

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

I, David M. Hardy, declare as follows:

(1) I am the Section Chief of the Record/Information Dissemination Section (“RIDS”), Records Management Division (“RMD”), of the Federal Bureau of Investigation (“FBI”) in Winchester, Virginia. My previous declaration in this matter explains my employment history and responsibilities at the Federal Bureau of Investigation. See ECF No.63 Declaration of David M. Hardy dated February 26, 2016 (“First Hardy Declaration”). This declaration supplements, and hereby incorporates by reference, the information previously provided in my first declaration, and is submitted in further support of the FBI action regarding the basis for certain redactions in the records at issue and to address specific issues raised by the Plaintiffs’ April 20, 2016 “Cross Motion for Partial Summary Judgment.”

(2) In its April 20, 2016, Cross Motion, the Plaintiffs claim the FBI failed to conduct a proper search for responsive records; failed to provide any of the terms or combinations of

terms it used to search its records; improperly limited its search to only five offices; and failed to adequately describe how each division or unit conducted its search for responsive records. The Plaintiffs further claim that as a result of the FBI's supposedly inadequate search the FBI has identified extraordinarily few responsive documents, in comparison to the number of pages processed by the other agencies. Finally, Plaintiffs claim Exemption 7(E) was inappropriately asserted to withhold information in CIA 4, FBI 13-15, FBI 30-35, FBI 57-65, and NSD 202-207, because the information was not compiled for law enforcement purposes. Within this supplemental declaration, the FBI will demonstrate the search was adequate and reasonably calculated to locate records responsive to Plaintiffs' request; Exemptions 1, 3 and 7(E) were appropriately asserted and justified to withhold FBI information and equities in CIA 4, FBI 13-15, FBI 30-35, FBI 57-65, and NSD 202-207; and the FBI released all reasonably segregable non-exempt information in the documents responsive to Plaintiffs' FOIA request.

FBI'S SEARCH FOR RESPONSIVE RECORDS

(3) To better understand the issues raised by Plaintiffs and the FBI's action in this case, a brief description of FBI's surveillance authority is in order. The FBI conducts electronic surveillance primarily pursuant to court authorization from the Foreign Intelligence Surveillance Court ("FISC") or by obtaining a warrant via Title III of the Omnibus Crime Control and Safe Streets Act ("Title III"). The FBI is not authorized to conduct electronic surveillance pursuant to Executive Order 12333 (hereinafter referred to as "EO 12333") for subjects located in the United States or when a Title III or FISC warrant can be obtained, nor is the FBI authorized to conduct "signals intelligence"¹ (Presidential Policy Directive 28). The FBI's use of EO 12333 to

¹ Signals Intelligence ("SIGINT") is intelligence derived from electronic signals and systems used by foreign targets, such as communications systems, radars, and weapons systems. SIGINT provides a vital window for our nation into foreign adversaries' capabilities, actions, and intentions. [<https://www.nsa.gov/what-we-do/signals-intelligence/>]

conduct electronic surveillance is limited only to instances where the subject is located outside of any U.S. Court's jurisdiction. In order to obtain authorization to conduct electronic surveillance under EO 12333, the FBI must seek authorization from the Attorney General. The Attorney General may authorize the use of any technique for which a warrant would be required if undertaken for law enforcement purposes, provided that the Attorney General has determined in each case that there is probable cause to believe the technique is directed against a foreign power or an agent of a foreign power.²

(4) The FBI's search for responsive records in this case was directed to the divisions/offices noted in my first declaration because those are the locations where responsive documents were reasonably likely to be located. First, because EO 12333 can only be used against foreign powers or an agent of a foreign power, the most likely places to find instances where EO 12333 was authorized is within the National Security Branch. Other divisions responsible for purely criminal violations are unable to rely on EO 12333 to collect electronic surveillance and, therefore, there is no factual basis to conclude those offices would possess responsive documents. Second, FBI's Training Division retains all documents, PowerPoint presentations and policies related to any training that occurs within the FBI. The Corporate Policy Office retains all documents related to any policies drafted and implemented by the FBI. Consequently, any documents related to the FBI's training and/or policies concerning EO 12333 would have been located in these two divisions/offices. The Records Information Dissemination Section ("RIDS") structures searches for responsive material on the principle of reasonableness;

