**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| ELECTRONIC FRONTIER FOUNDATION, | ) | |
| Plaintiff, | ) | |
| v. | ) | Civil Action No. 17-cv-1039 |
| DEPARTMENT OF JUSTICE, | ) | |
| Defendant. | ) | |

**DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES**
**IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

**STATUTES**

**FEDERAL RULES**

## INTRODUCTION

This action arises from a Freedom of Information Act ("FOIA") request by Plaintiff Electronic Frontier Foundation to the Federal Bureau of Investigation ("FBI"), a component of Defendant the United States Department of Justice ("DOJ"). Plaintiff's request sought records relating to the FBI's use of cooperating human sources ("CHSs") or informants, at any Best Buy facility or any other computer repair facility, at any time, as well as FBI training and recruiting materials directed at Best Buy personnel at any time. Compl. ¶ 6, ECF No. 1. Despite the highly sensitive nature of the law enforcement information requested, the FBI provided a limited response to the request because the Government had previously acknowledged, in a criminal case, the existence of FBI CHSs at a specific Best Buy facility during a specific period of time. To confirm the existence or non-existence of responsive records beyond the parameters of the Government's limited official acknowledgement, however, could reasonably be expected to cause harms protected by FOIA Exemption 7(E). Thus, the Government's response, known as a partial *Glomar* response, was appropriate and justified.

Because the FBI conducted an adequate search for certain requested documents, properly withheld certain records or portions of records pursuant to applicable exemptions, and appropriately asserted a partial *Glomar* response as to all other requested documents, Defendant's motion for summary judgment should be granted.

## BACKGROUND

### I. *United States v. Rettenmaier*

In November 2014, Dr. Mark Rettenmaier was indicted on two counts of possession of child pornography. *United States v. Rettenmaier*, 14-cr-188 (C.D. Cal.), ECF No. 1. Dr. Rettenmaier had taken his computer to a local Best Buy for repair. Best Buy shipped the

computer to its Brooks, Kentucky facility, where Best Buy sends hard drives for data recovery. In working to repair the computer, a Best Buy employee discovered what appeared to be child pornography on the hard drive. *Id*. The employee's supervisor subsequently contacted the FBI, and an investigation was initiated that culminated in criminal charges against Dr. Rettenmaier. *Rettenmaier*, ECF No. 173 at 2-3.

In the course of the criminal case, the Government disclosed that the Best Buy supervisor at the Kentucky facility was a CHS for the FBI, and specifically, that the FBI had a total of eight different CHSs at Best Buy's Brooks, Kentucky facility from 2007 to 2016. *Id.* at 18-19. While the Government acknowledged the existence of eight CHSs at this facility during this time, only four CHSs were publicly identified during the case. *Id*.; ECF Nos. 98, 176-4, 176-5, 180-1.

In addition, in response to court-ordered discovery, the Government searched the FBI's Louisville, Kentucky Field Office ("LSFO"), for the time period between 2008 and February 2012 (the time period relevant to the facts of the case), for internal FBI memoranda or other documentation about the use of Best Buy informants, FBI training of Best Buy employees in the detection and location of child pornography on computers brought to Best Buy for repair, and "recruiting material" from LSFO to Best Buy personnel. *Rettenmaier,* ECF No. 174 at 3-4. Records concerning the use of Best Buy informants were located, but no training or recruiting material was found. *Id*. The *Rettenmaier* litigation appears to have been the genesis of Plaintiff's instant FOIA request.

II. Plaintiff's FOIA Request

On February 2, 2017, Plaintiff submitted a FOIA request to the FBI, seeking to broaden the disclosures and record searches from the *Rettenmaier* case, which were limited to one Best Buy facility, one FBI field office, and a discrete time period. The request sought:

1. All internal memoranda or other documentation regarding the use of informants and/or CHSs at any Best Buy facility;

2. All internal memoranda or other documentation regarding FBI training of Best Buy personnel in the detection and location of child pornography, or other material, on computers brought to Best Buy for repair;

3. All recruiting material from the FBI directed to Best Buy personnel; and

4. All memoranda, guidance, directives, or policy statements concerning the use of informants and/or CHSs at any computer repair facilities in the United States.

Compl. at 2. The request contained no time-period limitation.

The FBI's initial response to the request was that it was the FBI's "policy to neither confirm nor deny the existence of any records which could tend to indicate or reveal whether an individual or organization is of investigatory interest to the FBI." Declaration of David M. Hardy ("Hardy Decl.") ¶ 9. The FBI accordingly refused to confirm or deny the existence of any records requested by Plaintiff. *Id.*

Plaintiff administratively appealed this response, arguing in part that the response was inappropriate because "record evidence" in the *Rettenmaier* case, "confirms the FBI's relationship with Best Buy and a court opinion relies on that evidence." *See* Letter from Electronic Frontier Foundation to FBI at 2, dated April 28, 2017, attached hereto as Exhibit E. Before the appeal could be adjudicated, however, Plaintiff filed the instant action, alleging that the FBI wrongfully withheld agency records, and wrongfully denied Plaintiff's request for a waiver of all FOIA processing fees.[1] Compl. at 3-4.

[1] While the FBI did not formally resolve the issue of fee payment in the administrative stage, it states here that Plaintiff will not be charged for any fees in connection with processing the instant FOIA request. Accordingly, Count Two of Plaintiff's Complaint, seeking "a waiver of all processing fees" is moot. Compl. ¶ 20.

In light of, and consistent with, the limited disclosures in the *Rettenmaier* case set forth above, the FBI conducted a search "for records concerning confidential human sources utilized by the FBI between 2007 and 2016, at the Brooks, Kentucky Best Buy facility." Joint Mot. to Vacate Summ. J. Br. Schedule at 1, ECF No. 8. The FBI made productions of responsive, non-exempt documents on a rolling basis, releasing 165 pages of records either in full or in part. Hardy Decl. ¶ 38. The case is now ripe for summary judgment.

