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-01392 (RJL)
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION and UNITED STATES DEPARTMENT OF JUSTICE, Defendants.	)	Civil Action No. 18-cv-00345 (RJL)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Federal Bureau of Investigation ("FBI") and U.S. Department of Justice ("DOJ") (together, "Defendants") respectfully move for summary judgment in these consolidated cases brought by the Reporters Committee for Freedom of the Press ("RCFP") and the Associated Press ("AP") (together, "Plaintiffs") under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

The Court previously granted summary judgment to Defendants in the 15-1392 matter in *RCFP v. FBI*, 236 F. Supp. 3d 268 (D.D.C. 2017). While the D.C. Circuit reversed and remanded on several narrow issues pertaining to the adequacy of Defendants' search, Defendants addressed those issues on remand, and Plaintiffs informed defense counsel in February 2019 that they do not intend to challenge the adequacy of the search with respect to either the 15-1392 matter or the 18-345 matter.

Defense counsel understands that Plaintiffs intend to challenge certain of Defendants' redactions and withholdings with respect to records produced in both cases. Yet in the 15-1392 matter, the Court previously upheld *all* of Defendants' withholdings, and Plaintiffs did not challenge *any* of Defendants' withholdings on appeal. Under the doctrines of law of the case and issue preclusion, Plaintiffs should be precluded from relitigating any matters that this Court previously decided and that the D.C. Circuit did not address. Regardless, Defendants' withholdings are supported by a thorough agency declaration and are eminently reasonable. The Court should enter judgment in Defendants' favor.

BACKGROUND AND PROCEDURAL HISTORY

I. Initial Proceedings in 15-1392

By letter dated October 31, 2014, RCFP submitted a FOIA request to the FBI seeking "copies of 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)." Compl. Ex. B at 1, ECF No. 1-2.[1] In a separate letter that same day, RCFP submitted another FOIA request to the FBI seeking

> 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.

Compl. Ex. C at 1, ECF No. 1-3. By letter dated November 6, 2014, the AP submitted a similar FOIA request to the FBI seeking three categories of records:

- 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.

- 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.

- 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.

Compl. Ex. A at 1, ECF No. 1-1.[2] The FBI acknowledged receipt of RCFP's FOIA requests in two e-mails sent on November 3, 2014, *see* Declaration of David M. Hardy ("First Hardy Decl.")

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[1] Except where otherwise noted, all ECF references are to the 15-1392 docket.

[2] As this Court noted in its previous summary judgment opinion, these FOIA requests by RCFP and the AP "were sparked by reports that the FBI had applied for and was granted a search

Ex. M at 20, 23, ECF No. 18-4 at 20, 23; and it acknowledged receipt of the AP's request by letter dated December 1, 2014, *see* First Hardy Decl. Ex. B at 7, ECF No. 18-2 at 7.

Some months later, Plaintiffs brought an action alleging that Defendants violated the FOIA by (1) failing to comply with statutory deadlines, (2) wrongfully withholding agency records, and (3) failing to conduct a reasonable search.[3] *See* Compl. ¶¶ 58–74, ECF No. 1. After litigation commenced, the FBI completed its FOIA search and processing efforts, relying primarily on targeted searches of the Operational Technology Division ("OTD") for "Group 1" records (*i.e.*, those records responsive to RCFP's request for materials concerning the FBI's use of news media links to install malware) and targeted searches of a variety of components for "Group 2" records (*i.e.*, those records responsive to the other RCFP and AP requests). *See* First Hardy Decl. ¶¶ 37–38, 42–43. The FBI ultimately processed 267 pages of records and released 186 pages in full or in part, with redactions pursuant to FOIA Exemptions 1, 3, 5, 6, 7(C), and 7(E). *See* First Hardy Decl. ¶ 32. The FBI twice supplemented its production, first by re-releasing 26 pages in which it applied additional exemptions to withheld information and lifted certain redactions, and second by re-releasing 4 pages in which it lifted certain redactions. *See id.* ¶ 33; Second Declaration of David M. Hardy ("Second Hardy Decl.") ¶ 28, ECF No. 22-2. The parties then cross-moved for summary judgment.

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warrant authorizing it to deliver a Computer Internet Protocol Address Verifier ('CIPAV') to a juvenile suspected of issuing anonymous bomb threats to Timberline High School, located near Seattle, Washington, and that the FBI executed this warrant by creating a fake news website to deliver the CIPAV." *RCFP*, 236 F. Supp. 3d at 272.

[3] Plaintiffs also included a count concerning RCFP's request for news media status and fee waivers, but that count was mooted out by Defendants' subsequent representation that they would not assess any fees against either RCFP or the AP. *See* First Hardy Decl. ¶ 10.

In a Memorandum Opinion and Order dated February 22, 2017, this Court granted Defendants' summary judgment motion in full. The Court first held that "the FBI . . . carried its burden to show that its search was adequate." *RCFP*, 236 F. Supp. 3d at 276. Next, the Court discussed each of the FBI's categories of withholdings, finding that the FBI had properly justified those withholdings. *See id.* at 277 (Exemption 1), (Exemption 3), *id.* at 278 (Exemption 5), *id.* at 278–79 (Exemptions 6/7(C) and 7(E)). Finally, the Court ruled: "Upon "review of the FBI's declarations and *Vaughn* index, I conclude that the Bureau has fulfilled its duty to be 'as specific as possible without actually disclosing information that deserves protection.'" *Id.* at 280 (citation omitted).

II. Appellate Proceedings

Plaintiffs in the 15-1392 matter appealed, challenging *only* this Court's ruling as to the adequacy of Defendants' search. On December 15, 2017, the D.C. Circuit reversed and remanded. *Rep. Comm. For Freedom of the Press v. FBI*, 877 F.3d 399 (D.C. Cir. 2017). In its opinion, the D.C. Circuit identified three deficiencies with Defendants' prior search efforts and explanation of those efforts. First, the appellate court found that Defendants failed to explain their targeted search methodology, writing that the First and Second Hardy Declarations "are utterly silent as to which files or record systems were examined in connection with the targeted searches and how any such searches were conducted, including, where relevant, which search terms were used to hunt within electronically stored materials." *RCFP*, 877 F.3d at 404. Second, the appellate court found that Defendants failed to justify their decision to conduct a narrow search of the OTD for Group 1 records. The D.C. Circuit explained that

> given the FBI's determination that certain divisions were "reasonably likely" to hold records relating to a specific instance where media impersonation was used to deliver malware [*i.e.*, one of the Group 2 requests], its failure to search these very same divisions for records relating to other such instances leaves us unable to conclude, barring some explanation, that the FBI searched for the latter

> records in a manner "reasonably expected to produce the information requested."

Id. at 406 (citation omitted). Third, the D.C. Circuit ruled that the "record unmistakably establishes that the FBI Director's Office was intimately involved in coordinating the Bureau's response" to the Timberline controversy and that, accordingly, Defendants should have searched for records located in the Director's office. *Id.* at 407. At the same time, the D.C. Circuit rejected Plaintiffs' arguments that Defendants should have searched for records located in regional offices other than the Seattle Field Office and that a September 2016 report by the DOJ Office of the Inspector General ("OIG") should have placed Defendants on notice of additional, unsearched offices that may have held responsive information within the applicable date range. *Id.* The Court also reminded the parties that the mere fact that the OIG report referenced a handful of Timberline-related documents that Defendants had not produced to Plaintiffs did not show that Defendants had violated the FOIA: "That a few responsive documents may have slipped through the cracks does not, without more, call into question the search's overall adequacy." *Id.* at 408.

III. Remand Proceedings in 15-1392; Initial Proceedings in 18-345

Shortly before the D.C. Circuit entered its ruling in the 15-1392 matter, RCFP submitted a new FOIA request to the FBI, seeking six categories of records that partially overlap with the requests at issue in 15-1392:

- All records consisting of, reflecting, referencing, or discussing 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") since November 1, 2014.

- All records consisting of or reflecting the FBI's guidelines and policies concerning undercover operations or activities in which a person may act as a member of the news media, since November 1, 2014.

- The FBI's Interim Policy Notice (PN) 0907N, adopted on or about June 7, 2016, and titled "Undercover Activities and Operations—Posing as a Member of the News Media or Documentary Film Crew" (the "Interim Policy Notice"). . . .
- The "comments" provided by the FBI to the Department of Justice Office of the Inspector General in response to a draft of the IG Report . . . .
- Any and all records consisting of, referencing, or discussing FBI efforts to inform its employees about the Interim Policy Notice.
- Any and all revisions, updates, or modifications to the Interim Policy Notice since June 8, 2016.