² See E.O. 12,333, § 2.5 ("Attorney General Approval. The Attorney General hereby is delegated the power to approve the use for intelligence purposes, within the United States or against a United States person abroad, of any technique for which a warrant would be required if undertaken for law enforcement purposes, provided that such techniques shall not be undertaken unless the Attorney General has determined in each case that there is probable cause to believe that the technique is directed against a foreign power or an agent of a foreign power. Electronic surveillance, as defined in the Foreign Intelligence Surveillance Act of 1978, shall be conducted in accordance with the Act, as well as this Order").

because the searches that FBI conducted yielded no additional facts indicating that responsive records may exist somewhere else, additional searches are not warranted as there is no reasonable likelihood that they would locate any additional responsive material.

(5) As indicated in Paragraph 21 of my First Declaration,

RIDS prepared and circulated Electronic Communications^[1] to the FBI's Corporate Policy Office,^[2] Counterintelligence Division,^[3] Counterterrorism Division,^[4] and its Office of the General Counsel Discovery Processing Units,^[5] requesting each office to conduct a search of database systems, as well as paper and manual files, for records responsive to Plaintiffs' request. In addition, RIDS recommended that each recipient division/unit send to each of its employees an e-mail seeking all relevant records pertaining to this request.

The EC additionally set forth as follows:

To comply with all provisions of the FOIA request, the Records Management Division ("RMD") determined that your office may have documents potentially responsive to this request. Therefore, RMD requests that personnel in your office search and produce all retrievable agency records regarding this request created on or before June 6, 2013.

Examples of any agency records include:

All records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, faxes, files, guidance, evaluations, instructions, analysis, memoranda, agreements, notes, rules, technical manuals, technical specifications, training manuals or studies;

- Electronic records maintained on computers, or audio or video tapes
- Emails (regardless of whether they have been designated as "record" or "non-record" in Trilogy Microsoft Outlook)
- Any other portable media (CD-ROMs, diskettes, etc.); and
- Any other stand alone databases for the purpose of particular investigation(s).

^[1] An Electronic Communication is a document used to communicate within the FBI in a consistent format that can be uploaded by the originating Division or office, transmitted, and downloaded by recipient Divisions or offices within the FBI's internal computer network.

^[2] The Corporate Policy Office, now known as the Information Policy Office, centrally manages the coordination, review, approval, publication, and promulgation of FBI policy.

^[3] The Counterintelligence Division is a component of the National Security Branch charged with preventing and investigating foreign intelligence activities within the United States. The Counterintelligence Division targets both traditional and emerging nontraditional threats and investigates espionage activities using both intelligence and law enforcement techniques.

^[4] The Counterterrorism Division is a component of the National Security Branch that works with intelligence and law enforcement partners to provide a centralized, comprehensive, and intelligence-driven approach to address international and domestic terrorism-related matters.

^[5] The Discovery Processing Units identify information that is relevant and subject to disclosure during the civil discovery process.

(6) Although the EC contained a general description of the types of records to be searched and possible locations where the information may be stored, the EC did not limit or restrict the search parameters to specific search terms, due to the expertise of these divisions/units, as they would be in a better position to most effectively determine the search methodology and/or terms to be searched. Therefore, the FBI relied upon its employees' knowledge of the records maintained and stored within each division/unit, to search by whatever means are necessary to locate records potentially responsive to Plaintiffs' request. Each division/unit was responsible for collecting and compiling responses from each of its employees and providing a single response to the lead set by RIDS, advising whether or not potentially responsive records were located, and if located, providing the records to RIDS for review. RIDS heard from each requested division/unit that it completed the requested search, and each division/unit provided any records that it located, which under FBI's usual search procedures constitutes an organizational representation that the requested search has occurred. Particularly given the passage of time and the numerous individuals involved in its search, FBI is not in a position to detail all search steps taken by all of its tasked employees, but FBI tasked and gave appropriate search instructions to all relevant personnel and components, and, given FBI's ordinary procedures for tasking and performing searches in responses to FOIA requests, FBI reasonably believes that the search was performed as tasked.

