UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

American Civil Liberties Union of New Jersey, Plaintiff, v. Federal Bureau of Investigation, *et al.* Defendants.	Case No. 11-CV-2553 (ES) (CLW)

PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DEFENDANTS' FEBRUARY 22, 2012 RELEASE

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiff in the above-captioned action respectfully moves the Court to enter partial summary judgment in its favor on the claims discussed in the Reply Memorandum in Support of Plaintiff's Cross-Motion for Summary Judgment and Opposition and Cross-Motion for Partial Summary Judgment as to Defendants' February 22, 2012 Release which accompanies this motion.

This lawsuit concerns a Freedom of Information Act ("FOIA") request Plaintiff submitted on July 27, 2010 to the Federal Bureau of Investigation's New Jersey offices. Plaintiff seeks the disclosure of information concerning the FBI's implementation of its authority under the 2008 Domestic Investigations and Operations Guide to collect, analyze, and map

local communities' racial and ethnic information in investigations. This motion for partial summary judgment pertains to the FBI's failure to adequately justify withholding information responsive to Plaintiff's FOIA request from the document partially released to Plaintiff on February 22, 2012. There are no genuine issues of material fact in dispute. For the reasons stated in the accompanying Reply Memorandum in Support of Plaintiff's Cross-Motion for Partial Summary Judgment and Opposition and Cross-Motion for Partial Summary Judgment as to Defendants' February 22, 2012 Release, and supported by the accompanying Second Declaration of Nusrat J. Choudhury and attached exhibits, Plaintiff is entitled to judgment as a matter of law on these claims.

Respectfully Submitted,

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April 2, 2012

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

American Civil Liberties Union of New Jersey, Plaintiff, v. Federal Bureau of Investigation, *et al*. Defendants.	Case No. 11-CV-2553 (ES) (CLW)

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DEFENDANTS' FEBRUARY 22, 2012 RELEASE

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INTRODUCTION

This Freedom of Information Act ("FOIA") lawsuit seeks to determine whether the Federal Bureau of Investigation ("FBI") is using New Jersey communities' racial and ethnic information to conduct investigations in violation of fundamental civil rights and civil liberties. The FBI's use of such information has been a cause for serious concern since the Department of Justice's 2008 Domestic Investigations and Operations Guide ("DIOG") granted the FBI two sweeping authorities: the power to collect and map local communities' racial and ethnic information, and the power to open suspicionless "assessment" investigations without objective evidence of actual misconduct. Taken together, these authorities could result in improper and unlawful investigations based on racial and ethnic profiling of communities and groups with little or no suspicion of wrongdoing.

Recent reports indicate that the New York Police Department ("NYPD") engaged in discriminatory religious and national origin profiling when it mapped and created dossiers on New Jersey Muslims' places of work and worship without any suspicion of criminal activity. Adam Goldman & Matt Apuzzo, *NYPD Built Secret Files on Mosques Outside NY*, Assoc. Press, Feb. 22, 2012, http://bit.ly/HgeBPt. Those revelations resulted in public outrage and calls for investigation and reform. Adam Goldman &

Matt Apuzzo, *Newark Mayor Seeks Probe of NYPD Muslim Spying*, Assoc. Press, Feb. 23, 2012, http://bit.ly/HQezNu; *NJ Muslims, Officials Discussed NYPD Surveillance*, Assoc. Press, Mar. 3, 2012, http://cbsn.ws/HiHGpf. The public has a right to know whether the FBI is using its DIOG authorities to engage in similar misconduct.

In response to Plaintiff's FOIA Request, Defendants have failed to demonstrate that they conducted an adequate search for responsive documents both because they fail to present sufficiently detailed affidavits describing search procedures, and because evidence in the record raises significant doubt as to the adequacy of the searches. Plaintiff therefore merits summary judgment on the search claim.

Defendants also fail to carry their burden to show that they have disclosed all non-exempt and segregable information from either 17 documents withheld in full or from their recent February 22, 2012 partial release. Plaintiff has made clear that it seeks only a narrow category of information in these documents: racial and ethnic information that is already publicly available from census data and other demographic information sources. Defendants concede that the documents withheld in full contain such information, yet refuse to segregate and disclose it. They fail, however, to support their claim that this public source information is so intermingled with exempt information

in the documents as to be exempt from disclosure itself with the factual showing required by Third Circuit law. Defendants also fail to shield this information from disclosure through reliance on FOIA Exemption 7A, because they do not show that release of the narrow category of information Plaintiff seeks is reasonably likely to harm an ongoing enforcement proceeding.

Finally, the briefing to date makes clear that the parties' proposed process for this Court to resolve Defendants' reliance, if any, on the FOIA's exclusion provision, 5 U.S.C. § 552(c) ("Section 552(c)") does not permit meaningful judicial review and public access to judicial opinions. Plaintiff therefore proposes a process for adjudicating the Section 552(c) issue in this case that will avoid such negative consequences.

Accordingly, Plaintiff respectfully requests that the Court: 1) order Defendants to conduct a thorough search for all responsive records and to provide an affidavit describing in detail the steps taken to search for responsive records; 2) review *in camera* the documents withheld in full to determine what segregable, non-exempt material exists; 3) review *in camera* the February 22, 2012 release to determine what segregable, non-exempt material exists, and 4) adopt Plaintiffs proposed procedure for adjudicating the Section 552(c) issue in this case as described below.

FACTUAL BACKGROUND AND PROCEDURAL POSTURE

The factual background and procedural posture of this case is set forth in Plaintiff's January 20, 2012 brief. Mem. in Supp. of Pl.'s Cross-Mot. for Partial Summ. J. and in Opp'n to Defs.' Mot. for Summ. J., ECF No. 21 (Jan. 20, 2012) ("Pl.'s Opp."), 3-8.

Since that filing, on February 22, 2012, more than seven months after the final release of documents responsive to Plaintiff's FOIA Request, Defendants released a partially redacted six-page Electronic Communication ("EC")from the Newark Field Office. The EC documents and authorizes the opening of a Type 4 Domain Assessment, an FBI investigative activity to "[o]btain information to inform or facilitate intelligence analysis and planning." Second Supplemental Decl. of David M. Hardy, ECF No. 26-2 (Mar. 16, 2012) ("Second Supp. Hardy Decl."), Ex. A. Defendants withheld information from the EC under Exemptions 6, 7A, 7C, and 7E. On March 16, 2012, Defendants moved for summary judgment as to the withholdings.

Plaintiff files this brief in reply to its cross-motion for partial summary judgment on claims challenging Defendants' failure to adequately search for responsive records and their improper withholding of information from seventeen documents withheld in full. Plaintiff also cross-moves for partial summary judgment on claims challenging Defendants' improper

withholding of information under Exemptions 7A and 7E from the February 22, 2012 release.[1]

ARGUMENT

I) Defendants Have Not Demonstrated that the FBI Conducted an Adequate Search.

Plaintiff merits summary judgment on its search claim for two independent reasons: first, Defendants' submissions explaining the FBI's search continue to provide insufficient detail; and second, the FBI's search methods as described on the face of Defendants' declarations were inadequate.

1. Although twice supplemented, Defendants' declarations fail to provide sufficient detail to allow Plaintiff to properly challenge, and the Court to assess, the adequacy of Defendants' searches because they do not sufficiently describe how any of the offices instructed to search for responsive documents responded to those instructions. The Supplemental Hardy Declaration explains for the first time that the FBI Records/Information Dissemination Section ("RIDS") directed subdivisions of three offices at FBI headquarters to search "database systems" and "paper or manual files" for legal memoranda and policy and guidance documents responsive to Plaintiff's Request. *See* Supplemental Decl. of David M. Hardy,

[1] Plaintiff does not challenge Defendants withholding of information from the EC under Exemptions 6 or 7C.

