No. 25-_____

IN THE

Supreme Court of the United States

NATHANIEL J. BUCKLEY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Freedom of Information Act requires federal agencies to make information available to the public upon request unless the information falls within one of nine exemptions. Exemption 7 covers certain "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7).

The question presented is:

Whether "records or information compiled for law enforcement purposes" encompasses all records or information compiled by a law enforcement agency, even those not compiled for law enforcement purposes.

RELATED PROCEEDINGS

Buckley v. U.S. Department of Justice, No. 19-cv-319F (W.D.N.Y. Nov. 18, 2021)

Buckley v. U.S. Department of Justice, No. 19-cv-319F (W.D.N.Y. Sep. 28, 2023)

Buckley v. U.S. Department of Justice, No. 19-cv-319F (W.D.N.Y. Nov. 5, 2024)

Buckley v. U.S. Department of Justice, No. 24-3192-cv (2d Cir. Oct. 14, 2025)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nathaniel J. Buckley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a-8a) is unpublished but available at 2025 WL 2911011. The district court's opinions (Pet. App. 9a-18a, 19a-70a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 2025. Pet. App. 1a. On December 19, 2025, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including February 11, 2026. On February 4, 2026, Justice Sotomayor again extended the time within which to file a petition for a writ of certiorari to and including February 26, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Appendix to this petition reproduces the relevant provisions of the Freedom of Information Act (FOIA) (codified, as amended, at 5 U.S.C. § 552).

INTRODUCTION

The Freedom of Information Act (FOIA) gives the public the right to access records from any federal agency, subject to nine limited exemptions. Exemption 7 allows the Government to withhold certain "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). Five circuits have a per se rule that any documents compiled *by* a law enforcement *agency* are automatically compiled *for* law enforcement *purposes*—no further analysis required. In those circuits, an FBI agent could even admit that he compiled a dossier to sell to a private party, to intimidate or bully, or for some other non-law enforcement purpose—and Exemption 7 would still apply. Indeed, in this case, Petitioner Nathaniel Buckley argued that the records in question were gathered in the course of an investigation that was not aimed at a law enforcement purpose, but the district court held that it wouldn't matter even if true, and the Second Circuit affirmed. Pet. App. 40a-41a.

Three circuits, by contrast, reject the per se rule. The Second Circuit itself acknowledged that there is "much to be said" for those circuits' "contrary approach." Pet. App. 4a n.2 (citations omitted). That was a considerable understatement. By its plain terms, Exemption 7 asks about the "purpose[]" for which specific records were compiled—not the nature of the agency that compiled them. And as then-Judge Scalia put the point, "[o]bviously," documents from an investigation conducted, for instance, "for purposes of harassment" aren't documents "compiled for law enforcement purposes." *Shaw v. FBI*, 749 F.2d 58, 63 (D.C. Cir. 1984).

Because the circuits are intractably split over an important and recurring question, and because the per se rule cannot be squared with the plain text of FOIA, this Court should grant certiorari and reverse.

STATEMENT OF THE CASE

A. Legal background

1. Passed in 1966 to "hold the governors accountable to the governed," FOIA requires agencies to disclose requested records. *NLRB v. Robbins Tire*, 437 U.S. 214, 242 (1978). Agencies may only withhold records that "fall within one of nine exemptions," which are "explicitly made exclusive." *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) (citation and internal quotation marks omitted). "The Government bears the burden of establishing that [an] exemption applies." *DOJ v. Landano*, 508 U.S. 165, 171 (1993).

Exemption 7, the provision at issue in this case, applies to "records or information compiled for law enforcement purposes . . . to the extent that the production" of such records could result in one of six specified consequences. 5 U.S.C. § 552(b)(7). Thus, "judicial review of an asserted Exemption 7 privilege requires a two-part inquiry." *FBI v. Abramson*, 456 U.S. 615, 622 (1982). First, the agency must meet the "threshold requirement" by showing that the requested material was "compiled for law enforcement purposes." *Id.* at 623. Second, "the agency must demonstrate that release of the material would have one of the six results specified in the Act." *Id.* at 622. This case concerns the threshold requirement.

2. The text at issue in this case—"compiled for law enforcement purposes"—has not changed since FOIA's

enactment in 1966. Pub. L. No. 89-487, 80 Stat. 250, 251 (1966). As originally enacted, Exemption 7 covered all "investigatory files compiled for law enforcement purposes." *Id.* Congress amended that text into its current form in two steps.

First, in 1974, Congress narrowed the scope of Exemption 7 by adding the second part of the two-part inquiry. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 156-57 (1989).

Then, in 1986, to "resolve any doubt that law enforcement manuals" and other internal policies could be withheld, S. Rep. No. 98-221, at 23 (1983), Congress adjusted the threshold requirement's language by replacing "*investigatory records* compiled for law enforcement purposes" with "*records or information* compiled for law enforcement purposes." *Compare* Pub. L. No. 93-502, § 2(b), 88 Stat. 1563 (emphasis added), *with* Pub. L. No. 99-570, § 1802(a), 100 Stat. 3207-48 (emphasis added). Congress clarified that it did not intend to "affect the threshold question of whether 'records or information' . . . were 'compiled for law enforcement purposes.'" S. Rep. No. 98-221, at 23 (1983).

B. Factual and procedural background

1. Petitioner Nathaniel Buckley co-owns a bookstore in Buffalo, New York. Mr. Buckley is involved in political activism for anti-war and environmental causes, and the bookstore frequently hosts speakers and screens documentaries critical of the Government, and particularly the FBI. Pet. App. 22a.

2. After finding out that undercover FBI agents were monitoring bookstore events, Mr. Buckley

submitted a FOIA request seeking records relating to himself, his lawyer, and several friends, colleagues, and family members.

After three years and multiple rounds of administrative appeals, the FBI identified 58 pages of information responsive to Mr. Buckley's request. Pet. App. 3a. The FBI turned over only three pages in full. The remaining pages were either heavily redacted (some to the point where only one word on the page was visible) or withheld altogether. The only justification the FBI gave for withholding information was a form letter with boxes checked next to the claimed statutory exemptions. Pet. App. 24a; C.A. J.A. A-71-72. The FBI invoked Exemption 7 for every one of the 55 pages it failed to release in full. *Id.* A-109-10. And 14 pages were redacted based solely on Exemption 7. *Id.*

3. After exhausting his administrative appeals, Mr. Buckley filed an action in the Western District of New York. C.A. J.A. A-5-7.

To support its invocation of Exemption 7, the FBI relied on form declarations from David Hardy and Michael Seidel. C.A. J.A. A-15-55, A-149-57. Hardy was a Section Chief of the FBI's records division. *Id.* A-15. He was based in Winchester, Virginia and supervised 243 employees across 12 FBI offices. *Id.* Seidel was Hardy's successor. *Id.* A-149. The vast majority of the two declarations consisted of boilerplate language. Only two paragraphs addressed Exemption 7's threshold question, and those two paragraphs contained virtually no information specific to Mr. Buckley. *Id.* A-32-33, A-151-52.

Mr. Buckley argued that the FBI's affidavits did not establish that the records in question were

"compiled for law enforcement purposes." Pet. App. 36a-37a. He also submitted an affidavit outlining evidence that the records were compiled for a non-law-enforcement purpose—that the Government was surveilling him in order to chill his protected First Amendment activity. C.A. J.A. A-112-48. Mr. Buckley appended three news articles suggesting that the FBI had investigated him and his co-owner because of their protected political activities. *Id.*

The district court granted the FBI's motion for summary judgment with respect to its invocation of Exemption 7. Pet. App. 21a. Applying Second Circuit precedent, the court held that it was irrelevant whether the investigation was designed to target "political activists" for their "political activities." *Id.* 40a. The FBI's purposes for compiling the documents were "not proper subjects for judicial review." *Id.* 39a (quoting *Halpern v. FBI*, 181 F.3d 279, 296 (2d Cir. 1999)).[1]

4. The Second Circuit affirmed. Pet. App. 1a-8a. The court explained that under Second Circuit precedent, Exemption 7's threshold requirement is always satisfied "[w]hen records are sought from a law enforcement agency." *Id.* 4a. Thus, courts cannot "engage in a factual inquiry" regarding the law enforcement purpose. *Id.* (internal quotation omitted). The court noted that "[o]ther circuits take a contrary approach." *Id.* 4a n.2 (citations omitted). Although the panel acknowledged that there was "much to be said"

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[1] The court also held that the records were "compiled in the course of an FBI investigation." Pet. App. 38a. That holding was unnecessary; the requirement that the records be "investigatory" was deleted from Exemption 7 in 1986. *See supra* 3-4.

for the "position" taken by those circuits, it was "bound by" circuit precedent to apply the per se rule. *Id.*

REASONS FOR GRANTING THE WRIT

I. There is an intractable and acknowledged split on the question presented.

As the Second Circuit acknowledged, the circuits take "contrary approach[es]" to interpreting the phrase "law enforcement purposes" in Exemption 7. Pet. App. 4a n.2. Five circuits adopt the per se rule that when the statute says "compiled *for* law enforcement *purposes*," it actually means compiled *by* law enforcement *agencies*. Three other circuits reject the per se rule, recognizing that some documents compiled by law enforcement agencies have no law enforcement purpose and thus cannot satisfy Exemption 7's threshold requirement.

Circuits on both sides of the split recognize its existence. *See, e.g.*, *ACLU of N. Cal. v. FBI*, 881 F.3d 776, 778 n.2 (9th Cir. 2018) (acknowledging disagreement with "[o]ther circuits" that "apply a 'per se' rule"); *Jordan v. DOJ*, 668 F.3d 1188, 1193-94 (10th Cir. 2011) (surveying the circuit split and concluding "that the per se rule is the proper approach"). And with eight circuits having weighed in over the course of a half century, further percolation is unnecessary.

A. Five circuits adopt the per se rule.

1. The First Circuit originated the per se rule over four decades ago, holding that the "records of law enforcement agencies are inherently records compiled for 'law enforcement purposes' within the meaning of Exemption 7." *Irons v. Bell*, 596 F.2d 468, 475 (1st Cir. 1979). In *Irons*, the court reached this result despite

concluding that the FBI "lack[ed] even a colorable claim to a law enforcement purpose" for the requested records, which documented the agency's surveillance of a civil rights organizer. *Id.* at 472. Solely for "policy reasons," the First Circuit read "law enforcement purpose" in the statute to be "a description of the type of agency the exemption is aimed at." *Id.* at 474. In the First Circuit, therefore, *all* FBI files "bask under" the "prophylactic umbrella" of the per se rule. *Curran v. DOJ*, 813 F.2d 473, 475 (1st Cir. 1987).

The Sixth Circuit has also "adopted a per se rule under which any documents compiled by a law enforcement agency fall within" Exemption 7. *Rugiero v. DOJ*, 257 F.3d 534, 550 (6th Cir. 2001); *see also Jones v. FBI*, 41 F.3d 238, 246 (6th Cir. 1994) (adopting per se rule); *ACLU of Mich. v. FBI,* 734 F.3d 460, 466 (6th Cir. 2013) (reaffirming that "records compiled by the FBI *per se* satisfy" the law enforcement purpose requirement). In *Jones*, the plaintiff, a political activist, argued that the FBI had investigated him solely for his political beliefs and therefore that its records were not "compiled for law enforcement purposes." 41 F.3d at 246. "Applying the *per se* rule," however, the Sixth Circuit refused to address the plaintiff's argument. *Id.* The court instead concluded that the FBI could claim the exemption regardless of whether the records were compiled for law enforcement purposes. *Id.*

The Eighth Circuit also applies the per se rule, "agree[ing]" with the First Circuit's decision in *Irons*. *Kuehnert v. FBI*, 620 F.2d 662, 666 (8th Cir. 1980). In *Kuehnert*, the plaintiff sought access to documents from an FBI investigation into his associations with the American Friends Service Committee and other political organizations. The Eighth Circuit could not

"discern any threshold connection between the organization and activities being investigated and violations of federal law." *Id.* The court nonetheless exempted the documents from disclosure because all "records of a criminal law enforcement agency" necessarily "meet exemption 7's threshold requirement of having been 'compiled for law enforcement purposes.'" *Id.* at 667.[2]

Finally, in 2011, the Tenth Circuit concluded that "the per se rule is the proper approach" after surveying what was already a mature 4-3 split and considering the arguments on both sides. *Jordan*, 668 F.3d at 1193-94. As that court explained more recently, it too "employs a per se rule whereby all information compiled by" an agency whose primary function is law enforcement is "inherently compiled for law enforcement purposes." *Friends of Animals v. Bernhardt*, 15 F.4th 1254, 1267 (10th Cir. 2021).

2. The Second Circuit applied the "per se rule" in this case, holding as a matter of law that all records compiled by a law enforcement agency are "compiled for law enforcement purposes." Pet. App. 4a. The Second Circuit's rule, like four other circuits', "leave[s] no room" for a court to assess whether the FBI in fact

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[2] Although *Kuehnert* predates the 1986 amendments to Exemption 7, courts in the Eighth Circuit continue to apply the per se rule. *See, e.g.*, *Guillen v. DHS*, 2021 WL 4482985, at *8 (D. Minn. Sept. 30, 2021); *Kuntz v. DOJ*, 2020 WL 6324343, at *11 (D.N.D. Aug. 14, 2020), *report and recommendation adopted*, 2020 WL 6324340 (D.N.D. Sept. 9, 2020).

had a law enforcement purpose. *Ferguson v. FBI*, 957 F.2d 1059, 1070 (2d Cir. 1992).

B. Three circuits reject the per se rule.

Three circuits, in contrast, have rejected the per se rule as contrary to Exemption 7's plain text.

1. Start with the D.C. Circuit, where most FOIA cases are litigated. That court has considered and rejected the per se rule, holding that "[i]t is not for this court to rewrite a statute." *Pratt v. Webster*, 673 F.2d 408, 416 n.17 (D.C. Cir. 1982) (disagreeing with *Irons*). Exemption 7 asks whether the files at issue were compiled for a law enforcement *purpose*; it thus "would not protect the files of an [FBI] inquiry explicitly conducted, for example, for purposes of harassment." *Shaw v. FBI*, 749 F.2d 58, 63 (D.C. Cir. 1984) (Scalia, J.).

So, in the D.C. Circuit, "FBI records are not law enforcement records simply by virtue of the function that the FBI serves." *Vymetalik v. FBI*, 785 F.2d 1090, 1095 (D.C. Cir. 1986). Instead, the FBI must "'supply facts' in sufficient detail" to enable a court to "identify a law enforcement purpose underlying withheld documents." *Campbell v. DOJ*, 164 F.3d 20, 32 (D.C. Cir. 1998) (quoting *Quiñon v. FBI*, 86 F.3d 1222, 1229 (D.C. Cir. 1996)).

In *Campbell*, for instance, the Government invoked Exemption 7 to withhold FBI records on the writer James Baldwin. 164 F.3d at 32-33. Attempting to meet the threshold requirement, the Government submitted "only two facts": First, the files were "stored inside a folder with an official-sounding label," which the court found "insufficient." *Id.* at 32. Second, an agent declared that "Baldwin was associating with persons and organizations which were believed to be a

threat to the security of the United States." *Id.* (internal quotation marks omitted). But the court held that the Government could not rely on this vague assertion to withhold "files collected over many years on different topics in different contexts." *Id.* at 32-33. It explained that even if the FBI can "justify its investigation of a person," that does not mean "all documents related to that person are exempt from FOIA." *Id.* at 33.

2. The Third Circuit also "reject[s]" the "per se rule." *Abdelfattah v. DHS*, 488 F.3d 178, 185 (3d Cir. 2007). In that circuit, records do not qualify as "compiled for law enforcement purposes" simply because they are compiled by a law enforcement agency. Rather, the law enforcement agency must "articulate a connection between the responsive documents and a legitimate law enforcement concern." *Id.* In *Abdelfattah*, the FBI supplied summaries of the withheld documents with no explanation, "merely not[ing] that the documents were 'compiled for law enforcement purposes' without providing any further detail." *Id.* at 186. The Third Circuit said it would "not extrapolate such a purpose" from document summaries, even summaries that "arguably suggest[ed]" the documents "were compiled for law enforcement purposes." *Id.*

3. The per se rule doesn't govern in the Ninth Circuit, either. *ACLU of N. Cal v. FBI*, 881 F.3d 776, 778 n.2 (9th Cir. 2018). It is not enough for a law enforcement agency to simply assert that records were compiled for law enforcement purposes; the agency must provide "sufficient evidence in the record to warrant a finding" of such a purpose. *Church of Scientology of Cal. v. Dep't of Army*, 611 F.2d 738, 748

(9th Cir. 1979), *overruled on other grounds by Animal Legal Def. Fund v. FDA*, 836 F.3d 987 (9th Cir. 2016).