## LEGAL STANDARD

"FOIA cases are typically and appropriately decided on motions for summary judgment." *Dean v. DOJ*, 87 F. Supp. 3d 318, 320 (D.D.C. 2015) (citation omitted); *accord Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 527 (D.C. Cir. 2011) ("[T]he vast majority of FOIA cases can be resolved on summary judgment."). Summary judgment is warranted "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). "A fact is 'material' if it is capable of affecting the substantive outcome of the litigation." *Bartko v. DOJ*, 167 F. Supp. 3d 55, 61 (D.D.C. 2016) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)). "[A] dispute is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*., at 61-62. In responding to the motion, the nonmovant attempting to show that a fact is genuinely disputed must "cit[e] to particular parts of materials in the record," *i.e*. evidentiary submissions, or show that the materials cited by the movant "do not establish the absence . . . of a genuine dispute." Fed. R. Civ. P. 56(c)(1)(A)-(B).

A court reviews an agency's response to a FOIA request *de novo*. 5 U.S.C. § 552(a)(4)(B). Generally, "[t]he defendant in a FOIA case must show that its search for responsive records was adequate, that any exemptions claimed actually apply, and that any

reasonably segregable non-exempt parts of records have been disclosed after redaction of exempt information." *Light v. DOJ*, 968 F. Supp. 2d 11, 23 (D.D.C. 2013). A court may award summary judgment in a FOIA action solely on the basis of information provided by the agency through declarations when they are "not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Bartko*, 167 F. Supp. 3d at 62 (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)). This is because "[s]uch affidavits or declarations 'are accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents.'" *Id.* (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)).

## ARGUMENT

### I. THE FBI'S SEARCH FOR RECORDS RESPONSIVE TO PORTIONS OF THE FOIA REQUEST WAS ADEQUATE

In light of the disclosures made by the Government in the *Rettenmaier* criminal case, the FBI expanded on the searches conducted in that case in order to respond to Plaintiff's FOIA request, but only as to the cooperating human source activity officially acknowledged by the Government in *Rettenmaier* – that is, the FBI's use of eight CHSs at Best Buy's Brooks, Kentucky facility, during the period of 2007 to 2016. Consistent with this acknowledgement, the FBI expanded the search that had been conducted for records about the use of informants at the Best Buy Kentucky facility between 2008 and February 2012, to the longer 2007-2016 timeframe. The Government also acknowledged in *Rettenmaier* the nonexistence of records pertaining to the FBI's training or recruitment of Best Buy employees at its Kentucky repair facility between 2008 and February 2012, and the FBI relied on those searches here, since no new responsive records would have been created for that time frame. The FBI's searches were, however, limited to these official acknowledgements because to confirm or deny the existence of

responsive records more broadly, for instance as to other Best Buy facilities or other companies that repair computers, would disclose information about the FBI's broader use, or nonuse, of CHSs – information about its law enforcement techniques and procedures that remains secret. *See* Section II, supra. The searches the FBI conducted were adequate under FOIA, as we demonstrate below.

An agency demonstrates the adequacy of its search for responsive records by showing that it "has conducted a 'search reasonably calculated to uncover all relevant documents.'" *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994) (quoting *Weisberg v. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). It is well-settled that an agency's search for responsive records "need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request." *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986). Consequently, an agency's failure to locate a responsive document does not render the search inadequate, as the question for the court is "not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*." *Weisberg*, 745 F.2d at 1485; *see also Rosenberg v. ICE*, 13 F. Supp. 3d 92, 104 (D.D.C. 2014) ("[T]he adequacy of a FOIA search is not to be judged by its results[.]"). Thus, courts have rejected challenges to the adequacy of a search, even when a "slim yield may be intuitively unlikely" and a "reasonable observer would find th[e] result[s] unexpected." *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011). Moreover, "mere speculation that as yet uncovered documents might exist[] does not undermine the determination that the agency conducted an adequate search for the requested records." *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004); *see also Sheffield v. Holder*, 951 F. Supp. 2d 98, 101

(D.D.C. 2013) (noting that a requester "cannot rest . . . on mere conjecture or purely speculative claims about the existence and discoverability of other documents") (citation omitted).

"In demonstrating the adequacy of the search, the agency may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith." *Steinberg*, 23 F.3d at 551 (quoting *Weisberg*, 745 F.2d at 1485). Affidavits or declarations are sufficient if they "set[] forth the search terms and the type of search performed, and aver[] that all files likely to contain responsive materials (if such records exist) were searched." *Chambers v. U.S. Dep't of Interior*, 568 F.3d 998, 1003 (D.C. Cir. 2009) (quoting *McCready v. Nicholson*, 465 F.3d 1, 14 (D.C. Cir. 2006)). This standard does not require that "the affidavits of the responding agency set forth with meticulous documentation the details of an epic search for the requested records." *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982). "Rather, in the absence of countervailing evidence or apparent inconsistency of proof, affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice . . . ." *Id.* Moreover, "[s]uch agency affidavits attesting to a reasonable search 'are afforded a presumption of good faith, and can be rebutted only with evidence that the agency's search was not made in good faith.'" *Riccardi v. DOJ*, 32 F. Supp. 3d 59, 63 (D.D.C. 2014) (quoting *Defs. of Wildlife v. U.S. Dep't of Interior*, 314 F. Supp. 2d 1, 8 (D.D.C. 2004)).

A. Item One of Plaintiff's Request

The Government acknowledged the existence of eight CHSs at Best Buy's Brooks, Kentucky facility between 2007 and 2016. *See Rettenmaier,* ECF No. 173 at 18-19. The FBI confirmed here that the eight CHSs acknowledged in the *Rettenmaier* litigation constituted the total number of CHSs that were present at that facility during that time. Hardy Decl. ¶ 34. In searching for records about those eight FBI informants between 2007 and 2016, the FBI FOIA

office evaluated where responsive documents were likely to be located, based on its knowledge of FBI record-keeping systems and its assessment of the documents sought in Plaintiff's request. *Id*. ¶ 31. In general, documents concerning FBI informants may be present in either "investigative case file[s]," which document a single investigation from beginning to end, or "informant file[s]," which document the FBI's interaction with a single informant, often across multiple investigations. *Id*. ¶ 114. The FBI accordingly searched both of these types of records in response to Plaintiff's request.