ECF No. 22-1 (Feb. 10, 2012) ("Supp. Hardy Decl."), ¶¶ 5, 11-12, 17. Although the Supplemental Hardy Declaration states that these offices sent "an all-employee email" directing searches, it does not describe any of the steps the offices took to search databases or paper files. *Id*. at ¶¶ 11, 16. None of Defendants' declarations describe which electronic databases were searched or how, what search terms were used, or how electronic records were otherwise searched. Defendants' failure to provide this information does not meet the FOIA's requirements. *See Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980) (adequate affidavit indicates which files were searched); *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (a "reasonably detailed affidavit" concerning an agency's search for responsive information will "set[] forth the search terms and the type of search performed" on electronic databases); *see e.g.*, *Negley v. FBI*, 658 F. Supp. 2d 50, 60 (D.D.C. 2009) (agency's failure to describe the search terms used "plainly violates" the rule set forth in *Oglesby*).

The Hardy declarations' description of the Newark Field Office's search suffers from the same deficiency. Although Defendants' submissions explain that the Newark Field Office devoted two hours to searching for responsive records and sent an "email canvass for the requested material," they still do not describe any of the steps taken during the two-hour search,

including which electronic or paper file systems were searched, how the searches were conducted, or what search terms, if any, were used to search databases. Supp. Hardy Decl. ¶ 20. Without such information, neither Plaintiff nor the Court can determine whether the search was reasonable or whether additional searches would be burdensome. *See Church of Scientology of Cal. v. IRS*, 792 F.2d 146, 151 (D.C. Cir. 1986) ("Summary judgment . . . would require an affidavit reciting facts which enable the District Court to satisfy itself that all appropriate files have been searched, *i.e.*, that further searches would be unreasonably burdensome."); *Weisberg*, 627 F.2d at 371 (agency affidavit must reflect a systematic approach to document location in order to enable requester to challenge search procedures).

2. The FBI's search was also inadequate because the methods it employed, as described in Defendants' declarations, were not reasonably calculated to retrieve either the legal memoranda and policy documents, or certain types of field office records identified in the Request.

Plaintiff seeks five categories of legal memoranda and policy documents concerning the types of racial and ethnic information that the FBI may collect and use under the DIOG. Declaration of David M. Hardy, ECF No. 20-2 (Dec. 12, 2011) ("Hardy Decl."), Ex. A at 2-4 (categories 1, 3, 5, 7, 9). Defendants' declarations fail to show that the search adequately

captured these records. The Newark Field Office stated that it had searched for legal memoranda and policy documents by conducting "a diligent search of *intelligence products* and *maps.*" Supp. Hardy Decl. ¶¶ 17, 20 (emphasis added). But a search for legal memoranda and policy documents amongst "intelligence products or maps" is not "reasonably calculated to uncover all documents" and is inadequate under the FOIA. *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1350-52 (D.C. Cir. 1983).[2]

Plaintiff also requested field office records that were likely generated through Domain Management intelligence activities and/or involve the use of the Geospatial Intelligence (GEOINT) program. *See* Pl.'s Opp. 16-17. Defendants fail to describe a search that reasonably encompassed field office records concerning Domain Management because they do not show that the Newark Field Office actually searched the electronic or paper files storing the 800 series files that Defendants

[2] Plaintiff directed the Request to the field office and its resident agencies because they necessarily retain legal, policy and training documents guiding their collection and use of New Jersey communities' racial and ethnic information pursuant to the DIOG. That components of the Directorate of Intelligence and Director's Office searched for, and released, a handful of training and policy documents does not cure the inadequacy in the Field Office's search for these records. Courts have made clear that the adequacy of a search is determined not by its results, but by the agency's methods. *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003).

acknowledge correspond to this intelligence program, notwithstanding RIDS' instruction to include such files in the search. Supp. Hardy Decl. ¶ 19 n.1. Similarly Defendants' declarations do not show that either the Directorate of Intelligence or the Newark Field Office searched locations where responsive field office GEOINT program records in their possession are stored.[3] Neither the Defendants' asserted lack of bad faith, nor the possibility that aspects of the search may have been reasonable cures the inadequacies resulting from search methods that were not reasonably calculated to retrieve responsive records. *See Neugent v. U.S. Dep't of the Interior*, 640 F.2d 386, 389-90 (D.C. Cir. 1981) (remanding for order requiring further searches where material questions of fact existed as to adequacy of search, despite agency's good faith or the possibility that aspects of search were extensive).

For these reasons, Defendants do not merit summary judgment on the search claim, and this Court should order Defendants to conduct a thorough and expeditious search for responsive records and to submit a detailed affidavit describing the search.

[3] While Defendants assert that the Directorate of Intelligence is the most logical place for GEOINT records, the field office also likely possesses them. The DIOG permits field offices to use racial and ethnic demographic information in intelligence and threat analysis and the GEOINT program specifically involves analysis of "demographics" for such purposes. *See* Pl.'s Opp. 16-17.

II) Defendants Fail to Justify their Refusal to Segregate and Disclose Non-Exempt Information From Documents Withheld In Full.

Defendants' withholding in full of Domain Intelligence Notes ("DINs") 1-8 and 10-11, the 2009 Newark Annual Baseline Assessment ("Baseline Assessment"), the Domain Program Management Electronic Communication memorializing the 2009 Newark Annual Baseline Assessment ("Domain Program Management EC"), and five maps cannot be sustained because their declarations fail to demonstrate that all reasonably segregable information has been disclosed. The parties do not dispute that Defendants have described the agency's *process* for making segregation determinations in this case. *See* Pl.'s Opp. 24-25; Defs.' Reply in Supp. of Mot. for Summ. J. and Opp'n to Pl.'s Cross-Mot. for Partial Summ. J., ECF No. 22 (Feb. 10, 2010) ("Defs.' Reply"), 11-12. They disagree, however, about whether Defendants have provided the factual explanation necessary to support their refusal to segregate and disclose non-exempt information from the documents withheld in full. Even as supplemented, however, Defendants' declarations remain insufficient to discharge their segregability burden under the FOIA.

A. This Court Should Conduct *In Camera* Review of the Withheld Documents.

Although courts typically accord "substantial weight" to government declarations in national security-related FOIA cases, that deference is due only when the government's affidavits "contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record." *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982); *see also Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987) (even in the national-security context, courts must not "relinquish[] their independent responsibility" to review an agency's withholdings); *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998) ("[D]eference is not equivalent to acquiescence . . . .").

The Hardy declarations do not merit this deference because they fail to provide the "factual recitation" necessary to justify the FBI's withholding of the publicly-available information contained in the documents, as explained in detail in Section III(B). *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 488 F.3d 178, 187 (3d Cir. 2007); Pl.'s Opp. 24-25.[4] This case is

[4] Defendants' recent declassification of a map previously withheld under Exemption 1 and release of public information from a training slide previously withheld under Exemption 7E further calls the Hardy declarations into question by demonstrating that the FBI improperly used its authority to classify information and to apply FOIA in the course of this

therefore one in which "in *camera* inspection is needed in order to make a responsible de novo determination" as to whether Defendants have discharged their segregability burden. *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978) (per curiam); *Patterson v. FBI*, 705 F. Supp. 1033, 1040 (D.N.J. 1989) (where agency declaration is "unduly vague," *in camera* review is "the best means available to render substantial justice to plaintiff's claims" while protecting legitimate government interests); *see* 5 U.S.C. § 552(a)(4)(B).[5]

B. Defendants Declarations Do Not Justify the Withholding of Publicly-Available Information.

Defendants concede that the withheld documents contain publicly-available information, Hardy Decl. ¶ 32, but claim that such information is either exempt or so inextricably intertwined with exempt information that disclosure would compromise national security and ongoing investigations. Defs.' Reply 9–11. Yet, none of Defendants' four overarching points or document-specific assertions show that they have met their burden under the FOIA. Plaintiff addresses and refutes each argument in turn.

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litigation. *See* Supp. Hardy Decl. ¶ 19 n.1; Defs.' Reply 29 n.5.

[5] Because no more than seventeen fully redacted documents and one partially redacted document are at issue in this case, judicial economy also strongly favors *in camera* review in order to test the credibility of the government's assertions and provide a reviewing court with a proper record on appeal. *See Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 996 (D.C. 1998) ("*in camera* inspection may be particularly appropriate . . . when the number of withheld documents is relatively small").

1. Defendants' contention that they may withhold publicly-available information under Exemption 7A because it will interfere with ongoing and prospective investigations, Defs.' Reply 12-13, 17-18, is premised on two flawed assertions: 1) a factually unsupported claim that public source information is inextricably intertwined with exempt information in the documents, and 2) an unreasonable conclusion that disclosure of publicly-available demographic information will cause harm.