And the Ninth Circuit does not allow the Government to invoke Exemption 7 if the record suggests that "the asserted [law enforcement] purpose is pretextual or wholly unbelievable." *Rosenfeld v. DOJ*, 57 F.3d 803, 808 (9th Cir. 1995) (internal quotation marks omitted). For instance, in *Rosenfeld*, the Ninth Circuit held that documents from two investigations had to be disclosed, even though the FBI asserted a law enforcement purpose for each. *Id.* at 806. It claimed the first investigation, into the Chancellor of the University of California, was initiated because he had access to a nuclear laboratory—but FBI notes made clear that J. Edgar Hoover simply "disagreed with his politics." *Id.* at 809. And it claimed the second was because the leaders of the subject political organization "had communist leanings"—but the investigation continued well after the FBI concluded the organization was "not controlled by communists." *Id.* at 811. Because the FBI's asserted "law enforcement purposes" were simply "pretext," the Ninth Circuit held it could not invoke Exemption 7. *Id.* at 810.

II. This case presents a frequently recurring issue of national importance.

Exemption 7 is invoked thousands of times each year. U.S. Dep't of Just., *2024 Annual FOIA Report Summary* 9-10 (Apr. 28, 2025). In 2024, 613,538 FOIA requests were denied either in full or in part, and over 56% of denials were based on Exemption 7. *Id.* That number is only growing: The number of FOIA requests has doubled in the last decade and now sits at 1.5 million annually. *Id.* at 3. Even assuming that only a

minuscule percentage of those denials involved records that were not, in fact, compiled for a law enforcement purpose, the question presented recurs frequently.

And the question presented here affects a critical segment of FOIA requests. Our Nation's law enforcement agencies have at times engaged in investigations or other activities that were not based on any law enforcement purpose. FOIA requests have uncovered records regarding the FBI spying on peaceful civil-service organizations, ATF surveilling Second Amendment advocates, and DHS monitoring journalists—records that have led to congressional inquiries and internal investigations.[3] Under the per se rule, the agencies would be free to refuse to release documents about any of those incidents.

In light of the significance of the records in question, this Court has recognized that the proper construction of FOIA's Exemption 7 presents an "important question of federal statutory law" meriting certiorari. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1978); *see DOJ v. Landano*, 508 U.S. 165, 171 (1993). And it has specifically noted the significance of Exemption 7's threshold requirement.

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[3] *See* Chip Gibbons, *Still Spying on Dissent: The Enduring Problem of FBI First Amendment Abuse*, Defending Rights and Dissent 4-13 (2019), https://perma.cc/EPG8-7JM7; Patrick G. Eddington, *Does the FBI Spy on FOIA Requesters?*, CATO Institute (Mar. 18, 2021), https://perma.cc/RJQ9-JPAP; Aidan Johnston, *ATF's Illegal Gun Owner Registry*, Gun Owners of America (May 2022), https://perma.cc/8KG7-M5DP; U.S. Senate Committee on Homeland Security & Governmental Affairs, *Chairman Paul Seeks Information from ATF on Secret Firearm Surveillance Program* (Apr. 10, 2025), https://perma.cc/LU3P-E7HZ.

See John Doe Agency v. John Doe Corp., 493 U.S. 146, 151 (1989). The question presented here warrants review as well.

III. The decision below is incorrect.

The per se rule rewrites the statute to exempt information compiled *by* law enforcement *agencies*, rather than information compiled "*for* law enforcement *purposes*." That can't be right.

1. Section 552(b)(7) exempts from FOIA disclosure "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). At the time FOIA was enacted, as today, "purpose" meant "the reason for which something exists or is done." The Random House Dictionary of the English Language 1167 (Jess Stein & Laurence Urdang eds., 1973). "Law enforcement" is a phrasal adjective that modifies—and therefore limits—"purposes." *See* The Chicago Manual of Style §§ 5.92-5.93, p. 171 (15th ed., 2003); *see also Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 (2018) ("Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality."). Thus, by its terms, Section 552(b)(7) applies only where law enforcement is a "reason for the compilation" of the requested information, not when some other purpose motivated the compilation. *See Milner v. Dep't of Navy,* 562 U.S. 562, 584 (2011) (Alito, J., concurring).

But law enforcement agencies sometimes compile records for purposes other than law enforcement. Then-Judge Scalia thought it "[o]bvious[]" that an investigation "explicitly conducted, for example, for purposes of harassment" is not one undertaken "for

law enforcement purposes." *Shaw v. FBI*, 749 F.2d 58, 63 (D.C. Cir. 1984).

That's consistent with how the phrase "law enforcement purposes" is used in other settings. When this Court uses that phrase, it doesn't mean just any action taken by a law enforcement agency. For instance, police officers do not act with a "law enforcement purpose" when they invite reporters to ride along with them. *Wilson v. Layne*, 526 U.S. 603, 612-13 (1999). Even where a law enforcement agency is the one seeking "good public relations for the police" or "accurate reporting on police issues," those goals don't become "law enforcement purposes." *Id.*[4]

2. Had Congress wanted to create a categorical exemption from FOIA for law enforcement agencies, it knew how to do so. Exemption 7(D) asks about information "compiled *by* a criminal law enforcement *authority*." 5 U.S.C. § 552(b)(7)(D) (emphasis added). Other provisions of FOIA exempt certain records "maintained *by* a criminal law enforcement *agency*" and "maintained *by* the Federal Bureau of Investigation." 5 U.S.C. §§ 552(c)(2), (3) (emphasis added). In fact, more than twenty other provisions of FOIA apply to information "maintained by" an agency

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[4] *See also Caniglia v. Strom*, 141 S. Ct. 1596, 1600 (2021) (Alito, J., concurring) (characterizing police officers' "community caretaking" checks as being conducted "for non-law-enforcement purposes"); *California v. Ciraolo*, 476 U.S. 207, 211-212 (1986) (noting that "casual, accidental observation," even when carried out by law enforcement officers, is not "motivated by a law enforcement purpose"); *Florida v. Royer*, 460 U.S. 491, 504-05 (1983) (finding, where officers were not motivated by "reasons of safety and security," that a detention did not further "legitimate law enforcement purposes").

or depend on actions taken "by the agency."[5] But Congress drafted Exemption 7 differently.

3. Without the text or structure of the statute to stand on, the First Circuit expressly invoked "policy reasons" to justify creating the per se rule. *Irons v. Bell*, 596 F.2d 468, 474 (1st Cir. 1979). It fashioned a "prophylactic umbrella" ensuring that records maintained by the FBI and other law enforcement agencies would always satisfy Exemption 7's threshold requirement. *Curran*, 813 F.2d at 475. The other circuits that have adopted the per se rule have largely relied on *Irons* and its explicitly policy-based rationale, with little or no effort to ground their approach in Exemption 7's text. *See supra* I.A.

This Court has considered and rejected an analogous policy-based argument in the specific context of Exemption 7. *DOJ v. Landano*, 508 U.S. 165 (1993), concerned Exemption 7(D)'s protection of records that "could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D). The Government "contend[ed] that *all* FBI sources should be presumed confidential" for purposes of the exemption. *Landano*, 508 U.S. at 174. This Court disagreed. Although it "recognize[d] that confidentiality often will be important to the FBI's

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[5] *See, e.g.*, 5 U.S.C. § 552(f)(2)(A) (referring to records or information "maintained by an agency"); *id.* § 552(g)(2) (requiring public disclosure of some systems "maintained by the agency"); *id.* § 552(a)(1)(D) (referring to rules "formulated and adopted by the agency"). *See also* 5 U.S.C. §§ 552(a)(2)(B), 552(a)(2)(E), 552(a)(3)(B), 552(a)(4)(E)(ii)(II), 552(a)(6)(A)(ii), 552(a)(6)(C)(i), 552(a)(6)(C)(iii), 552(a)(6)(E)(i)(II), 552(a)(6)(E)(iii), 552(e)(1)(A), 552(e)(1)(D), 552(e)(1)(E), 552(e)(1)(F), 552(e)(1)(G), 552(e)(1)(I), 552(e)(1)(J), 552(e)(1)(K), 552(e)(1)(N), 552(e)(1)(O), 552(j)(3).

investigative efforts," it held that a "universal" presumption of confidentiality could not be squared with the statutory text. *Id.* at 175. While the "prophylactic rule" urged by the Government would have "serve[d] the Government's objectives" and was easy "to administer," the Court refused to "engraft that policy choice onto the statute that Congress passed." *Id.* at 180-81. It should do the same here.

4. In any event, the purported policy concerns underlying the per se rule are unfounded—as evidenced by decades of experience in the D.C. Circuit, the primary venue for FOIA litigation.

For example, the First Circuit worried about the privacy of confidential informants. *Irons*, 596 F.2d at 475. But even in the D.C. Circuit, the Government does not have to disclose information about confidential informants so long as the information was, indeed, compiled for law enforcement purposes. *See, e.g.*, *Robinson v. Att'y Gen. of the U.S.*, 534 F. Supp. 2d 72, 81 (D.D.C. 2008). And other parts of FOIA provide additional protection to confidential informants, such as Exemption 6, which covers files whose disclosure "would constitute a clearly unwarranted invasion of privacy," whether or not compiled for law enforcement purposes. 5 U.S.C. § 552(b)(6).

The First Circuit also worried that federal judges were poorly positioned to decide whether documents were "compiled for law enforcement purposes." *Irons*, 496 F.2d at 474, 476. But the D.C. Circuit has managed to adjudicate Exemption 7 claims for nearly five decades since it rejected the per se rule.

To be sure, close calls and sensitive questions will invariably arise. But Congress nonetheless chose to

condition Exemption 7 on the "purpose[]" for which records are compiled, and the role of a court "is to apply the statute as it is written—even if [it] think[s] some other approach might 'accord with good policy.'" *Burrage v. United States*, 571 U.S. 204, 218 (2014) (brackets and citations omitted). Courts must give effect to Congress's statutory command, even if it may require difficult line-drawing.

IV. This case is an excellent vehicle for resolving the question presented.

1. The question presented was pressed and passed upon below. Mr. Buckley argued at every stage that the records in question were not "compiled for law enforcement purposes," even though they were compiled by a law enforcement agency. Petr. C.A. Br. 4; C.A. J.A. A-173. At the Second Circuit, Mr. Buckley expressly called for the court to "reconsider[]" the per se rule. Petr. C.A. Br. 5.

The district court and the Second Circuit ruled against Mr. Buckley based on the per se rule. The district court held that, even assuming that the FBI investigated Mr. Buckley solely for his "political activities," rather than for any "law enforcement purposes," it wouldn't matter: "No further judicial review [was] permitted" under the per se rule. Pet. App. 40a (citing *Halpern v. FBI*, 181 F.3d 279, 296 (2d Cir. 1999)). Similarly, because its rule categorically allows withholding "[w]hen records are sought from a law enforcement agency," the Second Circuit refused to address Mr. Buckley's claim that the FBI did not compile the records "for law enforcement purposes." *Id.* 4a.

2. But for the per se rule, Mr. Buckley would likely receive the documents in question. Exemption 7 was the sole basis for withholding 14 pages of Mr. Buckley's file and some part of the basis for withholding some 55 pages more. C.A. J.A. A-109-10. Absent the per se rule, the lower courts would have at least considered Mr. Buckley's argument that he was investigated for political reasons, not for law enforcement purposes. And they would have considered whether the FBI had provided any meaningful evidence of its purpose in monitoring Mr. Buckley.

On the latter front, it's hard to imagine that the FBI's submissions below would have passed muster. The FBI justified its invocation of Exemption 7 with affidavits from two agency records chiefs who had no particular connection to Mr. Buckley's case. C.A. J.A. A-15, A-149. Each affiant addressed the "law enforcement purposes" threshold requirement in a single paragraph with virtually no information specific to Mr. Buckley. *Id.* A-32-33, A-151-52. Courts in the D.C. Circuit, applying the proper test, have rejected declarations by these very affiants as too vague to establish a law enforcement purpose.[6]

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[6] *See Brick v. DOJ*, 293 F. Supp. 3d 9, 12 (D.D.C. 2017) (finding David Hardy statements "so sweeping and vague that they could apply to almost any" FOIA case) (Jackson, J.); *Shapiro v. DOJ*, 37 F. Supp. 3d 7, 29 (D.D.C. 2014) ("Mr. Hardy's averments are too generalized for purposes of Exemption 7."); *Kolbusz v. FBI,* 2021 WL 1845352, at *22 (D.D.C. Feb. 17, 2021), *report and recommendation adopted,* 2023 WL 2072481 (D.D.C. Feb. 17, 2023) (describing the Michael Seidel declaration as "deficiently vague").

3. This case presents a rare opportunity for the court to consider this cleanly presented issue. The question presented has long evaded review because the Government "does not ask" the non-per se circuits to reconsider their precedent, nor does it petition for review after losing in those circuits. *See ACLU of N. Cal. v. FBI*, 881 F.3d 776, 778 n.2 (9th Cir. 2018).[7] Moreover, sophisticated FOIA litigants, like news organizations and nonprofits, have the means to avoid the per se rule altogether by filing in the District of Columbia. That means that this Court's review will only come from a litigant like Mr. Buckley, who does not have the means to file suit outside of his home district and so must litigate in a per se circuit. But those litigants often lack the resources to petition this Court. The Court should not miss the chance to resolve this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[7] *See also Abdelfattah v. DHS*, 488 F.3d 178 (3d Cir. 2007); *Jefferson v. DOJ,* 284 F.3d 172 (D.C. Cir. 2002); *Campbell v. DOJ*, 164 F.3d 20 (D.C. Cir. 1998); *Quiñon v. FBI*, 86 F.3d 1222 (D.C. Cir. 1996); *Davin v. DOJ*, 60 F.3d 1043 (3d Cir. 1995).

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of October, two thousand twenty-five.

Present:

GUIDO CALABRESI,
DENNY CHIN,
EUNICE C. LEE,
Circuit Judges.

NATHANIEL J. BUCKLEY,
Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF JUSTICE,
Defendant-Appellee.

No. 24-3192-cv

For Appellant:	Michael Kuzma, Michael Kuzma Attorney at Law, Buffalo, NY
For Appellee:	Michael S. Cerrone, Assistant United States Attorney, *for* Michael DiGiacomo, United States Attorney for the Western District of New York, Buffalo, NY

Appeal from a judgment of the United States District Court for the Western District of New York.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Appellant Nathaniel J. Buckley appeals from a judgment of the United States District Court for the Western District of New York (Leslie G. Foschio, *Magistrate Judge*)[1] entered on November 6, 2024, granting in part and denying in part the parties' cross-motions for summary judgment and denying Buckley's request for attorneys' fees. Buckley sought records under the Freedom of Information Act

[1] The Parties consented to the Magistrate Judge's authority to conduct all proceedings on August 16, 2019.

(FOIA), 5 U.S.C. § 552(a), related to a domestic terrorism investigation of him and of a bookshop he co-owns. The investigation ended without charges. In response to his initial public records request, Appellee the Department of Justice (DOJ) and its component the Federal Bureau of Investigation (FBI) released 14 partially redacted pages, of 16 relevant pages it identified. After Buckley filed this suit, another 54 partially redacted pages, out of 58 pages identified as relevant, were released to him. The district court's summary judgement order did not result in the release of any additional records. Buckley appealed.

On appeal, Buckley argues that the DOJ improperly withheld information about the units, squads, and divisions that were involved in the investigation and about alleged confidential informants under FOIA Exemption 7. Buckley also argues that the district court erred in denying him attorneys' fees because he should be considered a prevailing party under the catalyst theory. We assume the parties' familiarity with the case.

Because this case was decided on summary judgment, we review *de novo* Buckley's arguments related to Exemption 7. *Jabar v. U.S. Dep't of Just.*, 62 F.4th 44, 48 (2d Cir. 2023) (per curiam). We review the denial of attorneys' fees for abuse of discretion, except insofar as Buckley argues the Magistrate Judge "committed legal error in denying a fee award," which we review *de novo*. *Wilson v. Fed. Bureau of Investigation*, 91 F.4th 595, 598 (2d Cir. 2024) (per curiam).

I. The Applicability of FOIA Exemption 7

FOIA Exemption 7 lists six sub-categories of "records or information compiled for law enforcement purposes" that are exempt from release under FOIA. 5 U.S.C. § 552(b)(7). As a threshold matter, Buckley argues that because the investigatory records here were compiled not for legitimate law enforcement purposes but for political reasons, Exemption 7 does not apply to records in this case. But the law of this Circuit is clear and to the contrary: When records are sought from a law enforcement agency, we cannot "engage in a factual inquiry as to the legitimacy of a law enforcement purpose" when applying Exemption 7. *Ferguson v. Fed. Bureau of Investigation*, 957 F.2d 1059, 1070 (2d Cir. 1992). Instead, we must assume "that all investigatory records of the FBI were compiled for a law enforcement purpose" even "in the event a court determined such records were compiled in the course of an unwise, meritless or even illegal investigation." *Williams v. Fed. Bureau of Investigation*, 730 F.2d 882, 884–85 (2d Cir. 1984).[2] Exemption 7 therefore may be applied to the contested records in this case.