Compl. Ex. A at 1-2, *RCFP v. FBI*, No. 18-345 (D.D.C.), ECF No. 1-1. RCFP sued Defendants on February 14, 2018, in relation to this new request, alleging that the FBI and DOJ violated the FOIA by failing to make a determination on RCFP's request within 20 days (Count I), withholding responsive records (Count II), and failing to conduct a search reasonably calculated to identify responsive records (Count III). Compl. at 10–12, *RCFP v. FBI*, No. 18-345 (D.D.C.), ECF No. 1. Thereafter, RCFP filed a Notice of Designation of Related Civil Case on both this docket and the new Civil Action No. 18-345 docket. On March 9, 2018, RCFP moved to consolidate the two actions, *see* ECF No. 33. Defendants opposed consolidation, *see* ECF No. 34, but this Court granted the consolidation motion in a February 11, 2019, Minute Order. Pursuant to that Order, Defendants are addressing all remaining issues across both cases in this consolidated summary judgment brief and accompanying agency declaration.

During the summer of 2018, the parties met and conferred frequently about the FOIA requests in both actions. Defendants planned and conducted a simultaneous search to both address the deficiencies the D.C. Circuit had identified in the 15-1392 matter and locate records responsive to the request in the 18-345 matter. Defendants released responsive non-exempt records on July 13, 2018; August 15, 2018; September 14, 2018; January 10, 2019; May 10, 2019; and May 30, 2019. Third Decl. of David M. Hardy ("Third Hardy Decl.") ¶¶ 18–24, Ex. L. The FBI consulted

with DOJ's Office of the Inspector General ("OIG") regarding two sets of potentially responsive records, some of which were withheld in part or in full. Third Hardy Decl. ¶¶ 20, 24, 82; *see also* Decl. of Deborah M. Waller ("Waller Decl.") ¶ ¶ 3–8, Ex. M. The FBI also consulted with the Central Intelligence Agency ("CIA") regarding one record, which was ultimately released in full. Third Hardy Decl. ¶ 83. In total, Defendants released 324 pages, either in full or in part.[4] Third Hardy Decl. ¶¶ 5, 86.

Having satisfied their FOIA obligations, Defendants now move for summary judgment in both cases. Because the parties have reached an agreement as to the adequacy of Defendants' search, Defendants do not further address their search methodology in this brief but instead focus on their withholdings pursuant to FOIA exemptions, some number of which Defendants understand Plaintiffs are challenging. As a threshold matter, the Court need not even address the merits of most of those withholdings given the Court's prior rulings on Defendants' withholdings and Plaintiffs' failure to challenge those rulings on appeal. Pursuant to the doctrines of law of the case and issue preclusion, the Court should decline to reconsider its prior reasoning now. But even if the Court were to revisit its prior rulings, the attached Third Declaration of David M. Hardy, Index of Withholdings ("Index"), and Declaration of Deborah M. Waller show that Defendants properly invoked Exemptions 1, 3, 5, 6, 7(C), and 7(E), and adequately explained why those exemptions apply to the disputed records. *See* Exs. K–M. The Court should grant in full Defendants' motion for summary judgment.

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[4] Defendants also informed RCFP that portions of the FBI's Domestic Investigations and Operations Guide ("DIOG") were responsive to RCFP's FOIA request. *See* Hardy Decl. ¶ 19 n.3. Because the FBI had determined, separately from this litigation, to publicly release the DIOG with appropriate redactions, and to avoid the unnecessary cost of duplicate processing, the FBI directed RCFP to that section of the FBI's FOIA library (the "Vault") where the publicly available DIOG could be located. Third Hardy Decl. ¶ 19.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine dispute as to any material fact and the moving party is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Courts review an agency's response to a FOIA request *de novo* . . . and FOIA cases typically and appropriately are decided on motions for summary judgment." *Campbell v. DOJ*, 133 F. Supp. 3d 58, 63 (D.D.C. 2015) (citations and internal quotation marks omitted).

"To prevail on summary judgment, an agency must demonstrate that it conducted a search reasonably designed to uncover responsive documents, that any materials withheld fall into a FOIA statutory exemption, and that it disclosed all reasonably segregable, nonexempt material." *Id.* at 64. An agency may carry its burden by "submitting appropriate declarations and, where necessary, an index of the information withheld." *Am. Immigration Lawyer's Ass'n* ("*AILA") v. DHS*, 852 F. Supp. 2d 66, 72 (D.D.C. 2012). If the agency's declaration describes its rationale for withholding information with "specific detail, demonstrates that the information withheld logically falls within the claimed exemption, and is not contradicted by contrary evidence in the record or by evidence of the agency's bad faith, then summary judgment is warranted on the basis of the [declaration] alone." *ACLU v. DOD*, 628 F.3d 612, 619 (D.C. Cir. 2011). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Wolf v. CIA*, 473 F.3d 370, 374–75 (D.C. Cir. 2007) (citation omitted). As the Supreme Court has repeatedly noted, "FOIA expressly recognizes that 'important interests are served by its exemptions,' and 'those exemptions are as much a part of FOIA's purposes and policies as the statute's disclosure requirement.'" *Food Mktg. Inst. v. Argus Leader Media*, — S. Ct. —, 18-481, 2019 WL 2570624, at *6 (U.S. June 24, 2019) (internal citations and alterations omitted); *see also John Doe Agency*

v. John Doe Corp., 493 U.S. 146, 152 (1989) ("FOIA exemptions are "intended to have meaningful reach and application.").

ARGUMENT

I. Defendants Have Carried Their Burden to Establish the Sufficiency of Their Withholdings in Both Cases.

A. Because the D.C. Circuit Did Not Disturb This Court's Summary Judgment Rulings on Defendants' Withholdings, the Law of the Case Doctrine Counsels Against Any Reconsideration of Those Rulings in the 15-1392 Matter.

Following the first round of summary judgment briefing in the 15-1392 matter, this Court upheld all of the FBI's withholdings pursuant to FOIA Exemptions 1, 3, 5, 6, 7(C), and 7(E). Plaintiffs did not seek appellate review of that aspect of the Court's decision. *See RCFP*, 877 F.3d at 402 ("No exemption is at issue in this appeal; rather, the lone issue before us is whether the FBI responded to the Reporters Committee's FOIA requests by conducting a search adequate to support summary judgment in the government's favor."); Br. for Pls.-Appellants at 14, No. 17-5042 (D.C. Cir. June 26, 2017) ("Plaintiffs-Appellants limit this appeal to challenging Judge Leon's determination that the FBI conducted an adequate search for records responsive to their requests for agency records under FOIA."). Yet Defendants understand that Plaintiffs intend to challenge some unspecified number of the FBI's withholdings in its supplemental production pursuant to these same statutory exemptions, most of which are based on the same criteria and rationales that this Court previously found sufficient. The Court should not permit Plaintiffs to relitigate issues the Court has already decided, particularly because, to date, Plaintiffs have identified no defect in the Court's prior analysis, and the D.C. Circuit's mandate does not require or invite the Court to undertake such reconsideration.

Under the law of the case doctrine, "the same issue presented a second time in the same case in the same court should lead to the same result." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393

(D.C. Cir. 1996) (en banc); *see Overseas Shipholding Grp., Inc. v. Skinner*, 767 F. Supp. 287, 296 (D.D.C. 1991) ("[I]t is hornbook law that the law of the case doctrine operates as a form of issue preclusion within the same case." (emphasis omitted)); *Singh v. George Wash. Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005) ("[W]here litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." (citations omitted)). The doctrine applies with full force in the FOIA context. *E.g.*, *Yunes v. DOJ*, 263 F. Supp. 2d 82, 88 (D.D.C. 2017); *Charles v. Office of the Armed Forces Med. Examiner*, 979 F. Supp. 3d 35, 41–42 (D.D.C. 2013).

As particularly relevant here, the law of the case doctrine "further states that 'a legal decision made at one stage of litigation,' which goes 'unchallenged in a subsequent appeal when the opportunity to do so existed' will be 'the law of the case for future stages of the same litigation." *Sturdza v. UAE*, No. 98-2051 (BJR), 2013 WL 12309863, at *3 (D.D.C. July 16, 2013) (quoting *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987)); *accord United States v. Burroughs*, 810 F.3d 833, 838 (D.C. Cir. 2016) ("the parties are deemed to have waived the right to challenge that [previously unchallenged] decision at a later time" (citations omitted)); *United States v. Hylton*, 294 F.3d 130, 135 (D.C. Cir. 2002) (same); *Wesby v. Dist. of Columbia*, 189 F. Supp. 3d 31, 36 (D.D.C. 2016) (same).