(7) As noted above, the FBI's primary method of electronic surveillance is NOT conducted using any authority under EO 12333. In the rare instances when EO 12333 is utilized, the Attorney General must still make a finding that probable cause exists, as specified in the executive order. Although this can potentially explain the reduced number of responsive records located, I must note that a search's adequacy is not determined by the number of records located,

but rather by whether or not the search was directed to the places reasonably likely to possess responsive records. As explained above, in order to locate responsive records here, the FBI followed the parameters of reasonableness required by the FOIA as applied to the specific nature of the material sought by plaintiffs here.

FORMAL LEGAL MEMORANDA

(8) Plaintiffs challenge the government's redactions in documents NSD 9, OLC 5, and OLC 6. For the reasons set forth in my original declaration, and the following reasons, the FBI properly invoked FOIA Exemptions 1, 3 and 7(E) with respect to the redacted information in these documents.

(9) First, Plaintiffs challenge the FBI's redactions taken pursuant to Exemptions 1 and 3 in NSD 9 "OLC Legal Advice Memorandum to FBI General Counsel." The FBI reviewed its redactions, and based on its review, determined that no further segregable information could be publically released. The FBI withheld information regarding how the FBI implements electronic surveillance and the legal hurdles the FBI must overcome to obtain authority to conduct electronic surveillance. The withheld information provides detailed legal analysis, discussion and descriptions of law enforcement techniques, sources and methods used by the FBI to collect intelligence. The sources and methods discussed in this memo are classified and thus, all discussion about these methods is classified as well. The FBI released all legal analysis that was not intertwined with the discussion of classified information. Disclosing these intelligence sources and methods details would alert subjects and their associates, thus enabling them to alter their behavior to avoid detection and evade the FBI's investigative efforts. Disclosing this information would cause harm to national security by revealing how the FBI authorizes electronic surveillance, the techniques, methods and analysis that is undertaken before

authorization is requested, and how the FBI acquires information concerning subjects' activities and associates. Furthermore, as explained above and in my first declaration, the responsive records were reviewed pursuant to Executive Order 13526 ("E.O. 13526"). This review determined the withheld information warranted classification at the Secret level as it pertains to intelligence sources and methods. Consequently, the information is exempt from disclosure pursuant to FOIA Exemptions 1 and 3 concurrently. The FBI released all legal analysis that was not intertwined with the discussion of classified information. The FBI's assertion of Exemption 3 is not discretionary, as it is mandated by law.³

(10) Plaintiffs challenge the FBI's redactions taken pursuant to Exemptions 1 and 3 in OLC 5 and OLC 6 which are both described as "Legal advice memorandum discussing among other things, legal issues pertaining to surveillance under EO 12333." The FBI withheld information concerning the cooperation between the FBI and the Intelligence Community as it pertains to electronic surveillance and applicable rules for the various agencies. The withheld information contains detailed descriptions of agencies' roles and responsibilities, and how to handle information obtained via surveillance. The information discusses classified aspects pertaining to intelligence sources and methods. Disclosing this intelligence source and method information would provide valuable insight to adversaries and associates of the relationship and information sharing that occurs between the FBI and other members of the intelligence community, thus risking harm to national security. Furthermore, as stated above, per my review pursuant to E.O. 13526, these records are classified at the Secret level and pertain to intelligence sources and methods. Consequently, the information is exempt from disclosure pursuant to FOIA Exemptions 1 and 3. The FBI assertion of Exemption 3 is not discretionary, as it is mandated by law. The FBI conducted a comprehensive segregability review of OLC 5 and OLC

³ See National Security Act of 1947, 50 U.S.C. § 3024(i)(1).

6 and released all legal analysis that was not intertwined with the discussion of classified information. The FBI determined that the information redacted pursuant to Exemptions 1 and 3 could not be further segregated.

