IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, and **THE ASSOCIATED PRESS**, Plaintiffs, v. **FEDERAL BUREAU OF INVESTIGATION,** and **UNITED STATES DEPARTMENT OF JUSTICE** Defendants.	Civil Action No. 15-cv-1392 (RJL)

MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
AND IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND/OR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

This case concerns three Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), requests submitted by the Reporters Committee for Freedom of the Press ("Reporters Committee" or "RCFP") and The Associated Press ("AP") (collectively, "Plaintiffs") seeking records related to the Federal Bureau of Investigation's ("FBI") practice of impersonating members of the news media in criminal investigations. Plaintiffs submitted the requests at issue in October and November of 2014, shortly after it came to light that in 2007 the FBI had posed as the AP in order to successfully deliver malicious computer software ("malware") to a criminal suspect in Seattle, Washington (the "Seattle/Timberline Incident"). The news captured national attention; it prompted outcry from members of the press and public, inquiries from two leading members of Congress, and public statements from a number of FBI officials, including FBI Director James Comey. It also led RCFP and the AP to request records that would shine light on the FBI's use of this tactic in Seattle and elsewhere—records that Plaintiffs have yet to obtain.

On February 29, 2016, after this lawsuit was filed, the FBI and the United States Department of Justice ("DOJ") (collectively, "Defendants" or the "Government") released 186 pages of records, most of which were heavily redacted, in response to Plaintiffs' FOIA Requests. Those records consist of a handful of guidelines and policy documents, as well as records relating to the Seattle/Timberline Incident, all of which, save 11 pages, date from 2007. Defendants have not released a single record concerning any instance of FBI impersonation of the news media other than the Seattle/Timberline Incident, despite its own public statements that such impersonation is "lawful and appropriate" and occurs in "rare circumstances[.]"

Defendants now move for summary judgment, asserting that the Declaration of David M. Hardy, ECF No. 18-1, (the "Hardy Declaration" or "Hardy Decl."), both establishes that the Government conducted a sufficient search to locate records responsive to Plaintiffs' FOIA

Requests, and justifies the Government's withholding of 59 pages of records in their entirety, as well as portions of an additional 103 pages of records, in response to those requests. The Hardy Declaration, however, is facially inadequate and cannot support summary judgment in the Government's favor as to either issue.

Not only does the Hardy Declaration fall far short of demonstrating that the Government fulfilled its obligation to conduct a search "reasonably calculated to uncover all relevant documents," *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983) ("*Weisberg II*"), it highlights the inadequacy of Defendants' search. Among other deficiencies, the FBI utilized narrow search parameters designed to identify only records mentioning the Seattle/Timberline Incident and to pass over records related to other instances of FBI impersonation of the media, and it overlooked records systems and FBI offices, including the Office of the Director, where responsive records are almost certain to be found. Contrary to the Government's position, the material facts establish that its search, which identified fewer than 270 pages of material, was insufficient. Plaintiffs are entitled to summary judgment as to that issue.

Moreover, the Hardy Declaration is patently insufficient to meet the Government's burden to justify its redactions or its withholding of 59 pages of records in full. Indeed, notwithstanding its length, the Hardy Declaration is astonishingly short on substance. It makes no attempt to provide a "separate," "itemized explanation"—let alone one of "adequate specificity"—for each of the Government's withholdings. *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973), *cert*. *denied*, 415 U.S. 977 (1974). In fact, it fails to provide even a "useful description" of those withholdings. *Oglesby v. U.S. Dep't of Army*, 79 F.3d 1172, 1180 (D.C. Cir. 1996) ("*Oglesby II*") (stating that the Government must provide "general information (for example: length, date, author and brief description of each document)" for each withheld record). And despite the fact that nearly one-third of the material the Government identified in response

to Plaintiffs' FOIA requests has been withheld in full, the Hardy Declaration offers nothing more than the bare, conclusory assertion that no portion of those withheld pages is segregable in order to support withholding them in their entirety. *See* 5 U.S.C. § 552(b) ("Any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . . ."); *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 31 (D.C. Cir. 1998) (". . . a conclusory assertion that material is exempt and nonsegregable is insufficient to support nondisclosure"). The Government has failed to carry its burden to justify its redactions and other withholdings, 5 U.S.C. § 552(a)(4)(B), and to the extent the Court does not grant summary judgment in Plaintiffs' favor as to the impropriety of the Government's withholdings on that basis alone, Plaintiffs respectfully urge the Court to grant their concurrently filed Motion for *In Camera* Review and/or Other Appropriate Relief.

For the reasons set forth herein, Defendants' Motion for Summary Judgment (the "Government's MSJ") should be denied, and the Court should enter summary judgment and/or partial summary judgment in favor of Plaintiffs as to the (1) inadequacy of the Government's search for records responsive to Plaintiffs' FOIA Requests and (2) the Government's improper withholding of responsive records, in whole and in part, from Plaintiffs.

BACKGROUND

A. The FBI's Impersonation of the AP

In late October 2014, it came to light that records previously released by the FBI in response to a FOIA request made by the Electronic Frontier Foundation ("EFF"), and reviewed by Christopher Soghoian of the American Civil Liberties Union ("ACLU"), revealed that the FBI had masqueraded as a member of the news media, specifically, as the AP, in 2007 in order to successfully deliver a certain type of surveillance malware—a Computer and Internet Protocol Address Verifier (CIPAV)—to a juvenile suspected of issuing anonymous bomb threats to his

high school, Timberline High School, near Seattle, Washington. Plaintiffs' Combined Statement of Material Facts as to which there is no Genuine Issue and Response to Defendants' Statement of Material Facts (hereinafter, "SMF") ¶¶ 47–50. The revelation captured national attention, and sparked outcry from members of the public and the press, including the AP. SMF ¶¶ 50–61.[1]

On October 28, 2014, AP spokesperson Paul Colford issued a statement calling it "unacceptable" that the FBI had "misappropriated the name of The Associated Press and published a false story attributed to [it]." SMF ¶ 52. Two days later, on October 30, AP General Counsel Karen Kaiser delivered a letter to the DOJ protesting the FBI's actions. SMF ¶ 55. The letter stated, in part: "The FBI both misappropriated the trusted name of The Associated Press and created a situation where our credibility could have been undermined on a large scale . . . . It is improper and inconsistent with a free press for government personnel to masquerade as The Associated Press or any other news organization." *Id.* The next day, the editorial board of *The New York Times* wrote that the FBI's actions, "if not prohibited by the agency or blocked by courts, risk opening the door to constitutional abuses on a much wider scale." SMF ¶ 57. And on November 6, the Reporters Committee and 25 other media organizations wrote to then-Attorney General Eric Holder and FBI Director James Comey voicing their concerns about the FBI's actions, stating: "The utilization of news media as a cover for delivery of electronic surveillance software is unacceptable. This practice endangers the media's credibility and creates the appearance that it is not independent of the government . . . ." SMF ¶ 58.

Revelation of the FBI's impersonation of the AP also captured the attention of members of Congress. On October 30, 2014, Senator Patrick Leahy wrote to Attorney General Holder,

[1] True and correct copies of the news articles and other publicly available material referred to herein that demonstrate the widespread attention that the issue of FBI impersonation of the news media received in the Fall of 2014 are attached as exhibits to the Townsend and Barrett Declarations. Plaintiffs respectfully request that the Court take judicial notice of these materials pursuant to Fed. R. Civ. P. 201.

stating: "When law enforcement appropriates the identity of legitimate media institutions, it not only raises questions of copyright and trademark infringement but also potentially undermines the integrity and credibility of an independent press[.]" SMF ¶ 56. In a letter to FBI Director Comey sent in June of 2015, Senator Chuck Grassley noted that "FBI agents posed as the Associated Press and created a fake AP news article in a successful phishing effort to deploy spyware[,]" but that the FBI "did not alert the judge of their plan to mimic the media." SMF ¶ 62. Among other things, Senator Grassley's letter asks the FBI for an accounting of how many times the agency impersonated personnel from legitimate companies, media or otherwise, in deploying spyware, and which companies it has impersonated. *Id.*

Following public disclosure of the Seattle/Timberline Incident in 2014, a number of FBI officials made public statements about the FBI's practice of impersonating the news media. FBI special agent Frank Montoya Jr. stated that impersonation of the media "happens in very rare circumstances[.]" SMF ¶ 52. A spokesperson for FBI's Seattle Bureau was quoted as stating that the FBI in the Seattle/Timberline case had "just used something in the style of media," and "could have pulled it off the *Washington Post* or *New York Times*." SMF ¶ 54. When asked to provide a general number of how many times the FBI had impersonated journalists, the FBI spokesperson reportedly replied: "That's something you'd have to FOIA[.]" *Id.*

On November 6, 2014, in response to the public outcry, *The New York Times* published a letter to the editor from FBI Director Comey that defended the FBI's impersonation tactics. The letter not only confirmed that the FBI drafted a fake AP news article, but that an "online undercover officer portrayed himself as an employee of The Associated Press, and asked if the suspect would be willing to review a draft article about the threats and attacks[.]" SMF ¶ 59. AP Executive Editor Kathleen Carroll issued a statement the next day stating that Mr. Comey's letter to the editor "doubles our concern and outrage, expressed earlier to [Attorney General

Holder], about how the agency's unacceptable tactics undermine AP and the vital distinction between the government and the press." SMF ¶ 60. And in a letter dated November 10, 2014 to then-Attorney General Holder and FBI Director Comey, AP President and Chief Executive Officer Gary Pruitt demanded assurances that the FBI would never again impersonate a member of the news media, stating, in part: "In stealing our identity, the FBI tarnishes [the AP's] reputation, belittles the value of the free press rights enshrined in our Constitution and endangers AP journalists and other newsgatherers around the world." SMF ¶ 61.