Because Plaintiffs could have appealed this Court's rulings with respect to Defendants' withholdings but chose not to do so, the law of the case doctrine should bar Plaintiffs from taking another bite at the apple now. As the Third Hardy Declaration explains, the vast majority of

withholdings in Defendants' supplemental production are supported by the same rationales that supported the withholdings in the earlier proceedings. Third Hardy Decl. ¶ 31.[5]

This Court accordingly need not address the merits of any withholdings that are supported by the same rationales the Court previously upheld, but should instead rule summarily in Defendants' favor as to all such withholdings.

B. Because the Court Upheld Defendants' Withholdings in the 15-1392 Matter, the Court Should Preclude RCFP from Effectively Relitigating the Propriety of Those Withholdings in the Related 18-345 Matter.

As the D.C. Circuit recognized over thirty years ago, "Courts today are having difficulty giving a litigant one day in court. To allow that litigant a second day is a luxury that cannot be afforded." *Nat'l Treasury Emps. Union v. IRS*, 765 F.2d 1174, 1177 (D.C. Cir. 1985) (Ginsburg, J.) (citation omitted). The problem has not resolved in the intervening decades. *Compare Federal Judicial Caseload Statistics 2018*, U.S. Courts, http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018 (for the year ending March 31, 2018, over 277,000 civil cases were filed in U.S. district courts), *with Judicial Vacancies*, U.S. Courts, http://www.uscourts.gov/judges-judgeships/judicial-vacancies (last updated June 25, 2019) (accounting for vacancies, just 566 district judges are in service). The doctrine of issue preclusion, also known as collateral estoppel, is one mechanism courts use to maintain control of their expansive dockets. Issue preclusion bars parties from relitigating issues previously decided in a case involving the same parties: "The Supreme Court has defined issue preclusion to mean that

[5] Defendants acknowledge that a handful of withholdings—principally those coded as "(b)(7)(E)-3," "(b)(7)(E)-8," "(b)(7)(E)-9," and "(b)(7)(E)-10"—are supported by explanations that the Court did not consider in the earlier proceedings, Third Hardy Decl. ¶ 31, and Defendants do not contend that such withholdings are covered by the law of the case. Rather, these withholdings should be upheld on their merits, as discussed below.

once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Landmark Legal Found. v. DOL*, 278 F. Supp. 3d 420, 426 (D.D.C. 2017) (citations and internal quotation marks omitted).

For issue preclusion to apply, (1) "the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case"; (2) "the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case"; and (3) "preclusion in the second case must not work a basic unfairness to the party bound by the first determination." *Martin v. DOJ*, 488 F.3d 446, 454 (D.C. Cir. 2007) (quoting *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992)). The party invoking issue preclusion "bears the burden of establishing that the conditions for its application have been satisfied." *In re Subpoena Duces Tecum*, 439 F.3d 740, 743 (D.C. Cir. 2006).

Courts routinely enforce issue preclusion in the FOIA context. *See, e.g.*, *Martin*, 488 F.3d at 455 (affirming district court's decision precluding plaintiff from relitigating agency's withholding of unredacted report); *Roman v. Nat'l Reconnaissance Office*, 952 F. Supp. 2d 159, 164-65 (D.D.C. 2013) (precluding plaintiff from relitigating adequacy of search and withholding of documents that were identical to documents at issue in earlier FOIA case); *LaRouche v. U.S. Dep't of Treasury*, 112 F. Supp. 2d 48, 55–56 (D.D.C. 2000) (precluding plaintiff from relitigating applicability of Exemptions 3 and 5 to Special Agent Report and Criminal Reference Letter).

The elements of issue preclusion are readily satisfied here. The defendants in the 15-1392 and 18-345 cases (DOJ and the FBI) are the same; and the sole plaintiff in the 18-345 case, RCFP, was one of two plaintiffs in the 15-1392 case. The question whether the FBI has properly invoked FOIA Exemptions 1, 3, 5, 6, 7(C), and 7(E) was raised in the earlier proceeding, decided by the

Court in the Government's favor, and essential to the Court's judgment. *See RCFP*, 236 F. Supp. 3d at 268 ("I will defer to the FBI's predictive judgment regarding . . . classified material and will not review it *in camera* or order it disclosed."), *rev'd and remanded on other grounds*, 877 F.3d 399 (D.C. Cir. 2017); *id.* at 277–78 ("I am satisfied that the Bureau properly withheld portions of the responsive records under the National Security Act of 1947."); *id.* at 278 ("Exemption 5 incorporates the traditional privileges that the Government could assert in civil litigation against a private litigant including the deliberative process privilege and the government attorney-client privilege. . . . I conclude that both exemptions apply." (citations and internal quotation marks omitted)); *id.* at 279 ("In the absence of a legitimate public interest, the private interest in avoiding harassment or violence tilts the scales. The Bureau properly withheld this information." (citations and internal quotation marks omitted)); *id.* at 279 ("I find that the agency has justified its withholdings because it has logically explain[ed] how the information could help criminals circumvent the law." (alteration in original) (citation and internal quotation marks omitted)).

As the Hardy Declaration explains, the overwhelming majority of withholdings in the 18-345 litigation are materially similar to and supported by the same rationales that supported the withholdings in the 15-1392 litigation, which the Court found adequate. This should come as no surprise, given the similarity between the requests. *Compare* Compl. Exs. A, B, C *with* Compl. Ex. A at 1-2, *RCFP v. FBI*, No. 18-345 (D.D.C.), ECF No. 1-1.

Further, there is no indication that issue preclusion would work any kind of unfairness on RCFP, which had a full opportunity to litigate its challenges to the FBI's assertions of FOIA exemptions. RCFP itself has acknowledged the overlap between the FOIA requests in these two cases. *See* Mot. to Consolidate at 2, *RCFP v. FBI*, No. 18-345 (D.D.C.), ECF No. 11 ("[T]he FOIA request at issue in Civil Action No. 18-00345 seeks essentially the same categories of records as

the FOIA requests at issue in the earlier filed Civil Action No. 15-01392; in light of the search 'cut-off' dates previously used by Defendants, however, the request at issue in Civil Action No. 18-00345 seeks records from a more recent time period."). The requests need not have been identical in all respects for issue preclusion to apply. *E.g.*, *Nat'l Treasury Emps. Union*, 765 F.2d at 1177-78 (enforcing issue preclusion where requests involved different years); *Landmark Legal Found.*, 278 F. Supp. 3d at 428 (enforcing issue preclusion where requests were directed to different agencies).[6]

To be sure, a handful of withholdings—principally those coded as "(b)(7)(E)-3" and "(b)(7)(E)-10"—are supported by explanations that the Court did not review in the prior litigation, and the Government does not assert issue preclusion with respect to these withholdings. (The withholdings should instead be upheld on their merits, as discussed below.) But for the vast majority of withholdings, this Court has already decided that the FBI properly relied on various FOIA exemptions and adequately justified its invocation of those exemptions. The Court need not and should not reconsider its prior rulings.

C. Should the Court Reach the Merits, the Court Should Uphold Defendants' Reasonable Assertions of FOIA Exemptions 1, 3, 5, 6, 7(C), and 7(E).

The FOIA represents a balance struck by Congress "between the right of the public to know and the need of the Government to keep information in confidence." *John Doe Agency*, 493 U.S.

[6] By contrast, courts decline to enforce issue preclusion in FOIA cases where distinct issues are raised in subsequent proceedings. *See, e.g.*, *Hall v. CIA*, No. Civ.A. 04-00814 (HHK), 2005 WL 850379, at *3 (D.D.C. Apr. 13, 2005) ("While Hall previously sought records which overlap substantially with plaintiffs' request here, the 'issues presented' are not 'in substance the same' as the court addressed in the previous litigation. Before, Hall challenged the adequacy of CIA's search and the validity of the exemptions it cited in withholding or redacting specific documents; here, plaintiffs seek immediate production of documents and reductions or waivers of associated fees."). But here, where Plaintiffs essentially invite the Court to reconsider its prior evaluation of Defendants' justifications for their withholdings, issue preclusion should apply with full force.

at 152 (citation omitted). Congress recognized "that legitimate governmental and private interests could be harmed by release of certain types of information and provided nine specific exemptions under which disclosure could be refused." *FBI v. Abramson*, 456 U.S. 615, 621 (1982). Although these exemptions are to be "narrowly construed," *id.* at 630, courts must not fail to give them "meaningful reach and application," *John Doe Agency*, 493 U.S. at 152.