Investigative case files and informant files are stored in the FBI's Central Records System ("CRS"). Investigative case files are electronically searchable through the Automated Case Support ("ACS") and Sentinel case management systems. *Id*. ¶¶ 24-26. The next-generation Sentinel system enables searches for case file records created on or after July 1, 2012, and ACS can be used to locate records that were created before then. *Id*. By contrast, due to their sensitive nature, informant files generally require a separate search process in order to retrieve them.[2]

The FBI first performed searches of investigative case files likely to contain responsive records. The FBI began with certain records that had been previously identified in the *Rettenmaier* criminal litigation. There, the FBI had conducted searches, using ACS and Sentinel, of LSFO case file documents, for the period Jan. 1, 2008 through Feb. 29, 2012, using as search terms: (1) the names of certain informants involved in the *Rettenmaier* case, (2) Best Buy, (3) Geek Squad (the name of Best Buy's subsidiary that conducts computer repairs), (4) Best Buy sources, (5) Best Buy CHSs, or (6) Brooks, Ky. *See Rettenmaier*, ECF No. 174 at ¶ (d). The

[2] Due to the sensitive nature of informant files, the FBI cannot provide further detail as to the exact manner and location in which informant files are indexed and searched. Hardy Decl. ¶ 36.

FBI located 48 "serials," or batches of related case file pages, in response to these searches. *Id*.; Hardy Decl. ¶ 32. The FBI determined that these 48 serials were potentially responsive to Plaintiff's FOIA request, and the FBI FOIA office retrieved those records for review and processing. *Id*. ¶ 33.

Next, the FBI determined that because the *Rettenmaier* case concerned certain informants at the Brooks, Kentucky facility from 2007 to 2016, the specific *Rettenmaier* investigative case file was likely to contain documents responsive to Plaintiff's request. *Id*. ¶ 35. As a result, the FBI conducted a search, using both ACS and Sentinel, to locate the *Rettenmaier* investigative case file. Then, the investigative case file was "searched page-by-page by reviewing each of the electronic case file pages for any responsive serials concerning the FBI's use of CHSs at the Best Buy, Brooks, Kentucky computer repair facility." *Id.*

To conclude its search of investigative case files, the FBI conducted a general search in both ACS and Sentinel for LSFO records concerning the eight CHS informants that were acknowledged in the *Rettenmaier* case, for the period of 2007 to 2016. *Id*. ¶ 34. This search of LSFO records was conducted using search terms related to the eight Best Buy informants which had been previously acknowledged, such as variations of their names and other personal identifiers. *Id*. The search was reasonably limited "to LSFO records, because CHSs at the Brooks, Kentucky facility would likely have worked only with FBI personnel from the LSFO." *Id*. Further, it was also reasonable to search "only for records concerning the eight Best Buy informants cited in the *Rettenmaier* investigation, since the LSFO confirmed that the FBI did not utilize any other CHSs at the Brooks, Kentucky facility from 2007 to 2016." *Id*. Indeed, because the FBI specifically searched for records concerning the eight CHSs at this facility, during this time, this search was more likely to retrieve responsive records than the less focused,

broader search conducted during the *Rettenmaier* litigation. The search for records concerning the eight CHSs located additional records, but because they were found on the public docket of the *Rettenmaier* case, they were not provided to Plaintiff pursuant to a prior agreement between the parties. *Id*.; Joint Status Report at 1, ECF No. 7.

Separate from its search of investigative case files, the FBI conducted a search of those informant files reasonably likely to contain responsive records. The FBI concluded that the eight informant files for the informants identified in the *Rettenmaier* litigation were the only informant files reasonably likely to contain responsive records, because those were the only CHSs at the Brooks, Kentucky facility from 2007 to 2016. Hardy Decl. ¶ 36. Accordingly, the FBI searched for and retrieved the informant files for those informants referenced in the *Rettenmaier* litigation. *Id*.

Because these searches were reasonably calculated to locate all records regarding the use of informants by the FBI at Best Buy's Kentucky facility between 2007 and 2016, they were adequate to respond to the portion of Item One that the FBI determined it could respond to.

B. Items Two and Three of Plaintiff's Request

As noted above, during the *Rettenmaier* litigation the FBI searched for and found no LSFO records, from 2008 to February 2012, concerning the "training conducted for Best Buy employees in the detection and location of child pornography on computers brought to Best Buy for repair." *Rettenmaier*, ECF No. 174 at 3. In conducting this search, the training coordinator for the FBI's Louisville Field Office searched the Training File and found no responsive records. The FBI also contacted the previous LSFO training coordinator, who confirmed that to the best

of her knowledge, from 2008 to February 2012, no FBI agents trained Best Buy personnel in the detection and location of child pornography on computers brought to Best Buy for repair. *Id*.

Similarly, in *Rettenmaier* the FBI searched for and found no LSFO records regarding "recruiting material from [LSFO] directed to Best Buy personnel between 2008 and February 2012[.]" *Id*. at 4. The FBI contacted the LSFO Recruiter, as well as an Investigative Operations Analyst and Special Agent of the CHS Office, and all three individuals determined that no such recruiting material was known to exist. *Id*.

Thus, the FBI previously searched for, and denied the existence of, records that would be potentially responsive to parts of Items Two and Three of Plaintiff's request, for one time frame and one FBI field office. The FBI relied on those searches and findings for purposes of responding to the relevant portions of Plaintiff's FOIA request here. These searches were adequate under FOIA because in both instances the FBI searched all places likely to contain responsive records for the place and time period specified. For both searches, the personnel tasked with conducting the searches "were in the best position to know specifically whether the LSFO maintained any records concerning training[,]" or "recruitment" which was "conducted by the LSFO." Hardy Decl. ¶¶ 42, 46. No additional search was necessary in response to Plaintiff's request, because the searches in the *Rettenmaier* litigation were conducted in 2016 solely for records dating from 2008 to February 2012, such that no new responsive records for that acknowledgement time frame could have been created since the original searches.