B. Plaintiffs' FOIA Requests

Shortly after the FBI's 2007 impersonation of the AP came to light, in October and November of 2014, the Reporters Committee and the AP submitted a total of three FOIA requests to the FBI seeking, essentially, three separate categories of records: (1) records concerning the Seattle/Timberline Incident; (2) records concerning other instances where the FBI has impersonated a member of the news media or used links to news media articles in order to deliver malware to a suspect; and (3) the guidelines and policies governing the FBI's impersonation of the news media (collectively, the "FOIA Requests"). SMF ¶¶ 1, 7, 9.

The Reporters Committee's FOIA Requests

On October 31, 2014, the Reporters Committee submitted two separate FOIA requests to the FBI's central FOIA Office. SMF ¶ 7, 9. The first request ("RCFP Request 1") sought:

> all records concerning the FBI's utilization of links to what are or appear to be news media articles or news media websites to install data extraction software, remote access search and surveillance tools, or the 'Computer and Internet Protocol Address Verifier' (CIPAV).

SMF ¶ 9.

The second request ("RCFP Request 2") sought:

> all records concerning the FBI's guidelines and policies concerning undercover operations or activities in which a person may act as a member of the news media, including, but not limited to, the guidelines and policies relating to the criminal and national security undercover operations review committees and the Sensitive Operations Review Committee; guidelines and policies concerning the use of investigative methods targeting or affecting the news media, including, but not limited to, sensitive Title III applications; and all guidelines and policies concerning sensitive investigative matters involving the activities of the news media or relating to the status, involvement, or impact of an investigation upon the news media.

SMF ¶ 7. The RCFP Requests included a request for a fee benefit as a representative of the news media under 5 U.S.C. § 552(a)(4)(A), as well as a request for a fee waiver. SMF ¶¶ 8, 10.

On November 3, 2014 the FBI confirmed receipt of the RCFP Requests via email. SMF ¶ 11. In a letter from Mr. Hardy dated January 8, 2015, the FBI denied the Reporters Committee's request for expedited processing as to RCFP Request 2. SMF ¶ 13. By letter dated May 18, 2015, the FBI stated that it had "conducted a search of the Central Records System" in connection with RCFP Request 1 and was "unable to identify main file records responsive to the FOIA." Hardy Decl. ¶ 25, Ex. S.

Having received no further information or communication from the FBI concerning either of its requests, on June 2, 2015, the Reporters Committee submitted, via U.S. Mail, administrative appeals for both RCFP Requests to the Office of Information Policy ("OIP") at DOJ. Hardy Decl. ¶¶ 26-27, Ex. T-U. With respect to RCFP Request 1, the Reporters Committee appealed the FBI's failure to conduct an adequate search for responsive records. Hardy Decl. ¶ 27, Ex. U. With respect to RCFP Request 2, the Reporters Committee appealed the FBI's failure to make a determination with respect to the request within the statutory time limits proscribed by FOIA. Hardy Decl. ¶ 26, Ex. T.

As to RCFP Request 1, on August 5, 2015, OIP denied the Reporters Committee's administrative appeal, concluding that the FBI had conducted an adequate search for responsive

records. Hardy Decl. ¶ 30, Ex. X. As to RCFP Request 2, by letter dated August 4, 2015, OIP stated that it was refusing to consider the administrative appeal: "As no adverse determination has yet been made by the FBI, there is no action for this Office to consider on appeal." Hardy Decl. ¶ 29, Ex. W. No records were produced to the Reporters Committee prior to the filing of this lawsuit. SMF ¶ 94.

The AP's FOIA Request

On November 6, 2014, Raphael Satter, a journalist with AP, submitted a FOIA request to the FBI's central FOIA Office and its Seattle Division seeking:

> (1) Any documents referring to the decision to create the fake AP news article in the Timberline High School case. In particular, I seek correspondence between the FBI's Seattle office and FBI headquarters about the case. I also seek a copy of the internal review carried out by the FBI and a copy of the Web link sent by the FBI to suspect in 2007;
>
> (2) An accounting of the number of times, between Jan. 1, 2000 and Nov. 6, 2014, that the Federal Bureau of Investigation has impersonated media organizations or generated media-style material (including but not limited to emails, webpages or links) to deliver malicious software to suspects or anyone else caught up in an investigation; and
>
> (3) Any documents—including training material, reviews and policy briefings—dealing with the creation and deployment of bogus news stories or media-style material in an investigative context."

SMF ¶ 1. The AP Request asked for a fee benefit as a representative of the news media, a fee waiver, and for expedited processing. SMF ¶ 2.

By letter dated December 1, 2014, the FBI acknowledged receipt of the AP Request. SMF ¶ 3. On December 8, the FBI granted the AP's request for expedited processing. SMF ¶ 5. And on December 17, the FBI granted AP's request for a fee waiver. Compl. ¶ 37; Answer ¶ 37.

Almost seven months after the AP Request was submitted, and having received no records in response to that request, on June 2, 2015 the AP submitted an administrative appeal to

OIP regarding the FBI's failure to comply with FOIA's statutory deadlines. Hardy Decl. ¶ 13, Ex. H. By letter dated August 21, 2015, OIP notified the AP that it was refusing to consider the appeal, stating: "As no adverse determination has yet been made by the FBI on Request No. 1313504, there is no further action for this Office to consider on appeal." Hardy Decl. ¶ 15, Ex. J. No records were produced to the AP prior to the filing of this lawsuit. SMF ¶ 94.[2]

C. Plaintiffs' Lawsuit

Plaintiffs filed their Complaint on August 27, 2015. ECF No. 1. Defendants filed their Answer on October 2, 2015. ECF No. 9. Thereafter, the parties met and conferred regarding Plaintiffs' requests, and counsel for Defendants represented that the Government was conducting an additional search for responsive records. *See* Joint Meet and Confer Statement, ECF No. 12. Defendants thereafter processed 267 pages of records in response to Plaintiffs' FOIA Requests. SMF ¶ 16. On February 29, 2016, Defendants released 186 pages of responsive records to Plaintiffs. *Id.* The majority of those records—103 pages—contained redactions. *Id.* In addition, the Government withheld 59 pages of responsive records in their entirety. *Id.* By letter dated March 28, 2016, concurrently with the filing of their Motion for Summary Judgment, Defendants re-produced a number of those same pages of records to Plaintiffs citing additional exemptions in support of their redactions, and releasing approximately five previously redacted words as well as a small attachment icon. SMF ¶ 15.

In meet and confer discussions and correspondence both before and after the Government's release of records in response to this lawsuit, Plaintiffs sought to narrow the issues for presentation to the Court and, if possible, avoid motions practice by proposing that the Government discuss and attempt to reach agreement with Plaintiffs on the scope of its search for

[2] The Hardy Declaration indicates that FBI initially split the AP Request into two parts, assigning it two different tracking numbers, only to later re-combine the request into one. *See* Hardy Decl. ¶¶ 7, 9.

records responsive to Plaintiffs' FOIA Requests. For example, during the initial telephonic meet and confer discussion between the parties' counsel, Plaintiffs' counsel asked Defendants' counsel for information regarding the scope of the FBI's search or planned search for records responsive to Plaintiffs' FOIA Requests. Townsend Decl. ¶ 18. Defendants' counsel was unable or unwilling to provide that information. *Id.* During subsequent communications, Plaintiffs' counsel again asked for information about how the FBI was conducting its search, to no avail. *Id.* Plaintiffs had no information about the scope of the search conducted by the Government until its Motion for Summary Judgment was filed on March 28. Similarly, in an effort to narrow the issues for presentation to this Court, Plaintiffs' counsel also repeatedly asked Defendants' counsel to agree to provide an itemized justification for each of its redactions and other withholdings as required by *Vaughn*, 484 F.2d at 827—i.e., a *Vaughn* Index—in advance of any summary judgment briefing or, at a minimum, concurrently with any motion for summary judgment filed by Defendants. *See* Townsend Decl. ¶ 19; Joint Meet and Confer Statement, ECF No. 12, at 4–7. Defendants' counsel refused to provide a *Vaughn* Index, and the Government has taken the position that the Hardy Declaration satisfies its obligations under *Vaughn*. *Id.*

LEGAL STANDARDS

The Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), codifies the public's right "to be informed about what their government is up to." *United States Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 773 (1989) (quotation omitted). It was enacted to create an enforceable right of "access to official information long shielded unnecessarily from public view." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). As the U.S. Supreme Court has explained, FOIA's "core purpose" is to contribute to "public understanding *of the operations or activities of the government.*" *Reporters Committee*,

489 U.S. at 775 (emphasis in original). "Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose." *Id.* at 773.

FOIA requires that agency records be made "promptly available" upon request unless they fall within one of nine categories of information that may be withheld. 5 U.S.C. § 552(a)(3), (b). "Consistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass." *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989); *FBI v. Abramson*, 456 U.S. 615, 630 (1982) ("FOIA exemptions are to be narrowly construed[.]"). In addition, FOIA mandates that any "reasonably segregable portion of a record" be released even if other parts are exempt from disclosure. 5 U.S.C. § 552(b). Thus, an agency "may not sweep a document under a general allegation of exemption, even if that general allegation is correct with regard to part of the information." *Vaughn*, 484 F.2d at 825.