In these consolidated cases, much of the information withheld "implicat[es] national security, a uniquely executive purview." *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 926–27 (D.C. Cir. 2003) (noting that "both the Supreme Court and this Court have expressly recognized the propriety of deference to the executive in the context of FOIA claims which implicate national security"). The D.C. Circuit has "consistently deferred to executive affidavits predicting harm to the national security, and ha[s] found it unwise to undertake searching judicial review." *Id.* at 927; *see also Competitive Enter. Inst. v. U.S. Dep't of Treasury*, 319 F. Supp. 3d 410, 416 (D.D.C. 2018) (recognizing the "deference afforded to agencies in matters of national security"). Such judicial deference extends to all relevant exemptions "so long as the government's declarations raise legitimate concerns that disclosure would impair national security." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 928.

The Third Hardy Declaration and the Waller Declaration provide a thorough justification for all of the FBI's withholdings here. The index accompanying the Third Hardy Declaration organizes those withholdings using a coded list that identifies the categories of information withheld and the bases for withholdings. Courts have routinely accepted similar submissions from

the FBI and other agencies.[7] Defendants are entitled to summary judgment with respect to these withholdings, the details of which are explained further below.

1. FOIA Exemption 1

FOIA Exemption 1 protects from disclosure agency records that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Pursuant to section 1.1 of Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009), information may be classified if the following four conditions are met:

> (1) an original classification authority is classifying the information;
>
> (2) the information is owned by, produced by or for, or is under the control of the United States Government;
>
> (3) the information falls within one or more of the categories of information listed in section 1.4 of th[e] order;[8] and
>
> (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

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[7] *See, e.g.*, *Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007); *Keys v. DOJ*, 830 F.2d 337, 349-50 (D.C. Cir. 1987); *Citizens for Responsibility & Ethics in Wash. ("CREW") v. DOJ*, 822 F. Supp. 2d 12, 15 n.2 (D.D.C. 2011); *Amuso v. DOJ*, 600 F. Supp. 2d 78, 92 n.4 (D.D.C. 2009); *Queen v. Gonzales*, No. Civ. A. 96-1387 (JAR), 2005 WL 3204160, at *3 (D.D.C. Nov. 15, 2005).

[8] Section 1.4 in turn provides that information "shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security" and unless such information falls into one of the following categories: military plans/operations, foreign government information, intelligence activities and sources/methods, foreign relations and activities, scientific/technological/economic matters relating to the national security, government nuclear programs, vulnerabilities and capabilities of critical systems, or weapons of mass destruction.

Because courts "lack the expertise necessary to second-guess . . . agency opinions in the typical national security FOIA case," courts must "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record[s]." *ACLU*, 628 F.3d at 619 (citations omitted); *see also Rosenberg v. DOD*, 342 F. Supp. 3d 62, 82-83 (D.D.C. 2018) ("The Circuit has cautioned against 'undertak[ing] searching judicial review' when it comes to evaluating an agency's withholding of classified information, because 'the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse [e]ffects . . . might occur as a result of a particular classified record.' As such, to properly invoke Exemption 1, 'little proof or explanation is required [from the agency] beyond a plausible assertion that information is properly classified.'" (alterations in original) (citations omitted)).

Here, the FBI asserted Exemption 1 to protect information in two records (consisting of three pages) that were released in part. *See* Third Hardy Decl. ¶ 36; Index at 5, 20. The first record consists of an email dated October 31, 2014, which provided then-FBI official Ronald J. Yearwood with responses to the FBI Deputy Assistant Director's questions concerning the FBI's Timberline investigation. Third Hardy Decl. ¶ 36. The second record was attached to an email, *see* Index at 20, and the withheld information pertains to the FBI's National Security Undercover Operations Policy Implementation Guide (NSUOPG) that was provided to FBI personnel in preparation for an upcoming briefing, *see* Third Hardy Declaration ¶ 36; *see also* Index at 20. David M. Hardy, an original classification authority, personally and independently examined this withheld information and determined that (1) all procedural elements of Executive Order 13,526 were followed, Hardy Decl. ¶ 35; and (2) the classified information continues to warrant classification at the "Secret" level in accordance with Section 1.4(c) of Executive Order 13,526, Hardy Decl. ¶ 36, as "intelligence activities (including covert action), intelligence sources or methods, or

cryptology," the unauthorized disclosure information of which "could reasonably be expected to cause serious damage to the national security." Exec. Order No. 13,526, Classified National Security Information, 75 Fed. Reg. 707.

Because Defendants have complied with the procedural and substantive requirements of Executive Order 13,526 and have demonstrated their compliance through the Third Hardy Declaration, the Court should uphold the FBI's assertion of FOIA Exemption 1.

2. FOIA Exemption 3

FOIA Exemption 3 protects information that is "specifically exempted from disclosure" by a statute that either "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3).[9] "The D.C. Circuit has explained that 'Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage.'" *Nat'l Sec. Counselors v. CIA*, 320 F. Supp. 3d 200, 214–15 (D.D.C. 2018) (quoting *Morley v. CIA*, 508 F.3d 1108, 1126 (D.C. Cir. 2007)); *see also Larson v. U.S. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) (agency "need only show that the statute claimed is one of exemption as contemplated by Exemption 3 and that the withheld material falls within the statute").

Here, the FBI relies on Section 102A(i)(l) of the National Security Act of 1947 ("NSA"), as amended, 50 U.S.C. § 3024(i)(l) (applicable to those withholdings coded as "(b)(3)-1"). The NSA can qualify for protection under FOIA Exemption 3, as Plaintiffs themselves previously

[9] Statutes enacted after the date of enactment of the OPEN FOIA Act of 2009 must cite FOIA Exemption 3 to trigger its protections. 5 U.S.C. § 552(b)(3)(B).

acknowledged. *Elec. Privacy Info. Crt. ("EPIC") v. DOJ*, 296 F Supp. 3d 109, 120–21 (D.D.C. 2017) (Section 102A(i)(1) of NSA is qualifying statute); *see also* Mem. of Law in Opp'n to Defs.' Mot. for Summ. J. at 29 ("Pls.' First Summ. J. Mot."), ECF No. 19-1 ("Plaintiffs acknowledge that the statute[] cited by Defendants—50 U.S.C. § 3024(i)(1) . . .—may be properly invoked under Exemption 3 in appropriate circumstances . . . .").

Section 102A(i)(1) of the NSA requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1); *see CIA v. Sims*, 471 U.S. 159, 169 (1985) (the NSA vests the government with "broad authority to protect all sources of intelligence information from disclosure"). Section 102A(i)(2)(A) in turn provides that "the Director of National Intelligence shall establish and implement guidelines for the intelligence community" for the purposes of classification of information, access to and dissemination of intelligence, and proper removal of source information to facilitate dissemination of intelligence products. As one of 17 agencies that make up the intelligence community, the FBI is obligated to protect intelligence sources and methods. Here, the FBI applied Exemption 3 to the information it withheld under Exemption 1: to protect information in two pages attached to an email that were released in part that pertains to the FBI's National Security Undercover Operations Policy Implementation Guide (NSUOPG). *See* Third Hardy Declaration ¶ 43; Index at 20. The FBI determined that its intelligence sources and methods would be revealed if the withheld information was disclosed and, thus, that the NSA prohibited the agency from releasing the information. Third Hardy Decl. ¶ 44.

Because the FBI properly withheld information covered by Section 102A(i)(1) of the NSA, the Court should uphold Defendants' assertions of FOIA Exemption 3.

3. FOIA Exemption 5

FOIA Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency," 5 U.S.C. § 552(b)(5), *i.e.*, records that would ordinarily be protected by a privilege in civil discovery. Defendants have asserted Exemption 5 with respect to withholdings in 99 pages of responsive records pursuant to the deliberative process privilege.

The deliberative process privilege "allows the government to withhold documents and other materials that would reveal 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (citations omitted). "Two requirements are essential to the deliberative process privilege: the material must be predecisional and it must be deliberative." *Id.* Predecisional documents are those "generated 'before the adoption of an agency policy.'" *Pub. Emps. for Envtl. Responsibility v. EPA*, 288 F. Supp. 3d 15, 23 (D.D.C. 2017) (citations omitted). Deliberative documents are those that "reflect 'the give-and-take of the consultative process.'" *Id.* (citation omitted). The deliberative process privilege "does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *In re Sealed Case*, 121 F.3d at 737; *see also Wolfe v. HHS*, 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc) (while the fact/opinion distinction may offer a predictable rule of decision for most cases, in some circumstances, "even material that could be characterized as 'factual' would so expose the deliberative process that it must be covered by the privilege"). "The 'key question' in identifying 'deliberative' material is whether disclosure of the information would 'discourage candid discussion within the agency.'" *Access Reports v. DOJ*, 926 F.2d 1192, 1195 (D.C. Cir.