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[2] Other circuits take a contrary approach, requiring a rational nexus between the investigative records and a legitimate law enforcement purpose. *See, e.g.*, *Pratt v. Webster*, 673 F.2d 408, 421 (D.C. Cir. 1982); *Binion v. U.S. Dep't of Just.*, 695 F.2d 1189, 1194 (9th Cir. 1983); *Davin v. U.S. Dep't of Just.*, 60 F.3d 1043, 1056 (3d Cir. 1995), *holding modified by, Abdelfattah v. U.S. Dep't of Homeland Sec.*, 488 F.3d 178 (3d Cir. 2007) (per curiam). There is much to be said for that position. We are, however, bound by our Court's precedent.

A. Withholding Information About Confidential Informants Under FOIA Exemption 7(D)

Buckley seeks disclosure of any confidential informants who offered information in his case and of their confidential source symbol numbers. Exemption 7(D) exempts law enforcement records from disclosure if the records "could reasonably be expected to disclose the identity of a confidential source" or if they include "information furnished by a confidential source" (in the course of a criminal or national security investigation). 5 U.S.C. § 552(b)(7)(D). Buckley argues that, even if the contested records were compiled for law enforcement purposes, information about confidential informants in his case should nonetheless be disclosed because the alleged informants here waived their protection. Moreover, he argues that the FBI has not always protected confidential informants' information, thereby undercutting its argument that such protection is necessary for its operations.

There is no basis for Buckley's argument in law. Exemption 7(D) contains no balancing test as a result of which the Congressional intent to protect confidential sources could be undermined by the actions of those sources or of the FBI. Exemption 7(D) is part of "a scheme of categorical exclusion." *Ferguson*, 957 F.2d at 1068 (quoting *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 631 (1982)). "[S]ubsequent disclosures of the identity of a confidential source" and other "[s]uch considerations are not relevant to the applicability of exemption 7(D)." *Id.* Information about confidential informants in Buckley's case, if such information exists, is

therefore exempt from disclosure under Exemption 7(D).

B. Withholding Information About Participating Units Under Exemption 7(E)

Buckley seeks the names of the units, squads, or divisions that were involved in his investigation. Exemption 7(E) exempts two categories of investigative records from release under FOIA: (1) those that "would disclose techniques and procedures for law enforcement investigations or prosecutions," and (2) those that "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).

Buckley argues that the first category—"techniques and procedures"—cannot be construed to include the names of investigative units. But, in fact, the identification of investigative units easily fits in the category of "guidelines," which this Court has said "in the context of Exemption 7(E) [refers] to resource allocation." *Allard K. Lowenstein Int'l Hum. Rts. Project v. U.S. Dep't of Homeland Sec.*, 626 F.3d 678, 682 (2d Cir. 2010). On these particular facts, the DOJ has met its burden of showing that revealing the identity of units involved in FBI counterterrorism investigations would amount to a revelation of information about resource allocation, and that such revelation could reasonably be expected to risk circumvention of the law. Exemption 7(E) is thus satisfied.

II. Buckley's Eligibility for Attorneys' Fees

Buckley also argues that the Magistrate Judge erred in denying him attorneys' fees. In the absence

of a judgment in his favor, a plaintiff may still be entitled to attorneys' fees under FOIA's so-called catalyst theory. He must show "a voluntary or unilateral change in position by the agency" and that his "claim is not insubstantial." 5 U.S.C. § 552(a)(4)(E)(ii)(II). In other words, Buckley can be a prevailing party, despite losing on the merits below, if he can show that the DOJ changed course and released records due to a "not insubstantial" claim he brought. Buckley points out that the DOJ released 54 additional pages of information after he filed suit, and that this creates an inference that he prevailed under the catalyst theory.

The DOJ, however, argues that it released these additional records not because of Buckley's suit but because he finally, in 2019, submitted release forms from other individuals. Thus, according to the DOJ, "the catalyst for the . . . 2019 release of records was the provision of the release forms and not the filing of the lawsuit." Appellee's Br. at 31.

Buckley notes that he submitted identical release forms much earlier, in 2018. He has a point. The DOJ gives no reason why the release forms submitted by Buckley's counsel in 2018—which covered the same individuals as did the release forms submitted in 2019, after Buckley filed suit—were procedurally deficient. Further, the DOJ's briefing admits that the 2018 release forms effectively "authorized release of information to Buckley's counsel[.]" Appellee's Br. At 4. Buckley's inference that it was litigation, not the 2019 release forms, that catalyzed the cross-reference release is therefore plausible.

And yet, Buckley failed to raise this issue below. His catalyst-theory argument at the district court

level made no mention of the 2018 release forms. As the Magistrate Judge rightly noted, the mere filing of a complaint and subsequent release of documents is insufficient to establish that the lawsuit substantially caused the requested records to be released; the plaintiff bears the burden of showing that the government would not have released the records but for the lawsuit. Buckley neglected to assert the February 2018 release forms in his district court submission and, therefore, failed to meet this burden. Under the circumstances, we see no reason to conclude that the Magistrate Judge clearly erred in its factual finding that Buckley's suit was not the catalyst for the additional release of information.

* * *

We have considered Buckley's remaining arguments and find them unpersuasive. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk
Catherine O'Hagan Wolfe
[SEAL]

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

NATHANIEL J. BUCKLEY,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

DECISION and ORDER
19-CV-319F
(consent)

[Filed: 11/05/2024]

APPEARANCES: MICHAEL KUZMA, ESQ.
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JURISDICTION

On August 16, 2019, the parties to this action consented pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned. The matter is presently before the court for a determination of whether Plaintiff substantially prevailed in this FOIA action

and is thus entitled to an award of costs, including attorney fees incurred in connection with this action.

BACKGROUND

On February 9, 2016, Plaintiff's counsel, Michael Kuzma, Esq. ("Kuzma"), submitted a request pursuant to Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, ("FOIA" or "the Act"), seeking all records pertaining to Plaintiff, Nathaniel J. Buckley ("Plaintiff") ("FOIA request"). Dkt. 15-1 at 1-5. The FOIA request was accompanied by Department of Justice ("DOJ") Certificate of Identity Form DOJ-361 ("Form DOJ-361"), completed and signed by Plaintiff as required for each person for whom information is sought pursuant to a FOIA request. On November 19, 2017, the Federal Bureau of Investigation ("FBI"), the DOJ component to which the FOIA request was directed, advised Plaintiff 16 pages responsive to Plaintiff's FOIA request were identified of which 14 pages were being released. Dkt. 15-1 at 16. On March 8, 2019, Plaintiff commenced this action pursuant to the FOIA seeking, *inter alia*, the disclosure and release of agency records withheld by Defendant DOJ in response to Plaintiff's requests for information pertaining to a two-year investigation by the FBI of Plaintiff and one Leslie James Pickering ("Pickering"), and their possible involvement in domestic terrorism. On April 16, 2019, Defendant answered the Complaint. Dkt. 4. On June 12, 2019, Kuzma, on behalf of Plaintiff, provided the FBI with the original and completed Form DOJ-361s for eight individuals required for Defendant to release information responsive to the FOIA request but pertaining to such individuals. Dkt. 15-1 at 36-45. By letter dated July 12, 2019, the FBI advised Plaintiff it reviewed 58 pages of records responsive to Plaintiff's

FOIA request, of which 54 pages were released in full or in part with certain information withheld pursuant to FOIA exemptions 3, 6, 7(C), 7(D), and 7(E). Dkt. 15-1 at 46-50.

In support of Defendant's motion for summary judgment filed on December 20, 2019 (Dkt. 13) ("Defendant's Motion"), Defendant filed, *inter alia*, the so-called "*Vaughn* Index" (Dkt. 15-1 at 51-56).[1] On March 5, 2020, Plaintiff filed a motion for summary judgment (Dkt. 19) ("Plaintiff's Motion"). In a Decision and Order filed November 18, 2021 (Dkt. 30) ("D&O"),[2] both Defendant's and Plaintiff's Motions were granted in part and denied in part with Defendant ordered to file additional documentation permitting the court to determine whether Defendant properly asserted FOIA Exemption 3 to support Defendant's withholding of information on Bates-stamped page 51 ("page 51"). D&O at 30.

As directed in the D&O, Defendant filed the requested documentation specifically, the Declaration of Michael G. Seidel (Dkt. 31) ("Seidel Declaration"), who advised that, as the Section Chief of the

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[1] The "*Vaughn* Index" refers to an index prepared by the agency upon whom a FOIA request is made setting forth all materials otherwise responsive to the FOIA request but which the agency withholds as exempt as well as the exemptions asserted as justifying the withholdings. *See Vaughn v. Rosen*, 484 F.2d 820, 826-27 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) (requiring government agency, in responding to FOIA request, prepare a list of documents withheld as exempt, either in full or in part, and furnish detailed justification for the asserted exemptions). Each entry listed in the *Vaughn* Index bears a Bates-stamped page number.

[2] An Amended Decision and Order correcting several typographical errors was filed on December 16, 2021 (Dkt. 32).

Record/Information Dissemination Section ("RIDS"), Information Management Division, Federal Bureau of Investigation ("FBI"), he is qualified to respond to FOIA requests seeking information from the FBI's files including the FBI's handling of Plaintiff's FOIA request for records related to himself. Seidel Declaration ¶¶ 1-3. Seidel explained that upon re-reviewing the processing and application of exemptions asserted for page 51 ("page 51") in the *Vaughn* Index (Dkt. 15-1 at 51-56), the FBI removed the application of both FOIA Exemption 3, and FOIA Exemption 7(E)-10, thereby allowing the FBI to release a further portion of page 51, *id.* ¶ 5, but that the balance of information on page 51 remains redacted as subject to Exemptions 7(E)-6 and 7(E)-8, as well as Exemptions 6 and 7(C) which still apply. *Id.* ¶¶ 5-7. Because in the D&O, the undersigned affirmed Defendant's assertion of Exemptions 6, 7(C), and 7(E), D&O at 30-36, 41-45, the information redacted on page 51 pursuant to Exemptions 6, 7(C), and 7(E) remains exempt from disclosure.

With the entry of the D&O, the only remaining issue to be decided in this matter is whether Plaintiff substantially prevailed in this action and is thus entitled to an award of attorney fees. The undersigned therefore ordered Plaintiff to file papers showing he is entitled to an award of costs, including attorney fees, incurred in connection with this action, and also provided Defendant an opportunity to respond.

Accordingly, on October 18, 2023, Plaintiff filed the Declaration of Michael Kuzma[, Esq.][3] (Dkt. 34)

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[3] Unless otherwise indicated, bracketed material has been added.

("Kuzma Declaration"), asserting Plaintiff substantially prevailed in this FOIA action entitling Plaintiff to an award of costs, including attorney fees, incurred in connection with this action. In response, Defendant filed Defendant's Memorandum of Law in Opposition to Plaintiff's Request for Attorney's Fees (Dkt. 35) ("Defendant's Response"), arguing Plaintiff is not entitled to an award of costs, including attorney fees, because Plaintiff did not substantially prevail in this FOIA action. Oral argument was deemed unnecessary.

DISCUSSION

FOIA permits courts to assess "against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case . . . in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E)(i) ("§ 552(a)__"). "Evaluating FOIA fee applications is a three-step process." *New York Times Co. v. Central Intelligence Agency*, 251 F.Supp.3d 710, 713 (S.D.N.Y. 2017). First, to recover attorney fees and costs, a FOIA complainant must demonstrate he substantially prevailed in the FOIA action by

> obtain[ing] relief through either--
>
> > (I) a judicial order, or an enforceable written agreement or consent decree; or
> >
> > (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

5 U.S.C.A. § 552(a)(4)(E)(ii) ("prong I" and "prong II").

Upon demonstrating he substantially prevailed in the litigation so as to be eligible for fees, "a litigant must show that he is entitled to an award under the four

criteria the court weighs in determining whether fees are appropriate: (1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) whether the Government had a reasonable basis for withholding requested information." *Pietrangelo v. U.S. Army*, 568 F.3d 341, 343 (2d Cir. 2009) (citing *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1498 (D.C. Cir. 1984)). Only after satisfying the first two steps does the court address the third step, *i.e.*, "whether the fee requested by an eligible and entitled applicant is 'presumptively reasonable' under the lodestar approach generally applied to fee applications in the Second Circuit." *New York Times Co.*, 251 F.Supp.3d at 713 (citing *Simmons v. N.Y.C. Transit Auth.*, 575 F.3d 170, 174 (2d Cir. 2009)).

In the instant case, in support of an award of costs, including attorney fees incurred, Plaintiff explains that prior to commencing this FOIA action on March 8, 2019, in connection with the FOIA request made at the administrative stage, the FBI reviewed 16 pages responsive to Plaintiff's administrative FOIA request of which 14 pages were released, Kuzma Declaration ¶ 3, yet after Plaintiff, in response to the FBI's request, provided on June 12, 2019 newly signed Form DOJ-361s for eight individuals, the FBI, on July 12, 2019, advised Plaintiff it conducted the cross-reference search requested by Plaintiff's FOIA request and reviewed an additional 58 pages of which 54 were released. *Id.* ¶¶ 6-7. Plaintiff argues that if Plaintiff had never commenced this FOIA action, the FBI would not have conducted the cross-reference search and released the additional 54 pages. *Id.* ¶ 8. Plaintiff further asserts

that he has not derived any commercial benefit from this action and has made the released information publicly available via social media and public presentations. *Id.* ¶ 9. Plaintiff thus maintains he has substantially prevailed in this action and is eligible for an award of reasonable attorney fees and other litigation costs pursuant to § 552(a). *Id.* ¶ 10.

In opposition, Defendant argues Plaintiff did not prevail in this action, explaining that in the D&O, the Defendant's summary judgment motion was granted in all respects except as to Defendant's application of FOIA Exemption 3 to page 51. Defendant's Response at 7. Although after subsequent briefing Defendant withdrew its assertion of FOIA Exemption 3 to page 51, the document remained exempt from disclosure pursuant to other FOIA exemptions such that the court never ordered the release of any records to Plaintiff pursuant to prong I of § 552(a)(4)(e)(ii), *i.e.*, release pursuant to a court order. *Id.* Defendant further maintains that despite Defendant's release of an additional 54 pages of information after Plaintiff commenced this action, the circumstances under which the additional pages were released establish that Plaintiff did not substantially prevail in this FOIA action pursuant to prong II of § 552(a)(4)(e)(ii) based on the FBI's "voluntary or unilateral change in position. . . ." *Id.* at 7-8.

With regard to the release of information pursuant to a court order under prong I, despite the court's determination that FOIA Exemption 3 did not apply to page 51, and Defendants withdrawal of its assertions of Exemptions 3 and 7(E)-10 to page 51, the redacted portions of page 51 remained withheld and were never released pursuant to FOIA

Exemptions 6 and 7(C), as well as Exemptions 7(E)-6 and 7(E)-8. Accordingly, no part of page 51 was ever released pursuant to this court's order. Nor were any of the 54 additional pages released pursuant to court order. Plaintiff thus is not eligible for an award of attorney fees based on substantially prevailing by way of a court order as required by prong I.

Plaintiff also maintains that he substantially prevailed in this action under prong II, the so-called "catalyst theory" for fee eligibility, because the FBI released 54 additional pages only upon conducting a cross-reference search pursuant to the FOIA request and the filing of this action. Kuzma Declaration ¶¶ 7-9. In opposition, Defendants argue that not only is the release of subsequent records pursuant to the filing of a complaint insufficient to satisfy prong II, Defendant's Response at 7 (citing *Grand Canyon Tr. v. Bernhardt*, 947 F.3d 94, 97 (D.C. Cir. 2020)), but the release of the additional records on July 12, 2019, occurred only 30 days after Plaintiff provided the necessary and additional Form DOJ-361s for individuals to whom information in the 54 documents pertained other than Plaintiff, which Plaintiff did not provide with the initial FOIA request, such that the release of the additional pages cannot be attributed to Plaintiff's commencement of this action. *Id.* at 7-8.