FOIA cases are frequently decided on motions for summary judgment. *See Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83, 87 (D.D.C. 2009); *Bigwood v. United States Agency for Int'l Dev.*, 484 F.Supp.2d 68, 73 (D.D.C. 2007). Generally speaking, summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Under FOIA, the agency bears the burden of establishing that it conducted a search "reasonably calculated to uncover all relevant documents," *Weisberg II*, 705 F.2d at 1351, and that its withholding of records, or portions thereof, is proper, *Campbell*, 164 F.3d at 30 ("an agency bears the burden to justify exemptions under FOIA"). *See* 5 U.S.C. § 552(a)(4)(B) ("[T]he burden is on the agency to sustain its action."). An agency is entitled to summary judgment in a FOIA action only if it establishes that it has "fully discharged" its statutory obligations to search for and disclose responsive documents. *Weisberg II*, 705 F.2d at 1350. If "the record leaves substantial doubt as to the sufficiency of the search," or fails to establish that the agency's

withholdings are justified, "summary judgment for the agency is not proper." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). The agency's actions are reviewed by the district court *de novo*. 5 U.S.C. § 552(a)(4)(B).

ARGUMENT

I. The Government failed to conduct a sufficient search for records in response to Plaintiffs' FOIA Requests.

Plaintiffs' FOIA Requests seek essentially three categories of records: (1) records concerning the Seattle/Timberline Incident; (2) records concerning other instances where the FBI has impersonated a member of the news media to deliver malware to a suspect; and (3) the FBI's guidelines and policies governing impersonation of the news media. *See* SMF ¶¶ 1, 7, 9. In responding to Plaintiffs' FOIA Requests, the Government was obligated to conduct a search "reasonably calculated to uncover all" material "relevant" to all three categories. *Weisberg II*, 705 F.2d at 1351. It is entitled to summary judgment as to the adequacy of its search only if it can establish that it made a "good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) ("*Oglesby I*").

Not only has the Government failed to carry its burden on summary judgment to establish that the search it conducted—which identified a total of 267 pages of records—was sufficient, the material facts establish that the Government's search was patently inadequate. As the Hardy Declaration demonstrates, the Government inexplicably limited its search parameters to exclude records concerning incidents of FBI impersonation of the news media other than the Seattle/Timberline Incident, and did not search divisions and offices, including the Office of the Director, likely to have responsive records. The Government's insufficient search resulted in, among other things, the Government's release of *no records* relating to instances of FBI

impersonation of the news media other than the Seattle/Timberline Incident, and only 11 pages of material dating from in or around October 2014, when the FBI's 2007 impersonation of the AP was being widely reported, and FBI officials, including FBI Director Comey, were making public statements defending the FBI's practices. SMF ¶¶ 67-68; Townsend Decl. ¶¶ 23-24, 28, Ex. S. For the reasons set forth below, Plaintiffs are entitled to summary judgment as to the inadequacy of the Government's search for records responsive to their FOIA Requests.

A. The Hardy Declaration fails to establish that the Government is entitled to summary judgment as to the adequacy of its search.

"A reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched, is necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment." *Oglesby I*, 920 F.2d at 68; *see also Weisberg II*, 705 F.2d at 1351. The Hardy Declaration fails to meet these requirements.

As an initial matter, although Plaintiffs submitted three FOIA Requests seeking essentially three distinct categories of records, the Hardy Declaration indicates that, in processing Plaintiffs' FOIA Requests, the FBI treated them as falling into two separate "groups." "Group 1," according to the FBI, consists of records concerning its practice of using "links to what appear to be news media articles or news media websites" to install malware. SMF ¶ 70; Hardy Decl. ¶ 35. "Group 2" includes the remaining two categories of records sought by Plaintiffs: records relating to the 2007 Seattle/Timberline Incident, and the FBI's guidelines and policies concerning impersonation of the news media. SMF ¶ 71; Hardy Decl. ¶ 41.[3]

[3] While the Government suggests that it included in "Group 2" the portion of the AP Request seeking "[a]n accounting of the number of times, between Jan. 1, 2000 and Nov. 6, 2014, that the [FBI] has impersonated media organizations or generated media-style material," Hardy Decl. ¶ 34, there is no indication that the Government

Thus, the FBI's position appears to be that "Group 1" encompasses the broader of the three categories of records sought by Plaintiffs: records relating to all instances where the FBI has impersonated a member of the news media or used links to news media articles in order to deliver malware to a suspect. Yet the FBI did not include records relating to the 2007 Seattle/Timberline Incident, a subset of that broader category, within "Group 1." Instead, the FBI lumped that portion of Plaintiffs' request together with Plaintiffs' request for FBI guidelines and policies concerning impersonation of the news media—two categories of material unlikely to reside in the same records systems—into "Group 2." Among its other deficiencies, the Hardy Declaration offers no explanation for the FBI's decision to divide Plaintiffs' FOIA Requests into these two groups, a division that is not only facially illogical, but resulted in the FBI conducting unreasonably narrow and misdirected searches for responsive records.

As to the "Group 1" records, the Hardy Declaration is plainly insufficient to establish that the Government conducted an adequate search. The Hardy Declaration avers only that the FBI "recommended" that the Operational Technology Division ("OTD") "send an email to each of its employees asking them to search for all relevant records pertaining to" the "Group 1" request, and that "OTD completed the search" and located no relevant documents. Hardy Decl. ¶ 38–39. The Hardy Declaration provides no information about the scope of the search purportedly conducted by OTD, and fails to identify the search terms and other parameters that were used. And, in contrast to its assertions regarding one portion of its "Group 2" search, the Government does not assert that it conducted an additional search for records responsive to "Group 1" after this lawsuit was filed. *Compare* Hardy Decl. ¶¶ 35–49 *with id.* ¶ 57. The Hardy Declaration's

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actually conducted any search—let alone a reasonably calculated search—to uncover documents responsive to this portion of the AP Request, as part of its "Group 2" search, or otherwise. Notably, as discussed above, this portion of the AP Request overlaps with questions posed by Senator Grassley in his June 2015 Letter to FBI Director Comey. Yet, as discussed herein, the Government makes no showing that it searched the offices and/or divisions responsible for preparing the FBI's response to Senator Grassley's letter for responsive records.

bare assertion that a search of some kind was "completed" by OTD at some unspecified date falls far short of establishing that the Government met its burden to conduct a search "reasonably calculated to uncover all relevant documents." *Weisberg II*, 705 F.2d at 1351.

Moreover, the Hardy Declaration makes clear that there is a material issue of fact as to the FBI's apparent failure to search the Central Records System (CRS) for "Group 1" records.[4] The Hardy Declaration avers that the FBI determined that the CRS, which includes records about "particular investigative subjects," would not include "Group 1" records, and therefore it was not searched. Hardy Decl. ¶¶ 36–37. Yet specific instances of the FBI impersonating the news media to deliver malware to a criminal suspect would arise in connection with "particular investigative subjects." And, in fact, as discussed in more detail below, the FBI did search CRS for certain "Group 2" records—records related to the 2007 Seattle/Timberline Incident—that are also responsive to "Group 1." SMF ¶ 23; Hardy Decl. ¶ 57. Moreover, as the Hardy Declaration acknowledges, the FBI previously asserted that it had searched the CRS, Hardy Decl. ¶¶ 25, 27 & Ex. S & U, before claiming that it had made a "typographical error[,]" *id*. ¶ 30 & Ex. X. The FBI's failure to search CRS, and elsewhere, for "Group 1" records was patently unreasonable.

As to the more limited category of "Group 2" records, the Hardy Declaration indicates that the FBI conducted a slightly broader—albeit still deficient—search for responsive records than it did for "Group 1." The Hardy Declaration avers that the FBI targeted the following divisions for its "Group 2" search: the Seattle Division, the Office of General Counsel, Discovery Processing Units, OTD, Behavioral Analysis Unit ("BAU"), National Covert Operations Section within the Criminal Investigative Division, and the Training Division. SMF

[4] Notably, Mr. Hardy previously asserted that the FBI did, in fact, search the CRS for records responsive to Plaintiffs' Group 1 request, raising a material issue of fact regarding the adequacy of the FBI's search. In May 2015 Plaintiffs received, via U.S. Mail, a response from Mr. Hardy concerning what he now terms the "Group 1" request in which Mr. Hardy stated that the FBI had "conducted a search of the Central Records System" and was "unable to identify main file records responsive to the FOIA." Hardy Decl. ¶ 25 & Ex. S.

¶ 21; Hardy Decl. ¶ 43. Again, however, the Hardy Declaration fails to identify what search terms or methods these divisions utilized to search for "Group 2" material. Nor does it indicate which divisions located responsive records and which, if any, failed to conduct a search as requested. In fact, the only detail the Hardy Declaration provides regarding the scope of the search conducted for "Group 2" material is its statement that the FBI searched for responsive documents in its CRS and ELSUR indices using only three keywords relating solely to the Seattle/Timberline Incident: "Timberline," "Timberline High School" and "Timberline Highschool." SMF ¶¶ 23–24; Hardy Decl. ¶ 57.

Finally, the Government's failure to identify the date or dates on which it conducted its searches for both "Group 1" and "Group 2" material—and the temporal limits, if any, that it placed on those searches—precludes summary judgment in its favor. Indeed, the Hardy Declaration makes only one vague statement regarding the timing of any search conducted in response to Plaintiffs' FOIA Requests, asserting that its CRS index search for "Group 2" material was conducted "at the litigation stage." Hardy Decl. ¶ 57. This lack of information is particularly troubling because, as discussed in more detail below, the documents ultimately released by Defendants include only two records, consisting of 11 pages, that date from October 2014, and no records created after that time. *See infra* II.B. This strongly suggests that the FBI imposed a date-of-request cut-off on Plaintiffs' FOIA requests—a practice that the D.C. Circuit has previously found "unreasonable." *See, e.g.*, *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 644 (D.C. Cir. 2002); *McGehee v. CIA*, 697 F.2d 1095, 1103 (D.C. Cir. 1983) (finding that the CIA's long delay in responding to requester "cast considerable doubt on the merits of the agency's procedure" imposing a time-of-request cut-off date). At the very least, the FBI must inform Plaintiffs and this Court of any cut-off date used. *McGehee*, 697 F.2d at 1105 ("It would be

extremely difficult for the CIA to convince us that it may 'reasonably' use *any* cut-off date without so informing the requester.") (Emphasis in original).