1991) (quoting *Dudman Commc'ns Corp. v. Dep't of Air Force*, 815 F.2d 1565, 1567–68 (D.C. Cir. 1987)).

The Third Hardy Declaration in combination with the Index and the Waller Declaration demonstrate that FBI properly withheld or redacted limited information pursuant to the deliberative process privilege. Of the nine records that were withheld in full, four were drafts, either of the Office of the Inspector General's report regarding the FBI's impersonation of a journalist in a criminal investigation, *see* Waller Decl. ¶ 14, or of PowerPoint slides about undercover investigations, *see* Third Hardy Decl. ¶ 50. The withheld draft OIG report contains predecisional information because the draft was preceded to the final OIG report. Waller Decl. ¶ 14. This withheld information is also deliberative because it reflects OIG's preliminary assessments regarding FBI's impersonation of a journalist in a criminal investigation and was circulated for the purposes of obtaining the FBI's input before finalization. *Id.* Meanwhile, the draft PowerPoint slides are predecisional because they are non-final drafts of a final PowerPoint presentation. Third Hardy Decl. ¶ 53. This information is also deliberative because the drafts were circulated to seek input from officials at the FBI before being finalized, *id.*, and were therefore "generated as part of a definable decision-making process." *D Gold Anti-Tr. Action Comm., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 762 F. Supp. 2d 123, 136 (D.D.C. 2011). Indeed, drafts "are commonly found exempt under the deliberative process exemption." *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 303 (D.D.C. 2007).

The FBI also withheld in full copies of blank/fillable forms that FBI personnel used to submit comments on the OIG draft report. Third Hardy Decl. ¶ 50. The withheld information is predecisional because it precedes OIG's final report. *Id.* ¶ 52. And the information is also deliberative because it reflects the subjective opinions and suggestions of FBI personnel that were

offered as part of OIG's process for coming to its final conclusions and recommendations about the FBI's impersonation of a journalist. *Id.*; *see Envtl. Integrity Project v. Small Bus. Admin.*, 125 F. Supp. 3d 173, 177 (D.D.C. 2015) (documents that reflect an entity's comments and suggestions for improvement regarding an agency's methodology and proposed action "are classic examples of the types of communications that the deliberative process privilege is designed to protect").

OIG also recommended that the FBI withhold in full a two-page memorandum written in August 2016 by the Inspector General that contained his preliminary conclusions and recommendations regarding the draft OIG report on the FBI's impersonation of a journalist in criminal investigation.[10] Waller Decl. ¶ 13; *see* Index at 4–5. The withheld memorandum is predecisional because it predates the OIG's final report, Waller Decl. ¶ 13, released in September 2016. The withheld information is also deliberative because it reflects substantive discussion between high-level DOJ officials regarding OIG's proposed conclusions and recommendations. *Id.* ¶ 18; *see also Envtl. Integrity Project v. Small Bus. Admin.*, 151 F. Supp. 3d 49, 56 (D.D.C. 2015).

Much of the information that was redacted from records released in part under Exemption 5, meanwhile, contains (1) the FBI's internal discussions regarding the FBI's policies and procedures that govern FBI's undercover operations, (2) an FBI official's preliminary assessment about next steps after having received a draft of the OIG report on FBI's impersonation of a journalist in a criminal investigation, and (3) discussions between high-level FBI officials

[10] OIG reviewed the same memorandum in a second time while consulting on a second set of potentially responsive records in this case and initially recommended that the document be withheld in full under Exemption 5; upon further review, OIG clarifies that the memorandum withheld under Exemption 5 as bates-numbered RCFP 822 and 23 is duplicative. Waller Decl. ¶ 17; *see also* Index at 25.

regarding potential responses to press inquiries about the FBI's handling of the Seattle Timberline case. Third Hardy Decl. ¶¶ 50. These discussions are predecisional because they respectively precede (1) the FBI's changes to the policies and procedures governing certain undercover operations and implementation of those changes; (2) the OIG's final report, and (3) the FBI's decision about whether and how to respond to certain press inquiries. Third Hardy Decl. ¶¶ 51–54. The redacted information is deliberative because it "reflect[s] the give-and-take of the consultative process." *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

Finally, OIG recommended that one-page memorandum from the Inspector General to the Attorney General and/or the FBI discussions over email regarding the Inspector General's preliminary conclusions regarding be redacted to withhold information under Exemption 5,[11] *see* Waller Decl. ¶¶ 15, 19, which FBI did, *see* Index at 25–26. The withheld information in the memorandum is predecisional because the memorandum, while generated contemporaneously with OIG's final report, contains references to predecisional communications between the Inspector General and the FBI that preceded the final report. *Id.*; *see also N. L. R. B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). The withheld information in the emails, meanwhile, predates the OIG final report. Waller Decl. ¶ 19. This information is also deliberative in that the communications played a part in the process by OIG reached its final conclusions in its investigation into the FBI's practices, which were memorialized in the final OIG report. *Id.*; *see also Coastal States*, 617 F.2d at 866.

[11] OIG also recommended withholding the draft OIG reports which were discussed *supra*.

Defendants are entitled to withhold records (or portions of records) that reflect predecisional government deliberations. The Court should uphold Defendants' withholdings under FOIA Exemption 5.

4. FOIA Exemptions 6 and 7(C)

FOIA Exemption 6 authorizes agencies to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C § 552(b)(6); *see Pinson v. DOJ*, 202 F. Supp. 3d 86, 99 (D.D.C. 2016) (Exemption 6 has been "construed broadly to cover essentially all information sought from Government records that 'appl[y] to a particular individual'" (alteration in original) (citation omitted)). FOIA Exemption 7(C), which applies specifically to records compiled for law enforcement purposes,[12] similarly authorizes agencies to withhold records the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5

[12] "According to the Supreme Court, the term 'compiled' in Exemption 7 requires that a document be created, gathered, or used by an agency for law enforcement purposes at some time before the agency invokes the exemption." *Pub. Emps. for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n*, 740 F.3d 195, 203 (D.C. Cir. 2014). For agencies like the FBI whose principal functions involve law enforcement, courts are "'more deferential' to the agency's claimed purpose for the particular records." *Id.* (citation omitted). "To show that the disputed documents were 'compiled for law enforcement purposes,' the FBI need only 'establish a rational nexus between the investigation and one of the agency's law enforcement duties and a connection between an individual or incident and a possible security risk or violation of federal law." *Blackwell v. FBI*, 646 F.3d 37, 40 (D.C. Cir. 2011) (citation omitted). That threshold requirement is plainly satisfied here. Third Hardy Decl. ¶ 56 (explaining that "portions of the responsive records were compiled for purposes of investigating and gathering intelligence information, and apprehending and prosecuting subjects suspected of terrorism against the United States," while "[o]ther portions of the responsive records were compiled during the FBI's criminal investigation of a third-party subject for violations of 18 U.S.C. § 875(c), Interstate Transmission of Communication Containing Treat to Injure, and 1030(a)(5)(A)(i) and (B)(iv), Computer Intrusion Causing a Threat to Public Safety"); *see also* Waller Decl. ¶ X (explaining that the records for which OIG were consulted were compiled in response to a request that OIG investigate alleged misconduct). Plaintiffs did not challenge this issue in the prior round of briefing. *See* Pls.' Mem in Opp. To Defs.' Mot. for Summ. J. and in Supp. of Pls.' Cross-Mot. for Summ. J., ECF No. 19-1.

U.S.C. § 552(b)(7)(C). Although Exemption 7(C) applies to a narrow universe of law enforcement records, its privacy language is broader than that of Exemption 6 in two respects: "First, whereas Exemption 6 requires that the invasion of privacy be 'clearly unwarranted,' the adverb 'clearly' is omitted from Exemption 7(C). . . . Second, whereas Exemption 6 refers to disclosures that 'would constitute' an invasion of privacy, Exemption 7(C) encompasses any disclosure that 'could reasonably be expected to constitute' such an invasion." *DOJ v. RCFP*, 489 U.S. 749, 756 (1989); *see also ACLU v. DOJ*, 655 F.3d 1, 6 (D.C. Cir. 2011) ("'Exemption 7(C) is more protective of privacy than Exemption 6' and thus establishes a lower bar for withholding material." (citations omitted)).