First, Defendants do not factually support their assertion that public source information is "inextricably intertwined" and "intermingled" with exempt investigatory data in the documents. Defs.' Reply 12-13; Hardy Decl. ¶ 32. For many documents, the Hardy declarations fail to describe how much of the document consists of public source information or how that information is dispersed. Hardy Decl. ¶ 40 at 33-34, 36-38, 39-40, 44-50 (failing to provide necessary detail for DINs 1, 3, 5, 8, 10, and 11, Baseline Assessment, and Domain Program Management EC); Supp. Hardy Decl. ¶¶ 25-31 (same for Baseline Assessment); *id.* at ¶ 32 (same for Domain Program Management EC). Such descriptions do not provide the factual recitation required by the FOIA. *See Abdelfattah*, 488 F.3d at 187 (affidavit must describe "what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document" to support refusal to segregate and disclose); *see*

also Davin v. U.S. Dep't of Justice, 60 F.3d 1043, 1052 (3d Cir. 1995). Indeed, for four DINs withheld in full, Defendants' submissions explain that one-to-two page "background" sections of these twenty-plus page documents contain "population[]" information, suggesting that census data and demographics could reasonably be segregated and disclosed without undue burden or causing harm. Hardy Decl. ¶ 40 at 35-36, 38-39, 41-44 (describing DINs 2, 4, 6, and 7).

Second, as a result, Defendants declarations fail to show how disclosure of the publicly-available information sought by Plaintiff is reasonably likely to harm an ongoing enforcement proceeding as Exemption 7A requires. *See Campbell v. Dep't of Health & Human Servs.*, 682 F.2d 256, 259 (D.C. Cir. 1982) ("[T]he government must show, by more than conclusory statement, *how* particular kinds of investigatory records would interfere with a pending enforcement proceeding.") (emphasis added). Defendants' declarations do not explain how withholding publicly-available census information that delineates or maps New Jersey's communities by race, ethnicity or national origin would tip off specific investigation targets. Presumably, the New Jersey FBI is targeting individuals or groups for investigation based on suspicion of wrongful conduct and not just on race, ethnicity, or national origin. It is indicia of that wrongful conduct rather than race, ethnicity or national

origin information that would tip the target off, and Plaintiff does not seek any conduct-based information. Even if the FBI is instead targeting individuals or groups for investigation based on race, ethnicity or national origin, disclosure of that information would not tip off any particular individual; it would only indicate that a particular racial, ethnic or national origin *group* is being subjected to closer scrutiny—precisely the kind of information that Defendants should segregate and that the New Jersey public has a right to know.

Indeed the FBI has disclosed the opening of suspicionless "domain assessment" investigations of racial and ethnic communities in response to similar FOIA requests.[6] *See, e.g.*, Declaration of Nusrat J. Choudhury, ECF No. 21-2 (Jan. 20, 2012) ("Choudhury Decl."), Ex. K (FBI document seeking authority to open investigation into Michigan's Middle-Eastern and Muslim population); *id.* at Ex. D (FBI document opening investigation into San Francisco's Chinese and Russian populations).[7]

[6] "Assessments" are suspicionless investigations because they do not require objective information suggesting the possibility of misconduct, but only an FBI agent's subjective determination that he or she is acting with an authorized purpose to prevent crime or a threat to national security. U.S. Dep't of Justice, The Attorney General's Guidelines for Domestic FBI Operations 17 (2008), http://www.justice.gov/ag/readingroom/guidelines.pdf.

[7] *See also* American Civil Liberties Union, Eye on the FBI: The FBI is Engaged in Unconstitutional Racial Profiling and Racial "Mapping" (Oct. 20, 2011), http://www.aclu.org/files/assets/aclu_eye_on_the_fbi_alert_-

2. Defendants' contention that the FBI has not waived exemptions applicable to public source information under the doctrine of public domain waiver misses the point. Defs.' Reply 13-14. Plaintiff does not argue that Defendants have waived otherwise valid exemptions over publicly available census data and demographic information—this information is undeniably and "truly public" and is not exempt from disclosure. *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) (public domain waiver doctrine applies when information that would be protected by "an otherwise valid exemption" has been "disclosed and preserved in a permanent public record"); *cf. Students Against Genocide v. Dep't of State*, 257 F.3d 828, 835 (D.C. Cir. 2001) (FOIA requesters invoking public domain waiver doctrine conceded that requested records were initially classified and exempt).[8] Defendants' public domain waiver argument thus collapses into their third claim: that the FBI's *use* of census data and

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_fbi_engaged_in_unconstitutional_racial_profiling_and_racial_mapping_0.pdf.

[8] For example, the online 2010 Census Demographic Profile Table and the 2010 Census Demographic Profile for New Jersey show that data on race and Hispanic or Latino origin for all county subdivisions, school districts, zip code tabulation areas, and other geographic areas down to the census tract level in New Jersey is publicly-available, non-exempt information. *See* Choudhury Decl. Ex. B (2010 Census Redistricting Data (Public Law 94 171) Summary File: Race, U.S. Census Bureau (2010)); *2010 Census Demographic Profile for New Jersey*, U.S. Census Bureau (May 26, 2011), http://www2.census.gov/census_2010/03-Demographic_Profile/New_Jersey/.

demographic information in the context of a specific case is exempt information. Defs.' Reply 14-15.

3. But, the FBI's use of census data and demographic information pursuant to the DIOG is not protected information that may be withheld; it is a widely known practice. Choudhury Decl. Ex. A at 33 (DIOG § 4.3(C)(2)); *id.* at Ex. C (Compl. ¶ 18) (citing press reports of FBI's racial and ethnic mapping under the DIOG).[9] As described above, Defendants' releases in response to nearly identical requests in other states have shown that the FBI uses population statistics and census data to target suspicionless domain assessment investigations. *See discussion supra* 15. The FBI's use of this information is thus different from, for example, the non-public "structure, pattern and sequence of questions" about polygraph use that the court in Blanton found was exempt from disclosure. *Blanton v. U.S. Dep't*

[9] Contrary to Defendants' contention, the FBI has not merely revealed that it "occasionally uses publicly available demographic information as part of investigations." Defs.' Reply 23. Publication of DIOG Section 4.3(C)(2) and the documents received by ACLU affiliates across the country has shown that this practice is a routine part of the FBI's nationwide Domain Management intelligence gathering program. *See* Pl.'s Opp. 6 n.4; (citing American Civil Liberties Union, Eye on the FBI: The FBI is Engaged in Unconstitutional Racial Profiling and Racial "Mapping"); *see, e.g.*, Jerry Markon, *ACLU Says FBI Uses Profiling Against Muslims Other Minorities*, Wash. Post, Oct. 20, 2011, http://wapo.st/H9QRJc; Charlie Savage, *FBI Scrutinized for Amassing Data on American Communities*, N.Y. Times, Oct. 20, 2011, http://nyti.ms/H9QVsp.

of Justice, 63 F. Supp. 2d. 35, 50 (D.D.C. 1999).[10] In *Blanton*, the Court permitted the agency to withhold this non-public information to prevent individuals from cheating the polygraph test. Here, no similar concern comes into play because the FBI's use of publicly-available racial, ethnic and national origin information is widely known.

4. Defendants' final overarching claim repeats their position that public source information is so "inextricably intertwined" with exempt information in the withheld documents that it is protected from release. Defs.' Reply 16-17. Plaintiff has demonstrated, however, that Defendants' submissions fail to support this assertion with the factual support the Third Circuit requires. *See discussion supra* 13-14; *Abdelfattah*, 488 F.3d at 187. Defendants submissions rely entirely on conclusory and boilerplate statements that fail to

[10] Exemption 7E would nevertheless not protect the FBI's use of public source census data or demographics in Domain Management activities because this practice falls under the "routine-technique" exception. *See Rosenfeld v. Dep't of Justice*, 57 F.3d 803, 815 (9th Cir. 1995) (recognizing "routine-technique" exception to Exemption 7E); *accord Davin*, 60 F.3d at 1064 (same). Although Defendants invoked Exemption 7E over all of the documents withheld in full, they did not brief this argument as to the DINs, Baseline Assessment, or Domain Program Management EC in their summary judgment motion or in reply. *See* Pl.'s Opp. 23 n.14. Plaintiff again reserves the right to present additional briefing on this issue and in response to Defendants' Exemption 7E claims.

discharge their burden under the FOIA. *See* Pl.'s Opp. 25-26; Defs.' Reply 16-17 (citing Hardy Decl. ¶ 32 and boilerplate language in each DIN). The public source information must therefore be disclosed. *EPIC v. Dep't of Justice*, 584 F. Supp. 2d 65, 72 (D.D.C. 2008).

