: Domain Management Section/Domain Analysis Unit

Newark

ASAC [redacted]
CDC [redacted]
SSA [redacted]
SA [redacted]
COLIMC [redacted]
IA [redacted]
SST [redacted]

b6 1
b7C 1

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 2-9-2009 BY 6877/DAW/SAW/SA
64

From: Newark

I-1, Domain Management

Contact: IA [redacted]

b6 1
b7C 1

Approved By: Dun Weysan

[redacted]

Drafted By:

[redacted]

b7A

Case ID #: [redacted] (Pending)

[redacted] (Pending)

b7A
b7E 2

Title: DOMESTIC TERRORISM DOMAIN ASSESSMENTS

[redacted]

ASSESSMENT BEGIN: 2/20/2009

Synopsis: (U//FOUO) Pursuant to a tasking from FBIHQ on 2/2/2009
during a SVTC and in an EC dated 2/5/2009, [redacted]

b7A

Serial [redacted] the Newark Domain Management Team is initiating a Type
4 Assessment on [redacted]

b7A
b7E 2

[redacted] in order to identify the presence, activities,
and impact [redacted] in FBI Newark's
AOR and prepare a domain intelligence note (DIN) based upon
existing information.

Reference: [redacted] Serial [redacted]

b7A

UNCLASSIFIED

UNCLASSIFIED

To: Intelligence Directorate From: Newark
Re: [redacted] 02/20/2009

b7A

Details: (U//FOUO) This communication authorizes FBI Newark's Intelligence Program to initiate a Type 4 Assessment, as noted in the Domestic Investigations and Operations Guide (DIOG) and the Attorney General Guidelines for Domestic FBI Operations (AGG-DOM), to identify the presence, activities, and impact of any person or persons, groups, organizations, or facilities supporting, aiding, facilitating or acting on behalf of [redacted]

b7A
b7E 2

(U//FOUO) A review of the DIOG, Section 10.2.C, and consultation with Newark's Chief Division Council reveals that any investigation into [redacted] may be construed as a Sensitive Investigative Matter. As such CDC review and SAC approval is required prior to any Assessment activity.

b7A
b7E 2

(U//FOUO) According to the DIOG, Section 5.4, an FBI Field Office can acquire information in the course of a Domain Assessment for an authorized purpose. The DIOG states that an authorized purpose would be to detect, obtain information about or prevent or protect against federal crimes or threats to the national security. In addition to an authorized purpose, a Field Office must also have an articulable rationale for acquiring the information and data, which may not be based solely on activities protected by the First Amendment or on race, ethnicity, national origin or religion. The Type 4 Assessment is also authorized for the purpose of gathering information needed to conduct intelligence analysis and planning as allowed in Part IV of the AGG-DOM.

b7A
b7E 2

(U//LES) [redacted]

[redacted]

(U//LES) [redacted]

[redacted]

UNCLASSIFIED

UNCLASSIFIED

To: Intelligence Directorate From: Newark
Re: [redacted] 02/20/2009

b7A

[redacted]

b7A
b7E 2, 18

(U//LES) Specifically, pursuant to guidance from the Domain Management Section, [redacted] Serial [redacted] the NK Domain Management Team will initiate an assessment to identify preliminary domain awareness on the threat from [redacted] based upon information already in possession of FBI Newark. Such information will be memorialized in Newark's DIN.

b7A

b7A
b7E 2

(U//LES) Collection of additional or newly developed information on [redacted] should occur under the general Domestic Terrorism Standing Requirement [redacted] as the new FBI Standing Requirements specific to [redacted] [redacted] have not been drafted yet.

b7A
b7E 2, 5

(U//LES) Based upon guidance from the Domain Management Section, the NK Domain Team will consider the following questions in this Assessment:

1) What [redacted] [redacted] have occurred in the division in the past year?

b7A
b7E 2, 18

2) What [redacted] present in the division? ([redacted] should be presented in order of highest to lowest assessed threat.)

- What is the [redacted] involved in criminal activity?
- What is the [redacted] involved in criminal activity?
 - Is there evidence of [redacted] [redacted] engaged in criminal activity [redacted]?
 - If so, [redacted]?