C. Item Four of Plaintiff's Request

In Item Four of its request, Plaintiff sought "[a]ll memoranda, guidance, directives, or policy statements concerning the use of informants and/or CHSs at any computer repair facilities in the United States." Compl. ¶ 6. As noted above and discussed at greater length below, the

FBI issued a *Glomar* response with respect to those portions of Plaintiff's request that exceeded the scope of its official acknowledgements in *Rettenmaier*. While the FBI previously disclosed the existence of specific informants at a single Best Buy facility, the FBI has not acknowledged the existence of any general guidance or policy documents concerning the use of informants at computer repair facilities. Hardy Decl. ¶ 63. The FBI was not required to conduct a search pursuant to Item Four in light of its *Glomar* response. *See Elec. Privacy Info. Ctr. v. NSA*, 678 F.3d 926, 934 (D.C. Cir. 2012) (holding that where an agency issues a *Glomar* response, "requiring [an agency] to conduct a search and segregability analysis would be a meaningless . . . exercise").

In sum, the FBI's searches for records responsive to those portions of Plaintiff's FOIA request that had previously been acknowledged "were reasonably calculated to uncover all records potentially responsive to Plaintiff's FOIA request, within the parameters of the information acknowledged by the Government, and all files likely to contain responsive material, within those parameters, were searched." Hardy Decl. ¶ 148. The FBI has provided "[a] reasonably detailed [declaration], setting forth the search terms and the type of search performed, and aver[ed] that all files likely to contain responsive materials (if such records exist) were searched." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (quoting *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). And this declaration sets forth in detail the FBI's "good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby*, 920 F.2d at

68. As such, there can be little doubt—and no dispute of material fact—that the FBI conducted searches consistent with its obligations under FOIA.

## II. THE FBI PROPERLY REFUSED TO CONFIRM OR DENY THE EXISTENCE OF RESPONSIVE RECORDS BEYOND THE DISCLOSURES MADE IN *RETTENMAIER*

As detailed above, in the *Rettenmaier* case, the Government acknowledged certain information about the existence or nonexistence of records concerning the FBI's use of CHSs at one particular Best Buy facility, during one particular time period. But Plaintiff's FOIA request seeks highly sensitive law-enforcement information about the FBI's utilization, training and recruitment of informants more broadly. The FBI cannot answer whether such records exist without revealing highly sensitive law-enforcement information about the scope and details of the FBI's use of informants at computer repair facilities – information that could reasonably be expected to be used by criminals to avoid detection of their computer-based criminal activities by the FBI.

Normally, "agencies must acknowledge the existence of information responsive to a FOIA request and provide specific, non-conclusory justifications for withholding that information[.]" *Roth v. DOJ*, 642 F.3d 1161, 1178 (D.C. Cir. 2011). However, an agency "may refuse to confirm or deny the existence of records where to answer . . . would cause harm cognizable under an FOIA exception." *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (citation omitted). "Such an agency response is known as a Glomar response and is proper if the fact of the existence or nonexistence of agency records falls within a FOIA exemption." *Id.*[3] To justify

[3] The term "*Glomar*" stems from a case in which a FOIA requester sought information concerning a ship named the "Hughes Glomar Explorer," and the CIA refused to confirm or deny its relationship with the Glomar vessel because to do so would compromise the national security or divulge intelligence sources and methods. *Phillipi v. CIA*, 655 F 2d. 1325 (D.C. Cir. 1981).

a Glomar response, "[t]he agency must demonstrate that acknowledging the mere existence of responsive records would disclose exempt information." *Elec. Privacy Info. Ctr.*, 678 F.3d at 931 (citing Wolf, 473 F.3d at 374). But in doing so, the agency's explanatory burden is not demanding, and the standard is, ultimately, no different than in the typical FOIA case: "[A]n agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Wolf*, 473 F.3d at 374-75 (quoting *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982)).

The FBI relied upon Exemption 7(E) as the basis for its *Glomar* response to certain portions of Plaintiff's Request. In order to withhold information pursuant to Exemption 7(E), an agency must demonstrate that release of information "compiled for law enforcement purposes" "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). "Rather than requiring a highly specific burden of showing how the law will be circumvented, exemption 7(E) only requires that the [agency] 'demonstrate[] logically how the release of [the requested] information might create a risk of circumvention of the law.'" *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011) (citation omitted). Therefore, Exemption 7(E) "exempts from disclosure information that could *increase the risks* that a law will be violated or that past violators will escape legal consequences." *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009). As the D.C. Circuit put it: "the exemption looks 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*. at 1196.

Revealing the existence or non-existence of records responsive to Plaintiff's request, to the extent such records have not been officially acknowledged, would disclose "techniques and procedures for law enforcement investigations or prosecutions" and, assuming it is required, such disclosure "could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E).[4] Revealing whether or not there are records about the FBI's use, training, or recruitment of CHSs at Best Buy facilities other than the Brooks, Kentucky facility, or at the Brooks, Kentucky facility outside the 2007-2016 timeframe, or at computer repair facilities not associated with Best Buy, would reveal the scope and details of the FBI's cyber-crime investigation techniques and strategies. This would allow those individuals involved in computer crimes to judge whether or not the FBI has discovered, or could discover, their criminal activities through the use of CHSs, and to structure their behavior accordingly to avoid detection. Hardy Decl. ¶ 57. "For example, revealing the FBI used or uses Best Buy CHSs at other Best Buy locations would dissuade criminals from seeking computer repair services from Best Buy, potentially depriving the FBI of information it could use to curtail their criminal activities; or, if criminals have already sought Best Buy services, they may now know they need to destroy evidence in their possession because of possible pending FBI investigative efforts.