Under both Exemption 6 and Exemption 7(C), courts must balance the privacy interest in nondisclosure against the public interest in shedding light on agency operations. Under Exemption 6, the privacy interest at stake need not be especially compelling: "[t]he Court must . . . examine whether disclosure of the information would compromise a substantial privacy interest, [but] the word substantial 'means less than it might seem' and encompasses 'anything greater than a *de minimis* privacy interest.'" *Pinson*, 202 F. Supp. 3d at 99 (quoting *Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1229–30 (D.C. Cir. 2008)); *see also id.* ("Information such as an individual's name, address, criminal history, and employment history have been found to constitute a substantial privacy interest. . . . Additionally, '[t]he exemption is generally thought to protect intimate personal details the disclosure of which would be likely to cause embarrassment.'" (citation omitted)). Under Exemption 7(C), the privacy inquiry is "essentially the same . . . with the difference being the magnitude of the public interest that is required to override the respective privacy interests protected by the exemptions. If an agency meets its burden to justify withholding information under Exemption 6, it has also met the lighter burden under Exemption 7(C)." *Garza v. U.S.*

Marshall Serv., No. 16-0976, 2018 WL 4680205, at *12 (D.D.C. Sept. 28, 2018) (citations and internal quotation marks omitted).

Importantly, once an agency has established that records fall within the ambit of Exemptions 6 and/or 7(C) and that a substantial privacy interest is at stake, the "burden of establishing that disclosure would serve the public interest is on the requester, . . . and '[m]ere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy.'" *Pinson*, 202 F. Supp. 3d at 101 (alteration in original) (citations omitted).

In these consolidated cases, the FBI has asserted Exemptions 6 and 7(C) for five coded categories of records:

- (b)(6)-1, (b)(7)(C)-1: Names and/or Identifying Information of FBI Special Agents and Support Personnel
- (b)(6)-2, (b)(7)(C)-2: Names and/or Identifying Information of Non-FBI Federal Government Personnel
- (b)(6)-3, (b)(7)(C)-3: Names and/or Identifying Information of Third Parties of Investigative Interest
- (b)(6)-4, (b)(7)(C)-4: Names and/or Identifying Information of Third Parties Merely Mentioned
- (b)(6)-5, (b)(7)(C)-5: Names and/or Identifying Information of Local Law Enforcement Personnel

Third Hardy Decl. at 14.

Notably, in the initial summary judgment proceedings in the 15-1392 matter, Plaintiffs did not challenge redactions associated with non–government employees coded as (b)(6)-3, (b)(6)-4, (b)(6)-6, (b)(7)(C)-3, and (b)(7)(C)-4. *See* Pls.' First Summ. J. Mot. at 36.

OIG withholdings coded as (b)(6)/(b)(7)(C). In this category of withholdings, the FBI withheld at OIG's recommendation the names and email addresses of lower-level OIG officials, and the email addresses of higher-level OIG officials, from one page of an email record, under

Exemption 6. *See* Waller Decl. ¶ 22; Index at 25–26. OIG also specifically withheld under Exemption 7(C) two names of lower-level OIG personnel. Waller Decl. ¶ 23; Index at 25.

OIG concluded that identification of lower-level officials and release of higher-level officials' email addresses could subject those individuals to annoyance or harassment, and would not reveal government operations; therefore, the substantial privacy interests at stake outweighed the public interest in disclosure.[13] Waller Decl. ¶¶ 22, 23. Further, Plaintiffs did not request this information. *See* Compl. Exs. A, B, C; *see also* Compl. Ex. A at 1-2, *RCFP v. FBI*, No. 18-345 (D.D.C.), ECF No. 1-1. Defendants therefore properly withheld this information under Exemption 6, *see Pinson v. Lappin*, 806 F. Supp. 2d 230, 234 (D.D.C. 2011), and Exemption 7(C), *see Ctr. for Pub. Integrity v. U.S. Dep't of Energy*, 287 F. Supp. 3d 50, 73 (D.D.C. 2018).

Withholdings coded as (b)(6)-1 and (b)(7)(C)-1. In this first category of Exemption 6/7(C) withholdings, the FBI withheld from 181 pages the names, Unique Employee Identification Numbers, email addresses, telephone numbers, and personal cellular telephone numbers of FBI special agents and support personnel who were responsible for receiving, reviewing, supervising, and/or conducting the investigative activities and day-to-day operations of the FBI that are reflected in the responsive records. Third Hardy Decl. ¶ 60; *see also* Index at 1–26.

The FBI protected this information because it determined that there was no public interest in its disclosure, since this information "does not shed light on government operations." Third Hardy Decl. ¶ 62. Meanwhile, "there are cognizable privacy interests" at stake in the release of FBI employee names and identifying information. *Id.* For example, "[p]ositive identification as an

[13] For Exemption 6 purposes OIG ,determined that the emails fell within the category of "personnel, medical or similar files" covered by the exemption Waller Decl. ¶ 22; Index at 25–26. *See* note 12 for an explanation of why the information over which OIG asserted Exemption 7(C) is contained in records compiled for law enforcement purposes.

FBI is of genuine interest to criminal elements . . . and foreign intelligence services," because such individuals may subject known FBI personnel to harassment or other overtures in their pursuit of access to FBI information. *Id.* ¶ 63. Further, if FBI personnel were publicly identified, such publicity "may seriously prejudice" those individuals' "effectiveness in conducting . . . investigations." *Id.* ¶ 60. *See Garza*, 2018 WL 4680205, at *13 (citations omitted) ("Law enforcement personnel conducting investigations have a well-recognized and substantial privacy interest in withholding information about their identities. Redaction of the names of federal law enforcement officers and support personnel under similar circumstances has been routinely upheld."). To protect the integrity of the FBI's law-enforcement mission, the Court should uphold the FBI's withholdings coded as (b)(6)-1 and (b)(7)(C)-1.

Withholdings coded as (b)(6)-2 and (b)(7)(C)-2. In this second category of Exemption 6/7(C) withholdings, the FBI withheld the name of a government employee outside the FBI. The FBI applied this exemption on just one record, an email which was released in part. *See* Third Hardy Decl. ¶ 66; Index at 1. The FBI has determined that disclosure of this information could subject the individual to unauthorized inquiries and harassment and would constitute a clearly unwarranted invasion of privacy. Meanwhile, there is no meaningful public interest in this information, because it would not shed light on the operations an activities of the federal government. Third Hardy Decl. ¶ 66. *See Watson v. DOJ*, 799 F. Supp. 193, 196 (D.D.C. 1992) (collecting cases for the proposition that names may be properly redacted under Exemption 7(C)). Such withholdings are proper and should be upheld.

Withholdings coded as (b)(6)-3 and (b)(7)(C)-3. In this third category of Exemption 6/7(C) withholdings, the FBI withheld names and identifying information of third parties of investigative interest in 26 pages of responsive records. Specifically, the FBI withheld the names and identifying

information of individuals of interest in the FBI's Operation Timberline criminal investigation. Third Hardy Decl. ¶ 67. The FBI has determined that release of this information could subject the individuals at issue to "harassment or embarrassment, as well as undue public attention." *Id.* ¶ 67. Further, "disclosing personal information about these individuals would not significantly increase the public's understanding of the FBI's . . . performance of [its] mission." *Id. See Barouch v. DOJ*, 962 F. Supp. 2d 30, 59 (D.D.C. 2013) ("As a general rule, third-party identifying information contained in [law enforcement] records is categorically exempt from disclosure. Under Exemption (b)(7)(C), an agency may redact the names, addresses, or other identifiers of individuals mentioned in investigatory files in order to protect the privacy of those persons." (alteration in original) (citations and internal quotation marks omitted)). The FBI's withholdings coded as (b)(6)-3 and (b)(7)(C)-3 were proper, and the Court should uphold them.