5. Defendants' specific arguments with respect to the withheld documents fare no better.

a. Domestic Intelligence Notes 1-8, 10-11: Defendants' Exemption 7A claim over the DINs fails because, as Plaintiff has shown, Defendants' submissions do not provide the factual support required to show that disclosure of specific public source information Plaintiff seeks is reasonably likely to harm pending enforcement proceedings. *See discussion supra* 13-15.

Similarly, Defendants' fail to demonstrate with any specificity how publicly-available census data and demographic information in DINs 1-8, or the the FBI's use of this information, constitutes an intelligence source or method. Pl.'s Opp. 28-29.[11] Defendants' arguments to the contrary boil

[11] Defendants' briefs and declarations do not squarely assert that the publicly-available information in the documents or the FBI's use of such information are, in and of themselves, classified. Rather, they contend that publicly-available information and its use "can be" classified, Defs.' Reply 23, and that the public information is so intertwined with classified information as to be protected, Hardy Decl. ¶¶ 32, 34; Supp. Hardy Decl. ¶¶ 31, 33. To the extent that Defendants claim that either the public information itself or its use by the FBI is a classified intelligence source or method, or

down to a "generalized, theoretical discussion of the possible harms" and are inadequate under the FOIA. *Wiener v. FBI*, 943 F.2d 972, 981 (9th Cir. 1991); *see, e.g.*, Defs.' Reply 23. Nor does the Supreme Court's decision in *CIA v. Sims*, 471 U.S. 159 (1985) support Defendants' Exemption 1 position. In noting that "public sources of information" may be protected from disclosure under Exemption 3, the Supreme Court considered the subject matter of government-sponsored research programs that although public were not known to be connected to the CIA. *Id*. at 177 & n.21. In contrast, it is widely known that the FBI uses racial and ethnic information in investigations both because the DIOG sections authorizing this use have been disclosed and because media have reported on the program.[12]

Defendants' assertion that segregation and disclosure of non-exempt information from the DINs would be unduly burdensome and ineffectual, is also inadequately supported. Defs.' Reply 20-21; *see, e.g., Mead Data Central Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977) (requiring factual description of how much non-exempt information is in each

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sensitive intelligence information about foreign relations or U.S. foreign activities, the FOIA requires that they support these assertions with specificity in order for the Court to assess them. *Halpern v. FBI*, 181 F.3d 279, 291 (2d. Cir. 1999). Defendants fail to make this showing and rest principally on their Exemption 7A argument that disclosure will harm enforcement proceedings.

[12] Choudhury Decl. Ex. C (Compl. ¶¶ 11, 18); Markon, *supra* note 9; Savage, *supra* note 9.

document and how it is dispersed to meet segregability burden). Because only ten domestic intelligence notes are in dispute, segregation would not impose an undue burden on the agency. Nor would disclosure of reasonably segregable information be ineffectual. Plaintiff does not dispute the withholding of the names and other descriptors of targets from the DINs. Even if this information is withheld, the disclosure of publicly-available census figures and demographic information would shed critical light on whether the FBI is improperly and potentially unlawfully collecting and mapping New Jersey communities on the basis of race, ethnicity or national origin. Pl.'s Opp. 26-27 & n.16; *see, e.g.*, Hardy Decl. Ex. I at NK GEOMAP 743, 746-47, 753 (disclosure of census figures concerning Hispanic, African American, and other populations would remain even absent "MS-13," "gang," and "Central American" descriptors of target). The "focus of the FOIA is information, not documents," *Mead Data Central, Inc.*, 566 F.2d at 260, and disclosure of such information would fulfill the FOIA's purpose of "provid[ing] a means of accountability, to allow Americans to know what their government is doing," *ACLU v. Dep't of Def.*, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004).

b. 2009 Newark Annual Baseline Assessment and Domain Program Management EC: As with the DINs, Defendants have not met their burden under Exemption 7A because their declarations still

fail to provide the required factual basis for withholding publicly-available information from the Baseline Assessment or Domain Program Management EC. *See discussion supra* 13-14; *see also* Supp. Hardy Decl. ¶¶ 31-32 (stating in conclusory fashion that "public source information . . . has been intermingled with available investigatory data" but failing to specify where in the 45-page Baseline Assessment or 36-page EC such information might be). Nor have Defendants carried their burden of withholding these documents under Exemption 1 for the same reasons that they fail to do so with respect to DINs 1-8: their declarations do not address with any specificity why disclosure of census or demographic data would reveal intelligence sources or methods or result in harm to foreign relations. *See discussion supra* 19-20; Pl.'s Opp. 32; *see Halpern*, 181 F.3d at 293 (requiring more than summary assertions of harm for Exemption 1 to apply).

Defendants contend that disclosure of non-exempt, public source data from the Baseline Assessment and Domain Program Management EC would reveal specific factors and characteristics pertinent to FBI investigations and the target and scope of investigations. Defs.' Reply 25. But, as discussed above, the public is aware that the FBI uses racial and ethnic communities' information in threat analysis. *See, discussion supra* 17; *see, e.g.*, Choudhury Decl. Ex. H. (FBI document using population

statistics on "black/African-American populations in Georgia" to analyze threat). Defendants have not adequately shown that the disclosure of census data and statistics, without accompanying disclosure of exempt target descriptors, will reveal the target or scope of investigations.

c. Maps: Defendants' supplemental declarations fail to discharge their burden to withhold the maps under Exemption 7A because they do not adequately explain why disclosure of the public source information in the maps would compromise ongoing investigations. Common sense and evidence in the record make clear that that it should not. For example, if Domain Intelligence Note 9 was linked to an ongoing (rather than closed) investigation of MS-13, public source information from the map in that note could be disclosed without identifying "MS-13" as the target. *See* Hardy Decl. Ex. I at NK GEOMAP 753 (describing "El Salvador, Honduras, Guatemala" to "show[] areas in Newark's [Area of Responsibility] where MS-13 is likely to be concentrated."). This disclosure would provide responsive information to Plaintiff and not harm any ongoing enforcement proceedings.

Moreover, Defendants' supplemental description of the maps underscore that the public source information in them is precisely what Plaintiff seeks. Four maps concern a New Jersey "ethnic-based population" and related "establishments." Supp.

Hardy Dec. ¶ 34. Disclosure of the public information in this document is critical to inform the public whether the FBI may be using—and potentially abusing—its authority to map New Jersey's racial and ethnic communities, their businesses, and community institutions. *See* Choudhury Decl. Ex. A (DIOG 32-33); *see, e.g.*, Choudhury Decl. Ex. K; *cf*. *NYPD Built Secret Files on Mosques Outside New York*, *supra* 1 (reporting on NYPD Muslim mapping program in New Jersey).[13]

Even as supplemented, Defendants' declarations remain insufficient to discharge their segregability burden under the FOIA. The Court should thus review *in camera* unexpurgated versions of the documents withheld in full to determine what segregable, non-exempt material exists.

III) Defendants Have Improperly Withheld Non-Exempt Material From the EC.

The FBI's recently released EC documented and authorized the opening of a Type 4 Domain Assessment, a type of suspicionless FBI investigative activity to procure information for "intelligence analysis and planning." Choudhury Decl. Ex. A at 39, 45 (DIOG §§ 5.1, 5.4(A)(4)). The DIOG permits the FBI to

[13] *See also* N.Y.P.D. Intelligence Division Demographics Unit, Newark, New Jersey Demographics Report (Sept. 25, 2007), *available at* http://hosted.ap.org/specials/interactives/documents/nypd/nypd_newark.pdf (mapping mosques and businesses frequented by Muslims.

collect and map communities' racial and ethnic information in the course of such investigations, Choudhury Decl. Ex. A. at 32–33 (DIOG § 4.3(C)(2)); and the EC thus likely uses and relies on publicly-available information about racial or ethnic communities, including census data or demographics. Although Defendants have partially released the document, they have disclosed no such information.