In sum, notwithstanding Mr. Hardy's conclusory claim that the Government's search for records responsive to Plaintiffs' FOIA Requests was "comprehensive," Hardy Decl. ¶ 59, his declaration fails to set forth facts establishing that the Government in fact conducted a search "reasonably calculated to uncover all relevant documents." *Weisberg v. Dep't of Justice*, 627 F.2d 365, 369 (D.C. Cir. 1980) ("*Weisberg I*"); *Perry v. Block*, 684 F.2d 121, 126 (D.C. Cir. 1982) ("[A]ffidavits setting forth the record procurement efforts of an agency should provide some detailing of the scope of the examination conducted"). The Hardy Declaration "do[es] not denote which files were searched or by whom, do[es] not reflect any systematic approach to document location, and do[es] not provide information specific enough to enable [Plaintiffs] to challenge the procedures utilized." *Weisberg I*, 627 F.2d at 371. Accordingly, Defendants' motion for summary judgment as to the adequacy of its search should be denied.

B. The material facts establish the inadequacy of the Government's search and Plaintiffs are entitled to summary judgment as to that issue.

To the extent it is not "totally uninformative," *Founding Church of Scientology of Washington, D. C., Inc. v. N.S.A.*, 610 F.2d 824, 834 (D.C. Cir. 1979), the Hardy Declaration highlights the Government's failure to conduct an adequate search in response to Plaintiffs' FOIA Requests, and supports summary judgment in favor of Plaintiffs.

The FBI's "Group 1" search, as described in the Hardy Declaration, was plainly insufficient. According to the Hardy Declaration, in response to Plaintiffs' request for records related to *any* instance where the FBI had impersonated a member of the news media, the FBI searched only *one* component—OTD—and located *no* responsive records. SMF ¶¶ 20, 72. Conducting a "targeted search" of the one component that the Government selects as the *most*

"likely to possess responsive records" is inadequate. SMF ¶ *19*. FOIA requires that the Government search *all* locations where such records are "likely" to be found. *See Oglesby I*, 920 F.2d at 68 ("[T]he agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested."). Moreover, that its "targeted search" of OTD turned up no "Group 1" material underscores its insufficiency. At a minimum, a search for "Group 1" material should have identified records concerning the Seattle/Timberline Incident; the fact that it did not alone demonstrates that it was inadequate.

For both "Group 1" and "Group 2" material, the FBI failed to search divisions and offices almost certain to have relevant documents. As discussed above, *supra* p. 4, at the time Plaintiffs' FOIA Requests were made, and thereafter, the FBI's practice of impersonating the news media was the subject of extensive reporting, and public comments by high-ranking FBI officials. Among other things, on November 6, 2014, *The New York Times* published a letter to the editor from FBI Director Comey defending the FBI's impersonation of the AP in the Seattle case as "proper and appropriate." SMF ¶ 59. And in June 2015, Senator Grassley sent a letter to Mr. Comey asking: "Since 2009, how many times has the FBI impersonated personnel from legitimate companies, whether media or otherwise, in deploying spyware?" SMF ¶ 62. The Government's search for responsive records, however, did not include the Office of the Director, nor any other office or division responsible for responding to the concerns of members of Congress, or for crafting the FBI's public statements—offices and divisions very likely to have precisely the type of information requested by Plaintiffs. The FBI improperly ignored the extensive information available to it that "suggest[ed] the existence of documents that it could not locate without expanding the scope of its search." *Campbell*, 164 F.3d at 28. This failure supports summary judgment in Plaintiffs' favor as to the inadequacy of the Government's search.

That the Government's search was insufficient is further evidenced by the fact that, notwithstanding the attention that the FBI's impersonation of the AP garnered in the Fall of 2014—both inside and outside of the agency—the FBI released portions of only *two* documents consisting of 11 pages from that time period. SMF ¶ 68; Townsend Decl. ¶ 28, Ex. S. Those "Situation Action Background" documents, dated October 29 and 31, 2014, were created by the FBI's Cyber Division in response to widespread media coverage of the Seattle/Timberline Incident. While those documents make clear that the FBI was revisiting that incident internally, the agency produced no documents that post-date them. The failure to produce documents related to the FBI's response to the public outcry over the Seattle/Timberline Incident in 2014 is further evidence that its search was inadequate and, as noted above, also suggests that the FBI improperly employed an unreasonable "cut-off date." *McGehee*, 697 F.2d at 1105.

Records released by the FBI also contain other "positive indications of overlooked materials." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327 (D.C. Cir. 1999). For example, the FBI produced one email from 2007 related to the Seattle/Timberline Incident in which the author—whose name is redacted—references attached "ponies of an application for a mobile tracking order, a mobile tracking/PRTT order, and the affidavit supporting the two *that ST. Louis [sic] drafted for a similar type order*." SMF ¶ 87; Townsend Decl. ¶ 27, Ex. R. At a minimum, this record should have signaled to the FBI that it should search the St. Louis field office for responsive records, but there is no indication that the Government did so.

Additionally, in a recent court filing in the United States District Court for the District of Massachusetts, the Government responded to a court order to provide a list of investigations in which the Government has used "network investigative techniques," by referencing the search warrant from the Seattle/Timberline Incident, as well as two other unsealed warrants authorizing the use of similar techniques. SMF ¶¶ 63–64; Townsend Decl. ¶¶ 15–16, Ex. N & O. This

publicly available information too provides a "positive indication[]" of material overlooked by the FBI, and underscores the inadequacy of its search. *Valencia-Lucena*, 180 F.3d at 327.

The Government's failure to pursue these "clear and certain" leads is inexcusable. *Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996). To be clear, the Government's failure to release *any* records to Plaintiffs related to *any* other instance in which the FBI has impersonated a member of the news media would be warranted only if the Seattle/Timberline Incident was, in fact, a singular event, and the only time that the FBI has employed that practice. This would be contrary to other records released by the Government, as well as the FBI's public statements, both of which indicate that the Seattle/Timberline Incident, while perhaps "unusual," was by no means entirely unique. SMF ¶¶ 52, 54, 59.

In sum, in response to Plaintiffs' request for records concerning any instance when the FBI has impersonated a member of the news media in order to deliver malware to a suspect, the Government conducted an unjustifiably narrow search of a single division, and located no records. Although it conducted a slightly broader search for "Group 2" material related to the Seattle/Timberline Incident and the FBI's guidelines and policies concerning impersonation of the news media, its failure to uncover documents related to, *inter alia*, the agency's response in 2014 to coverage of the Seattle/Timberline Incident demonstrates that the FBI's search was not "reasonably calculated to uncover all relevant documents." *Weisberg II*, 705 F.2d at 1351.

II. The Government has failed to meet its burden to justify withholding responsive records, in whole and in part, from Plaintiffs.

A. The Hardy Declaration is insufficient to support the Government's withholdings.

It is undisputed that when an agency seeks to withhold information in response to a FOIA request, "it must provide a relatively detailed justification, specifically identifying the reasons

why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Mead Data Cent., Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977). The agency's showing must be sufficiently "full and specific" to create a factual record robust enough for the district court to review the agency's withholdings. Such a showing necessarily includes, in addition to an adequately specific "explanation of the reason for the agency's nondisclosure," a "description of each document being withheld." *Oglesby II*, 79 F.3d at 1176. While that description need not reveal the substance of material the agency claims is exempt, it must be "useful"; the agency must provide, at a minimum, "general information (for example: length, date, author and brief description of each document)" for each withheld record." *Id*. at 1180. A specific showing as to each of the agency's withholdings is necessary to balance the "asymmetrical distribution of knowledge that characterizes FOIA litigation." *King v. U.S. Dept. of Justice*, 830 F.2d 210, 218 (D.C. Cir. 1987).

The Hardy Declaration clearly does not meet this standard. It consists largely of rote recitation of the statutory language found in 5 U.S.C. § 552(b), and describes the Government's withholdings in sweeping, categorical terms. For example, the Hardy Declaration offers nothing more than a generalized description of the category of material the Government has withheld pursuant to Exemption 1, failing to describe any of the withheld information with even a minimal level of specificity. Hardy Decl. ¶ 70 ("In the records at issue, the FBI protected information pertaining to specific FBI's intelligence sources and methods, including its intelligence gathering capabilities.") Similarly, in support of its position that certain material may be withheld under Exemption 5, the Government relies on nothing more than the Hardy Declaration's vague, conclusory assertions that the material is "deliberative" and "confidential." *Id*., ¶ 82. The Hardy Declaration's bare assertions that the Government has withheld "law enforcement techniques and procedures and law enforcement guidelines" under Exemption 7(E) are likewise insufficient.

Hardy Decl. ¶ 96; *see Albuquerque Pub. Co. v. U.S. Dep't of Justice*, 726 F. Supp. 851, 857 n.9 (D.D.C. 1989) ("In order to make a reasoned determination that [Exemption 7(E)] was properly claimed, we first must know more about the techniques at issue. . . . Only then will we be in a position to evaluate whether the techniques are generally unknown to the public.")