Eligibility for fees under the catalyst theory requires the "litigant . . . 'show[ ] that the lawsuit was reasonably necessary and the litigation substantially caused the requested records to be released.'" *Judicial Watch, Inc. v. U.S. Dept. of Justice*, 878 F. Supp.2d 225, 231 (D.D.C. 2012) (quoting *Burka v. HHS*, 142 F.3d 1286, 1288 (D.C. Cir. 1998)). "[T]he mere filing of the complaint and the subsequent release of the documents is

insufficient to establish causation." *Grand Canyon Tr.*, 947 F.3d at 97 (internal quotation & citation omitted). "[T]he plaintiff has the burden of showing that it is more probable than not that the government would not have performed the desired act absent the lawsuit." *Id.* (internal quotation & citation omitted). Courts have found that "[t]he causation requirement is missing when disclosure results not from the suit but from delayed administrative processing." *Short v. U.S. Army Corps of Eng'rs*, 613 F. Supp. 2d 103, 106 (D.D.C. 2009)). In the instant case, Plaintiff has failed to meet his burden of showing it is more probable than not that absent commencing this action, Defendant would not have conducted the cross-reference search and released the 54 pages; rather, the release of the 54 pages one month after Plaintiff provided the eight additional Form DOJ-361s as required for releasing information pertaining to other than the FOIA applicant strongly supports that Defendant promptly released the records upon receipt of the necessary forms. Accordingly, Plaintiff has failed to establish eligibility for attorney fees based on the catalyst theory.

Because Plaintiff has failed to establish the first step, *i.e.*, that he substantially prevailed in this action under either prong I or prong II, Plaintiff is not eligible for an award of attorney fees incurred in connection with this action, and the court need not consider the remaining two steps. See *New York Times Co.*, 251 F.Supp.3d at 713 (if the Plaintiff does not establish he substantially prevailed in a FOIA action so as to be eligible for an award of attorney fees, the court need not address the next two steps including entitlement to the fee and calculation of the fee amount).

CONCLUSION

Based on the foregoing, Plaintiff's request for attorney fees incurred in connection with the instant FOIA action is DENIED. The Clerk of Court is DIRECTED to CLOSE the file.

SO ORDERED.

/s/ *Leslie G. Foschio*
LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

DATED: November 5, 2024
Buffalo, New York

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

NATHANIEL J. BUCKLEY,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

DECISION and ORDER
19-CV-319F
(consent)

[Filed: 11/18/2021]

APPEARANCES: MICHAEL KUZMA, ESQ.
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JURISDICTION

On August 16, 2019, the parties to this action consented pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned. The matter is presently before the court on motions for summary judgment

filed by Defendant on December 20, 2019 (Dkt. 13), and by Plaintiff on March 5, 2020 (Dkt. 19).

BACKGROUND

Plaintiff Nathaniel J. Buckley ("Plaintiff" or "Buckley"), commenced this action pursuant to the Freedom of Information Act ("FOIA" or "the Act"), 5 U.S.C. § 552 *et seq.*, on March 8, 2019, seeking an injunction and other relief, including the disclosure and release of agency records withheld by Defendant United States Department of Justice ("Defendant" or "DOJ") in response to Plaintiff's requests for information pertaining to a two-year investigation by the Federal Bureau of Investigation ("FBI") of Plaintiff and Leslie James Pickering ("Pickering"), and their possible involvement in domestic terrorism and an eco-terrorism[1] conspiracy. On December 20, 2019, Defendant filed a motion for summary judgment (Dkt. 13) ("Defendant's Motion"), a Memorandum of Law (Dkt. 14) ("Defendant's Memorandum"), the Declaration of David M. Hardy (Dkt. 15) ("Hardy Declaration"), attaching exhibits A through L (Dkt. 15-1) ("Defendant's Exh(s). __"), and a Statement of Undisputed Facts (Dkt. 16) ("Defendant's Statement of Facts"). Also filed as Defendant's Exh. L (Dkt. 15-1 at 51-56), is the so-called "*Vaughn* Index" the requested government agency is required to furnish in responding to a FOIA request for records, purporting to identify each piece of information responsive to a FOIA request, as well

[1] A precise definition of "eco-terrorism" is not provided in the record. Although Plaintiff asserts he was investigated for both domestic terrorism and eco-terrorism, the parties essentially refer only to domestic terrorism and the court, in the interest of simplicity, does likewise.

as whether each responsive piece was released in full ("RIF"), released in part ("RIP"), or withheld in full ("WIF"), and the asserted reason why any information was withheld either in full or in part.[2] On March 5, 2020, Plaintiff filed a motion for summary judgment (Dkt. 19) ("Plaintiff's Motion"), the Memorandum of Law in Support of Motion for Summary Judgment (Dkt. 20) ("Plaintiff's Memorandum"), the Affidavit of Nathaniel J. Buckley (Dkt. 21) ("Plaintiff's Affidavit"), attaching exhibits 1 through 5 (Dkts. 21-1 through 21-5) ("Plaintiff's Exh(s). __"), and Plaintiff's Statement of Material, Undisputed Facts and Response to the FBI's Statement of Undisputed Facts Pursuant to Local Rule 56 (Dkt. 22) ("Plaintiff's Statement of Facts"). In further support of Defendant's Motion, Defendant filed on August 28, 2020, the Reply Memorandum of Law (Dkt. 28) ("Defendant's Reply"), and the Declaration of Michael G. Seidel (Dkt. 29) ("Seidel Declaration"). Oral argument was deemed unnecessary.

Based on the following, Defendant's Motion should be GRANTED; Plaintiff's Motion should be DENIED.

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[2] The "*Vaughn* Index" refers to an index prepared by the agency upon whom a FOIA request is made setting forth all materials otherwise responsive to the FOIA request but which the agency withholds as exempt as well as the exemptions asserted as justifying the withholdings. *See Vaughn v. Rosen*, 484 F.2d 820, 826-27 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) (requiring government agency, in responding to FOIA request, prepare a list of documents withheld as exempt, either in full or in part, and furnish detailed justification for the asserted exemptions).

FACTS[3]

Plaintiff and Pickering are co-owners of Burning Books ("Burning Books"), an independent book store located in Buffalo, New York ("Buffalo"), which Plaintiff describes as "specializing in social justice struggles and state repression." Plaintiff's Affidavit ¶ 2. Burning Books has hosted events featuring political activists and journalists, and screenings of film documentaries on such topics as civil rights and environmental concerns, which events were monitored by undercover FBI agents and informants. Plaintiff is an associate of Friends of the Ancient Forest, and has participated in protests to prevent logging in Zoar Valley, a deep canyon river valley located between Cattaraugus and Erie Counties in western New York, and in "ARISSA," a community activist organization on Buffalo's west side.[4] In 2011, Plaintiff was criminally prosecuted in Buffalo City Court for participating in an anti-war protest,[5] with stories about Plaintiff's arrest and subsequent trial featured in local news media outlets including The Buffalo News, a local newspaper of general circulation, radio station WBFO, and television news station WIVB. Commencing in January 2012 and continuing through January 2014, Plaintiff was the subject of a federal ecoterrorism conspiracy investigation based on Plaintiff's association with Pickering. In connection with this investigation,

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[3] Taken from the pleadings and motion papers filed in this action.

[4] The record does not reveal whether "ARISSA" is an acronym and, if so, what each letter represents.

[5] The charges eventually were dismissed with prejudice. *People v. Buckley*, 967 N.Y.S.2d 868 (City Ct. 2013)

Plaintiff sought to obtain from the FBI copies of all records pertaining to Plaintiff and that are the subject of the instant action. Plaintiff suspects that some of the information that may be present in the FBI's records would pertain to statements made by Amy Upham ("Upham") and Selena K. Lloyd ("Lloyd"), both of whom were tenants in the apartment located above Burning Books from April 2011 through November 2011, and neither of whom personally liked Plaintiff or Pickering. Plaintiff further maintains that Lloyd's animus toward Plaintiff was so great that Crisis Services, Inc. ("Crisis Services"), warned Plaintiff that Lloyd, upon being released from Erie County Medical Center's Mental Health Unit, made death threats against Plaintiff.

With regard to Plaintiff's attempts to obtain the information from the FBI, by letter dated February 9, 2016 ("FOIA Request"),[6] Plaintiff, through his legal counsel, Michael Kuzma, Esq. ("Kuzma"), requested

> any and all records that were prepared, received, transmitted, collected, and/or maintained by the Federal Bureau of Investigation (FBI), the Terrorist Screening Center, the National Joint Terrorism Task Force, or any Joint Terrorism Task Force relating or referring to *Nathaniel J. Buckley*.

FOIA Request at 1 (italics in original).

The FOIA Request was accompanied by the required DOJ Certificate of Identity, Form DOJ-361 ("Certificate of Identity forms"), completed with Plaintiff's information and signature. FOIA Request

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[6] Defendant's Exh. A (Dkt. 15-1 at 1-5).

at 5. By letter dated February 23, 2016 ("February 23, 2016 Letter"),[7] the FBI acknowledged receipt of the FOIA Request, assigning it Freedom of Information/Privacy Acts ("FOIPA") Request Number 1344909-000 ("First FOIPA"). By letter to the DOJ dated February 6, 2017 ("February 6, 2017 Letter"),[8] Plaintiff advised Defendant had failed to provide records responsive to the First FOIPA within 20 days of receiving the FOIA Request, and that Plaintiff was treating the DOJ's failure to timely respond as a denial of the FOIA Request. By letter dated February 21, 2017 ("February 21, 2017 Letter"),[9] the DOJ acknowledged receipt of the February 6, 2017 Letter and advised it was being considered an appeal, assigning it number DOJ-AP-2017-002444 ("First Appeal"). By letter dated March 21, 2017 ("March 21, 2017 Letter"),[10] the DOJ's Office of Information Policy ("OIP"), advised Kuzma that the First Appeal was without merit because it was filed prior to any adverse opinion being made regarding Plaintiff's FOIA Request, but that the OIP had contacted the FBI and the FOIA Request was being processed.

On November 20, 2017, the FBI released records responsive to Plaintiff's FOIA Request ("First Records Release"),[11] advising 16 records were located and reviewed, with 14 of the records released in full or in part, explaining the withheld records were protected from disclosure pursuant to FOIA

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[7] Defendant's Exh. B (Dkt. 15-1 at 6-8).

[8] Defendant's Exh. C (Dkt. 15-1 at 9-10).

[9] Defendant's Exh. D (Dkt. 15-1 at 11-12).

[10] Defendant's Exh. E (Dkt. 15-1 at 13-14).

[11] Defendant's Exh. F (Dkt. 15-1 at 15-18).

Exemptions 3, 6, 7(c), 7(D), and 7(E),[12] but that Plaintiff could appeal the FBI's decision by filing an administrative appeal with the DOJ's OIP within 90 days or by seeking dispute resolution through the Office of Government Information Services ("OGIS") or the FBI's FOIA Public Liaison. By letter dated February 6, 2018 ("Second Appeal"),[13] Plaintiff appealed to OIP for assistance with the FBI's alleged inadequate search and failure to reasonably segregate portions of the First Records Release. Included with the appeal were additional completed Certification of Identity forms authorizing the release to Kuzma of any information responsive to Plaintiff's FOIA Request pertaining to John Buckley, Sarah Buckley, Daire Brian Irwin, Carrie Ann Nader, Leslie James Pickering, Theresa Baker-Pickering, Sean Francis Raess, and Michael Kuzma. *See* Dkt. 15-1 at 22-29. On February 20, 2018, the OIP acknowledged receipt of the Second Appeal which was assigned number DOJAP-208-00286.[14]

By letter dated August 9, 2018 ("August 9, 2018 Letter"),[15] DOJ OIP advised Plaintiff of the FBI's actions on Plaintiff's FOIA Request, *i.e.*, the documents, with some redactions, included in the First Records Release, were affirmed, and that the FBI properly withheld certain information as protected from disclosure pursuant to FOIA exemptions. The OIP also confirmed the FBI conducted an adequate and reasonable search for

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[12] The categories of government records exempt from disclosure under FOIA are set forth in 5 U.S.C. § 552(b).

[13] Defendant's Exh. G (Dkt. 15-1 at 19-21).

[14] Defendant's Exh. H (Dkt. 15-1 at 30-31).

[15] Defendant's Exh. I (Dkt. 15-1 at 32-35).

records responsive to Plaintiff's FOIA Request, advising if Plaintiff remained dissatisfied with the OIP's action on Plaintiff's Second Appeal, Plaintiff could commence an action in federal district court pursuant to 5 U.S.C. § 552(a)(4)(B). Accordingly, on March 8, 2019, Plaintiff commenced the instant action.

On June 12, 2019, in response to a request from the FBI, Plaintiff provided newly completed and signed DOJ-361 forms authorizing the release to Plaintiff of information pertaining to John Buckley, Sarah Buckley, Daire Brian Irwin, Carrie Ann Nader, Leslie James Pickering, Theresa Baker-Pickering, Sean Francis Raess, and Michael Kuzma.[16] By letter to Kuzma dated July 12, 2019 ("Second Records Release"),[17] the FBI advised it located and reviewed 58 pages of records responsive to Plaintiff's FOIA Request, releasing 54 pages in full or in part, with certain information withheld pursuant to FOIA exemptions 3, 6, 7(C), 7(D), and 7(E).

In connection with the pending motions, explanations as to how Plaintiff's FOIA Request was processed are provided by David M. Hardy ("Hardy"), and Michael G. Seidel ("Seidel"). Hardy was the Section Chief of the Record/Information Dissemination Section ("RIDS"), Information Management Division ("IMD"), in Winchester, Virginia, when the search for records responsive to Plaintiff's FOIA Request occurred. Hardy Declaration ¶ 1. Hardy was succeeded by Seidel who was Assistant Section Chief of RIDS when the relevant

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[16] Defendant's Exh. J (Dkt. 15-1 at 36-45).

[17] Defendant's Exh. K (Dkt. 15-1 at 46-50).

records search occurred, becoming Acting Section Chief May 26, 2020 until July 26, 2020, when Seidel became Section Chief of RIDS, IMD, FBI. Seidel Declaration ¶ 1.

According to Hardy, in fulfilling its integrated missions and functions as a law enforcement, counterterrorism, and intelligence agency, the FBI compiles and maintains in the Central Records System ("CRS") records consisting of applicants, investigative, intelligence, personnel, administrative, and general files. The CRS maintains records for the entire FBI organization including FBI Headquarters ("FBIHQ"), FBI Field Offices, and FBI Legal Attached Officers ("Legats") worldwide.

CRS files are numerically sequenced and organized according to designated subject categories referred to as "FBI classifications." As each FBI case file is opened, the file is assigned a Universal Case File Number ("UCFN") consisting of three sequential components including (1) the CRS file classification number; (2) the abbreviation of the FBI Office of Origin ("OO") initiating the file; and (3) the assigned individual case file number for that particular subject matter. Within each case file, certain documents of interest are "serialized" *i.e.*, assigned a document number in the order in which the document is added to the file, typically in chronological order.

Records are located within the CRS through its general indices with the files alphabetized according to subject matters including individuals, organizations, events and subjects of investigative interest. Entries in the general indices fall into two categories including (1) a main entry created for each individual or non-individual that is the subject or

focus of an investigation, and (2) a reference or "cross-reference" entry created for individuals or non-individuals associated with a case, but not the main subject or focus of an investigation. Reference subjects typically are not identified in the case title of a file. CRS indexing information is done by FBI investigators who have the discretion to deem information sufficiently significant to warrant indexing for future retrieval. Thus, not every individual name, organization, event, or other subject matter is separately indexed in the general indices.

In 1995, Automatic Case Support ("ACS"), an electronic, integrated case management system was implemented with CRS records converted from automated systems previously utilized by the FBI into a single, consolidated case management system accessible by all FBI offices. ACS searches were conducted through use of the Universal Index ("UNI") which provides an electronic means to search by indexing pertinent investigative information including such identifying information as name, date of birth, race, sex, locality, Social Security Number, address, and date of an event. On July 1, 2012, the Sentinel system ("Sentinel") became the effective FBI-wide case management system. Sentinel includes the same automated applications utilized in ACS, and also provides a web-based interface to FBI users. Sentinel did not replace ACS, however, until August 1, 2018, when ACS data was migrated into Sentinel including ACS indices data and digitalized investigative records. Sentinel also retains the index search methodology and function whereby the CRS is queried via Sentinel for pertinent indexed main or reference entries in case files. As such, CRS index data from the UNI application previously searched

via ACS is now searched within Sentinel using the "ACS Search" function.

Accordingly, upon receiving FOIPA requests for information on subject matters predating implementation of Sentinel, RIDS begins its searching efforts by conducting index searches via Sentinel's ACS Search function, followed by an index search of Sentinel records to ensure any subsequent records or data relevant to the FOIPA request are located. The CRS automated indices are updated daily with searchable material newly indexed in Sentinel.