Defendants fail to meet their burden under the FOIA to withhold certain information redacted from the document under either Exemption 7A or 7E.[14]

1. Exemption 7A: Defendants fail to carry their burden for withholding public source racial or ethnic information, census data or population statistics from the EC under Exemption 7A. Plaintiff does not dispute that the EC was compiled for law enforcement purposes or that the Defendants have identified a pending investigation. Defendants fail, however, to show with any specificity that the disclosure of the particular type of information Plaintiff seeks—racial or ethnic information, census data, and population statistics used in the course of the Field Office's Domain Management activities—would cause harm. *See discussion supra* 13-15; Pl.'s Opp. 30-31; *Campbell v. Dep't of*

[14] Plaintiff hereby incorporates the "Legal Standards" and information and arguments concerning segregability and Exemptions 7A and 7E in Plaintiff's Opposition and Cross-Motion for Summary Judgment. *See* Pl.'s Opp. 8-11, 23-26, 29-30, 37-38.

Health and Human Servs., 682 F.2d 256, 259 (D.C. Cir. 1982) (government must show, by more than conclusory statement how particular records would interfere with pending enforcement proceeding).[15]

Additionally, the FBI has shown that it can safely disclose both general racial and ethnic information as well as census data and population statistics from ECs. It has done so in releases responsive to this Request and other nearly identical ones. *See, e.g.*, Choudhury Decl. Ex. K (FBI document disclosing that presence of Michigan's "large Middle Eastern and Muslim" population justified opening investigation); *id*. at Ex. D (disclosing that size of "Chinese population" and "sizeable Russian population" were factors in opening investigation); Hardy Decl. Ex. I at NK GEOMAP 743, 746-47 (segregating and disclosing census figures); Choudhury Decl. Ex. H (same); Choudhury Decl. Ex. J (same). These disclosures also demonstrate that the information Plaintiff seeks is already widely known, non-exempt, and will not cause "articulable harm" if disclosed. *Manna v. U.S. Dep't of Justice*, 51 F.3d 1158, 1164 (3d Cir. 1995).

[15] Plaintiff does not seek disclosure of other information Defendants seek to withhold, including group names and types, background information, and related file numbers. Mem. In Supp. of Defs.' Mot. for Summ. J. as to Defs.' Feb. 22, 2012 Supplemental Release, ECF No. 26 (Mar. 16, 2012) ("Defs.' Mot. as to Supp. Release"), 7-8.

2. Exemption 7E: Defendants also fail to carry their burden for withholding publicly-available racial and ethnic information, census data and population statistics from the EC under Exemption 7E. Exemption 7E provides for the withholding of law enforcement information that, if released, would reasonably risk circumvention of the law if "guidelines for law enforcement investigations or prosecutions" are disclosed. 5 U.S.C. § 552(b)(7)(E). Defendants' submissions fail to address how the disclosure of publicly-available racial and ethnic information, including census data or population statistics, would compromise what they seek to protect: techniques, procedures, or guidelines for Type 4 domain assessments. Defs.' Mot. as to Supp. Release 12. Plaintiff does not seek disclosure of the "questions or criteria for evaluation of the domestic terrorist groups" or "discussion of the specific factors to be analyzed to assess the threat posed by the groups." *Id*. (citing Second Supp. Hardy Decl. ¶ 16). Rather, Plaintiff seeks only the publicly-available information, including census data and demographics, of the concentrated racial, ethnic or national origin populations that are likely mentioned as a justification for opening the domain assessment investigation. Releasing such information will not risk circumvention of the law because Defendants have done so with respect to similar documents

initiating domain assessment investigations. *See discussion supra* 17, 22-23, 26.

Defendants' conclusory and speculative statements that disclosure of *any* of the withheld information would permit groups to alter their behavior and gather their resources so as to circumvent the law lack the specificity necessary to discharge their burden under the FOIA. Second Supp. Hardy Decl. ¶ 16; *see Halpern*, 181 F.3d at 293; *Davin*, 60 F.3d at 1051 (claims that disclosure would cause "great harm to the source" and "could announce to the world that they were of investigative interest to the FBI" lacked sufficient specificity) (internal citations omitted).

The Court should grant summary judgment to Plaintiff and order Defendants to disclose any publicly-available racial and ethnic information, census data, or population statistics from the EC or, in the alternative, review *in camera* an unexpurgated version to determine what segregable, non-exempt material has not been disclosed.

IV) The Court Should Adopt a Procedure to Adjudicate Defendants' Possible Invocation of FOIA Section 552(c) that Permits Meaningful Judicial Review and Public Access to Judicial Opinions.

The parties' briefing concerning Defendants' possible withholding of records under the FOIA's exclusion provision, 5 U.S.C. § 552(c), leaves two issues in dispute: 1) the nature of

the public order this Court should issue after its *in camera, ex parte* adjudication of the propriety of Defendants' reliance, if any, on Section 552(c), and 2) whether the Court should explain its reasoning in an accompanying sealed opinion to which Plaintiff has access.[16] Defendants have proposed that if the Court determines, after reviewing Defendants' *ex parte* submissions, that the reliance on Section 552(c), if any, was *proper*, then it should issue an order so stating. But Defendants' proposal does not permit this Court's meaningful judicial review of Defendants' reliance on Section 552(c), if any, and the bare order Defendants propose this Court issue does not permit meaningful appellate review (let alone provide enough information for Plaintiff to determine whether to appeal). Defendants' proposal also does not address the content of the Court's order should the Court find that Defendants' reliance on Section 552(c), if any, is *improper*. Partially in anticipation of these issues, Plaintiff proposed that the Court issue a sealed opinion to which Plaintiff would have access. Pl.'s Opp.

[16] Defendants have not contested Plaintiff's entitlement to *in camera* judicial consideration of the propriety of Defendants' Section 552(c) invocation, if any, and in fact have submitted *ex parte* materials to the Court to permit such review. Defs.' Reply 38; Notice of Filing Material *In Camera, Ex Parte*, ECF 22–2 (Feb. 10, 2012). The parties agree that the Court should issue a public order concerning its adjudication of the issue without confirming or denying whether Defendants treated any portion of Plaintiff's FOIA request as subject to Section 552(c), but disagree over the content of the order. *See* Defs.' Reply 38; Pl.'s Opp. 23.

23. But as briefing has progressed, it has become clear that a sealed opinion would not address the foregoing concerns and—regardless of whether Plaintiff had access to such an opinion or not—would result in secret litigation that is entirely at odds with the spirit of FOIA and the public's right of access to the judicial process and its outcomes. In short, there are significant drawbacks to the novel processes both parties have proposed to address Defendants' possible invocation of Section 552(c).

To address each of these concerns, Plaintiff therefore proposes below that the Court adopt a procedure for adjudicating the Section 552(c) issue that is akin to the Glomar response, and thus familiar to other litigants and courts around the country. Plaintiff's proposed procedure would permit meaningful judicial review of Defendants' Section 552(c) invocation, if any, and appellate review of this Court's decision concerning *either* the propriety or impropriety of any such invocation, without revealing whether Defendants have in fact invoked Section 552(c), or whether they have responsive records. Plaintiff's proposed procedure would thus protect the interests of the courts and litigants in meaningful judicial review, Defendants' asserted secrecy interest, Plaintiff's interest in meaningful appellate review, and Plaintiff's and the public's

interest in avoiding entirely secret litigation.[17] Plaintiff respectfully requests that the Court adopt the procedure set forth below.