Because the Hardy Declaration fails to provide "the kind of detailed, scrupulous description [of the withheld material] that enables a District Court judge to perform a *de novo* review," it cannot support summary judgment on behalf of the Government. *Brown v. FBI*, 873 F. Supp. 2d 388, 401 (D.D.C. 2012) (quoting *Church of Scientology of Cal., Inc. v. Turner*, 662 F.2d 784, 786 (D.C.Cir.1980)). District courts have repeatedly rejected the sufficiency of agency affidavits like the Hardy Declaration. *See, e.g.*, *Judicial Watch, Inc. v. U.S. Dept. of Homeland Sec.*, 841 F. Supp. 2d 142, 154–55 (D.D.C. 2013) (finding that DHS failed to meet its burden to prove the applicability of Exemption 5 where its *Vaughn* index "simply parrots selected elements of the attorney-client privilege"); *Brown*, 873 F. Supp. 2d at 407 (requiring *in camera* review where the FBI's affidavit in support of its invocation of Exemption 7(E) "does nothing but parrot the statutory language").

Indeed, even *more* detailed affidavits have been found insufficient to support summary judgment for an agency. *See Campbell*, 164 F.3d at 31; *Coleman v. FBI*, 972 F. Supp. 5 (D.D.C. 1997). In *Campbell*, for example, the D.C. Circuit made clear that declarations that "fail to draw any connection between the documents at issue and the general standards that govern the national security exemption" are inadequate. 164 F.3d at 31. And although the FBI in *Campbell* also provided a declaration from a Special Agent "in which she lists the names of the files containing withheld information"—far more detail than the Hardy Declaration provides—the D.C. Circuit found the FBI's showing insufficient to uphold nondisclosure under Exemption 7.

Moreover, this case is fundamentally unlike cases in which the D.C. Circuit has found the use of agency affidavits applying exemptions in a "categorical" manner to be sufficient. *See, e.g.*, *Nat'l Treasury Employees Union v. United States Customs Serv.*, 802 F.2d 525, 527 (D.C. Cir. 1986) ("The issues in this case were relatively simple and straightforward. All of the documents were withheld under a single exemption. . . . The documents, while numerous, were all of the same general type and all had the same purpose.") (internal citation omitted); *see also Dep't of Justice v. Landano*, 508 U.S. 165, 179 (1993) (permitting categorical approach to exemptions in "generic circumstances in which an implied assurance of confidentiality fairly can be inferred"). The issues here are far from simple and generic; the Government seeks to withhold large swathes of unspecified material under a series of different exemptions without presenting even an adequate *categorical* rationale for doing so. As discussed in more detail below, the Government's boilerplate assertions of various exemptions fail to support summary judgment on its behalf as to any of its withholdings.

B. The Hardy Declaration fails to establish that the 59 pages of records withheld in their entirety are exempt from disclosure under FOIA.

The Hardy Declaration provides little or no information about the records the Government has withheld in full. Indeed, although the Government has withheld 59 pages of the 267 processed in response to Plaintiffs' FOIA Requests in their entirety, the Hardy Declaration fails to provide even a "useful description" of that material, let alone details justifying withholding them in full. *Oglesby II*, 79 F.3d at 1180.

For example, the FBI withheld an entire page—RCFP-52—of one of two "Situation Action Background" documents on the basis of Exemption 5, asserting that the entire page, and other portions of that document, are shielded from disclosure by the deliberative process privilege and the attorney-client privilege. Townsend Decl. ¶ 28, Ex. S. The "Situation Action

Background" document at issue, however, which is dated October 31, 2014, was prepared by the FBI's Cyber Division in response to extensive media coverage of the Seattle/Timberline Incident in the Fall of 2014. It is a *post hoc* summary of that incident that reflects the FBI's official position that its actions in Seattle in 2007 comported with all applicable guidelines, and it appears to have been prepared primarily for media and public relations purposes.

There is no indication, whatsoever, from the document itself—nor does the Hardy Declaration offer any factual support for the Government's claim—that any portion of the "Situation Action Background" was prepared by an attorney or constitutes a confidential communication between attorney and client for the purpose of obtaining or providing legal advice to the client. *See In re Grand Jury*, 475 F.3d 1299, 1304 (D.C. Cir. 2007); *see also Fisher v. United States*, 425 U.S. 391, 403 (1976) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged."). The Hardy Declaration's bare, unsupported assertion that an entire page of the "Situation Action Background" is a "confidential communication" between unidentified "FBI counsel and their FBI client employees" is insufficient to support a claim of privilege. Hardy Decl. ¶ 84.

Nor is there any indication that the "Situation Action Background," or any portion of it, is the type of "'predecisional' and 'deliberative'" material that is exempt from disclosure under the deliberative process privilege incorporated into Exemption 5. *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 874 (D.C. Cir. 2010) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)); *see also Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006) (explaining that a record is "predecisional if it was generated before the adoption of an agency policy and deliberative if it reflects the give-and-take

of the consultative process").[5] Nothing about the *post hoc* "Situation Action Background" on its face, and nothing in the Hardy Declaration demonstrates, that the document is "predecisional," or that any portion of it expresses a personal opinion, or "reflects the give-and-take of the consultative process." To the contrary, the "Situation Action Background" is a look-back document relating to an investigation that was approximately seven years old at the time, and it reflects the FBI's official position that its actions in connection with the Seattle investigation were proper. The Hardy Declaration's vague and conclusory claims that the withheld portions of the "Situation Action Background" are "predecisional in that they precede final investigative and/or prosecutive decisions," and are being withheld to "protect information . . . reflecting the decision-making process of the FBI, alone or in conjunction with other DOJ components, regarding the scope and focus of the investigation," is belied by the facts and insufficient to support the Government's claim of privilege. Hardy Decl. ¶ 82.

The Hardy Declaration's conclusory and vague assertions regarding the pages the FBI has withheld in full are not limited to the Government's invocation of Exemption 5. For example, the Government asserts that Exemption 7(E) applies to 38 pages of responsive material withheld in their entirety solely on the basis of the Government's claim that those pages include "non-public details" about an undercover operation.[6] Hardy Decl. ¶ 97. According to the Hardy Declaration, release of those records "could have devastating operational consequences and would jeopardize future use of undercover operations by the FBI in similar cases or under similar circumstances." *Id.* Yet the Hardy Declaration offers no information—not even general descriptive information of the kind *Oglesby II* clearly requires—about any of those records, and

[5] Congress has recognized that Exemption 5—sometimes referred to as the "withhold it because you want to" exemption—is frequently misapplied and overused by agencies. *See* FOIA Is Broken: A Report, U.S. House of Representatives Cmte. on Oversight and Gov't Reform (Jan. 2016), *available at* https://perma.cc/A5KP-JFTB.

[6] The FBI has asserted Exemption (7)(E)-2 as the basis for withholding the following pages of material in their entirety: RCFP 52, 55–61, 65–75, 114–115, 130–132, and 139–153.

makes no attempt to tether the withholding of any individual record to the claimed risk to "future use of undercover operations by the FBI," or to explain what "operational consequences" may result from disclosure. At a minimum, the FBI was required to provide Plaintiffs and this Court with the date, author, and a general description of the documents it has withheld in full in order to meet its burden to demonstrate that those withholdings are proper. It failed to do so.

Finally, the Government has failed to justify its conclusion that there is no information in the 59 pages of records withheld in their entirety that is "reasonably segregable" and subject to release. *See* Hardy Decl. ¶ 105(b). FOIA requires that "[a]ny 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." 5 U.S.C. § 552(b). Since the Government has not identified or described any of the documents it has withheld in full, the Hardy Declaration's unsupported assertion that these records contain no segregable information is inadequate to say the least. *See Campbell*, 164 F.3d at 31 (". . . a conclusory assertion that material is exempt and nonsegregable is insufficient to support nondisclosure"). Indeed, the D.C. Circuit has recognized that a "critical problem of segregability" arises where, as here, an agency has offered "multiple exemptions for each withheld document"; in such circumstances, the court "should not be required to speculate on the precise relationship between each exemption claim and the contents of the specific document." *Ray v. Turner*, 587 F.2d 1187, 1196 (D.C. Cir. 1978). Thus, where, as here, "the record is vague or the agency claims too sweeping," a court may, *inter alia*, conduct an *in camera* review of documents withheld in full "to look for segregable non-exempt matter." *Weissman v. Central Intelligence Agency*, 565 F.2d 692, 698 (D.C. Cir. 1977).[7]

[7] As set forth in Section III, below, while it is clear that the Government has failed to satisfy its burden on summary judgment to justify its withholdings, by their concurrently filed Motion for *In Camera* Review and/or Other Appropriate Relief, Plaintiffs respectfully request that the Court conduct a limited *in camera* review of certain withheld material, and/or issue any other appropriate order needed for the Court to grant Plaintiffs affirmative relief.

The Government's failure to "describe the documents" it has withheld in full and the "justifications for nondisclosure with reasonably specific detail" precludes summary judgment for the Government as to the propriety of its withholding of 59 pages of material in their entirety. *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).

C. The Government fails to justify its withholdings under Exemption 1.

Exemption 1 applies to material "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." 5 U.S.C. § 552(b)(1). Executive Order 13526 ("E.O. 13526") governs the classification of information that affects national security. Section 1.3 of E.O. 13526 provides that the authority to classify information originally, or "original classification authority," may be delegated. The Government asserts that Mr. Hardy is an "original classification authority" within the meaning of the Order. SMF ¶ 26.

Generally speaking, a court should "accord substantial weight to an agency's affidavit concerning the details of the classified status of [a] disputed record because the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse [effects] might occur as a result of a particular classified record." *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (quotations omitted). However, an agency's "affidavits will not suffice if the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping." *Hayden v. N.S.A./Cent. Sec. Serv.*, 608 F.2d 1381, 1387 (D.C. Cir. 1979).