(11) Plaintiffs challenge the FBI's assertion of Exemption 7(E) on OLC 5 and OLC 6, alleging the information was not compiled for law enforcement purposes. OLC 5 and OLC 6 contain information concerning the legal authorities and hurdles the FBI must overcome to implement electronic surveillance under EO 12333. The FBI's dual function as both a national security and law enforcement agency are not mutually exclusive, but rather, they effectively work in concert. Intelligence collected under EO 12333 has a significant law enforcement purpose. EO 12333 sections 1.4, 1.14, and 2.1 - 2.12 provide the authorities and authorizations under which the FBI can operate as an intelligence agency and how the FBI fits into the United States Intelligence Community. Information obtained pursuant to intelligence methods and techniques under EO 12333, is used by the FBI to identify new subjects, associates and terrorist cells both domestically and overseas. Information can also be used to identify and establish bona fide Confidential Human Sources ("CHS") used in national security investigations. Releasing the exempt information would provide subjects and their associates with detailed, non-public information about the FBI's obligations or internal procedures under EO 12333 allowing these individuals to develop countermeasures to avoid detection and surveillance by the FBI, thus nullifying the effectiveness of these important investigative/national security techniques/procedures.

(12) As discussed in paragraph 42 of my earlier declaration, pursuant to the Attorney General's Guidelines for Domestic Operations ("AGG-DOM"):

"The FBI is the primary investigative agency of the federal government with the authority and responsibility to investigate all

violations of federal law that are not exclusively assigned to another federal agency.”

The FBI is further vested by the law and by Presidential directives with the primary role in carrying out investigations within the United States of threats to the national security. This includes the lead domestic role in investigating international terrorist threats to the United States, and in conducting counterintelligence activities to meet foreign entities’ espionage and intelligence efforts directed against the United States. The FBI is also vested with important functions in collecting foreign intelligence as a member agency of the Intelligence Community. The FBI accordingly plays crucial roles in the enforcement of federal law and proper administration of justice in the United States, in the protection of national security, and in obtaining information needed by the United States for the conduct of its foreign affairs. These roles reflect the wide range of the FBI’s current responsibilities and obligations, which require the FBI to be both an agency that effectively detects, investigates, and prevents crimes, and an agency that effectively protects the national security and collects intelligence. Consequently, the FBI asserted Exemption 7(E) because release of this information, compiled for a law enforcement purpose, could reasonably be expected to risk circumvention of the law as explained above and in my first declaration. There is no further segregable non-exempt information.

RULES AND REGULATIONS

(13) Plaintiffs challenge the governments withholding of information pursuant to Exemption 7(E) in CIA 4, FBI 13-15, FBI 30-35, FBI 57-65 and NSD 202-207 alleging the records were not compiled for law enforcement purposes. This challenge simply disregards the FBI’s dual mission and function as both a law enforcement and intelligence agency; each of these records identify a clear and direct nexus to the FBI’s law enforcement duties. Specifically, how the FBI collects, disseminates and retains intelligence is all part of its law enforcement

mission. The FBI routinely works with other state and federal law enforcement agencies to thwart terrorist and criminal activities, providing them with information collected pursuant to authorities under EO 12333. For the reasons set forth in my original declaration, and the reasons that follow, the FBI properly invoked FOIA Exemption 7(E) with respect to the redacted information.

CIA 4 - ("AR 2-2 ANNEX E, MEMO OF UNDERSTANDING CONCERNING OVERSEAS AND DOMESTIC ACTIVITIES OF CIA AND FBI")

(14) Following September 11, 2001, the FBI and CIA were mandated to share intelligence and information in order to protect the United States against further terrorist attacks. CIA 4 established guidelines concerning the sharing of information and applicable rules for the two agencies to work together, both domestically and overseas. Information collected by the FBI, regardless of being characterized as "traditionally criminal" or "intelligence," is used by the FBI for its overall law enforcement missions of combating counterintelligence and counterterrorism threats both domestically and overseas. The withheld information specifically discusses law enforcement techniques and procedures in the context of the memo between the CIA and FBI concerning overseas and domestic intelligence activities. The techniques and procedures at issue in this document pertain to non-publically available aspects about FBI intelligence gathering methods, and how they are used, analyzed, and coordinated among other agencies.