A. Defendants' Proposal Does Not Permit Meaningful Judicial Review.

Defendants propose that in adjudicating their invocation of Section 552(c), if any, the Court issue a public opinion stating only that "a full review of the claim was had and, if an exclusion was in fact employed, it was and remains amply justified." Defs.' Reply 38. But such a process does not permit meaningful judicial review because the Court has the benefit of only one side's briefing concerning whether any records, if they existed, would fall within Section 552(c)'s statutory language. The bare order Defendants propose also does not permit meaningful appellate review of the Court's determination. *Cf*. *Granite Auto Leasing Corp. v. Carter Mfg. Co*., 546 F.2d 654, 656 (5th Cir. 1977) ("When an order granting summary judgment is opaque and unilluminating as to either the relevant facts or the law with respect to the merits of [a] claim, an appellate court has no basis upon which to affirm the judgment."(internal citation and quotation marks omitted)). Nor

[17] Plaintiff made this proposal to Defendants, but Defendants rejected it without explanation. Second Decl. of Nusrat J. Choudhury Ex. M (March 13, 2012 letter); *id*. at Ex. L (March 20, 2012 email).

does it provide enough information for Plaintiff to determine whether or not to exercise its right to an appeal.

In addition, Defendants' proposal ignores the possibility that the Court might find Defendants' invocation of Section 552(c), if any, was improper. If the Court determines, after *in camera* review, that any reliance on Section 552(c) was improper, then issuing *any* type of public order to that effect would necessarily reveal that Defendants relied on Section 552(c) because the Court could not reach a determination of impropriety unless Defendants had in fact relied on Section 552(c). Thus, a public order parallel to the one Defendants propose in the event of a favorable decision—"a full review of the claim was had and, if any exclusion was in fact employed, it was *not* justified"—would necessarily reveal that Defendants had relied on Section 552(c), and that the reliance was improper. So would the simplest court order possible: "Judgment for Plaintiff." Even if the Court took the extraordinary step of sealing not only its opinion but its judgment as well, this too would effectively notify the public of Defendants' reliance on Section 552(c) because there would be no need for the Court to seal the judgment unless Defendants had in fact relied on Section 552(c), and the Court made a ruling adverse to Defendants.[18] In sum,

[18] Moreover, a sealed judgment and opinion would be contrary to the First Amendment and common law presumption of public access

Defendants do not provide the Court with a proposal for how to make an adverse opinion public while protecting Defendants' asserted interest in the secrecy of any Section 552(c) invocation, and affording meaningful appellate review of any such decision. Even if an appellate court were somehow to adjudicate a possible finding of impropriety based on a bare order, Defendants' interest in secrecy would not be preserved if the Court's adverse ruling were reversed on appeal: an appellate decision that Defendants had properly relied on Section 552(c) would also signify that Defendants had in fact relied on the exclusion provision.

B. A Sealed Opinion Would Permit Meaningful Judicial Review, But Would Result In Disfavored Secret Litigation.

In order to ensure meaningful judicial review, Plaintiff requested a sealed judicial opinion setting forth the Court's reasoning, to which Plaintiff would have access, in addition to a public order. Pl.'s Opp. 23; *see Farrar v. Cain*, 642 F.2d 86, 87 (5th Cir. 1981) (per curiam) (findings of fact and conclusions of law "will greatly facilitate appellate review" of a summary judgment grant); *Jones v. Morris*, 777 F.2d 1277, 1281 (7th Cir. 1985) (written opinion "greatly facilitates the

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to judicial opinions. *See, e.g.*, *Press-Enter. Co. v. Super. Ct. of Cal.*, 464 U.S. 501, 510 (1984); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978); *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006); *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348-349 (7th Cir. 2006).

process of appellate review" and "ensures that the trial court has carefully considered the allegations of the complaint and the applicable law"). Defendants oppose Plaintiff's request. Defs.' Reply 38-39. Plaintiff maintains that a sealed opinion containing the Court's reasoning is necessary to permit meaningful appellate review (and Plaintiff should have access to such an opinion to exercise its right to an appeal). However, this sealed process would promote wholly secret litigation, which is at odds with the spirit of FOIA and this Court's obligation to protect the public right of access to the judicial process and its outcomes under the First Amendment and the common law. *See, e.g.*, *Press-Enter. Co.*, 464 U.S. at 510 (1984) (presumption of public access to the activities of the judiciary is overcome only in the rarest and most compelling of circumstances.); *Nixon*, 435 U.S. at 597 (common law right of access to "judicial records and documents"); *Kamakana*, 447 F.3d at 1179 ("[T]he strong presumption of access to judicial records applies fully to dispositive pleadings."); *Hicklin Eng'g, L.C.*, 439 F.3d at 348-349 (unsealing district court opinion and emphasizing, "What happens in the federal courts is presumptively open to public scrutiny . . . We hope never to encounter another sealed opinion.").

C. Plaintiff Proposes a Glomar-Like Process to Permit Meaningful Judicial Review and Protect the Interests of the Litigants and the Public.

To avoid these negative consequences, Plaintiff proposes that the Court adopt a procedure that is akin to the Glomar procedure established by the D.C. Circuit in *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976) and followed by other circuits to accommodate those narrow circumstances in which an agency may properly refuse to confirm or deny the existence of records. *Lame v. U.S. Dep't of Justice*, 654 F.2d 917, 921 (3d Cir. 1981).

The normal FOIA practice requires an agency to search for responsive records, release nonexempt records, and then provide a detailed justification for any withholdings to the requester and the court. *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (1973). In limited circumstances, where an agency claims that its very confirmation or denial of the existence of records requested under the FOIA would "cause harm cognizable under a FOIA exception," agencies are permitted to invoke the Glomar procedure. *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1178 (D.C. Cir. 2011) (quoting *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)) (internal quotation marks and citation omitted); *Phillippi*, 546 F.2d 1009; c*f*. 5 U.S.C. § 552(c)(3) (requiring the very existence of the requested records to be classified information for agency to rely on exclusion).

In the Glomar procedure, an agency may respond to a FOIA requester by stating publicly that it interprets the request as seeking records that, if they exist, would be excludable under FOIA and thus have not been processed. *See, e.g.*, *Roth*, 642 F.3d at 1171-72; *Moore v. CIA*, 666 F.3d 1330, 1331 (D.C. Cir. 2001). The parties then brief, and the court resolves, whether the fact of the existence of the records sought is itself exempt from disclosure.[19]

Similarly, Plaintiff requests that the Court require Defendants to respond to Plaintiff's concern that they may have relied upon Section 552(c) with a statement similar to a Glomar response: a public court filing indicating that Defendants interpret all or part of Plaintiff's FOIA request as seeking records that, if they exist, would be excludable under Section 552(c), and that therefore, Defendants have not processed those portions of the Request.[20] This statement would not reveal whether Defendants have invoked Section 552(c) or whether they in fact have responsive records. Plaintiff could then brief to this Court its argument that the types of records sought, if

[19] *See, e.g.*, *Wolf*, 473 F.3d at 375 ("The question, then, is whether the existence of Agency records regarding an individual foreign national constitutes information itself protected by either FOIA Exemption 1 or Exemption 3.").

[20] As is the norm under Glomar, if Defendants do not interpret Plaintiff's request as seeking such records, their public court filing would so indicate.

they exist, would not fall within the exclusion. The Court would then determine, as courts commonly do in response to Glomar invocations, whether the type of information sought by Plaintiff, if it exists, is excludable under Section 552(c).

This procedure would permit meaningful judicial review of Defendants' Section 552(c) invocation, if any, by this Court, and the Court would issue a public opinion that would in turn permit meaningful appellate review. The Court's public opinion would not need to disclose whether Defendants actually treated any records as non-responsive under Section 552(c). Rather, as in the Glomar context, the opinion would simply address the question of whether such records, if they existed, fall within the statutory language of Section 552(c). If Defendants prevail, the Court would issue a public opinion that states, at a minimum, "The type of records sought by all or a portion of Plaintiff's FOIA request would be excludable under Section 552(c), if any such records exist." If Plaintiff prevails, the Court's public opinion would state, at a minimum, "The type of records sought by all or a portion of Plaintiff's FOIA request are not excludable under Section 552(c), and therefore the government must process Plaintiff's request to determine whether any such records exist." No matter the result of the Court's review, Defendants' asserted need for secrecy would be preserved unless and until an adverse ruling were affirmed on appeal.

Plaintiff's interest in judicial review would also be preserved.[21] The public's right of access to judicial opinions would also be protected because this procedure does not require the issuance of a sealed opinion.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants' motions for summary judgment and grant Plaintiff's cross-motions for partial summary judgment.