As an initial matter, there is a genuine issue of material fact as to whether the FBI satisfied the procedural requirements of Executive Order 13526, because the information withheld was classified long after the Plaintiffs filed the FOIA Requests at issue, and after Plaintiffs initiated this lawsuit. Based on the date stamps on the records themselves, the

Government appears to have classified the information it now seeks to withhold on November 27, 2015, SMF ¶ 90, Townsend Decl. ¶ 24, Ex. P, and January 12, 2016, SMF ¶ 91, Townsend Decl. ¶ 26, Ex. R. Yet neither the Hardy Declaration nor the Government's brief address the fact that withheld material was classified only after it was requested by Plaintiffs. The Hardy Declaration states that the withheld information is "properly classified at the 'Secret' level . . . pursuant to E.O. 13526 § 1.4(c)." Hardy Decl. ¶ 70. However, *post hoc* classification in response to a FOIA request is subject to different procedural requirements than an original classification decision.

Section 1.7(d) of E.O. 13526 provides:

> Information *that has not previously been disclosed to the public under proper authority* may be classified or reclassified after an agency has received a request for it under the Freedom of Information Act (5 U.S.C. 552), the Presidential Records Act, 44 U.S.C. 2204(c)(1), the Privacy Act of 1974 (5 U.S.C. 552a), or the mandatory review provisions of section 3.5 of this order *only if such classification meets the requirements of this order and is accomplished on a document-by-document basis with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official designated under section 5.4 of this order*.

(Emphasis added.)

Defendants do not appear to acknowledge that Section 1.7(d) applies to the information it has withheld under Exemption 1. The Hardy Declaration does not address whether any of the withheld information has "previously been disclosed to the public." Nor does it establish that Mr. Hardy is "the senior agency official designated under Section 5.4," and thus authorized to make a post-FOIA request classification decision. Further, DOJ regulations require that when an agency component "classif[ies] or reclassify[ies]" information after receipt of a FOIA request, such material "shall be forwarded to the Department Security Officer and classified or reclassified only at the direction of the Attorney General, the Deputy Attorney General, or the Assistant Attorney General for Administration." 28 C.F.R. § 17.22(e). The Government does

not acknowledge the applicability of this regulation or demonstrates that its requirements have been met.

Moreover, some of the Government's Exemption 1 withholdings appear in documents that are clearly labeled "SENSITIVE BUT UNCLASSIFIED." SMF ¶ 93, Townsend Decl. ¶¶ 25, 27, Ex. P & R. The fact that the material at issue appears to have been deemed *unclassified* long before Plaintiffs' FOIA Requests were submitted is especially noteworthy given that the Government has offered no information explaining how the withheld information "falls within one or more of the categories of classified information authorized by the governing executive order" or how "disclosure of the material in question would cause the requisite degree of harm to the national security." *King*, 830 F.2d at 224. The FBI's showing in support of its assertion of Exemption 1 amounts to nothing more than the mere boilerplate assertion that the records' release would endanger national security. Such generic assertions fall far short of satisfying the Government's burden to provide reasonably specific justifications for withholding information, particularly where, as here, the Government fails to acknowledge—let alone explain why—the documents appear, on their face, to be unclassified.

D. The Government fails to justify its withholdings under Exemption 3.

Exemption 3 applies to records "specifically exempted from disclosure by statute," but only if that statute "(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 . . . ." 5 U.S.C. § 552(b)(3). While Plaintiffs acknowledge that the two statutes cited by Defendants—50 U.S.C. § 3024(i)(1) and 18 U.S.C. § 3123(d)—may be properly invoked under Exemption 3 in appropriate circumstances, those statutes do not apply to the records at issue in this case. The Government's attempt to justify withholding material pursuant to either 50 U.S.C. § 3024(i)(1) or 18 U.S.C. § 3123(d) is not only

insufficient, the scant information they have provided makes clear that these statutes do not authorize the Government to withhold records responsive to Plaintiffs' FOIA Requests.

1. 50 U.S.C. § 3024 does not authorize the Government's withholdings.

The National Security Act of 1947 provides that "the Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). For the same reasons that the Government's showing is insufficient to support its claim that Exemption 1 exempts the information it has withheld under that authority, see Setion II.C, *supra*, its showing under Exemption 3 also fails. Aside from a bare assertion that the withheld information pertains to intelligence sources and methods, Hardy Decl. ¶ 76, the Government has not provided any facts in support of its exemption claim. *See, e.g.*, *Sack v. Cent. Intelligence Agency*, 53 F. Supp. 3d 154, 166 (D.D.C. 2014) (finding agency affidavit sufficient where it explained that the withheld information related to covert employees, "specified how the particular documents and withholdings relate to that program," and provided additional detail about the withheld documents). Because the Government has made only a general and conclusory assertion that the withheld material would purportedly reveal "intelligence sources and methods," it has not adequately justified its withholdings.

2. 18 U.S.C. § 3123(d) does not authorize the Government's withholdings

The second statute cited by Defendants to withhold records responsive to Plaintiffs' FOIA Requests, 18 U.S.C. § 3123, applies to applications for pen registers and trap and trace devices (hereinafter, "PRTT") pursuant to Chapter 206 of Title 18 of the United States Code. Specifically, Section 3123 authorizes two types of limitations on the disclosure of such records, but both provisions are limited in application and scope. *See* 18 U.S.C. § 3123. First, the statute provides that 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[.]" 18 U.S.C. § 3123(d). Second, the statute imposes various restrictions on the person(s) who own or lease the lines where the PRTT is applied, or those who assist them—limitations which also apply "unless or until otherwise ordered by the court." *Id*. at § 3123(d)(2).

While 18 U.S.C. § 3123 may qualify as an Exemption 3 statute for certain materials related to court orders for PRTT, it is inapplicable here because the Government did not apply for a PRTT under 18 U.S.C. § 3122 in connection with the Seattle/Timberline Incident. Instead, the Government applied for—and was granted—a search warrant. *See* Townsend Decl. ¶ 12, Ex. K (Affidavit of Norman B. Sanders) ("I submit this affidavit in support of the application of the United States for a search warrant."); *id.* ¶ 13, Ex. L (search warrant). Accordingly, since all the material withheld pursuant to this claimed exemption relates to the Seattle/Timberline Incident, the Government cannot assert that it has withheld material related to a PRTT.[8] Because there was no application for, or order granting, a PRTT in connection with the Seattle/Timberline Incident, 18 U.S.C. § 3123, by its own terms, has no application here.

Even if the Government had applied for and received a PRTT order pursuant to 18 U.S.C. § 3122 in connection with the Seattle/Timberline Incident, neither of the withholding provisions of 18 U.S.C. § 3123 would apply to the records in this case. First, subsection (d)(1) applies only to "court order[s]" authorizing or approving the installation/use of a PRTT. The records redacted by the Government consist of memos and emails, not court orders. *See* Townsend Decl. ¶¶ 24, 26, Ex. P & R.[9] Indeed, the court order at issue in the Seattle/Timberline case has already been

[8] It is certainly possible that the Government utilized a PRTT in connection with the Seattle/Timberline incident without first applying for and obtaining a court order pursuant to 18 U.S.C. § 3122. Yet even if the Government concedes that is what happened, the remainder of Plaintiffs' arguments demonstrate why 18 U.S.C. § 3123 is nevertheless inapplicable to the records at issue here.

[9] The Government has not provided any information, whatsoever, regarding RCFP-155, which it has withheld in its entirety. As discussed above, the Government's failure to provide such information amounts to a failure to satisfy its burden to justify that withholding. *See*, *e.g.*, *Brown*, 873 F. Supp. 2d at 401.

unsealed and is publicly available (although it was not provided to Plaintiffs in response to the FOIA Requests). *See* SMF ¶ 49.

Both subsections (d)(1) and (d)(2)[10] are also inapplicable to the records at issue here because, even assuming they ever applied to records relating to the Seattle/Timberline case, their secrecy provisions would no longer apply. The restrictions on dissemination of information under those subsections apply only "until otherwise ordered by the court." 18 U.S.C. § 3123. On June 21, 2007, after the investigation was concluded, the Seattle/Timberline case was unsealed. SMF ¶ 49. That unsealing put an end to whatever secrecy, if any, may have previously existed pursuant to 18 U.S.C. § 3123. The Government cannot now invoke that provision to withhold material responsive to Plaintiffs' FOIA Requests. *Id*.

E. The Government fails to justify its withholdings under Exemption 5.

Exemption 5 permits agencies to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Courts have recognized that "Exemption 5 protects, as a general rule, materials which would be protected" under the attorney-client privilege, the attorney work-product doctrine, "or the executive 'deliberative process' privilege." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (internal citations omitted). In this case, the government has asserted both the deliberative process privilege and the attorney-client privilege. Yet it has failed to justify its invocation of either.

[10] Plaintiffs note that 18 U.S.C. § 3123(d)(2) is inapplicable for other reasons as well. By its plain language, that subsection imposes certain restrictions on the person(s) owning or leasing the line that the PRTT is attached or applied to, or those that provide assistance to that person or persons. *Id*. It does not place any restrictions on the *Government*'s disclosure of such information. *See id.*

1. The deliberative process privilege does not apply to the material withheld by the Government.

The deliberative process privilege "serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." *Coastal States*, 617 F.2d at 866. As discussed above, "the privilege protects documents that are both 'predecisional' and 'deliberative.'" *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 874 (D.C. Cir. 2010) (quoting *Coastal States*, 617 F.2d at 866). A document is "predecisional if it was generated before the adoption of an agency policy and deliberative if it reflects the give-and-take of the consultative process." *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006) (quotation marks omitted). Accordingly, the exemption "covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States*, 617 F.2d at 866.

In this case, the Government has asserted that the deliberative process privilege applies to withhold portions of emails dating from 2007 among the Seattle Field Office, OTD and Office of General Counsel that relate to the Seattle incident. *See* Townsend Decl. ¶ 26, Ex. Q. In addition, as discussed above, the Government has withheld portions, including an entire page, from a 2014 "Situation Action Background" document. *Id.*, ¶ 28, Ex. S. The Government has not met its burden to demonstrate that any of this material is properly withheld pursuant to the "deliberative process privilege" under Exemption 5 of FOIA. 5 U.S.C. § 552(b)(5).