Withholdings coded as (b)(6)-4 and (b)(7)(C)-4. In this fourth category of Exemption 6/7(C) withholdings, the FBI withheld names and identifying information of third parties merely mentioned in four pages of responsive records. *See* Third Hardy Decl. ¶ 68; Index at 23–24. For example, the FBI withheld identifying information pertaining to individuals who had contacted the agency about the FBI's handling of the Timberline Investigation and of third parties mentioned in its newsletter. Third Hardy Decl. ¶ 68. There is no public interest in the release of this information, because the information does not shed light on government operations; meanwhile, the third parties at issue have a privacy interest in their identifying information remaining out of public view. *Id.* The Court should uphold the FBI's withholdings of the names and identifying information of such third parties. *SafeCard Services, Inc. v. S.E.C.*, 926 F.2d 1197, 1206 (D.C. Cir. 1991) ("[U]nless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is

engaged in illegal activity, such information is exempt from disclosure."); *see also Espino v. U.S. Dept. of Justice*, 869 F. Supp. 2d 25, 29 (D.D.C. 2012).

Withholdings coded as (b)(6)-5 and (b)(7)(C)-5. In this fifth category of Exemption 6/7(C) withholdings, the FBI withheld names and identifying information of local law enforcement personnel from two pages of responsive records. *See* Third Hardy Decl. ¶ 69. The FBI determined that these personnel were acting in their official capacity and aided the FBI in the law enforcement investigative records responsive to Plaintiff's request. Third Hardy Decl. ¶ 69. The rationale for protecting these local law enforcement personnel is the same as the rationale for withholding similar information of FBI Special Agents and support personnel. Third Hardy Decl. ¶ 69. The FBI concluded that releasing the identities of these local law enforcement personnel could subject them to harassment, and make them prime targets for compromise if their identities were known. *Id.* The individuals' privacy interests are thus substantial, and there would be no public interest in disclosing of their names and identifying information. *Id.* Courts frequently uphold Exemption 7(C) redactions to the names of local law enforcement officials. *See, e.g.*, *Petrucelli v. DOJ*, 51 F. Supp. 3d 142, 166–67 (D.D.C. 2014); *Willis v. DOJ*, 581 F. Supp. 2d 57, 76 (D.D.C. 2008). This Court should do so as well.

5. FOIA Exemption 7(E)

FOIA Exemption 7(E), like Exemption 7(C), protects from disclosure certain records and information compiled for law enforcement purposes—specifically those records the production of which "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). Though courts have differed over whether the risk of circumvention is a prerequisite to both prongs of Exemption 7(E), *see U.S. Section, Int'l Boundary & Water Comm'n*,

740 F.3d at 204 n.4, the better-reasoned decisions recognize that the "first clause of Exemption 7(E) affords categorical protection for 'techniques and procedures' used in law enforcement investigations or prosec utions," while "Exemption 7(E)'s second clause separately protects guidelines for law enforcement investigations or prosecutions if [their] disclosure could reasonably be expected to risk circumvention of the law," *Ortiz v. DOJ*, 67 F. Supp. 3d 109, 122 (D.D.C. 2014) (citations and internal quotation marks omitted).

Regardless whether the risk of circumvention applies to both clauses, the bar for invoking Exemption 7(E) is relatively low:

> The exemption allows for withholding information "not just for circumvention of the law, but for a risk of circumvention; not just for an actual or certain risk of circumvention, but for an expected risk; not just for an undeniably or universally expected risk, but for a reasonably expected risk; and not just for certitude of a reasonably expected risk, but for the chance of a reasonably expected risk."

Id. (citations omitted); *see also Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009) ("Exemption 7(E) clearly protects information that would *train* potential violators to evade the law or *instruct* them how to break the law. But it goes further. It exempts from disclosure information that could *increase the risks* that a law will be violated or that past violators will escape legal consequences.").

"The government 'must show that the records contain law-enforcement techniques and procedures that are generally unknown to the public . . . [and that] disclosure could reasonably be expected to risk circumvention of the law." *Elkins v. FAA*, 134 F. Supp. 3d 1, 4 (D.D.C. 2015) (citation omitted). *But cf. ACLU of Mich. v. FBI*, No. 11-13154, 2012 WL 4513626, at *11 (E.D. Mich. Sept. 30, 2012), *aff'd*, 734 F.3d 460 (6th Cir. 2013) ("[T]he fact that some of the withheld information may have been generally known to the public is not dispositive." (citing *Coleman v. FBI*, 13 F. Supp. 2d 75, 83 (D.D.C. 1998), for the proposition that "certain information [was] covered by 7(E) despite the fact that 'the techniques themselves have already been identified by

the FBI,' because 'the documents in question involve the manner and circumstances of the various techniques that are not generally known to the public'")). *Id.*

Here, the FBI has withheld or redacted material pursuant to eight coded categories under Exemption 7(E):[14]

- (b)(7)(E)-1: Operational Directives
- (b)(7)(E)-2: Undercover Operation
- (b)(7)(E)-3: Identity and/or Location of FBI or Joint Units, Squads, Divisions
- (b)(7)(E)-4: Internal FBI Secure Fax Number, Phone Numbers[15]
- (b)(7)(E)-5: Sensitive Investigative Techniques and Procedures, Including the Deployment of Computer and Internet Protocol Address Verifier ("CIPAV")
- (b)(7)(E)-6: Targets of Pen Registers / Trap and Trace Devices
- (b)(7)(E)-7: Collection and Analysis of Information
- (b)(7)(E)-10: Sensitive File Numbers and/or Subfile Names

Third Hardy Decl. at 15.

Withholdings coded as (b)(7)(E)-1. In this first category of Exemption 7(E) withholdings, the FBI withheld information that would reveal operational directives contained in 32 pages of responsive records. *See* Third Hardy Decl. ¶ 73; Index at 1–23. Specifically, the FBI protected certain information contained in the FBI's Domestic Investigations and Operations Guide, its Undercover Sensitive Operations Policy Guide, and its Policy Notice 0907N; and Undercover Activities and Operations- Posing as a Member of the News Media or a Documentary Film Crew

[14] As explained above in note 12, FBI compiled all responsive records at issue for law enforcement purposes, thus meeting the threshold to assert Exemption 7(E).

[15] Although this Exemption 7(E) coded category was also at issue in the initial summary judgment proceedings, Plaintiffs did not challenge this category at that time. *See* Pls.' First Summ. J. Mot. at 40-44.

responsive to Plaintiffs' requests. Third Hardy Decl. ¶ 73. "This law enforcement material comprises operational directives that provide information and instruct FBI employees on the proper use of certain sensitive non-public FBI procedures, techniques, and guidance for conducting investigations." Third Hardy Decl. ¶ 73. In providing this information and instruction, the withheld text "identif[ies] the procedures, techniques, and strategies at issue." *Id.* Such material lies at the core of Exemption 7(E)'s protection for "techniques and procedures for law enforcement investigations" and "guidelines for law enforcement investigations," 5 U.S.C. § 552(b)(7)(E); *see AILA*, 852 F. Supp. 2d at 79 (Exemption 7(E) applies where "information withheld would provide a 'roadmap' or 'guidance' to those looking to circumvent the law, which would thwart future law enforcement efforts"). The Court should uphold these sensitive withholdings.

Withholdings coded as (b)(7)(E)-2. In this second category of Exemption 7(E) withholdings, the FBI withheld information about undercover operations from 10 pages of responsive records. Third Hardy Decl. ¶ 74; Index at 1–23. Specifically, "[t]he non-public details relate to both the FBI's Seattle Timberline investigation as well as other FBI undercover operations." Third Hardy Decl. ¶ 74. This information was properly withheld under Exemption 7(E), since disclosure of non-public details about the FBI's execution of an undercover operation (including the specific techniques used in that operation) would have significantly negative operational consequences and would jeopardize the FBI's ability to conduct undercover operations in similar cases or under similar circumstances in the future, thus risking circumvention of the law. *See, e.g.*, *Brown v. FBI*, 873 F. Supp. 2d 388, 408 (D.D.C. 2012) (upholding Exemption 7(E) redactions of vehicle identification numbers where disclosure could compromise the use of forfeited vehicles in undercover operations); *Skinner v. DOJ*, 744 F. Supp. 2d 185, 215 (D.D.C. 2010) (upholding Exemption 7(E) redactions of drug investigation techniques and procedures

where disclosure could jeopardize future undercover operations). This Court should likewise uphold the FBI's withholdings here.