Each page of the records responsive to Plaintiff's FOIA Request is Bates-stamped. Defendant provides a "*Vaughn* Index"[18] listing a description of each document with the associated Bates-stamped page number, and a chart indicating for each record whether it was released in full, released in part, or withheld in full, as well as on which FOIA Exemption Defendant relies to support withholding the information. The *Vaughn* Index shows Defendant identified 58 records responsive to Plaintiff's FOIA Request, of which three were RIF, 51 were WIP, and 4 were WIF. The 58 records appear in 23 separately "serialized" documents ("serials"), *i.e.*, documents arranged in chronological order.

DISCUSSION

1. Summary Judgment

Both Plaintiff and Defendant move for summary judgment on Plaintiff's challenges to the adequacy of the documents provided in response to Plaintiff's

[18] Defendant's Exh. L (Dkt. 15-1 at 51-56).

FOIA Request in the First and Second Records Releases. Summary judgment of a claim or defense will be granted when a moving party demonstrates that there are no genuine issues as to any material fact and that a moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a) and (b); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986); *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003). The court is required to construe the evidence in the light most favorable to the non-moving party, *Collazo v. Pagano*, 656 F.3d 131, 134 (2d Cir. 2011), and summary judgment may not be granted based on a credibility assessment. *See Reyes v. Lincoln Automotive Financial Services*, 861 F.3d 51, 55 (2d Cir. 2017) ("Adverse parties commonly advance conflicting versions of the events throughout a course of litigation. In such instances on summary judgment, the court is required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." (citations, quotation marks, and brackets omitted)). The party moving for summary judgment bears the burden of establishing the nonexistence of any genuine issue of material fact and if there is any evidence in the record based upon any source from which a reasonable inference in the non-moving party's favor may be drawn, a moving party cannot obtain a summary judgment. *Celotex*, 477 U.S. at 322; *see Anderson*, 477 U.S. at 247-48 ("summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party"). "A fact is material if it 'might affect the outcome of the suit under governing law.'"

Roe v. City of Waterbury, 542 F.3d 31, 35 (2d Cir. 2008) (quoting *Anderson*, 477 U.S. at 248).

"[T]he evidentiary burdens that the respective parties will bear at trial guide district courts in their determination of summary judgment motions." *Brady v. Town of Colchester*, 863 F.2d 205, 211 (2d Cir. 1988)). A defendant is entitled to summary judgment where "'the plaintiff has failed to come forth with evidence sufficient to permit a reasonable juror to return a verdict in his or her favor on'" an essential element of a claim on which the plaintiff bears the burden of proof. *In re Omnicom Group, Inc., Sec. Litig.*, 597 F.3d 501, 509 (2d Cir. 2010) (quoting *Burke v. Jacoby*, 981 F.2d 1372, 1379 (2d Cir. 1992)). Once a party moving for summary judgment has made a properly supported showing of the absence of any genuine issue as to all material facts, the nonmoving party must, to defeat summary judgment, come forward with evidence that would be sufficient to support a jury verdict in its favor. *Goenaga v. March of Dimes Birth Defects Foundation*, 51 F.3d 14, 18 (2d Cir. 1995). "[F]actual issues created solely by an affidavit crafted to oppose a summary judgment motion are not 'genuine' issues for trial." *Hayes v. New York City Dep't of Corrections*, 84 F.3d 614, 619 (2d Cir. 1996). "An issue of fact is genuine and material if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Cross Commerce Media, Inc. v. Collective, Inc.*, 841 F.3d 155, 162 (2d Cir. 2016) (citing *SCR Joint Venture L.P. v. Warshawsky*, 559 F.3d 133,137 (2d Cir. 2009)).

In the instant case, Defendant argues in support of summary judgment the FBI's search of records responsive to the FOIA Request was adequate,

Defendant's Memorandum at 6-8, Plaintiff has no right to the requested records that are within the purview of the Privacy Act, *id.* at 8-10, and the FBI's FOIA Request response was proper because it complied with segregability requirements, *id.* at 10-11, as well as with the asserted FOIA exemptions, *id.* at 12-18. In response to Defendant's Motion and in support of Plaintiff's Motion, Plaintiff argues the FBI's investigations of Plaintiff do not qualify for FOIA's law enforcement exception, Plaintiff's Memorandum at 1-3, requests the court order the FBI release the non-exempt portions of the records, *id.* at 3-4, maintains the FBI's search for records was inadequate, *id.* at 4-5, asserts the FBI improperly withheld information based on the various FOIA exemptions, *id.* at 5-12, and requests an award of attorney fees and costs incurred in connection with this action. *Id.* at 12. In reply, Defendant argues the FBI's search for records responsive to Plaintiff's FOIA Request was adequate, Defendant's Reply at 2-5, and the FBI's response to the FOIA Request was proper with regard to segregability, *id.* at 5-7, as well as with regard to information withheld pursuant to the various asserted FOIA exemptions, *id.* at 7-19, and maintains not only is Plaintiff's argument in support of attorney fees an argument that is premature on summary judgment, *id.* at 20, but that even if such request were ripe for determination, the circumstances of the instant action do not support such an award. *Id.* at 20-23.

2. FOIA Overview

"The Freedom of Information Act adopts as its most basic premise a policy strongly favoring public disclosure of information in the possession of federal agencies." *Halpern v. F.B.I.*, 181 F.3d 279, 286 (2d

Cir. 1999) (citing cases). "As noted by the Supreme Court, under FOIA, 'federal jurisdiction is dependent on a showing that an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records.'" *Grand Cent. Partnership, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999) (quoting *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1980) (quoting *Kissinger v. Reporters Comm. for Freedom of Press*, 445 U.S. 136, 150 (1980))). "Only when each of these criteria is met may a district court 'force an agency to comply with the FOIA's disclosure requirements.'" *Id.*

"[T]he strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *U.S. Dep't of State v. Ray,* 502 U.S. 164, 173 (1991). The agency has the initial burden to show it conducted an adequate search for responsive records. *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir.), *cert. denied*, 513 U.S. 823 (1994). A search is considered adequate if it was reasonably calculated to uncover all relevant documents, yet reasonableness does not demand perfection, and a reasonable search need not uncover every document extant. *Grand Cent. Partnership, Inc.,* 166 F.3d at 489.

"The FOIA requires that agency records be made available promptly upon a request that 'reasonably describes such records and ... is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed.'" *Ruotolo v. Dep't of Justice, Tax Division*, 53 F.3d 4, 9 (2d Cir. 1995) (quoting 5 U.S.C. § 552(a)(3)). FOIA, however, exempts from disclosure nine categories of information. 5 U.S.C. § 552(b)(1) through (9) ("Exemption (b)(__)"). "Accordingly, to prevail on a summary judgment motion in a FOIA case, an agency

must demonstrate 'that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements.'" *Ruotolo*, 53 F.3d at 9 (quoting *Nat'l Cable Television Ass'n Inc. v. FCC*, 479 F.2d 183, 186 (D.C. Cir. 1973)). Furthermore, "'to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate.'" *Id.* (quoting *Carney*, 19 F.3d at 812).

"'Affidavits submitted by an agency are accorded a presumption of good faith; accordingly, discovery relating to the agency's search and the exemptions it claims for withholding records generally is unnecessary if the agency's submissions are adequate on their face.'" *Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior*, 36 F. Supp. 3d 384, 398 (S.D.N.Y. 2014) (quoting *Carney,* 19 F.3d at 812 (citation omitted)). "'In order to justify discovery once the agency has satisfied its burden, the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations, or provide some tangible evidence that an exemption claimed by the agency should not apply or summary judgment is otherwise inappropriate.'" *Id.* (citations omitted).

"Summary judgment is the preferred procedural vehicle for resolving FOIA disputes." *Bloomberg, L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 649 F.Supp.2d 262, 271 (S.D.N.Y. 2009). "In order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA." *Carney*, 19 F.3d at 812. In contrast, "'[s]ummary

judgment in favor of [a] FOIA plaintiff is appropriate when an agency seeks to protect material which, even on the agency's version of the facts, falls outside the proffered exemption.'" *Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior*, 36 F.Supp.3d 384, 398 (S.D.N.Y. 2014) (quoting *NY. Times Co. v. U.S. Dep't of Def.*, 499 F.Supp.2d 501, 509 (S.D.N.Y. 2007)). In resolving a summary judgment motion in a FOIA action, the district court conducts a *de novo* review of an agency's response to a FOIA request including any government records which the agency claims are exempt from disclosing. *See Lee v. F.D.I.C.*, 923 F.Supp. 451, 453 (S.D.N.Y. 1996) (citing 5 U.S.C. § 552(a)(4)(B); *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361-62 (1976). Such "*de novo* review requires the court to reweigh the evidence compiled by the agency to determine whether the agency's findings are correct, not just whether they are reasonable." *Id.* at 453-54. Although FOIA authorizes *in camera* inspection of the documents in question, it is not required. *Id.* (citing 5 U.S.C. § 552(a)(4)(B)).

3. FBI FOIA Request

As stated, Plaintiff's challenge to the information released by the FBI in response to Plaintiff's FOIA Request includes that the FBI improperly withheld information pertaining to an investigation of Plaintiff for exercising his First Amendment rights, Plaintiff's Memorandum at 2-3, requests the court order the FBI release non-exempt portions of the requested records the FBI erroneously maintains are "inextricably intertwined" with exempt portions, *id.* at 3-4, the FBI's records search was inadequate, *id.* at 4-5, and the FBI improperly withheld information based on various FOIA exemptions. *Id.* at 5-11. The court addresses each of these argument in turn.

A. Propriety of Investigation

At the outset, Plaintiff argues that the Privacy Act of 1974, 5 U.S.C. § 552a ("the Privacy Act"), specifically forbids any agency from maintaining records describing how any individual exercises First Amendment rights unless, as relevant here, such records are pertinent to or within the scope of authorized law enforcement activity. 5 U.S.C. § 552a(e)(7). Plaintiff's Memorandum at 2. According to Plaintiff, the investigation conducted by the FBI between 2012 and 2014, into Plaintiff and Pickering's possible involvement in domestic terrorism and eco-terrorism based on their activities at Burning Books was illegal because the activities being investigated consisted of guest speakers at events promoting social justice and the environment, as well as exposing the plight of political prisoners, all activities entitled to First Amendment protection. *Id.* As such, for the FBI to invoke FOIA Exemption (b)(7) (exempting from disclosure under FOIA six categories of "records or information compiled for law enforcement purposes) as supporting the withholding of documents responsive to Plaintiff's FOIA Request, the FBI must establish the documents pertain to investigative activities complying with the Privacy Act, *i.e.*, that "were realistically based on a legitimate concern that federal laws have been or may be violated or that national security may be breached," particularly, as relevant here, involvement in domestic terrorism and eco-terrorism. Plaintiff's Memorandum at 2 (citing cases). In opposition, Defendant maintains the FBI's investigation of Plaintiff was based on Plaintiff's association with individuals directly involved in domestic terrorism, and thus is supported by 28 U.S.C. §§ 533 and 534,

and Executive Order 12333 as implemented by the Attorney General's Guidelines for Domestic FBI Operations ("AGG-DOM"), and 28 C.F.R. § 0.85. Defendant's Reply at 10-11 (citing Hardy Declaration ¶ 42, and Seidel Declaration ¶ 7). There is no merit to Plaintiff's argument on this point.

As a threshold matter, Exemption 7 only permits the withholding of records or information to the extent it was "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). Accordingly, prior to withholding any records based on any of the six separately enumerated categories in Exemption 7 pertaining to "records or information compiled for law enforcement purposes," 28 U.S.C. § 552(b)(7), the agency must first meet the threshold requirement by demonstrating "the records sought were compiled for law enforcement purposes." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 148 (1989). Specifically, "[a]n agency must establish a rational nexus between the agency's activity in compiling the documents and its law enforcement duties." *New York Times Co.*, 390 F. Supp. 3d. at 513 (citing *Brennan Ctr.*, 331 F.Supp.3d at 97). Courts broadly construe the terms "law enforcement" and "compiled," with law enforcement purposes consisting of either civil or criminal matters, or an agency's "proactive steps designed to prevent criminal activity and maintain security." *Human Rights Watch v. Dep't of Justice Fed. Bureau of Prisons*, 2015 WL 5459713, at *5 (S.D.N.Y. Sept. 16, 2015) (quoting *Milner v. Dep't of the Navy*, 562 U.S. 562, 582 (2011) (Alito, J., concurring)); *see New York Times Co.*, 390 F. Supp. 3d at 513 (citing *Tax Analysts v. I.R.S.*, 294 F.3d 71, 76 (D.C. Cir. 2002)) (citations omitted). The act of compiling records for law enforcement purposes

"requires only 'that a document be created, gathered, or used by an agency for law enforcement purposes at some time before the agency invokes the exemption.'" *Schwartz v. Dep't of Defense*, 2017 WL 78482, at *12 (E.D.N.Y. Jan. 6, 2017) (quoting *Pub. Emps. for Envtl. Responsibility (PEER) v. U.S. Section, Int'l Boundary and Water Comm'n*, 740 F.3d 195, 203 (D.C. Cir. 2014)). This means that a document not originally compiled for a law enforcement purpose may later be "compiled" for purposes of Exemption 7(A). *See John Doe Agency*, 493 U.S. at 154 (reversing Court of Appeals' strict interpretation of "compiled" as meaning "originally compiled"). Further, "[l]aw enforcement entails more than just investigating and prosecuting individuals *after* a violation of the law," *Public Emps. For Env't. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n*, 740 F.3d 195, 203 (D.C. Cir. 2014), *i.e.*, statements of an intent to commit a crime, but less than an attempt, and, for purposes of Exemption 7, law enforcement goes beyond traditional investigation and prosecution of individuals for criminal offenses. *See id* (steps taken by law enforcement officers to prevent terrorism are taken for "law enforcement purposes").

Importantly, an agency's statement that records were compiled as a part of an investigation suffices to establish that records were compiled for law enforcement purposes without further factual findings. *Am. Civil Liberties Union Found. v. U.S. Dep't of Justice*, 833 F. Supp. 399, 406 (S.D.N.Y. 1993). Further, "once the government has demonstrated that the records were compiled in the course of an investigation conducted by a law enforcement agency, the purpose or legitimacy of

such executive action are not proper subjects for judicial review." *Halpern v. Fed. Bureau of Investigation*, 181 F.3d 279, 296 (2d Cir. 1999).

Here, Defendant relies on statements by Hardy and Seidel in their respective declarations to support Defendant's assertion that the withheld information was compiled in the course of an FBI investigation. Hardy avers that the records Plaintiff seeks were generated by the FBI "in furtherance of investigations of violations of federal laws to include domestic terrorism and the subject's association with individuals directly involved in such violations." Hardy Declaration ¶ 42. According to Hardy, "records responsive to Plaintiff's request were compiled during the FBI's criminal investigation into other sensitive investigations involving individuals and organizations the subject had an association with." *Id.* Seidel, who succeeded Hardy as Section Chief of RIDS, IMD, FBI, confirms the investigation pursuant to which the responsive records were generated by the FBI "relates to Plaintiff's association with individuals being investigated for Domestic Terrorism activities." Seidel Declaration ¶ 7. In particular, "[t]he 22 serials responsive to Plaintiff's request were all created in connection with Domestic Terrorism investigation activities or other potential illegal activities that could involve violence." *Id.*

Accordingly, during the course of the investigation, "[t]he FBI performed various law enforcement duties, to include, but not limited to, surveillance, third-party interviews, handling of source information on potential illegal activity, and various law enforcement database checks, to investigate whether any illegal activity occurred." *Id.*

In the instant case, "a more particularized justification would require reviewing material which the statute specifically exempts from disclosure or information from which inferences of such material can be deduced," and therefore is not required. *Doherty v. U.S. Dep't of Justice*, 775 F.2d 49, 52 (2d Cir. 1985) (citing cases). Moreover, in the instant case, the Plaintiff's own averments in support of summary judgment make clear the records Plaintiff seeks pertain to the FBI's investigation of political activists, including several particular political activities and journalists, as well as a defense attorney known for representing controversial defendants, who have appeared at Burning Books. Plaintiff's Affidavit ¶¶ 2, 13-14. *See Gonzalez v. U.S. Citizenship & Immigr. Servs.*, 475 F.Supp.3d 334, 350-51 (S.D.N.Y. 2020) (finding the plaintiff's own requests for records "make clear that he, in order to establish his claim for asylum in removal proceedings, seeks documents and information concerning the plaintiff's interactions with ICE and HSI" such that any documents responsive to the request would necessarily concern law enforcement activities of the agencies). This sufficiently establishes the records responsive to Plaintiff's FOIA Request were compiled for law enforcement purposes and was used in assisting law enforcement officials in the course of their duties, thereby satisfying the threshold for FOIA Exemption 7. *See Halpern*, 181 F.3d at 296 (no further judicial review is permitted once government establishes records were compiled in the course of a law enforcement investigation); *Am. Civil Liberties Union Found.*, 833 F. Supp. at 406 (agency's statement records compiled as part of investigation establishes records were compiled for

law enforcement purposes without further factual findings).