[4] Exemption 7's threshold requirement, that the records or information in question be compiled for law enforcement purposes, is easily satisfied here. Any records responsive to Plaintiff's request would relate to the FBI's use of informants to enforce the criminal laws falling within the FBI's jurisdiction, and would therefore have been compiled for law enforcement purposes. *See Robinson v. Attorney Gen. of U.S.*, 534 F. Supp. 2d 72, 81 (D.D.C. 2008) (holding that "[i]t is clear" that the records sought "pertained to alleged confidential informants[,]" such that "all the records plaintiff requested . . . were or would have been compiled for law enforcement purposes"); Hardy Decl. ¶ 56.

Conversely, revealing the FBI does not maintain additional Best Buy CHSs could embolden criminals who have sought Best Buy repair services to continue their criminal activities without fear of FBI investigation." *Id*.; *see also id*. ¶¶ 59, 61-62.

In addition, confirming or denying the existence of FBI guidance, directives, or policy statements regarding the FBI's use of CHSs at computer repair facilities, as Item Four of Plaintiff's request seeks, would be harmful to FBI operations. *Id*. ¶¶ 63, 64. This would "disclose whether the FBI pursued the recruitment of computer repair employees on such a regular basis that it found the need to establish guidance, directives, and/or policy concerning the use of CHSs at computer repair facilities," alerting criminals as to the amount of caution they should exercise when seeking technical support for their computers. *Id*. ¶ 63.

Accordingly, the FBI properly invoked Exemption 7(E) to refuse to confirm or deny whether or not the FBI has any records, apart from those previously acknowledged. *See, e.g.*, *Morley v. CIA*, 508 F.3d 1108, 1129 (D.C. Cir. 2007) (upholding use of Exemption 7(E) to withhold information relating to security clearance procedure because it was self-evident that "information revealing security clearance procedures could render those procedures vulnerable and weaken their effectiveness"); *Myrick v. Johnson*, 199 F. Supp. 3d 120, 125 (D.D.C. 2016) (holding that "Defendant's *Glomar* response is authorized under Exemption 7(E) because an undercover operation is not known to the public and acknowledging its existence or non-existence would therefore increase the risk of circumvention of the law"); *Perrone v. FBI*, 908 F. Supp. 24, 28 (D.D.C. 1995) (upholding withholding pursuant to exemption 7(E) where "disclosure of this information would help plaintiff or potential criminals predict future

investigative actions by the FBI and consequently employ countermeasures to neutralize those techniques").

## III. THE FBI PROPERLY WITHHELD CERTAIN RESPONSIVE INFORMATION PURSUANT TO VARIOUS FOIA EXEMPTIONS

The FBI processed 243 pages of records responsive to Plaintiff's FOIA request. It released 14 pages in full, withheld 78 pages in full, and released 151 pages in part. In addition, the FBI withheld in full eight informant files.

### A. The FBI Properly Withheld in Full Eight Informant Files

The FBI properly withheld in full the eight informant files for those CHSs that had been acknowledged in the *Rettenmaier* litigation. In contrast to individual case files, an informant file is the entire collection of source material provided by an individual confidential source, who generally provides evidence or leads which can potentially be used over multiple investigations. Hardy Decl. ¶ 114. While the FBI cannot provide an exact page count or accounting of the exact documents in the withheld files without risking the harms that underlie the invoked exemptions, it has grouped the types of documents that exist in CHS files into a number of functional categories, including photographs of CHSs, CHS maintenance documents (records used to open, validate, evaluate, and close FBI CHSs), CHS payment documents, FBI records checks and database search printouts on CHSs, and documentation provided by CHSs (information provided by CHSs to the FBI during the course of FBI operations and investigations). *Id*. The FBI properly withheld the eight informant files in full pursuant to FOIA Exemptions 6, 7(C), 7(D), and 7(E), as demonstrated below.

#### 1. Exemption 7(D)

Exemption 7(D) allows for the protection of records or information compiled for law

enforcement purposes when disclosure "could reasonably be expected to disclose the identity of a confidential source" or "information furnished by a confidential source." 5 U.S.C. § 552 (b)(7)(D). As noted above, because these files concern FBI confidential sources, by their very nature they were "compiled for law enforcement purposes." *Id.*

"[A] source is confidential within the meaning of Exemption 7(D) if the source provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." *Boyd v. Criminal Div. of U.S. Dep't of Justice*, 475 F.3d 381, 389 (D.C. Cir. 2007) (citation omitted). As the Hardy Declaration demonstrates, cooperating human sources, such as the eight at issue here, all "provide[d] information under an express assurance of confidentiality," as demonstrated by the FBI's use of a "source symbol numbers" used to further obscure their identifies in certain files. Hardy Decl. ¶ 91. As a result, "these individuals are considered to be confidential sources since they furnished information only with the understanding that their identities and the information provided will not be released outside the FBI." *Id.* ¶ 89. The CHSs at issue here thus constitute "confidential" sources, as that term is understood pursuant to Exemption 7(D).

The only remaining question is whether release of any information in these eight informant files "could reasonably be expected" to disclose the identity of, or information provided by, confidential sources. Informant files, by their very nature, consist of identifying information of confidential sources and information provided by these sources, placing these types of files squarely under the protection of Exemption 7(D). *Id.* ¶ 115. Further, "releasing even seemingly benign information to include dates, times and other administrative markings would reveal key pieces of information about when and what information particular informants provided to the FBI." *Id.* Even providing the number of pages in the files or an "accounting of

these records would reveal the extent of individual sources' utility – how much information the sources provided to the FBI – again risking revelation of information about what was furnished by particular sources." *Id*.

For purposes of Exemption 7(D), it is of no moment that four of the eight CHSs at the Best Buy Brooks facility were identified in the course of the *Rettenmaier* investigation. Even where the Government discloses the identity of a confidential source, for instance by having the source provide public testimony, the protections of Exemption 7(D) are not waived. *See, e.g.*, *Parker v. DOJ*, 934 F.2d 375, 380 (D.C. Cir. 1991) (explaining that the statute "says nothing at all about waiver," and "reject[ing Plaintiff's] claim that the FBI waived its 7(D) protection" by having an informant testify publically); *Borda v. DOJ*, 245 F. Supp. 3d 52, 61 (D.D.C. 2017) ("It is. . . well settled that confidentiality is not lost merely because a source becomes a government witness.") (citation omitted); *Bullock v. FBI*, 577 F. Supp. 2d 75, 80 (D.D.C. 2008) ("Exemption 7(D) applies even when the source's identity is no longer a secret."). This broad protection remains even where the Government has disclosed the identity of confidential informants because Exemption 7(D) is clear that "once the agency receives information from a 'confidential source' during the course of a legitimate criminal investigation . . . *all* such information obtained from the confidential source receives protection." *Parker*, 934 F.2d at 380 (citation omitted). Accordingly the FBI properly withheld in full the eight informant files pursuant to Exemption 7(D).