UNCLASSIFIED

UNCLASSIFIED

To: Intelligence Directorate From: Newark
Re: [redacted] 02/20/2009

b7A

- Is there evidence of [redacted] criminal activity?
- If so, [redacted]?
- What criminal activities [redacted]?
- What are the [redacted]?
- Does the [redacted] have a presence in other divisions?
- Does the [redacted] engaged in criminal activity in other Field Offices?
- Does the [redacted]?
- Does the [redacted]?
- Does [redacted]?
- Have any [redacted]

b7A
b7E 2, 3

- 3) What is the relative threat of [redacted] based on:
- Activity: [redacted]
- Capability: [redacted]
- Opportunity: [redacted]
- Intent: [redacted]
- Target Value: [redacted]
- Fear of Arrest/Reprisal: [redacted]
- Tactics
- Travel
- 4) Are there [redacted]

b7A
b7E 3

UNCLASSIFIED

b7A
b7E 2, 3

UNCLASSIFIED

To: Intelligence Directorate From: Newark
Re: [redacted] 02/20/2009

b7A

- [redacted] ? Do they have any [redacted] ?
- With respect to what [redacted] ?
- 5) Have [redacted] ? b7A
b7E 2, 18
- 6) Have [redacted] ?
- 7) Is there a [redacted] ?
- 8) What is the outlook for [redacted] ?
- 9) What [redacted] ? b7A
b7E 2, 18
- 10) How do [redacted] ?
- 11) What [redacted] ?
- 12) What [redacted] ?

UNCLASSIFIED

UNCLASSIFIED

To: Intelligence Directorate From: Newark
Re: [redacted] 02/20/2009

b7A

LEAD(s) :

Set Lead 1: (Info)

ALL RECEIVING OFFICES

Read and clear.

Set Lead 2: (Action)

NEWARK

b6 1
b7C 1

AT Newark, New Jersey

(U//LES) SST [redacted] : Please establish a sub-file
for the above captioned initiative: [redacted]

b7A
b7E 2

[redacted]

◆◆

UNCLASSIFIED

**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. Waldor
v.)	
	)	Civil No. 11-cv-02553
FEDERAL BUREAU OF)	
INVESTIGATION, UNITED STATES)	
DEPARTMENT OF JUSTICE,)	
)	
Defendants.)	
)	

DEFENDANTS' STATEMENT OF MATERIAL FACTS

Pursuant to Local Civil Rule 56.1 of the Rules of the United States District Court for the District of New Jersey, Defendant Department of Justice ("DOJ") and Defendant Federal Bureau of Investigation ("FBI") hereby incorporate the Statement of Material Facts filed in conjunction with Defendants' December 12, 2011 Motion for Summary Judgment. See Dkt. # 20-20. Defendants also add the following material facts as to which Defendants contend there is no genuine issue in connection with their March 16, 2012 Motion for Summary Judgment under Rule 56(b) of the Federal Rules of Civil Procedure:

1. On February 22, 2012, the FBI released six additional pages to Plaintiff in response to Plaintiff's July 27, 2010 Freedom of Information Act ("FOIA") request to the FBI. See Exhibit 1 to Def's March 16, 2012 MSJ, Second Supplemental Declaration of David M. Hardy ("Second supp. Hardy Decl.") ¶¶ 3-4 & Ex. A.

2. The attached Second Supplemental Declaration of David M. Hardy addresses the document and Defendants' partial withholdings pursuant to FOIA Exemptions 6 and 7, 5 U.S.C. § 552(b). Id. ¶¶ 6-16.

DATED: March 16, 2012

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

PAUL J. FISHMAN
United States Attorney

JOHN TYLER
Assistant Director
Federal Programs Branch

/s/ Deanna L. Durrett
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Attorneys for Defendants

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,)	
)	
Defendants.)	
)	

[PROPOSED] ORDER

Upon consideration of Defendants' March 16, 2012 Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56, it is hereby ORDERED that Defendants' Motion is GRANTED. It is further ORDERED that this action be, and hereby is, dismissed, and that judgment is entered in Defendants' favor.

DATED:

ESTHER SALAS
Judge, United States District
Court

**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,)	
)	
Defendants.)	
)	

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2012, a true and correct copy of Defendants' Motion for Summary Judgment, Memorandum in Support of Defendants' Motion for Summary Judgment, the Second Supplemental Declaration of David M. Hardy and attached exhibit, and Defendants' Statement of Material Facts as to which Defendants contend there is no genuine issue in connection with their Motion for Summary Judgment were electronically filed with the Clerk of the Court for the District of New Jersey using the CM/ECF system, in accordance with Local Rule 5.1. Notice of this filing will be sent to counsel for Plaintiff by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

Dated: March 16, 2012

/s/ Deanna L. Durrett
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