Accordingly, on this argument, summary judgment is DENIED as to Plaintiff and GRANTED as to Defendant.

B. Segregability

Plaintiff argues the FBI failed to provide "justifications for nondisclosure with reasonably specific details" as required to support withholding four pages of documents in full as well as the release of 54 pages only in part. Plaintiff's Memorandum at 3-4 (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). In opposition, Defendants argues Plaintiff fails to allege how or why the FBI's FOIA release does not comport with the segregability test.[19] Defendant's Reply at 5-7. According to Defendant, the Seidel Declaration sets forth a sufficient explanation of the segregability review conducted on the records responsive to Plaintiff's FOIA Request. *Id.* at 6-7.

Insofar as Plaintiff urges the court to conduct an *in camera* review of the withheld documents "'to look for segregable non-exempt matter,'" Plaintiff's Memorandum at 4 (quoting *Weissman v. Central Intelligence Agency*, 565 F.2d 692, 698 (D.C. Cir.

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[19] An agency must show that certain material in a document is privileged, but cannot be reasonably segregated from non-exempt material, and must also "describe what proportion of the information is nonexempt and how that material is disbursed throughout the document," such that "both litigants and judges will be better positioned to test the validity of the agency's claim that the non-exempt material is not segregable." *Mead Data Central, Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

1977)), Congress left it in the court's discretion to determine whether or not to undertake *in camera* review. *Military Audit Project v. Bush,* 418 F.Supp. 876, 879 (D.C. Cir. 1976). Moreover, where the Government's affidavits on their face indicate the documents withheld logically fall within the claimed exemptions and there is no doubt as to the requested agency's good faith, the court should restrain its discretion to order *in camera* review. *Lead Industries Ass'n, Inc. v. Occupational Safety and Health Administration,* 610 F.2d 70, 87-88 (2d Cir. 1979). In the instant case, no *in camera* review is required because the Hardy Declaration objectively verifies the FBI's asserted decision to deny disclosing documents and portions of documents pertaining to investigations of domestic terrorism and environmental extremism.

In particular, Hardy avers the FBI identified 58 pages of responsive records, three which were RIF, four WIF, and 51 RIP. Hardy Declaration ¶ 76. Hardy explains that the redactions to the 51 records RIP, and the four documents WIF avoids otherwise foreseeable harm to one or more of the interests protected by FOIA exemptions. *Id.* Seidel further explains that the redactions and withheld information is supported by the fact that Plaintiff is only referenced throughout the responsive records but, Plaintiff is not the main subject or focus of the domestic terrorism and environmental extremism investigations to which the records pertain. Seidel Declaration ¶ 14. Seidel provides further details as to a three-page document released in part, denominated on the *Vaughn* Index as "FBI document dated November 14, 2003, on information regarding Zoar Valley," and Bates-stamped 27, 28, and 29. Seidel

Declaration ¶ 14 (citing *Vaughn* Index, Dkt. 15-1 at 55). Seidel explains that the information withheld on these three pages includes the case file number, database name, and third parties' names and identifying information

"Disclosable information cannot be easily separated from that which is exempt without compromising the secret nature of the information." *Doherty*, 775 F.2d at 52–53. As such, "that there may be some nonexempt matter in documents which are predominantly exempt does not require the district court to undertake the burdensome task of analyzing" withheld documents in camera. *Id.* (citing *Lead Industries,* 610 F.2d at 88. *See also Weissman v. CIA,* 565 F.2d 692, 697–98 (D.C. Cir. 1977)). Here, the affidavits submitted provide an objective verification in support of the FBI's decision to deny disclosure of documents containing intelligence information and material pertaining, as Defendant asserts, to the FBI's investigation of domestic terrorism and environmental extremism. Significantly, Plaintiff concedes the investigations to which his FOIA Request pertains is "a federal eco-terrorism conspiracy investigation based on [Plaintiff's] association with Pickering." Plaintiff's Affidavit ¶ 9.

Summary judgment on Plaintiff's challenge to the segregation of information withheld, either in full or in part, is DENIED as to Plaintiff and GRANTED as to Defendant.

C. Adequacy of Search

As to the adequacy of Defendant's search for documents responsive to Plaintiff's FOIA Request, "[t]o secure summary judgment in a FOIA case, the defending agency must show through reasonably

detailed affidavits or declarations that it conducted an adequate search and that any withheld documents fall within a FOIA exception." *Adamowicz v. I.R.S.*, 402 Fed.Appx. 648, 650 (2d Cir. 2010) (citing *Carney*, 19 F.3d at 812). *See Hodge v. F.B.I.*, 703 F.3d 575, 579 (D.C. Cir. 2013) ("In general, the adequacy of a search is 'determined not by the fruits of the search, but by the appropriateness of [its] methods.'" (quoting *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003))). Such affidavits are accorded "'a presumption of good faith,'" *id.* (quoting *Wilner v. NSA*, 592 F.3d 60, 69 (2d Cir. 2009)), "which 'cannot be rebutted by purely speculative claims about the evidence and discoverability of other documents.'" *Id.* (quoting *Grand Cent. P'Ship, Inc.*, 166 F.3d at 489. Significantly, "[a]n affidavit from an agency employee responsible for supervising a FOIA search is all that is needed to satisfy Rule 56(e); there is no need for the agency to supply affidavits from each individual who participated in the actual search." *Carney*, 19 F.3d at 814. Nor does the fact that additional records responsive to a FOIA request are not located and produced until after the plaintiff commences a FOIA action render the initial search insufficient. *Hodge*, 703 F.3d at 580 ("it does not matter than an agency's *initial* search failed to uncover certain responsive documents so long as subsequent searches captured them" (italics in original)). Furthermore, "the law demands only a 'relatively detailed and nonconclusory' affidavit or declaration." *Adamowicz*, 402 Fed.Appx. at 650-51 (quoting *Grand Cent. P'Ship, Inc.*, 166 F.3d at 488-89). Here, this standard is satisfied by the Hardy Declaration and the Seidel Declaration provided by Defendant.

Specifically, Hardy avers that when Plaintiff filed his FOIA Request, Hardy, as RIDS Section Chief, was responsible for managing responses to requests for records and information pursuant to, as relevant here, FOIA and the Privacy Act. Hardy Declaration ¶ 2. In such capacity, Hardy is fully familiar with procedures followed by the FBI in responding to FOIA Requests, including the request filed by Plaintiff. *Id.* ¶ 3. Hardy recounts in meticulous detail the steps by which FOIA Requests are processed upon receipt, including Plaintiff's FOIA Request, *id.* ¶¶ 5-27, and addresses the adequacy of the search for records responsive to Plaintiff's FOIA Request. *Id.* ¶¶ 29-32. According to Plaintiff, RIDS policy, which was followed in processing Plaintiff's FOIA Request, is to search for and identify "main" files responsive to most FOIPA requests at the administrative stage and, thus, RIDS also conducted a search of the CRS to locate any "reference" material potentially responsive to Plaintiff's FOIA Request. *Id.* ¶ 28. The CRS search was done using the index search methodology including the FBI's automated indices available through Sentinel. *Id.* ¶ 29. Such searches included variations of Plaintiff's names resulting in the FBI identifying 22 references pertaining to Plaintiff. *Id.* ¶ 30. Because of its comprehensive nature and scope, CRS is the principal records system searched for records responsive to FOIA Requests concerning the FBI, and the Sentinel and ACS indices would also be most likely to locate any electronic surveillance records ("ELSUR") responsive to such request. *Id.* at 27, 31. These details provided by Hardy in his declaration, based on his personal knowledge and experience working as RIDS Section Chief when Plaintiff's FOIA Request was processed, *Carney*, 19 F.3d at 814 (FOIA response requires

affidavit from agency employee responsible for FOIA requests), and which is both unrebutted and entitled to a presumption of good faith, *Wilner*, 592 F.3d 69 (properly made and unrebutted affidavit responding to FOIA request entitled to good faith presumption), sufficiently describe a reasonable and thorough search of all databases relevant to Plaintiff's FOIA request, *Grand Cent. P'Ship, Inc.*, 166 F.3d at 488-89 ("the law demands only a 'relatively detailed and nonconclusory' affidavit or declaration").

Further, as to Plaintiff's assertion that the FBI also should have searched other databases, including records of microphone surveillance ("MISUR"), physical surveillance ("FISUR"), laboratory records, and the FBI's "Bureau Mailing List" records system, Plaintiff's Memorandum at 5, the FBI is not required to search all records systems suggested by Plaintiff. Nor has Plaintiff provided any information on which the FBI could reasonably conclude additional records would likely be located outside the CRS. *See Hodge*, 703 F.3d at 580 (rejecting FOIA plaintiff's challenge to adequacy of agency's search for records responsive to FOIA request where Plaintiff failed to identify additional searches the requested agency should have conducted and offered no basis for concluding additional documents might exist). Accordingly, the undisputed record establishes Plaintiffs performed a reasonable search for information, documents and records responsive to Plaintiff's FOIA request.

Summary judgment regarding the adequacy of the FBI's search in response to Plaintiff's FOIA Request is DENIED as to Plaintiff and GRANTED as to Defendant.

D. FOIA Exemptions

The balance of Plaintiff's arguments regarding the Records Releases are predicated on the so-called "FOIA Exemptions" set forth in 5 U.S.C. § 552(b) as the basis for redacting information from responsive documents or withholding their release altogether and "whether the agency has sustained its burden of demonstrating that the documents requested are ... exempt from disclosure." *Pub. Inv'rs Arbitration Bar Ass'n v. SEC*, 771 F.3d 1, 3 (D.C. Cir. 2014) (quoting *ACLU v. Dep't of Justice*, 655 F.3d 1, 5 (D.C. Cir. 2011)). In particular, information responsive to Plaintiff's FOIA Request was withheld pursuant to 5 U.S.C. § 552(b)(3) ("Exemption 3), (6) (Exemption 6), and 7(C) ("Exemption 7(C)"), 7(D) ("Exemption 7(D)"), and 7(E) ("Exemption 7(E)"), and the court addresses the arguments raised with regard to each of these asserted exemptions.

(1) Exemption 3

The *Vaughn* Index lists one record withheld pursuant to Exemption 3, identified as Bates 51 ("Bates 51"), and part of the serial described as an "FBI Intelligence report provided by Buffalo Division dated February 17, 2012, summarizing Pickering, Jr. and other individuals as being involved in a local terrorist cell in Buffalo, NY." Dkt. 15-1 at 55. According to Hardy, "[t]he information withheld from disclosure pursuant to Exemption 3 consists of details reflecting the set up and installation of a pen register and trap and trace device during a criminal investigation." Hardy Declaration ¶ 41. Hardy further describes the material redacted from Bates 51 as "the identities and phone numbers of the individuals subject to pen registers in this case,

because [the FBI] is precluded from disclosing such information pursuant to 18 U.S.C. § 3123." *Id.*

As relevant here, Exemption 3 protects from disclosure information that is

> (3) specifically exempted from disclosure by statute . . . if that statute –
>
> > (A)(i) requires that the matters by withheld from the public in such a manner as to leave no discretion on the issue; or
> > (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and
> > (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.[20]

5 U.S.C. § 552(b)(3).

The Pen Register Act, 18 U.S.C. § 3123(d) specifically provides

> An order authorizing or approving the installation and use of a pen register or a trap and trace device shall direct that--
>
> (1) the order be sealed until otherwise ordered by the court; and
> (2) the person owning or leasing the line or other facility to which the pen register or a trap and trace device is attached or applied, or who is obligated by the order to provide assistance to the applicant, not disclose the existence of the pen

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[20] Because the Pen Register Act was enacted prior to the enactment of the OPEN FOIA Act of 2009, 5 U.S.C. § 552(b)(3)(B) does not apply.

> register or trap and trace device or the existence of the investigation to the listed subscriber, or to any other person, unless or until otherwise ordered by the court.

18 U.S.C.A. § 3123(d).

It is on this language Defendant relies in redacting from Bates 51 information pursuant to Exemption 3, asserting "[t]he information withheld from disclosure pursuant to Exemption 3 consists of details reflecting the set up and installation of a pen register and trap and trace device during a criminal investigation." Defendant's Memorandum at 12-13. Defendant continues that "[t]he information withheld from disclosure pursuant to Exemption 3 consists of details reflecting the set up and installation of a pen register and trap and trace device during a criminal investigation." *Id.*

By its terms, the Pen Register Act provides for sealing a pen register order itself, but "not sealing of any and all information the order may contain even if appearing in other documents." *Labow v. U.S. Dep't of Just.*, 831 F.3d 523, 528 (D.C. Cir. 2016) ("*Labow II*") (citing 18 U.S.C. § 3132(d)(1)). "Although the statute additionally bars disclosures by certain private parties about the existence of a pen register order, in the absence of a court order allowing disclosure, . . . that limitation does not apply to the government." *Id.* (citing § 3123(d)(2)). As such, "Exemption 3 of FOIA, as regards the Pen Register Act, primarily authorizes the government to withhold a responsive pen register order itself, not all information that may be contained in or associated with a pen register order." *Id.*

Nevertheless, as used in the Pen Register Act, "the language 'unless otherwise ordered by the court' connotes two related principles," including providing the court with "discretion with respect to an order's unsealing," *Labow v. U.S. Dep't of Justice*, 278 F.Supp.3d 431, 440 (D.D.C. 2017) ("*Labow I*") (citing *Washington & G.R. Co. v. Tobriner,* 147 U.S. 571, 588-89 (1893); *Saunders v. Washington Metropolitan Area Transit Authority,* 505 F.2d 331, 333 (D.C. Cir. 1974) (examining the soundness of the district court's exercise of its discretion pursuant to an 'unless otherwise ordered by the court' provision); *Rector v. Mass. Bonding & Ins. Co.,* 191 F.2d 329, 333 (D.C. Cir. 1951) (noting the effect of a rule including the phrase "unless otherwise ordered by the court" vests discretion in the court.), and "FOIA litigation could, potentially, prompt the Court to exercise its discretion to unseal a given order. *Id.*, 278 F.Supp.3d at 440-41.

Significantly, in *Labow II*, the explanation on which the defendant government agency relied in withholding information as exempted from disclosure based on the Pen Register Act was provided by Hardy, and is essentially the same language found in the Hardy Declaration in the instant case, including that "the information withheld from disclosure pursuant to Exemption 2 consists of details reflecting the set up and installation of a pen register and trap and trace device during a criminal investigation," and the withheld information includes "the identities and phone numbers of the individuals subject to pen registers in this case, because it is precluded from disclosing such information pursuant to 18 U.S.C. § 3123." Hardy Declaration ¶ 41. In *Labow II*, although the District Court found such description

sufficiently justified withholding the information pursuant to Exemption 3, *Labow I*, 66 F.Supp.3d at 120, the D.C. Circuit Court of Appeals vacated the lower court's determination, explaining that

> [i]f the government withheld information contained exclusively in a pen register order, the information would necessarily fall under the Pen Register Act's nondisclosure requirements and thus would be shielded under Exemption 3 (assuming the pen register remains sealed). But if the government withheld information found in other responsive documents on the ground that a pen register order also contained the same information, the potential applicability of the Pen Register Statute (and hence of Exemption 3) would be far less clear. As it currently stands, we do not know whether this case involves the latter situation or, if so, whether there may be some justification for withholding the information beyond the mere fact that it also appears in a pen register.

Labow II, 831 F.3d at 529.

Significantly, upon remand to the District Court, the defendant government provided an updated declaration from Hardy permitting the court to discern whether a single sentence was properly withheld from disclosure because of how the sentence might relate to a pen register used in an FBI investigation six years earlier. *Labow v. U.S. Dep't of Justice*, 278 F.Supp.3d 431, 435 (D.D.C. 2017) ("*Labow III*"). The newly submitted declaration permitted the District Court to determine that the withheld sentence was "[i]nformation at the crux of a

pen register order that, as here, happens to appear in a document outside of the order itself and would necessarily compromise the order" and, thus, was "information that is protected by the [Pen Register] Act, and is properly withheld." *Id.* at 441-442.