The government asserts, in characteristically vague and generic manner, that its withholdings under the deliberative process privilege reflect intra- and inter-agency decisionmaking regarding "the scope and focus of the investigation." Hardy Decl. ¶ 82. As discussed above, however, although the Hardy Declaration describes the "Situation Action Background" as "a report containing information discussing legal issues regarding the Timberline School Investigation," *id.*, that document appears on its face to be a *post hoc* summary of the Seattle/Timberline Incident that was prompted by the widespread public and media attention it received in the Fall of 2014. The Government fails to acknowledge or address the fact that it was prepared approximately seven years after the close of the Seattle investigation, and offers no facts to support the claim that it reflects opinions, or was part of any give-and-take consultation process. The Government's assertion that the withheld material from this backward-looking document is "predecisional in that they precede final investigative and/or prosecutive decisions, and deliberative in that they played a part in the process by which specific decisions were made about the scope and focus of the investigation and prospective prosecution at issue" is simply belied by the document itself. *Id*.

2. The attorney-client privilege does not justify the FBI's withholdings.

Nor has the Government made an adequate showing regarding its assertions of attorney-client privilege under Exemption 5. The Government asserts this exemption to withhold portions of emails dating from 2007 among the Seattle Field Office, OTD, and Office of General Counsel that relate to the Seattle/Timberline Incident. *See* Townsend Decl. ¶ 26, Ex. Q. In addition, as discussed above, the Government has withheld in full one page from the 2014 "Situation Action Background" on this basis. *Id.*, ¶ 28, Ex. S. In support of their privilege claim, Defendants asserts that the information it withheld from disclosure constitutes "two-way communications" between unidentified "FBI attorneys and their agency clients." Hardy Decl. ¶ 84.

The attorney-client privilege "does not allow the withholding of documents simply because they are the product of an attorney-client relationship." *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 253 (D.C. Cir. 1977). An agency seeking to withhold information that it asserts is subject to the attorney-client privilege must demonstrate that the information is "confidential." *Id.* And, when an attorney communicates to a client, "the privilege applies only if the communication is based on confidential information provided by the client." *Brinton v. Dep't of State*, 636 F.2d 600, 603 (D.C. Cir. 1980) (quotation marks and citation omitted); *see also Fisher*, 425 U.S at 403.

The documents from which the Government has withheld material pursuant to the attorney-client privilege bear no indicia of confidentiality. The emails, for example, contain no "confidential" designation, and have many recipients from multiple offices. The "Situation Action Background" document appears to have been authored by the Cyber Division; there is no indication that it was prepared by an attorney, and there is nothing to suggest that it was not disseminated widely after its creation. The Government's claim—unsupported by any facts—that these materials are shielded from disclosure by the attorney-client privilege is insufficient to support a privilege claim under Exemption 5. *See* Hardy Decl. ¶ 84.

F. The Government fails to justify its withholdings under Exemptions 6 and 7(C).

Exemption 6 applies to "personnel and medical files and similar files when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 7(C) exempts from disclosure under FOIA "records or information compiled for law enforcement" to the extent that their disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

A court considering the application of Exemption 6 must first determine whether "disclosure would compromise a substantial, as opposed to a *de minimis*, privacy interest." *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989). If disclosure would implicate a substantial privacy interest, the court "must weigh that privacy interest in non-disclosure against the public interest in the release of the records in order to determine whether, on balance, disclosure would work a clearly unwarranted invasion of personal privacy." *Id.* Similarly, under Exemption 7(C), "a court must balance the public interest in disclosure against the interest Congress intended the Exemption to protect." *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 776 (1989). Although the balancing test applicable under Exemption 6 differs from that for Exemption 7(C), the Government asserts the two exemptions in tandem, and fails to justify its withholding of material under either exemption.

First, with regard to the Government's categorical explanation of its withholdings pursuant to Exemptions 6 and 7(c), Plaintiffs do not intend to challenge the Government's redaction of the names, addresses, email addresses, and telephone numbers of individuals who are not government employees in the following categories: (b)(6)-3, (b)(6)-4, (b)(6)-6, (b)(7)(C)-3, (b)(7)(C)-4, and (b)(7)(C)-6. SMF ¶¶ 35, 36, 38. Although, consistent with the conclusory, inadequate nature of its overall factual showing in this case, the Government has failed to provide any factual support for its contention that disclosure of the identities of third parties of investigative interest, third-party victims, or other third parties mentioned would, in fact, result in harassment, embarrassment, or stigma, Plaintiffs elect not to challenge the withholding of third-party identifying information.

Plaintiffs do, however, challenge the Government's withholding of the names of federal and state government personnel, including FBI personnel. In category (b)(6)-1 and (b)(7)(C)-1, the Government has redacted the names of FBI personnel from 101 pages of records on the basis

of its generalized conclusion that they should be protected "from unnecessary, unofficial questioning as to the conduct of the investigation or other investigations, whether or not they are currently employed by the FBI." Hardy Decl. ¶ 87.[11] In category (b)(6)-2 and (b)(7)(C)-2, the government has withheld portions of four pages of records that apparently identify "DOJ attorneys and support personnel." *Id.* ¶ 89. And, in category (b)(6)-5 and (b)(7)-5, the FBI has withheld portions of 17 pages of records that identify local law enforcement personnel who "were acting in their official capacity and aided the FBI in the law enforcement investigative records" released by the Government. *Id.*, ¶ 92.

Defendants' invocation of Exemption 6 and 7(C) to automatically shield from disclosure official information pertaining to all government employees, including their names, titles, telephone numbers, and the offices they work for, is improper. As an initial matter, the Government make no threshold showing that emails pertaining to the Seattle investigation, from which the FBI has withheld information, are "personnel and medical files" or "other similar files" within the meaning of Exemption 6. *Washington Post Co. v. U.S. Dep't of Health & Human Servs.*, 690 F.2d 252, 274 (D.C. Cir. 1982) (explaining that, in order to be exempt, "the information must be 'personnel,' 'medical,' or 'similar' files . . . "). Even assuming that the records are "similar files" within the scope of Exemption 6, the withheld information differs from "[i]nformation such as place of birth, date of birth, date of marriage, employment history, and comparable data" that would be exempt from disclosure because its release "would constitute a clearly unwarranted invasion of personal privacy." *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982); *see also Nat'l Ass'n of Retired Fed. Employees v. Horner*,

[11] The FBI has asserted Exemptions (6)-1 and (7)(C)-1 as a basis for withholding the following pages of material in their entirety: RCFP 55, 57-59, 114-116, 130-132, 137-151, and 161-174.

879 F.2d 873, 875 (D.C. Cir. 1989) (explaining that "Exemption 6 is designed to protect *personal* information in public records" (emphasis original).

The Government's reliance on Exemption 6 and 7(C) to automatically redact the names and work contact information of public employees is inappropriate. "A name and work telephone number is not personal or intimate information, such as a home address or a social security number, that normally would be considered protected information under FOIA Exemption 6." *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 257 (D.D.C. 2005). In *Leadership Conference*, the district court rejected the DOJ's invocation of Exemption 6 to withhold the names and work telephone numbers of Justice Department paralegals. Here, the Government attempts to redact the same information for virtually all federal and state government employees mentioned in the records. *See* SMF ¶¶ 33, 34, 37 (redacting names of FBI Special Agents, support personnel, non-FBI federal government personnel, and local law enforcement personnel). The Government's blanket assertions that disclosure of their names would constitute an unwarranted invasion of personal privacy are insufficient, and the Government fails to establish that government employees have any privacy interest, whatsoever, in the fact of their employment by a government agency—information the Government has redacted from email fields pursuant to Exemptions 6 and 7(C).

Given the minimal privacy interest at stake here, the public interest in disclosure of these public employees' identifying information tips the scale in favor of disclosure. *Nation Magazine, Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 893-94 (D.C. Cir. 1995). Even if the government employees whose identities have been protected had privacy interests in their names, offices, and/or work telephone numbers, the public has a strong interest in obtaining this information that would outweigh that privacy interest. The public interest in this information is particularly acute because it pertains to "substantive law enforcement policy." *Reporters*

Comm., 489 U.S. at 766 n. 18. The FOIA Requests at issue in this case pertain to a matter of substantial public concern: the FBI's practice of impersonating members of the news media in connection with criminal investigations. The records sought by Plaintiffs will inform the public as to whether the FBI followed its own internal guidelines in the Seattle case and in other cases where the FBI has posed as a member of the news media. They "are a far cry from individual tax returns or applications for public relief." *Steinberg v. U.S. Dep't of Justice*, 179 F.R.D. 366, 370 (D.D.C. 1998), *aff'd sub nom*. *Steinberg v. Dep't of Justice*, No. 98-5465, 1999 WL 1215779 (D.C. Cir. Nov. 5, 1999). The names of government employees is not information that should be redacted from the records sought by Plaintiffs under Exemptions 6 or 7(C).

G. The Government fails to justify its withholdings under Exemption 7(E).

The Government has also failed to meet its burden to show that it has properly withheld information pursuant to Exemption 7(E). Under FOIA, agencies may withhold information that would disclose "techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). Defendants have relied on this provision to withhold six broad categories of information: (1) "operational directives," (2) "undercover operation," (3) "internal FBI secure fax number, email or IP address, Intranet/Web address," (4) "sensitive investigative techniques and procedures, including the deployment of computer and internet protocol address verifier ('CIPAV')," (5) "targets of pen registers/trap and trace devices," and (6) "collection and analysis of information." SMF ¶¶ 39–44.