FBI 13-15 ("DIOG-SECTIONS OF THE FBI'S DOMESTIC INVESTIGATIONS AND OPERATION GUIDE") AND NSD 202-207 ("SUPPLEMENTAL GUIDELINES FOR COLLECTION, RETENTION, AND DISSEMINATION OF FOREIGN INTELLIGENCE")

(15) The FBI's DIOG provides FBI employees with the rules, regulations, and procedures it is to use when conducting both criminal and national security investigations. Specifically, it discusses tools, techniques and methods used during investigations, how they are

implemented, as well as the authority required to implement them. Although the DIOG is compiled for several purposes, one of the most significant purposes is the law enforcement purpose.

(16) The Supplemental Guidelines for Collection, Retention, and Dissemination of Foreign Intelligence spell out specific procedures the FBI, as a law enforcement agency investigating in the United States, must follow when collecting, retaining and disseminating intelligence information. These guidelines also discuss specific techniques utilized in FBI investigations, not limited specifically to intelligence investigations. The guidelines articulate how the FBI must handle this information for both intelligence and law enforcement purposes.

FBI 30-35 (“EC AUTHORITY 03.31.2006: ELECTRONIC SURVEILLANCE FROM THE FBI’S GC SETTING OUT THE POLICY AND PROCEDURE FOR REQUESTING AG AUTHORITY UNDER EO 12333”) AND FBI 57-65 (“CD PIG COUNTERINTELLIGENCE POLICY IMPLEMENTATION GUIDE”)

(17) The EC dated March 31, 2006 sets forth the legal requirements necessary for the FBI to obtain authority to collect electronic surveillance under EO 12333. Information collected under EO 12333 was not intended to be shielded from investigators. Rather, the purpose is to effectively integrate information collected pursuant intelligence and law enforcement techniques into the FBI’s overall law enforcement mission. The FBI utilizes information and intelligence from all sources in its day to day operations and investigations. Intelligence collected pursuant to a specific authority is not regulated for a singular purpose; rather the information is merged and evaluated during the course of the investigation.

(18) The Counterintelligence Policy Implementation Guide sets forth specific policies, procedures and investigative techniques used by the FBI in its counterintelligence investigations. These investigations are, by definition, both criminal in nature and for the purpose of collecting intelligence. Counterintelligence investigations may never result in a traditional prosecution, but

information obtained from these investigations can be used to disrupt foreign intelligence officers from obtaining valuable national security information or intellectual property owned by private entities, which is all part of the FBI's law enforcement mission.

(19) Releasing the exempt information in CIA 4, FBI 13-15, FBI 30-35, FBI 57-65 and NSD 202-207 would provide subjects and their associates with non-public information pertaining to the FBI's obligations or internal procedures under EO 12333 allowing these individuals to develop countermeasures to avoid detection and surveillance by the FBI, thus nullifying the effectiveness of these important investigative/national security techniques/procedures. Consequently, the FBI asserted Exemption 7(E) because release of this information, compiled for a law enforcement purpose, could reasonably be expected to risk circumvention of the law.

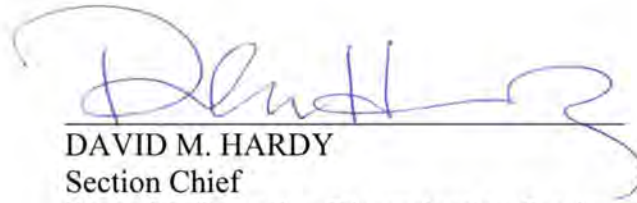
CONCLUSION

(20) The FBI conducted an adequate and reasonable search for responsive records, processed all such records and released all reasonably segregable non-exempt information in the documents responsive to Plaintiffs' FOIA request. There is no further non-exempt information that can be reasonably segregated and released without revealing exempt information.

(21) The FBI further provided support of its position for the assertion of FOIA Exemptions 1 and 3 to protect information in NSD 9, OLC 5 and OLC 6, and Exemption 7(E) to protect information withheld in OLC 5, OLC 6, CIA 4, FBI 13-15, FBI 30-35, FBI 57-65, and NSD 202-207.

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

Executed this 8th day of June, 2016.



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