In contrast, in the instant case, despite submitting the Seidel Declaration in further support of Defendant's summary judgment motion, the Seidel Declaration is silent as to the information withheld pursuant to Exemption 3, nor does Defendant provide any further declaration or information regarding the information withheld pursuant to Exemption 3. Further, although Bates 51 was also withheld as exempt pursuant to six other statutory FOIA exemptions, it is not possible to determine from the *Vaughn* Index whether the information for which FOIA Exemption 3 is asserted is exempt under another asserted FOIA Exemption, or whether such assertion is proper. Accordingly, Defendant must either, within 20 days, provide additional documentation permitting the court to determine whether FOIA Exemption 3 protects the release of information on Bates 51, or provide such information to Plaintiff. Summary judgment is thus DENIED insofar as Bates 51 was withheld pursuant to FOIA Exemption 3.

(2) Exemptions 6 and 7(C)

FOIA Exemptions 6 and 7(C) are the asserted reasons for numerous redactions. *Vaughn* Index, *passim*. Plaintiff maintains he seeks the names of FBI special agents involved in the investigation of Friends of the Ancient Forest, ARISSA, and the FBI's 2021-14 domestic terrorism investigation. Plaintiff's Memorandum at 6. Defendant maintains that in

deciding to withhold information under FOIA Exemption 6, the relevant privacy interests were properly identified and weighed against the public interests in disclosure so as to avoid "'a clearly unwarranted invasion of personal privacy.'" Defendant's Reply at 9 (quoting *Reed v. National Labor Relations Board*, 927 F.2d 1249, 1251 (D.C. Cir. 1991)). With regard to information withheld pursuant to FOIA Exemption 7(C), Defendant maintains disclosure of the information would serve no public interest, *id.* at 10, and the FBI properly demonstrated the withheld information was compiled for law enforcement purposes and readily meets the threshold requirement for Exemption 7, specifically, 5 U.S.C. § 552(b)(7). *Id.* at 10-11. *See* Discussion, *supra*, at 16-20.

FOIA Exemption 6 exempts from disclosure "personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). To determine whether identifying information may be withheld pursuant to Exemption 6, the court "must: (1) determine whether the identifying information is contained in 'personnel and medical files and similar files;' and (2) balance the public need for the information against the individual's privacy interest in order to assess whether disclosure would constitute a clearly unwarranted invasion of personal privacy." *Associated Press v. U.S. Dep't of Def.*, 554 F.3d 274, 291 (2d Cir. 2009) (citing and quoting *Wood v. F.B.I.,* 432 F.3d 78, 86 (2d Cir. 2005)). "The determination of whether Exemption 6 applies requires balancing an individual's right to privacy against the preservation of FOIA's basic purpose of opening agency action to

the light of public scrutiny." *Id.* (citing *Dep't of the Air Force v. Rose,* 425 U.S. 352, 372 (1976) ("Exemption 6 does not protect against disclosure every incidental invasion of privacy—only such disclosures as constitute 'clearly unwarranted' invasions of personal privacy.")). "'Only where a privacy interest is implicated does the public interest for which the information will serve become relevant and require a balancing of the competing interests.'" *Id.* (quoting *Fed. Labor Relations Auth. v. U.S. Dep't of Veterans Affairs*, 958 F.2d 503, 509 (2d Cir. 1992)). To prevail over the public interest in disclosure, "[a]n invasion of more than a *de minimis* privacy interest protected by Exemption 6 must be shown to be 'clearly unwarranted.'" *Id.* "Under Exemption 6, therefore, the government's burden in establishing the required invasion of privacy is heavier than the burden in establishing invasion of privacy under Exemption 7(C)." *Id.* (quoting *U.S. Dep't of State v. Ray,* 502 U.S. 164, 172 (1991).

FOIA Exemption 7(C) similarly 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 . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . . 5 U.S.C. § 552(b)(7)(C). Exemption 7(C) may be invoked where no public interest would be served by disclosure of information that implicates privacy interests. *U.S. Dep't of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 775 (1989) ("*RCFP*") (denying disclosure of contents of FBI rap sheet to third party because the disclosure reasonably could be expected to constitute an invasion of personal privacy within the meaning of

FOIA's law enforcement exemption). In particular, in *RCFP*, the court determined that although there may be "some public interest in providing interested citizens with answers to their questions" about the subject of the FOIA request, such as deciding whether to offer the subject employment, to rent him a house, or to extend him credit, "that interest falls outside the ambit of the public interest that the FOIA was enacted to serve." *RCFP*, 489 U.S. at 775. "Thus whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny,' rather than on the particular purpose for which the document is being requested." *Id.* (quoting *Rose*, 425 U.S. at 372).

In the instant case, as stated, Discussion, *supra*, at 30-31, Plaintiff clarifies that he seeks the names of the FBI Special Agents involved in the investigations of Friends of the Ancient Forest, ARISSA, and the FBI's 2012-14 domestic terrorism investigation. Plaintiff's Memorandum at 6. According to Plaintiff, because local media outlets have featured stories about the FBI's investigation into Buckley, and Buckley plans to make any FBI records released available on social media, the privacy interests of the FBI Special Agents do not outweigh the significant public interest regarding how the FBI handled its investigations of Buckley. *Id.* at 7. In opposition, Defendant argues the privacy interests of the FBI Special Agents whose identity Plaintiff seeks outweigh any significant public interests regarding the FBI's handling of investigations of Plaintiff because (1) there is no evidence of ongoing public or

media interest in Plaintiff's case with the most recent media article Plaintiff references dated 2016, (2) disclosure of the FBI Special Agents' names will not further the public's interest in how the FBI handled its investigation of Buckley because the progress of the investigation can be determined from the unredacted documents the FBI released to Buckley, and (3) disclosing the names of FBI Special Agency could lead to attempts to inflict violence or revenge on those involved in performing criminal investigations. Defendant's Reply at 12 (citing Seidel Declaration ¶ 8).

The Second Circuit Court of Appeals recognizes that government investigative personnel may be subject to harassment or embarrassment if their identities are disclosed. *Wood*, 432 F.3d at 78 (citing *Halpern v. FBI,* 181 F.3d 279, 297 (2d Cir. 1999) (holding that FBI agents and other government employees have an interest against the disclosure of their identities to the extent that disclosure might subject them to embarrassment or harassment in their official duties or personal lives); and *Massey v. FBI,* 3 F.3d 620, 624 (2d Cir. 1993) (same)). Accordingly, "[t]his interest against possible harassment and embarrassment of investigative personnel raises a measurable privacy concern that must be weighed against the public's interest in disclosure." *Id.* When determining the public's interest in disclosure of a government employee's identity, several factors must be considered "including the employee's rank and whether the information sought sheds light on government activity." *Id.* (citing *Perlman v. U.S. Dep't of Justice*, 312 F.3d 100, 107 (2d Cir. 2002) (applying a five-factor test where the government employee is the

subject of an investigation), *vacated*, 541 U.S. 970 (2004), *reaffirmed*, 380 F.3d 110 (2d Cir. 2004)). Although in the instant case, the record does not reveal the rank of the employees whose identity Plaintiff seeks, such information is not likely to add to the public's understanding of how the FBI conducts its investigations especially given that the results of the investigation were disclosed to Plaintiff, albeit in redacted form. *See Vaughn* Index, Dkt. 15-1 at 55. *See Wood*, 432 F.3d at 88-89 (citing *U.S. Dep't of Veteran's Affairs,* 958 F.2d at 512 (disclosure of employee names is not related to informing the public about an agency's actions); *Hopkins v. U.S. Dep't of Housing and Urban Development,* 929 F.2d 81, 88 (2d Cir. 1991) (noting that disclosing the names of individual employees would not illuminate how the Housing and Urban Development Agency enforced the Davis–Bacon Act)).

Initially, Plaintiff does not cite any case in support of his assertion that internal government investigations warrant additional scrutiny, and the Supreme Court has held that a presumption of legitimacy attends government actions that may not be overcome on the basis of unsupported allegations. *Wood*, 432 F.3d at 89 (citing *Ray,* 502 U.S. at 179; and *Nat'l Archives & Records Admin. v. Favish,* 541 U.S. 157, 174 (2004) (citing *Ray* and holding, pursuant to Exemption 7(C), "the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred")). Here, Plaintiff references no evidence of government wrongdoing that the investigators were negligent or biased in the performance of their duties. Moreover, the names of the FBI Special Agents who investigated Plaintiff

would not reveal anything about any asserted supposed bias, but such bias in the FBI's investigation would likely be reflected in the actions taken or not taken by the FBI or DOJ. Because the FBI has already revealed the substance of the investigation, knowledge of the names of the specific FBI Special Agents would add little, if anything, to the public's analysis of whether the FBI dealt with Plaintiff in an appropriate manner. Accordingly, the public's interest in the names of the FBI Special Agents involved in investigating Plaintiff is negligible and the investigators' interest in preventing the public disclosure of their identities, with the potential for resulting embarrassment and harassment, substantially outweighs disclosure of their identities. Consequently, such disclosure would be a "clearly unwarranted invasion of privacy," supporting the withholding of the information pursuant to Exemption 6 to FOIA.

Summary judgment with regard to Bates 51 information withheld pursuant to FOIA Exemptions 6 and 7(C) is DENIED as to Plaintiff and GRANTED as to Defendant.

(3) Exemption 7(D)

Information was redacted from several serials RIP or WIF pursuant to FOIA Exemption 7(D) which exempts from disclosure

> [R]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or

> any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source . . . .

5 U.S.C. § 552(b)(7)(D).

According to Defendant, the information redacted pursuant to Exemption 7(D) includes information pertaining to confidential human sources ("CHS"), including "the name, identifying data, and information provided by individuals who assisted the FBI in the criminal investigation of Plaintiff with implied or express assurances of confidentiality, as well as the confidential source file number, and confidential source symbol number."[21] Defendant's Memorandum at 17 (citing Hardy Declaration ¶¶ 55-61). Defendant maintains that because such information provided by confidential sources concerns a criminal investigation conducted by the FBI, the

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[21] Confidential "source file numbers" and "source symbol numbers" refer to administrative tools that facilitate the retrieval of information, responsive to a FOIA request, supplied by a confidential source while further obscuring such source's identity. Hardy Declaration ¶¶ 55, 57-61. Each confidential source file is unique to a particular confidential source and is used only in documentation relating to that confidential source. *Id.* ¶ 57. When a confidential source reports information to the FBI on a regular basis pursuant to an express assurance of confidentiality, such source is considered a CHS to whom the FBI assigns a permanent source symbol number which the FBI then uses when referring to the CHS to obscure the CHS's identity. *Id.* ¶ 60.

second clause of Exemption 7(D) applies. *Id.* at 16 (citing *Ferguson v. F.B.I.*, 957 F.2d 1059, 1069 (2d Cir. 1992)). In opposition, Plaintiff argues that any redactions of the names of Upham and Lloyd, and any information provided by such sources is unwarranted because their CHS work for the FBI was revealed in a public media article and Upham cooperated with one Adam Federman ("Federman"), a freelance journalist who wrote an article that was published in *The Buffalo News*, and that such cooperation essentially waived any assurances of confidentiality Upham and Lloyd received from the FBI for assisting with the FBI's investigation targeting Plaintiff, Pickering, and Burning Books. Plaintiff's Memorandum at 7-8. Plaintiff further maintains that insofar as the FBI asserts the release of a confidential source symbol number could impede the FBI's ability to recruit and maintain CHSs, the FBI's need to maintain the confidentiality of such confidential source symbol numbers to maintain ensure the continued cooperation of confidential sources has been rejected by courts. *Id.* at 8 (citing cases). In reply, Defendant argues that insofar as Plaintiff seeks records about third-party individuals he claims were federal witnesses and informants without proof the individuals were ever confirmed by the FBI to be such informants, *i.e.*, Upham and Lloyd, "the FBI relies on a long standing policy to neither confirm nor deny the existence of such records (a Glomar response) pursuant to FOIA exemption 7(D)." Defendant's Reply at 14-15.

"The *Glomar* doctrine originated in a FOIA case concerning records pertaining to the Hughes Glomar Explorer, an oceanic research vessel." *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 67 (2d Cir. 2009) (citing

Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976)). In *Phillippi,* the Central Intelligence Agency ("CIA"), believing that the "existence or nonexistence of the requested records was itself a classified fact exempt from disclosure under ... FOIA," responded to a FOIA request that "in the interest of national security, involvement by the U.S. government in the activities which are the subject matter of [plaintiff's] request can neither be confirmed nor denied." *Phillipi*, 546 F.2d at 1012. The principle "that an agency may, pursuant to FOIA's statutory exemptions, refuse to confirm or deny the existence of certain records in response to a FOIA request – has since become known as the *Glomar* doctrine." *Wilner*, 592 F.3d at 67. In the instant case, Defendant's response that it can neither confirm nor deny whether records exist pertaining to Upshaw or Lloyd was a proper *Glomar* response.[22]

In particular, the Second Circuit has held "as a general rule, (1) an agency may provide a *Glomar* response to FOIA requests for information gathered under a program whose existence has been publicly revealed, and may do so specifically with respect to information gathered under the [Terrorist Surveillance Program], and (2) that such a response will be reviewed in the same manner as any other *Glomar* response to a FOIA request." *Wilner*, 592

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[22] Although Defendant first asserts the *Glomar* doctrine as the basis for withholding information in its reply in further support of summary judgment, Defendant did not waive such argument by failing to raise it earlier because Plaintiff first specified he is seeking any information regarding Upham and Lloyd in arguing in support of Plaintiff's Motion for summary judgment, not in the FOIA Request, such that Defendant raises *Glomar* in opposition to summary judgment.

F.3d at 69. The so-called "*Glomar* doctrine" applies "in cases in which the existence or nonexistence of a record is a fact exempt from disclosure under a FOIA exception." *Id.* 592 F.3d at 70. If, however, the existence or nonexistence of the specific records sought by the FOIA request has been the subject of an official public acknowledgment, *i.e.*, the government has admitted that a specific record exists, then the government agency is precluded from later making a *Glomar* response regarding whether that same record exists or not. *Id.* (citing *Wolf v. CIA,* 473 F.3d 370, 378–79 (D.C. Cir. 2007), and *Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy*, 891 F.2d 414, 421 (2d Cir. 1989)). Further, "to invoke the *Glomar* response to a FOIA request, an agency must 'tether' its refusal to one of the nine FOIA exemptions." *Id.*, 592 F.3d at 71. "In other words, 'a government agency may ... refuse to confirm or deny the existence of certain records ... if the FOIA exemption would itself preclude the acknowledgment of such documents.'" *Id.* (quoting *Minier v. Central Intelligence Agency,* 88 F.3d 796, 800 (9th Cir. 1996)). To "tether its refusal to one of the nine FOIA exemptions" *New York Times v. Cent. Intel. Agency*, 965 F.3d 109, 114 (2d Cir. 2020) (quoting *Wilner*, 592 F.3d at 71), the agency can submit affidavits or declarations providing sufficient detail as to why an exemption is applicable. *Id.*

Here, Hardy explains that the FBI protected from disclosure under FOIA Exemption 7(D) identifying data and information provided by individuals who assisted in a domestic terrorism investigation and provided information on other matters under "express" assurances of confidentiality, and that the so-called CHSs were provided by the FBI expressed

assurances of confidentiality with their identities thereafter referenced only by a confidential source file number or symbol number. Hardy Declaration ¶ 55. Seidel further explains that either confirming or denying the existence of any records responsive to Plaintiff's FOIA Request seeking records of third-party individuals, specifically Upham and Lloyd, would jeopardize the FBI's confidential sources by revealing which individuals are informants thereby dissuading current and future potential sources from providing or continuing to provide critical, law enforcement relevant information to the FBI. Seidel Declaration ¶ 9. This information sufficiently tethers the withholding of the names of third-party informants, including Upshaw and Lloyd, to Exemption 7(D).

Both Hardy and Seidel also explain that requiring the FBI to reveal confidential source symbol numbers assigned to CHSs who report information to the FBI on a regular basis pursuant to express assurances of confidentiality would jeopardize these informant's cooperation with the FBI by providing criminals with the means to identify them in additional records, potentially resulting in harassment or retaliation against them by individual investigative subjects for whom they provided information. Hardy Declaration ¶¶ 57-61; Seidel Declaration ¶ 10. Significantly, "[a] source should be deemed confidential if the source furnished information with the understanding that the FBI would not divulge the communication except to the extent the Bureau thought necessary for law enforcement purposes." *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 174 (1993). Nor is disclosure required "if the source provided information under an

express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." *Halpern*, 181 F.3d at 298 (quoting *Landano*, 508 U.S. at 172) (quotations omitted). Moreover, with regard to Plaintiff's reliance on *Memphis Publishing Co. v. FBI*, 879 F.Supp.2d 1, 14 (D.D.C. 2012) for the proposition that there is no basis for withholding a confidential source symbol number when the identity of the CHS to whom the number pertains has been revealed, Plaintiff's Memorandum at 8-9, the case is inapposite because in contrast to *Memphis Publishing Co.*, in the instant case, neither Upshaw nor Lloyd have been definitively revealed as a CHS. Because the confidential source symbol numbers at issue here were created by the FBI during the course of a criminal investigation, such information relates to the identity of the confidential sources as well as to any information provided by the sources and is exempt from disclosure pursuant to 5 U.S.C. § 552(b)(7)(D).