2. Exemptions 6 and 7(C)

The FBI additionally withheld all eight informant files pursuant to Exemptions 6 and 7(C), and both exemptions justify the agency's categorical withholding here. Exemption 6 protects "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). Exemption 7(C) protects "records or information compiled for law enforcement purposes" when disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.* § 552(b)(7)(C). While similar, Exemption 7(C) is thus "broader" than the standard for withholding under Exemption 6. *DOJ v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 756 (1989).

The Supreme Court has defined the privacy interests protected by these exemptions expansively, as Congress intended to provide expansive protection against the government's release of information about individual citizens. *See Id.* 763-64. The privacy interest belongs to the individual, not to the agency in possession of information about the individual. *Id*. at 763-65. It protects the right of individuals "to determine for themselves when, how, and to what extent information about them is communicated to others." *Id*. at 764, n.16. With this right in mind, the Court should "balance [this] privacy interest against the public interest in disclosure." *Citizens for Responsibility & Ethics in Washington ("CREW") v. DOJ*, 746 F.3d 1082, 1091 (D.C. Cir. 2014) (citation omitted).

The Hardy Declaration explains that CHSs have a "substantial" interest in the FBI maintaining confidentiality concerning their identity and private information. Hardy Decl. ¶ 123; *see also Schrecker v. DOJ*, 349 F.3d 657, 666 (D.C. Cir. 2003) ("[P]ersons involved in law enforcement investigations - witnesses, informants, and the investigating agents – 'have a substantial interest in seeing that their participation remains secret.'") (citation omitted). The four CHSs who were identified in the *Rettenmaier* litigation still have a substantial privacy interest in their informant files, as "the breadth, depth, and nature of the cooperation of the eight FBI informants at issue has not been fully disclosed. Any retaliation/stigma/harassment directed

against them for their cooperation with the FBI could reasonably be expected to be amplified should the FBI choose to disclose additional information about their cooperation." Hardy Decl. ¶ 123; *see also Weisberg*, 745 F.2d at 1491 (holding that public disclosure of informants' identities "in no way undermines the privacy interests of these individuals in avoiding harassment and annoyance"); *Kleinert v. Bureau of Land Mgmt.*, 132 F. Supp. 3d 79, 93 (D.D.C. 2015) (holding that "[i]t is easy to see why those dangers" of "harassment, embarrassment, and reputational damage" are present for "investigators, suspects, witnesses, and informants") (citation omitted). The files also contain previously undisclosed personal identifying information of the CHSs, release of which would constitute serious invasions of these individuals' personal privacy. Hardy Decl. ¶ 123.

Balanced against these substantial privacy interests is a minimal public interest in these informant files, "considering these records relate only to the FBI's vetting, maintenance, and tasking of eight specific FBI CHSs. This information is not likely to reveal information about the FBI's performance of its statutory duties beyond a very limited set of circumstances." *Id*. ¶ 124. Critically, the privacy protections under Exemption 7(C) may only be outweighed where Plaintiff can "show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake" and that "the information is likely to advance that interest." *Barbosa v. DEA*, 541 F. Supp. 2d 108, 111 (D.D.C. 2008) (citation omitted). And it the information sought must shed light on the FBI's performance of its duties and mission. Hardy Decl. ¶ 121; *see Davy v. CIA*, 357 F. Supp. 2d 76, 87 (D.D.C. 2004). Because the privacy interest at stake outweighs the public's interest in disclosure, the FBI properly withheld in full the eight informant files under Exemptions 6 and 7(C).

3. Exemption 7(E)

The FBI also withheld the informant records in full pursuant to Exemption 7(E) to protect law enforcement techniques and procedures. "Releasing any information from FBI informant records, by definition, risks revealing who and why certain individuals are targeted for recruitment; and which types of individuals are likely to provide the most/least helpful information to the FBI based on their personality and/or their access to information most needed by the FBI to pursue its law enforcement mission." Hardy Decl. ¶ 125. The files also contain information about the vetting procedures the FBI uses for CHSs. *Id*. Revealing this information would allow criminals to judge who among their circle of associates are likely to be FBI CHSs and thus avoid or manipulate these people to prevent detection of criminal activity by the FBI's CHS program. *Id*. ¶ 126. In addition, informant files typically contain sensitive examples of nonpublic FBI strategies and techniques for maintaining and utilizing CHSs, and confidential CHS payment techniques and authorities, the disclosure of which could make the program less effective. *Id*. ¶ 127(A). The disclosure of these various techniques could also endanger the lives of current CHSs and discourage individuals from cooperating with the FBI in the future. *Id*. ¶ 128.

In withholding the informant files in full, the FBI reviewed the files for any information that could be segregated for release and determined that there was none. *Id*. ¶ 129.

B. Portions of the Informant Files are Also Exempt

Under the D.C. Circuit's decision in *Maydak v. DOJ*, 218 F.3d 760, 764 (D.C. Cir. 2000), an agency is required to assert "all exemptions at the same time, in the original district court proceedings." Accordingly, the Hardly Declaration explains that while the informant files were withheld in full pursuant to the above exemptions, specific portions of the informant files were

also withheld pursuant to Exemptions 3, 6/7(C), 7(A), 7(D) and 7(E). The Hardy Declaration discusses the types of evidentiary/investigative and administrative materials in the informant files, the harms that could result from their release, and the applicable exemptions. Hardy Decl. ¶¶ 131-46. The FBI respectfully refers the Court to those paragraphs.