Respectfully Submitted,

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Attorneys for Plaintiff

[21] If Defendants file a statement stating that they interpret Defendants' FOIA request as seeking records that would, if they exist, fall under Section 552(c), Plaintiff would further brief the propriety of any such hypothetical invocation.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

American Civil Liberties Union of New Jersey, Plaintiff, v. Federal Bureau of Investigation, *et al.* Defendants.	Case No. 11-CV-2553 (ES) (CLW)

SECOND DECLARATION OF NUSRAT J. CHOUDHURY

I, Nusrat J. Choudhury, hereby declare and state as follows:

1. I am counsel for the Plaintiff in the above-captioned case. I make this declaration in support of Plaintiff's Reply Memorandum in Support of Plaintiff's Cross-Motion for Partial Summary Judgment and Opposition and Cross-Motion for Partial Summary Judgment as to Defendants' February 22, 2012 Release.

2. Attached hereto are true and correct copies of the following:

Document	Exhibit
Letter from Nusrat Choudhury, ACLU, to Deanna L. Durrett, Dep't of Justice Civil Division (Mar. 13, 2012)	L
Email from Deanna L. Durrett, Dep't of Justice Civil Division, to Nusrat Choudhury, ACLU (Mar. 20, 2012)	M

3. On March 13, 2012, I wrote a letter to Defendants proposing an alternative procedure for litigation of the Section 552(c) issue in this lawsuit. That letter is attached hereto as Exhibit L. On March 20, 2012, Defendants rejected this proposal by email. The email response from Defendants' counsel to me is attached hereto as Exhibit M.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 2nd day of April 2012.

Nusrat J. Choudhury

Exhibit L

NATIONAL SECURITY PROJECT

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

March 13, 2012

VIA Email

Deanna L. Durrett
U.S. Department of Justice
Civil Division, Federal Programs Branch
26 Federal Plaza
New York, NY 10278

Re: *ACLU of New Jersey v. FBI*, 11 Civ. 2553 (D.N.J.) (ES) (CLW)

Dear Deanna,

We write to propose an alternative and mutually beneficial means of litigating the issue of Defendants' reliance, if any, on the exclusion provision of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(c), in responding to Plaintiff's FOIA request. The parties' current proposals for how the Court should communicate its adjudication of this issue are problematic for both parties because the proposals do not protect either Defendants' asserted interest in protecting the secrecy of their Section 552(c) invocation, if any, or Plaintiff's interests in meaningful judicial review of any such invocation and in avoiding entirely secret litigation. If this case proceeds in accordance with the parties' existing proposals, it could set a negative precedent for both the government and FOIA requesters in future cases. We therefore propose below an alternative process, which tracks existing *Glomar* procedures and would avoid any such negative consequences and precedent.

<u>The Parties' Current Proposals and Potential Negative Consequences</u>

As you know, Plaintiff believes that Defendants may have relied improperly on Section 552(c) in processing Plaintiff's FOIA request. In its motion for partial summary judgment, Plaintiff requested that the Court review Defendants' submissions concerning this issue *in camera* in order to adjudicate it. Plaintiff also asked the Court to issue a public order stating that it conducted its review and made a determination as to whether Defendants' reliance on 552(c), if any, was lawful—without confirming or denying Defendants' reliance on the exclusion provision. Plaintiffs also sought to have the Court further explain its ruling in an accompanying sealed decision to which Plaintiff's counsel would have access.

Defendants have not contested Plaintiff's entitlement to *in camera* judicial consideration of the propriety of their invocation, if any, of

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Section 552(c), and in fact have submitted *ex parte* materials to the Court to permit such review. Nor have Defendants opposed the Court's issuance of a public decision that does not confirm or deny whether they treated any portion of Plaintiff's FOIA request as subject to Section 552(c). Defendants have proposed that if the Court determines, after reviewing Defendants' *ex parte* submissions, that the reliance on Section 552(c), if any, was *proper*, then it should issue an order so stating. Defendants have, however, opposed Plaintiff's request for a sealed decision to which Plaintiff's counsel have access.

The parties' current proposed approach presents a serious problem because if the Court determines that Defendants' reliance on Section 552(c) was *improper*, then issuing *any* type of public order to that effect would necessarily reveal that Defendants relied on Section 552(c). The Court could not reach a determination of impropriety unless Defendants had in fact relied on Section 552(c). Thus, a public opinion parallel to the one Defendants propose in the event of a favorable decision—"a full review of the claim was had and, if any exclusion was in fact employed, it was *not* justified"—would necessarily reveal that Defendants had relied on Section 552(c), and that the reliance was improper. So would the simplest court order possible—"judgment for Plaintiff."

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Even if the Court took the extraordinary step of sealing not only its opinion but its judgment as well, this too would effectively notify the public of Defendants' reliance on Section 552(c) because there would be no need for the Court to seal the judgment unless Defendants had in fact relied on Section 552(c), and the Court made a ruling adverse to Defendants. Moreover, Plaintiff would vigorously oppose a sealed judgment and opinion in light of the First Amendment and common law presumption of public access to judicial opinions. *See, e.g., Press-Enter. Co. v. Super. Ct. of Cal.*, 464 U.S. 501, 510 (1984) (presumption of public access to the activities of the judiciary is overcome only in the rarest and most compelling of circumstances.); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) (common law right of access to "judicial records and documents"); *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) ("[T]he strong presumption of access to judicial records applies fully to dispositive pleadings, including motions for summary judgment and related attachments."); *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348-349 (7th Cir. 2006) (unsealing district court opinion and emphasizing, "What happens in the federal courts is presumptively open to public scrutiny . . . We hope never to encounter another sealed opinion."). The negative consequences for Defendants flowing from an adverse decision would remain even if the district court's adverse ruling were reversed on appeal: an appellate decision that Defendants' had properly relied on Section 552(c) would also signify that

Defendants had in fact relied on the exclusion provision and would not have protected Defendants' asserted interest in withholding disclosure of any such reliance.

In short, the course the parties are following does not assure Defendants that their reliance, if any, on Section 552(c) will remain secret.

Continued litigation of the Section 552(c) issues based on the parties' current proposals would also create adverse consequences for Plaintiff. Plaintiff is entitled to a judicial opinion concerning the Court's Section 552(c) determination that provides enough information for Plaintiff to determine whether or not to appeal, and permits meaningful appellate review of any district court decision. *Cf. Granite Auto Leasing Corp. v. Carter Mfg. Co.*, 546 F.2d 654, 656 (5th Cir. 1977) ("When an order granting summary judgment is opaque and unilluminating as to either the relevant facts or the law with respect to the merits of [a] claim, an appellate court has no basis upon which to affirm the judgment."(internal citation and quotation marks omitted)). Defendants' proposal for a public opinion that does not confirm or deny that an exclusion was invoked and states that "a full review of the claim was had and, if an exclusion was in fact employed, it was and remains amply justified," is insufficient to permit meaningful appellate review (or even a meaningful decision on whether to seek such review). Defs.' Reply in Supp. of Mot. for Summ. J. and Opp'n to Pl.'s Cross-Mot. for Partial Summ. J. 38. Plaintiff would therefore seek an accompanying sealed judicial opinion setting forth the Court's reasoning. *See Farrar v. Cain*, 642 F.2d 86, 87 (5th Cir. 1981) (per curiam) (remanding for written findings of fact and conclusions of law because they "will greatly facilitate appellate review" of a summary judgment grant); *Jones v. Morris*, 777 F.2d 1277, 1281 (7th Cir. 1985) (written opinion explaining dismissal of the case "greatly facilitates the process of appellate review" and "ensures that the trial court has carefully considered the allegations of the complaint and the applicable law").

Plaintiff's counsel would seek access to that sealed opinion, but whether or not counsel were granted access, the result would be to promote wholly secret litigation, which is at odds with the spirit of FOIA. The issuance of secret opinions is also strongly disfavored in light of the public right of access to the judicial process and its outcomes under the First Amendment and the common law, as the case law set forth above amply demonstrates.[1]

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[1] In addition, if the Court issues only a public opinion of the type Defendants propose, without a more detailed sealed opinion accessible by Plaintiff's counsel, Plaintiff and other FOIA requesters will have no

Plaintiff's New Proposal

Rather than proceed down this route, Plaintiff proposes that Defendants employ a procedure more akin to *Glomar* to protect their asserted interest in secrecy concerning the application of Section 552(c). Plaintiff proposes that Defendants state in a public court filing that they interpret all or part of Plaintiff's FOIA request as seeking records that, if they exist, would be excludable under Section 552(c), and that therefore, Defendants have not processed those portions of the Request. This statement, similar to a *Glomar* response, would not reveal whether Defendants in fact have responsive records or whether Defendants have invoked Section 552(c).