1. The Government may not withhold information from FBI internal guidelines and policies.

For category (b)(7)(E)-1, the Government asserts that it has withheld only information contained in its internal guides, specifically its Domestic Investigations and Operations Guide, Field Guides, its Manual of Administrative Operations and Procedures, and its Manual of Investigative Operations Guidelines. Hardy Decl. ¶ 96.[12]

As an initial matter, the Hardy Declaration overlooks the fact that the Government has also asserted this exemption as a basis for withholding an entire page from one of the two "Situation Action Background" documents generated in 2014 in response to news coverage of the FBI's impersonation of the AP. *See* Townsend Decl. ¶ 28, Ex. S. The Government does not address or explain its invocation of Exemption 7(E) with respect to the "Situation Action Background."

As to the Government's assertion of Exemption 7(E) to withhold portions of its internal guidelines and policies regarding impersonation of the news media, the Government's conclusory claim that all of its withholdings comprise both techniques *and* procedures elides an important statutory distinction between these categories. Exemption 7(E) protects guidelines from disclosure *only* "if [their] disclosure could reasonably be expected to risk circumvention of the law." *Labow v. U.S. Dep't of Justice*, 66 F. Supp. 3d 104, 126 (D.D.C. 2014) (quoting *Pub. Emps. for Envtl. Responsibility v. U.S. Section of Int'l Boundary & Water Comm.*, 839 F.Supp.2d 304, 327 (D.D.C. 2012). In order to justify withholding information from agency guidelines, the Government must show that release would "create a risk of circumvention of the law," and its assertions fail to meet that burden here. *PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 251 (D.C.

[12] *See* RCFP-178, 179, 181, 186, 192, 194-196, 199, 204-205, 208, 210-211, 213, 218, 247-248, 250, 253-255, and 257-267.

Cir. 1993) (approving FBI's withholdings of portions of law enforcement manuals based on "the specificity of the affidavit and the limited amount of information withheld").

In sum, the Government has failed to justify its contention that releasing the withheld portions of its internal policies and guidelines that describe the circumstances under which agency employees may or may not impersonate the news media would "not only provide sensitive, unknown investigative techniques, it would also reveal sensitive unknown uses of these specific techniques and procedures." Hardy Decl. ¶ 96. Because the FBI has failed to make such a showing, or even to describe the withheld contents of those guidelines in general terms, its contention that release "might increase the risk that a law will be violated" is unsupported and insufficient to justify summary judgment on the Government's behalf. *Pub. Employees for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mexico*, 740 F.3d 195, 205 (D.C. Cir. 2014) (citations and quotation marks omitted).

2. The Government has not justified its withholding of information pertaining to "undercover operations."

Likewise, the Government has failed to provide adequate information to assess the propriety of its withholdings under category (b)(7)(E)-2. SMF ¶ 40. As discussed above, the FBI has withheld 38 pages in their entirety under this claimed exemption. *See* RCFP-52, 55-61, 65-75, 114-115, 130-32, and 139-153. As justification for withholding this information, the FBI asserts only that all of these withheld material include "non-public details" the release of which "could have devastating operational consequences and would jeopardize future use of undercover operations by the FBI in similar cases or under similar circumstances." Hardy Decl. ¶ 97. The Government provides no information specific to any of the 38 pages it has withheld, and nothing to support a finding that any of the so-called "non-public details" it refers to describe "investigative techniques and procedures generally unknown to the public." *See Malloy v. U.S.*

Dep't of Justice, 457 F. Supp. 543, 545 (D.D.C. 1978) ("The Conference Report discussion of Exemption 7(E), which was enacted as part of the 1974 FOIA amendments, indicates that the exemption extends to investigative techniques and procedures generally unknown to the public."); *see also Labow*, 66 F. Supp. 3d at 127 n.15 (discussing cases). Nor does it make any attempt to tether any particular withheld information to its generalized, speculative claim that release "could have devastating operational consequences" or "jeopardize future use of undercover operations . . . ." The Government has thus failed to meet its burden to show that this category of information is properly exempt under FOIA.

3. The Government has not justified its withholding of information pertaining to the deployment of CIPAV.

The Government has also failed to meet its burden concerning the withholding of information related to the deployment of CIPAV. SMF ¶ 42. In addition to the many redactions the Government has made to records it asserts fall within this category, the FBI has also withheld three pages in their entirety, which it fails to describe, on the ground that they contain information about CIPAV deployment. *See* Townsend Decl. ¶ 29. Although the Government asserts that "the specific details concerning the deployment of CIPAV are not well-known," there is, in fact, a great deal of information about this technology that is publicly known, in part because of the FBI's earlier FOIA disclosures to EFF. *See* SMF ¶ 65.

Based on those disclosures, EFF has reported that CIPAV technology permits the FBI to collect information—including IP addresses, Media Access Control (MAC) addresses, the logged-in username, and a list of the programs running, among other things—about a target computer. *See id.* Moreover, the documents make clear that the FBI may seek to deploy the CIPAV through a messaging system or a link, like the one used in the Seattle case. *See* SMF ¶ 66. Particularly in light of the fact that the FBI's CIPAV capabilities have been the subject of

prior FBI disclosures and in-depth reporting by the media and others, the Government has failed to demonstrate how release of the specific information it is withholding in response to Plaintiffs' FOIA Requests would create a risk of circumvention of the law with respect to investigations that use CIPAV technology. Given the Government's failure to even acknowledge, let alone distinguish, the extensive information about CIPAV technology that is already known to the public, its bare-bones showing fails to demonstrate that the information it is withholding is properly exempt under FOIA.

4. The Government has not justified its withholding of information pertaining to pen registers and trap and trace devices.

The FBI has also asserted that it has withheld a category of material—category (b)(7)(E)-6—on the grounds that the material contains "non-public details about targets of FBI pen registers/trap and trace devices." This assertion is unsupported because, as discussed above in Section 2.D, *supra*, in relation to Exemption 3, there was no pen register or trap and trace device at issue in the Seattle case—the only instance of FBI impersonation of the news media that the Government has released documents relating to. As discussed above, in the Seattle case, the Government applied for—and was granted—a search warrant to deploy a CIPAV. *See* Townsend Decl. ¶¶ 12-13, Ex. K & L. Accordingly, the Government's attempt to withhold material about the Seattle incident on the ground that it concerns "targets of FBI pen registers/trap and trap devices" is unjustified.

5. The Government has not justified its withholding of material pertaining to the FBI's collection and analysis of information.

Finally, the Government's showing with respect to its category (b)(7)(E)-7 is similarly deficient. The Hardy Declaration offers only generic assertions purporting to justify the Government's assertion of Exemption 7(E) to protect "techniques and procedures the FBI uses to collect and analyze information in connection with both criminal and national security

investigations." Hardy Decl. ¶ 102. In addition to its many redactions on this basis, the Government has also withheld twenty pages in their entirety, yet has provided no information about that withheld material. *See* Townsend Decl. ¶ 29. The mere assertion that a document contains "sensitive information," in the absence of any description of the type of document it is, or its author, or the date it was created, is insufficient as a matter of law to "demonstrate logically how the release of the requested information might create a risk of circumvention of the law." *Blackwell v. F.B.I.*, 646 F.3d 37, 42 (D.C. Cir. 2011) (quoting *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1194 (D.C. Cir. 2009)).

III. Plaintiffs are entitled to summary judgment in their favor as to the Government's improper withholding of records and portions thereof.

The Government's failure to justify its withholding of 59 pages of records, in their entirety, as well as portions of 103 pages of additional records responsive to Plaintiffs' FOIA Requests forecloses summary judgment in the Government's favor. Indeed, because FOIA places the "burden on the agency to sustain its action," 5 U.S.C. § 552(a)(4)(B), the Government's failure to do so, *alone,* entitles Plaintiffs to summary judgment as to the impropriety of the Government's withholdings.

Plaintiffs are mindful, however, that notwithstanding the Government's failure to support its claims of exemption the Court may, in its discretion, afford the Government another opportunity to attempt to do so, or may "issue any other appropriate order," Fed. R. Civ. P. 56(e), before granting summary judgment in favor of Plaintiffs. Accordingly, through their concurrently filed Motion for *In Camera* Review and/or Other Appropriate Relief, Plaintiffs ask that the Court enter an order compelling the Government to furnish unredacted copies of certain withheld material to the Court for *in camera* inspection. 5 U.S.C. § 552(a)(4)(B) (stating that the

Court "may examine the contents" of withheld records "*in camera* to determine whether such records or any part thereof" are exempt from disclosure under FOIA).

As set forth in detail in Plaintiffs' concurrently filed Motion, because of the Government's refusal to provide, *inter alia*, a "useful description" of the material it has withheld, *Oglesby II*, 79 F.3d at 1180, and a separate, itemized, adequately detailed justification for each withholding, *Vaughn*, 484 F.2d at 827, Plaintiffs' ability to affirmatively challenge the Government's redactions and other withholdings has been significantly impaired. The limited *in camera* review requested by Plaintiffs will help correct that imbalance, and assist the Court in making a *de novo* determination as to whether, among other things, the Government has failed to fulfill its obligation to release "any reasonably segregable portion" of the 59 pages of records that it has withheld in full from Plaintiffs. *Oglesby II*, 79 F.3d at 1176; *see also supra* p. 26. *In camera* review is thus appropriate here, and may aid the Court in ruling on Plaintiffs' Cross-Motion for Summary Judgment and/or Partial Summary Judgment.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment should be denied, and the Court should enter summary judgment and/or partial summary judgment in favor of Plaintiffs as to the (1) inadequacy of the Government's search for records responsive to Plaintiffs' FOIA Requests and (2) the Government's improper withholding of responsive records, in whole and in part, from Plaintiffs.

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Respectfully submitted,

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