Accordingly, summary judgment on the information withheld pursuant to FOIA Exemption 7(D) should be DENIED as to Plaintiff and GRANTED as to Defendant.

(4) Exemption 7(E)

Information in several serials was redacted and withheld from disclosure pursuant to FOIA Exemption 7(E) which exempts

> [R]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (E) 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).

Defendant relies on the averments by Hardy that "[t]his exemption affords categorical protection to techniques and procedures used in law enforcement investigations; it thereby protects techniques and procedures that are not well-known to the public, and protects non-public details about the use of well-known techniques and procedures."

Hardy Declaration ¶ 63. Hardy particularly describes the information withheld as "FBI protected investigative techniques and procedures, sensitive file numbers or subfile numbers, information regarding targets, dates, and scope of surveillance, database identifiers, types of investigations, collection and analysis of information, non-public source reporting documents, identity of FBI squads, units, and divisions, operational directives, targets of pen registers, and tactical information contained in operational plans." Defendant's Memorandum at 18 (citing Hardy Declaration ¶¶ 65-75). In opposition, Plaintiff maintains the FBI invokes Exemption 7(E) to redact its use of database search results located through non-public databases, and investigative techniques that are generally known to the public and, thus, are not exempted from disclosure pursuant to Exemption 7(E). Plaintiff's Memorandum at 9-10. In reply,

Defendant denies Plaintiff's challenges to four specific categories of information withheld pursuant

to Exemption 7(D) including (1) database search results obtained through non-public databases; (2) the targets of pen register/trap and trace devices; (3) information about techniques and procedures the FBI uses in conducting domestic terrorism investigations; and (4) the names of FBI units, squads, and divisions reflect knowledge well-known to the public. Defendant's Reply at 15-19.

"Exemption (b)(7)(E) covers investigatory records that disclose investigative techniques and procedures not generally known to the public." *Doherty*, 775 F.2d at 52 & n. 4. "The Second Circuit has explained that, as used in Exemption 7(E), a 'technique' is 'a technical method of accomplishing a desired aim' and a 'procedure' is 'a particular way of doing something or going about the accomplishment of something.'" *American Civil Liberties Union Foundation v. Dep't of Homeland Security*, 243 F.Supp.3d 393, 402 (S.D.N.Y. 2017) (quoting *Allard K. Lowenstein Intern. Human Rights Project v. Dep't of Homeland Security*, 626 F.3d 678, 681 (2d Cir. 2010)).

"Accordingly, to invoke Exemption 7(E) here, the agency must justify its assertion that its practice . . . at issue in this motion actually shows a 'technique' or 'procedure' and that it is not already known to the public." *Id.* Nevertheless, "[w]hile the government retains the burden of persuasion that the information is not subject to disclosure under FOIA, 'a party who asserts that the material is publicly available carries the burden of production on that issue.'" *Inner City Press/Community on the Move v. Board of Governors of the Federal Reserve System*, 463 F.3d 239, 245 (2d Cir. 2006) (quoting *Davis v. U.S. Dep't of Justice*, 968 F.2d 1276, 1279 (D.C. Cir. 1992)). Somewhere within either the *Vaughn* Index or the government's

affidavit, Defendant must provide, "a sufficiently specific link" between disclosing the particular withheld information and revealing how, and to what extent, the Defendant relies on such information in its investigations. *Island Film, S.A. v. Dep't of the Treasury*, 869 F.Supp.2d 123, 138 (D.D.C. 212). "Moreover, 'it is well-established that 'an agency does not have to release all details concerning law enforcement techniques just because some aspects of them are known to the public.'" *Kuzma v. U.S. Dep't of Justice*, 2016 WL 9446868, at *12 (W.D.NY. Apr. 18, 2016) (quoting *Bishop v. U.S. Dep't of Homeland Security*, 45 F.Supp.3d 380, 391 (S.D.N.Y. 2014)).

In the instant case, Plaintiff has not produced any evidence the FBI's cited procedures and techniques used in investigating Plaintiff for domestic terrorism are publicly available. In contrast, Hardy explains although it is public knowledge that the FBI compiles and analyzes information, that specific methods and procedures the FBI uses to collect and analyze the information are not publicly known. *See* Hardy Declaration ¶¶ 63,64. Hardy further provides the requisite "specific link" between the withheld materials and the extent to which the FBI relies on such information in conducting its investigations. *Island Film, S.A.*, 869 F.Supp.2d at 138. Hardy specifically avers that revealing the techniques and procedures commonly used in sensitive FBI investigations, and the details and circumstances under which they are used, would enable targets of such techniques to avoid detection or develop countermeasures to circumvent the effective use of the techniques. *Id.* ¶ 65. Releasing file names and numbers can identify the investigative interest and priority given to such matters by the

FBI, as well as what types of investigative strategies the FBI uses in countering or investigating certain types of criminal behavior, and permit the targets to change their pattern of activity to avoid detection, apprehension, or create alibis for suspected activities. *Id.* ¶ 66. Revealing the targets, dates, and scope of surveillances would also provide criminals with an understanding of when they should expect the FBI to conduct surveillance. *Id.* ¶ 67. Identifying FBI protected, non-public database names and search results that serve as repositories for counterterrorism and investigative data for the FBI personnel, and task force members from local, state and other federal agencies would enable criminals to employ countermeasures to avoid detection. *Id.* ¶ 68. Information withheld which, when referenced in connection with an actual investigation rather than in general discussion would reveal what activities trigger a full, as opposed to preliminary, investigation. *Id.* ¶ 69. Releasing the methodologies to collect and analyze information would reveal now and from whether such information is collected. *Id.* ¶ 70. Releasing source reporting documents in multiple locations would reveal the true extent of information provided by individual confidential sources. *Id.* ¶ 71. The identity of FBI units, squads, and divisions involved in investigating domestic terrorism would reveal the level of focus applied by the FBI to certain areas of assigned enforcement activity, and provide insight into how the FBI applies its resources. *Id.* ¶ 72. Revealing the FBI's operational directives would provide individuals and entities with insight into the FBI's standards when investigating domestic terrorism. *Id.* ¶ 73. Releasing the names of the targets of pen registers and trap and trace devices would disclose why and when the FBI decides to use

such investigative devices. *Id.* ¶ 74. Finally, tactical information and the operation plans containing such information is an internal tool used by the FBI to coordinate with law enforcement agencies regarding contemplated actions, potential techniques to be used, and personnel needed to execute the operational plans. *Id.* ¶ 75. Significantly, all such revelations would facilitate criminals in their attempts to avoid disruption of their criminal activity and detection by FBI surveillance and develop countermeasures rendering use of the techniques less effective. *Id.* ¶¶ 65-75. Further, Plaintiff has not established that any of the requested information is publicly available as is Plaintiff's burden. *Inner City Press*, 463 F.3d at 245. Accordingly, the court finds the FBI properly withheld information pursuant to Exemption 7(E).

Summary judgment regarding information withheld pursuant to Exemption 7(E) is DENIED as to Plaintiff, and GRANTED as to Defendant.

CONCLUSION

Based on the foregoing, Defendant's Motion (Dkt. 13) is GRANTED in part and DENIED in part; Plaintiff's Motion (Dkt. 19) is GRANTED in part and DENIED in part. Defendant must either, within 20 days, provide additional documentation permitting the court to determine whether FOIA Exemption 3 protects the release of information on Bates 51, or provide such information to Plaintiff.

SO ORDERED.

/s/ *Leslie G. Foschio*
LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

DATED: November 18th, 2021
Buffalo, New York

APPENDIX D

Title 5 U.S.C. § 552

Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format--

(i) that have been released to any person under paragraph (3); and

(ii)

(I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

(II) that have been requested 3 or more times; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is

made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection in an electronic format current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)

(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to--

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)

(A)

(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities

qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(viii)

(I) Except as provided in subclause (II), an agency shall not assess any search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees) under this subparagraph if the agency has failed to comply with any time limit under paragraph (6).

(II)

(aa) If an agency has determined that unusual circumstances apply (as the term is defined in paragraph (6)(B)) and the agency provided a timely written notice to the requester in accordance with paragraph (6)(B), a failure described in subclause (I) is excused for an additional 10 days. If the agency fails to comply with the extended time limit, the agency may not assess any search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees).

(bb) If an agency has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, an agency may charge search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees) if the agency has provided a timely written notice to the requester in accordance with paragraph (6)(B) and the agency has discussed with the requester via written mail, electronic mail, or telephone (or made not less than 3 good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with paragraph (6)(B)(ii).

(cc) If a court has determined that exceptional circumstances exist (as that term is defined in paragraph (6)(C)), a failure described in subclause (I) shall be excused for the length of time provided by the court order.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records

improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[**(D)** Repealed. Pub.L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357]

(E)

(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either--

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)

(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency

concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall--

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)

(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of--

(I) such determination and the reasons therefor;

(II) the right of such person to seek assistance from the FOIA Public Liaison of the agency; and

(III) in the case of an adverse determination--

(aa) the right of such person to appeal to the head of the agency, within a period determined by the head of the agency that is not less than 90 days after the date of such adverse determination; and

(bb) the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial

review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except--

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)

(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such

request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency, and notify the requester of the right of the requester to seek dispute resolution services from the Office of Government Information Services. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining

whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests--

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests

actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)

(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does

not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)

(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement

under subparagraph (C) to exercise due diligence.

(E)

(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records--

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure--

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of

a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means--

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be

true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall--

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including--

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(8)

(A) An agency shall--

(i) withhold information under this section only if--

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or

(II) disclosure is prohibited by law; and

(ii)

(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and

(II) take reasonable steps necessary to segregate and release nonexempt information; and

(B) Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3).

(b) This section does not apply to matters that are--

(1)

(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute--

(A)

(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

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

would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) 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, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of

information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)

(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and--

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the

requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)

(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States and to the Director of the Office of Government Information Services a report which shall cover the preceding fiscal year and which shall include--

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)

(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for

the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency--

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests;

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests;

(P) the number of times the agency denied a request for records under subsection (c); and

(Q) the number of records that were made available for public inspection in an electronic format under subsection (a)(2).

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available for public inspection in an electronic format. In addition, each agency shall make the raw statistical data used in each report available in a timely manner for public inspection in an electronic format, which shall be made available--

(A) without charge, license, or registration requirement;

(B) in an aggregated, searchable format; and

(C) in a format that may be downloaded in bulk.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the

Committee on Oversight and Government Reform of the House of Representatives and the Chairman and ranking minority member of the Committees on Homeland Security and Governmental Affairs and the Judiciary of the Senate, no later than March 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6)

(A) The Attorney General of the United States shall submit to the Committee on Oversight and Government Reform of the House of Representatives, the Committee on the Judiciary of the Senate, and the President a report on or before March 1 of each calendar year, which shall include for the prior calendar year--

(i) a listing of the number of cases arising under this section;

(ii) a listing of--

(I) each subsection, and any exemption, if applicable, involved in each case arising under this section;

(II) the disposition of each case arising under this section; and

(III) the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4); and

(iii) a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(B) The Attorney General of the United States shall make--

(i) each report submitted under subparagraph (A) available for public inspection in an electronic format; and

(ii) the raw statistical data used in each report submitted under subparagraph (A) available for public inspection in an electronic format, which shall be made available--

(I) without charge, license, or registration requirement;

(II) in an aggregated, searchable format; and

(III) in a format that may be downloaded in bulk.

(f) For purposes of this section, the term--

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other

establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes--

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make available for public inspection in an electronic format, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including--

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(h)

(1) There is established the Office of Government Information Services within the National

Archives and Records Administration. The head of the Office shall be the Director of the Office of Government Information Services.

(2) The Office of Government Information Services shall--

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) identify procedures and methods for improving compliance under this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a nonexclusive alternative to litigation and may issue advisory opinions at the discretion of the Office or upon request of any party to a dispute.

(4)

(A) Not less frequently than annually, the Director of the Office of Government Information Services shall submit to the Committee on Oversight and Government Reform of the House of Representatives, the Committee on the Judiciary of the Senate, and the President--

(i) a report on the findings of the information reviewed and identified under paragraph (2);

(ii) a summary of the activities of the Office of Government Information Services under paragraph (3), including--

(I) any advisory opinions issued; and

(II) the number of times each agency engaged in dispute resolution with the assistance of the Office of Government Information Services or the FOIA Public Liaison; and

(iii) legislative and regulatory recommendations, if any, to improve the administration of this section.

(B) The Director of the Office of Government Information Services shall make each report submitted under subparagraph (A) available for public inspection in an electronic format.

(C) The Director of the Office of Government Information Services shall not be required to obtain the prior approval, comment, or review of any officer or agency of the United States, including the Department of Justice, the Archivist of the United States, or the Office of Management and Budget before submitting to Congress, or any committee or subcommittee thereof, any reports, recommendations, testimony, or comments, if such submissions include a statement indicating that the views expressed therein are those of the Director and do not necessarily represent the views of the President.

(5) The Director of the Office of Government Information Services may directly submit additional information to Congress and the President as the Director determines to be appropriate.

(6) Not less frequently than annually, the Office of Government Information Services shall conduct a meeting that is open to the public on the review and reports by the Office and shall allow interested persons to appear and present oral or written statements at the meeting.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j)

(1) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(2) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency--

(A) have agency-wide responsibility for efficient and appropriate compliance with this section;

(B) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(C) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(D) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(E) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply;

(F) offer training to agency staff regarding their responsibilities under this section;

(G) serve as the primary agency liaison with the Office of Government Information Services and the Office of Information Policy; and

(H) designate 1 or more FOIA Public Liaisons.

(3) The Chief FOIA Officer of each agency shall review, not less frequently than annually, all aspects of the administration of this section by the agency to ensure compliance with the requirements of this section, including--

(A) agency regulations;

(B) disclosure of records required under paragraphs (2) and (8) of subsection (a);

(C) assessment of fees and determination of eligibility for fee waivers;

(D) the timely processing of requests for information under this section;

(E) the use of exemptions under subsection (b); and

(F) dispute resolution services with the assistance of the Office of Government Information Services or the FOIA Public Liaison.

(k)

(1) There is established in the executive branch the Chief FOIA Officers Council (referred to in this subsection as the "Council").

(2) The Council shall be comprised of the following members:

(A) The Deputy Director for Management of the Office of Management and Budget.

(B) The Director of the Office of Information Policy at the Department of Justice.

(C) The Director of the Office of Government Information Services.

(D) The Chief FOIA Officer of each agency.

(E) Any other officer or employee of the United States as designated by the Co-Chairs.

(3) The Director of the Office of Information Policy at the Department of Justice and the Director of the Office of Government Information Services shall be the Co-Chairs of the Council.

(4) The Administrator of General Services shall provide administrative and other support for the Council.

(5)

(A) The duties of the Council shall include the following:

(i) Develop recommendations for increasing compliance and efficiency under this section.

(ii) Disseminate information about agency experiences, ideas, best practices, and innovative approaches related to this section.

(iii) Identify, develop, and coordinate initiatives to increase transparency and compliance with this section.

(iv) Promote the development and use of common performance measures for agency compliance with this section.

(B) In performing the duties described in subparagraph (A), the Council shall consult on a regular basis with members of the public who make requests under this section.

(6)

(A) The Council shall meet regularly and such meetings shall be open to the public

unless the Council determines to close the meeting for reasons of national security or to discuss information exempt under subsection (b).

(B) Not less frequently than annually, the Council shall hold a meeting that shall be open to the public and permit interested persons to appear and present oral and written statements to the Council.

(C) Not later than 10 business days before a meeting of the Council, notice of such meeting shall be published in the Federal Register.

(D) Except as provided in subsection (b), the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents that were made available to or prepared for or by the Council shall be made publicly available.

(E) Detailed minutes of each meeting of the Council shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the Council. The minutes shall be redacted as necessary and made publicly available.

(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center

Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

(m)

(1) The Director of the Office of Management and Budget, in consultation with the Attorney General, shall ensure the operation of a consolidated online request portal that allows a member of the public to submit a request for records under subsection (a) to any agency from a single website. The portal may include any additional tools the Director of the Office of Management and Budget finds will improve the implementation of this section.

(2) This subsection shall not be construed to alter the power of any other agency to create or maintain an independent online portal for the submission of a request for records under this section. The Director of the Office of Management and Budget shall establish standards for interoperability between the portal required under paragraph (1) and other request processing software used by agencies subject to this section.