C. The Redactions Made to the Processed Documents are Justified by Applicable FOIA Exemptions

The FBI made redactions to 151 pages of responsive records, pursuant to Exemptions 6, 7(C), 7(D), and 7(E), and withheld 78 pages in full (in addition to the eight informant files discussed above), pursuant to Exemptions 7(D) and 7(E). *See id*. ¶¶ 66-112; Vaughn Index, attached hereto as Exhibit K. The FBI conducted a segregability analysis to ensure the production of all non-exempt portions of the documents. *Id*. ¶ 66.

1. File numbers and investigative leads for pending investigations are protected under Exemption 7(A)

The FBI withheld pursuant to Exemption 7(A) file numbers of pending investigations and investigative leads forwarded from LSFO to other FBI field offices seeking further inquiry by those offices for potential opening of investigations. *Id*. ¶ 73. Exemption 7(A) allows agencies to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings[.]" 5 U.S.C. § 552(b)(7)(A). "Exemption 7(A) reflects the Congress's recognition that 'law enforcement agencies ha[ve] legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it [comes] time to present their case.'" *CREW*, 746 F.3d at 1096 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978)). "To justify withholding, [an agency] must therefore demonstrate that 'disclosure (1) could reasonably be expected to interfere

with (2) enforcement proceedings that are (3) pending or reasonably anticipated.'" *Id.* (quoting *Mapother v. DOJ*, 3 F.3d 1533, 1540 (D.C. Cir. 1993)). "Exemption 7(A) does not require a presently pending 'enforcement proceeding.' Rather . . . it is sufficient that the government's . . . investigation is likely to lead to such proceedings." *Ctr. for Nat. Sec. Studies v. DOJ*, 331 F.3d 918, 926 (D.C. Cir. 2003).

The withheld file numbers and investigative leads all pertain to pending investigations that are likely to lead to enforcement proceedings. Hardy Decl. ¶ 73. Release of this nonpublic information could result not only in the acknowledgment of the existence of the investigations, but also in the identification of suspects and what evidence the FBI gathered, and how it gathered it, allowing suspects to destroy or tamper with potential evidence. *Id*. ¶ 74. The FBI has accordingly determined that disclosure of the information, in the midst of these active and ongoing investigations, could reasonably be expected to interfere with these investigations as well as any resulting prosecutions. *Id*. Thus, the FBI properly withheld the file numbers and leads pursuant to Exemption 7(A). *See, e.g., Shapiro v. CIA*, 247 F. Supp. 3d 53, 65 (D.D.C. 2017) (holding that where redacted material, including "file numbers," "could expose potential leads and/or suspects the FBI identified" withholding information was proper under Exemption 7(A)") (citation omitted); *Hammouda v. U.S. Dep't of Justice Office of Info. Policy*, 920 F. Supp. 2d 16, 24 (D.D.C. 2013) (upholding use of Exemption 7(A) to redact "information from, and the file numbers of, pending FBI investigations into the criminal activities of various third parties") (citation omitted).

2. The FBI properly redacted names and identifying information under Exemptions 6 and 7(C)

The FBI properly redacted personal information exempt from disclosure under FOIA Exemptions 6 and 7(C). Specifically, the FBI redacted the names or identifying information of

(1) FBI special agents and support personnel, (2) third parties of investigative interest, (3) commercial institution personnel, (4) third party victims, (5) non-FBI federal government personnel, (6) local law enforcement personnel and (7) third parties merely mentioned in the documents. Hardy Decl. ¶¶ 78-87.

The FBI properly applied exemptions 6 and 7(C) to the above information. Indeed, the D.C. Circuit has held "categorically that, unless 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." *SafeCard Servs*., 926 F.2d at 1206. Plaintiff has put forward no evidence or any allegation of illegal activity, such that the identifying information of private individuals in categories (2), (3), (4), and (7) was properly withheld.

Further, as to the remaining categories, "law enforcement personnel have a privacy interest in protecting their own identities because disclosure could subject them to annoyance, embarrassment, and harassment in the conduct of their official and private lives." *Marshall v. FBI*, 802 F. Supp. 2d 125, 134 (D.D.C. 2011). Plaintiff cannot plausibly argue that the identities of law enforcement personnel here would "shed[] light on an agency's performance of its statutory duties," as required to overcome a withholding pursuant to Exemption 7(C). *Negley v. FBI*, 825 F. Supp. 2d 63, 72 (D.D.C. 2011). Accordingly, the FBI properly withheld the identifying information of law enforcement personnel in categories (1), (5), and (6) above. *See, e.g.*, *McGehee v. DOJ*, 800 F. Supp. 2d 220, 233 (D.D.C. 2011) (upholding 7(C) withholdings by the FBI to protect "names and/or identifying information of: 1) Third Parties Merely Mentioned . . . 3) FBI Agents and Support Personnel . . . 5) Local and/or State Government Employees . . . 6) Third Parties of Investigative Interest").

3. The FBI properly withheld confidential source information under Exemption 7(D)

The FBI properly withheld records in full or in part, pursuant to Exemption 7(D), in order to protect the following confidential source information: (1) information, names, and identifying data provided by source symbol numbered informants, and (2) confidential source file numbers. Hardy Decl. ¶¶ 91-97.

The FBI protected the names, identifying data such as source symbol numbers, and information provided by individuals who assisted in the multiple child pornography investigations documented in the records at issue. *Id*. ¶¶ 91, 96. Each of the CHSs referenced in the responsive records were provided an express assurance of confidentiality, as demonstrated by the FBI's provision of "source symbol numbers," *see id*. ¶¶ 96-97, to further obscure their identities. In the processed records, the FBI documented receipt of information from these CHSs by notating each of their identities by a specific confidential symbol source number. All CHSs protected here were provided a source symbol number, and so each constituted a "confidential source" within the meaning of Exemption 7(D). *Id*. ¶ 91. The names, identifying data (including source symbol numbers), and information provided by the confidential sources is squarely protected by Exemption 7(D). *See Clemente v. FBI*, 741 F. Supp. 2d 64, 87 (D.D.C. 2010) (upholding 7(D) withholding of "information provided by source symbol numbered informants," and that of "[i]nformants to whom no source code was assigned but who supplied information to the FBI") (citation omitted); *Amuso v. DOJ*, 600 F. Supp. 2d 78, 99 (D.D.C. 2009) (identities and information provided by symbol numbered sources were properly withheld under Exemption 7(D)).