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Plaintiff could then seek judicial review of Defendants' determination, arguing that the types of records sought, if they exist, would not fall within the exclusion. The Court would then determine, as it does in response to *Glomar* invocations, whether the type of information sought by Plaintiff, if it exists, is excludable under Section 552(c). The Court's public opinion following its review would not need to disclose whether Defendants actually treated any records as non-responsive under Section 552(c). Rather, as in the *Glomar* context, the opinion would simply address the question of whether such records, if they existed, fell within the statutory language of Section 552(c). If Defendants prevail, the Court would issue a public opinion that states, at a minimum, "The type of records sought by all or a portion of Plaintiff's FOIA request would be excludable under Section 552(c), if the any such records exist." If Plaintiff prevails, the Court would issue a public opinion that states, at a minimum, "The type of records sought by all or a portion of Plaintiff's FOIA request are not excludable under Section 552(c), and therefore the government must process Plaintiff's request to determine whether any such records exist."

No matter the result of the Court's review, Defendants' asserted need for secrecy would be preserved unless and until an adverse ruling were affirmed on appeal. Plaintiff's interest in judicial review and public judicial opinions would also be preserved.

If Defendants are amenable to proceeding in this way, please let me know as soon as possible. Plaintiff plans to present this proposal to the

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choice but to automatically appeal every district court Section 552(c) determination. Such a result would likely require the government to litigate many more appeals from Section 552(c) determinations than it would otherwise have to.

Court in its reply brief, which is due April 2. We would be happy to discuss this proposal further. You may reach me at (212) 519-7876.

Nusrat Choudhury

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Exhibit M

Nusrat Jahan Choudhury

From: Durrett, Deanna L. (CIV) <Deanna.L.Durrett@usdoj.gov>
Sent: Tuesday, March 20, 2012 4:23 PM
To: Nusrat Jahan Choudhury
Subject: RE: Proposal regarding ACLU of NJ v. FBI

Nusrat,

We have received and considered your letter of March 13, 2012. Defendants do not, however, agree to Plaintiff's proposal. Defendants have addressed Plaintiff's inquiry as to whether Defendants have relied on 5 U.S.C. § 552c in this case with their *in camera* filing of February 10, 2012.

Thank you,
Deanna

From: Nusrat Jahan Choudhury [mailto:nchoudhury@aclu.org]
Sent: Tuesday, March 13, 2012 3:23 PM
To: Durrett, Deanna L. (CIV)
Subject: Proposal regarding ACLU of NJ v. FBI

Deanna, I hope you're well. Attached is a letter for Defendants' consideration concerning litigation of the Section 552(c) issue in *ACLU of New Jersey v. FBI*, No. 11 Civ. 2553 (D.N.J.). We'd be happy to discuss the proposal described in the letter.

Nusrat

Nusrat J. Choudhury
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Because Freedom Can't Protect Itself

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

American Civil Liberties Union of New Jersey, Plaintiff, v. Federal Bureau of Investigation, *et al.* Defendants.	Case No. 11-CV-2553 (ES) (CLW)

PLAINTIFF'S 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, Plaintiff American Civil Liberties Union of New Jersey hereby incorporates the Statement of Material Facts filed in conjunction with Plaintiff's January 20, 2012 Cross-Motion for Partial Summary Judgment and Opposition to Defendants' Motion for Summary Judgment, ECF No. 21-6. Plaintiff also adds the following material facts as to which Plaintiff contends there is no genuine issue in connection with its Cross-Motion for Partial Summary Judgment as to Defendants' February 22, 2012 release under Rule 56(b) of the Federal Rules of Civil Procedure.

1. On February 22, 2012, the Federal Bureau of Investigation ("FBI") partially released six additional pages to Plaintiff in response to Plaintiff's July 27, 2010 Freedom of Information Act

("FOIA") request to the FBI. *See* Second Supplemental Decl. of David M. Hardy ("Second Supp. Hardy Decl.") ¶¶ 3-4 & Ex. A.

2. Defendants' filed the Second Supplemental Declaration of David M. Hardy, ECF No. 26-2, which addresses the document and Defendants' withholding of information from the document pursuant to FOIA Exemptions 6 and 7, 5 U.S.C. § 552(b). Second Supp. Hardy Decl. ¶¶ 6-16.

3. Defendants' February 22, 2012 partial release is a Newark FBI Field Office electronic communication opening a Type 4 domain assessment investigation authorized by the Domestic Investigations and Operations Guide. Second Supp. Hardy Decl. ¶ 5; *id.* Ex. A at 2.

Respectfully Submitted,

Nusrat J. Choudhury
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Attorneys for Plaintiff

April 2, 2012

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

American Civil Liberties Union of New Jersey, Plaintiff, v. Federal Bureau of Investigation, *et al.* Defendants.	Case No. 11-CV-2553 (ES) (CLW)

PLAINTIFF'S RESPONSE TO
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, Plaintiff American Civil Liberties Union of New Jersey hereby incorporates Plaintiff's response to Defendants' Statement of Material Facts, filed in conjunction with Plaintiff's January 20, 2012 Cross-Motion for Partial Summary Judgment and Opposition to Defendants' Motion for Summary Judgment. See ECF No. 21-7. The Defendants' Statement of Material Facts, ECF No. 26-4, sets forth the facts to which Defendants contend there is no genuine issue in connection with their Motion for Summary Judgment under Rule 56(b) of the Federal Rules of Civil Procedure. Plaintiff also adds the following responses to the Defendants' additional material facts.

1. Plaintiff admits Defs.' Statement of Material Facts ¶ 1.

2. Plaintiff admits Defs.' Statement of Material Facts ¶ 2.

Respectfully Submitted,

Nusrat J. Choudhury
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Attorneys for Plaintiff

April 2, 2012

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

American Civil Liberties Union of New Jersey, Plaintiff, v. Federal Bureau of Investigation, *et al*. Defendants.	Case No. 11-CV-2553 (ES) (CLW)

[PROPOSED] ORDER

Upon consideration of Defendants' March 16, 2012 Motion for Summary Judgment and Plaintiff's Cross-Motion for Partial Summary Judgment as to Defendants' February 22, 2012 Release, pursuant to Federal Rule of Civil Procedure 56, it is hereby ORDERED that Plaintiff's Cross-Motion is GRANTED;

It is further ORDERED that Defendants' motion is DENIED;

It is further ORDERED that the Court will review *in camera* an unexpurgated version of the February 22, 2012 release to determine what segregable, non-exempt material exists;

It is further ORDERED that Defendants shall publicly file a statement indicating whether they interpret all or

part of Plaintiff's request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as seeking records that, if they exist, would be excludable under 5 U.S.C. § 552(c) and that therefore, Defendants have not processed those portions of Plaintiff's FOIA request.

Dated:

_____

Esther Salas
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

American Civil Liberties Union of New Jersey, Plaintiff, v. Federal Bureau of Investigation, *et al*. Defendants.	Case No. 11-CV-2553 (ES) (CLW)

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2012, a true and correct copy of Plaintiff's Reply Memorandum in Support of Plaintiff's Cross-Motion for Partial Summary Judgment and Opposition and Cross-Motion for Partial Summary Judgment as to Defendants' February 22, 2012 Release, the Second Declaration of Nusrat J. Choudhury and attached exhibits, Plaintiff's Response to Defendants' Statement of Material Facts, and Plaintiff's Statement of Material Facts as to which Plaintiff contends there is no genuine issue with its Cross-Motion for Partial Summary Judgment as to Defendants' February 22, 2012 release were electronically filed with the Clerk of Court for the District of New Jersey using the CM/ECF system, in accordance with Local Rule 5.1 and 5.4. Notice of this filing will be sent to counsel for the Defendants by operation of the Court's electronic filing

system. Parties may access this filing through the Court's CM/ECF system.

s/ Jeanne Locicero

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