Withholdings coded as (b)(7)(E)-3. In this third category of Exemption 7(E) withholdings, the FBI withheld information from 65 pages of responsive records that would reveal the identities or locations of law enforcement units, joint units, squads, sections and divisions. Third Hardy Decl. ¶ 75; Index at 1–23. Office locations and units are usually found in the administrative headings of internal FBI documents and in the signature blocks of electronic mail correspondence. Third Hardy Decl. ¶ 75. Disclosing names, numbers, and alpha designators of these units would reveal the level of focus the FBI has applied to certain areas within the assigned enforcement activity, and as relevant here, to the investigative realm of domestic terrorism. *Id.* The release of this information could reasonably be expected to risk circumvention of the law because it would provide a kernel of information about the application and focus of FBI domestic terrorism investigative capability and presence in the associated geographical area(s). *Id.* This piece of information alone identifies the particular unit(s) internal designation, its geographical disposition, and the unit's primary activity and, either alone or when combined with other information in mosaic fashion, provides key insight into limited FBI resources that are employed in this type of enforcement activity in a particular area. *Id.* The court in *Light v. DOJ* found adequate the FBI's explanation for its refusal to "disclose the location, identity, and expertise of the investigating FBI units, as this could allow an individual to avoid or circumvent those locations and those activities that are the targets of investigation." 968 F. Supp. 2d 11, at 29 (D.D.C. 2013). That same reasoning should apply here.

Withholdings coded as (b)(7)(E)-4. In this fourth category of Exemption 7(E) withholdings, the FBI withheld internal fax and phone numbers and email addresses from approximately 100 pages of responsive records. Release of this type of information could allow

individuals under investigation to exploit and misuse the FBI's Information Technology system. Third Hardy Decl. ¶ 76. Criminals could interfere with the FBI's ability to timely and accurately conduct investigations, by exploiting this unclassified but non-public information, and by inundating these venues with faxes, phone calls, or emails providing inaccurate and misleading information. *Id.* Such actions could arm them with the information or ability to circumvent the law. *Id.* Such material, the disclosure of which could be supported by no plausible public interest, is well within the scope of Exemption 7(E). *See, e.g.*, *Shapiro v. DOJ*, 78 F. Supp. 3d 508, 520 (D.D.C. 2015); *Ortiz*, 67 F. Supp. 3d at 123; *Light*, 968 F. Supp. 2d at 29.

Withholdings coded as (b)(7)(E)-5. In this fifth category of Exemption 7(E) withholdings, the FBI withheld information on three pages about sensitive investigative techniques and procedures. Third Hardy Decl. ¶ 77. These techniques and procedures include those involving deployment of the CIPAV, as well as other techniques and procedures utilized by the FBI in both criminal and national security investigations, including information revealing what types of techniques and procedures are routinely used in such investigations and are not publicly known, as well as non-public details about the use of well-known techniques and procedures. Third Hardy Decl. ¶ 77. The government's use of CIPAV in the Timberline High School investigation is a known public fact; however, the specific details concerning the deployment of CIPAV are not well-known. *Id.* This information, which would reveal details about the FBI's use of sophisticated technologies to conduct its investigations, plainly is protected by Exemption 7(E). *See, e.g.*, *Garza*, 2018 WL 4680205, at *16 (Exemption 7(E) applies to text describing information technology); *Friedman v. U.S. Secret Serv.*, 282 F. Supp. 3d 291, 306–07 (D.D.C. 2017) (Exemption 7(E) applies to text describing protective technology); *Sack v. CIA*, 53 F. Supp. 3d 154, 174–75 (D.D.C. 2014) (Exemption 7(E) applies to text describing polygraph technology).

Withholdings coded as (b)(7)(E)-7. In this seventh category of Exemption 7(E) withholdings, the FBI withheld material on one page of responsive records concerning the collection and analysis of information in connection with an investigation. Third Hardy Decl. ¶ 79. Specifically, on Bates-numbered page RCFP-630, the FBI protected information concerning an FBI undercover operation that is unrelated to the Seattle Timberline investigation in a portion of an email chain dated February 8, 2016, wherein FBI personnel were trying to determine whether that undercover investigation would meet the requirements for Deputy-Director approval pursuant to the newly changed approval policy. *Id.* ¶ 74. The release of this information would disclose the identity of methods used in collecting and analyzing information, including how and from where the FBI collects information, and the methodologies employed to analyze it. *Id.* "Knowing what information is collected, how it is collected, and . . . when it is not collected, is information that law enforcement might reasonably expect to lead would-be offenders to evade detection." *Soghoian v. DOJ*, 885 F. Supp. 2d 62, 75 (D.D.C. 2012) (emphasis omitted); *see Roseberry-Andrews v. DHS*, 299 F. Supp. 3d 9, 33 (D.D.C. 2018) (collecting cases recognizing that database information may properly be withheld under Exemption 7(E)). This Court should uphold the FBI's withholdings that protect against such potentially compromising disclosures.

Withholdings coded as (b)(7)(E)-10. In this eighth and final category of Exemption 7(E) withholdings, the FBI withheld sensitive file numbers in one page of responsive records. Third Hardy Decl. ¶ 81. The FBI has determined that this exemption is appropriate for protecting these file numbers as the release of file numbering convention identifies the investigative interest or priority given to such matters. Third Hardy Decl. ¶ 81. Applying a mosaic analysis, suspects could use these numbers (indicative of investigative priority), in conjunction with other information known about other individuals and/or techniques, to change their pattern of activity to avoid

detection, apprehension, or create alibis for suspected activities, etc. *Id.* Exacerbating this harm, releasing these file numbers provides criminals with a tracking mechanism by which they can place particular files or investigations within the context of larger FBI investigative efforts. *Id.* Once again, such withholdings are routinely and appropriately upheld. *See, e.g.*, *Rojas-Vega v. ICE*, 302 F. Supp. 3d 300, 311 (D.D.C. 2018); *Reep v. DOJ*, 302 F. Supp. 3d 174, 186 (D.D.C. 2018); *Dutton v. DOJ*, 302 F. Supp. 3d 109, 124–25 (D.D.C. 2018).

II. Defendants Have Released All Reasonably Segregable Information in Both Cases.

The FOIA requires that, if a record contains information that is exempt from disclosure, any "reasonably segregable" information must be disclosed after deletion of the exempt information, 5 U.S.C. § 552(b), unless the non-exempt portions are "inextricably intertwined with exempt portions." *Kurdyukov v. U.S. Coast Guard*, 578 F. Supp. 2d 114, 128 (D.D.C. 2008). "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material." *Sussman v. U.S. Marshall Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). Further, the FOIA does not require disclosure of records in which the non-exempt information that remains is meaningless. *See Nat'l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 221 (D.D.C. 2005) (concluding that no reasonably segregable information existed because "isolated words or phrases that might not be redacted for release would be meaningless").

Here, the FBI examined each responsive page to identify non-exempt information that could be reasonably segregated from exempt information for release. Third Hardy Decl. ¶ 85; Waller Decl. ¶ 21. The agency determined that it released segregable information. *Id.*

In sum, Defendants have met their burden to justify their withholdings under FOIA Exemptions 1, 3, 5, 6, 7(C), and 7(E). As discussed above, the Court need not even reach the merits of these withholdings insofar as the Court previously determined that Defendants' justifications were appropriate. But to whatever extent the Court decides to consider the merits here, Defendants

have amply demonstrated that the facts and the law favor their position. Defendants are entitled to summary judgment.

III. RCFP's Claim in the 18-345 Matter Alleging That Defendants Failed to Comply with Statutory Deadlines Is Moot, Since Defendants Have Now Completed Their FOIA Production.

Though RCFP asserts in Count I of its Complaint that Defendants "failed to make a determination with respect to the Request within the 20 working-day deadline mandated by FOIA" and that Defendants' purported "failure" is a "violation of their obligations under the law," Compl. ¶¶ 37, 39, *RCFP v. FBI*, No. 18-345 (D.D.C.), "a lack of timeliness or compliance with FOIA deadlines does not preclude summary judgment for an agency, nor mandate summary judgment for the requester," *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 59, 68 (D.D.C. 2003). Rather, "once all the documents are released to the requesting party, there no longer is a case or controversy. This is so [b]ecause the [FOIA] only authorizes a court to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." *Cause of Action Inst. v. DOJ*, 282 F. Supp. 3d 66, 77 (D.D.C. 2017) (alterations in original) (citations and internal quotation marks omitted); *see also Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982) ("[H]owever fitful or delayed the release of information under the FOIA may be, once all requested records are surrendered, federal courts have no further statutory function to perform.").

As discussed above, Defendants performed a reasonable search and released to Plaintiffs all responsive, non-exempt records that they located through that reasonable search. Defendants therefore have satisfied their obligations under the FOIA. The Court need not assess the timeliness of Defendants' production but should instead dismiss Count I in the 18-345 case as moot.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion for summary judgment and enter final judgment in Defendants' favor in the 15-1392 and 18-345 cases.

Dated: June 27, 2019

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