Confidential source file numbers are administrative tools that facilitate the retrieval of information supplied by sources. Similar in usage to the confidential source symbol numbers,

confidential source file numbers are assigned in sequential order to confidential informants who report information to the FBI on a regular basis pursuant to express assurances of confidentiality. Confidential source file numbers are unique to a particular confidential informant, and are used only in documentation relating to each particular informant. Hardy Decl. ¶ 93. Disclosure of confidential source file numbers "at various times and in various documents could ultimately identify a source, because it would reveal the connection of a confidential informant to the information provided." *Id*. ¶ 94. And repeated release of these unique confidential source file numbers, along with the information they provided, would narrow the possibilities of the informant's identity. *Id*. Courts have therefore consistently upheld the withholding of confidential source file numbers under Exemption 7(D). *See, e.g., Pinson v. DOJ*, 177 F. Supp. 3d 56, 89 (D.D.C. 2016) (upholding withholding under Exemption 7(D) of informant "source file numbers and source symbol numbers"); *Petrucelli v. DOJ*, 51 F. Supp. 3d 142, 169 (D.D.C. 2014) (upholding withholding under Exemption 7(D) of "informant file number of a permanent confidential symbol number source") (citation omitted).

4. The FBI properly redacted information about techniques and procedures of the FBI's informant program information under Exemption 7(E)

Finally, the FBI withheld records, or portions of records, pursuant to Exemption 7(E), where the following information concerning law enforcement techniques and procedures was present: (1) sensitive file and sub-file names and numbers, (2) non-public investigative techniques and procedures of the FBI's informant program, and (3) internal FBI search slips and computer-generated search results. Hardy Decl. ¶¶ 100-111.

The FBI redacted sensitive case file and sub-file names and numbers that could be used to identify the investigative interest or priority given to such matters, as well as information about the particular types of techniques used by the FBI during child pornography investigations.

*Id*. ¶ 101. The FBI concluded that, "[a]pplying a mosaic analysis, suspects could use these numbers . . . 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[.]" *Id*. The Supreme Court has noted that "bits and pieces of data 'may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself.'" *CIA v. Sims*, 471 U.S. 159, 178 (1985) (citation omitted). Accordingly, the FBI properly withheld file numbers and names concerning FBI operations because their disclosure could reasonably risk circumvention of the law. *See Poitras v. DHS*, No. CV 15-1091 (BAH), 2018 WL 1702392, at *13 (D.D.C. Mar. 29, 2018) (upholding FBI use of Exemption 7(E) to withhold "sensitive case file numbers" where "[a]pplying a mosaic analysis, suspects could use these numbers . . . to avoid detection, apprehension, or create alibis"); *Shapiro*, 247 F. Supp. 3d at 72 (upholding FBI reliance on a "'mosaic' argument to justify its redactions," and concluding "that the FBI has passed the 'low bar' imposed by 7(E)").

The FBI also withheld records in full or in part to protect non-public investigative techniques and procedures of its informant program. Hardy Decl. ¶ 102. This information falls into one or more of four sub-categories: (1) operational directives and strategies for recruitment and utilization of CHSs, (2) approval limitations on utilizing CHSs, (3) confidential funding techniques and strategies, and (4) source recruitment and maintenance techniques.[5] Id. ¶¶ 102-110. Citing to the exact category of information withheld in each record within the files "would reveal information itself as to the direction and scope of the techniques used at a particular time

[5] The directives and strategies referenced here are not specific to the use of informants at computer repair facilities, as sought in Item Four of Plaintiff's request. The FBI cannot acknowledge or deny the existence of any memoranda, guidance, directives or policy statements concerning the use of informants and/or CHSs at computer repair facilities in the United States. Hardy Decl. ¶ 63.

during the investigation." *Id.* ¶ 103. However, a brief explanation of each of these sub-categories makes plain that all such withheld information concerns sensitive techniques and procedures, the disclosure of which could reasonably be expected to enable circumvention of the law.

First, the operational directives and strategies for recruitment and utilization of CHSs describe FBI procedures, techniques, and strategies for recruitment and utilization of CHSs, and also instruct FBI employees on the proper use of these procedures, techniques, and strategies. *Id.* ¶ 104. The release of this sensitive information would reveal how FBI special agents generally utilize CHSs, and how individuals are recruited, trained, paid, and communicate with their handlers. Criminals could clearly use this information to modify their behavior in an attempt to avoid detection. *Id.* ¶ 105; *Fisher v. DOJ*, 772 F. Supp. 7, 12 (D.D.C. 1991) (affirming FBI withholding under Exemption 7(E) where information could inform suspects in certain investigations "about techniques used to aid the FBI").

Second, information concerning approval limitations on utilizing CHSs governs when CHSs may be recruited and used, and the requirements for approval and oversight of the use of CHSs. Hardy Decl. ¶ 106. Again, release of this type of information would be harmful to FBI operations, as it "would disclose to criminals which investigative activities involving CHSs are or are not prohibited during certain types of investigations. Criminals could then combine this knowledge with other information to determine whether their activities are likely to be detected by FBI CHSs." *Id.* ¶ 107.

Third, confidential funding techniques and strategies are the specific techniques and strategies that enable the FBI to pay CHSs for their assistance or reimburse them for expenses incurred related to investigations. *Id.* ¶ 108. Disclosing this category of information "would

reveal the spending limits for employing sources, spending accounts utilized, the transmission methods for making payments, specific amounts paid to CHSs, and would reveal the FBI's strategies and techniques of effectively using its limited resources in this manner." *Id.* Revealing the amount of money the FBI has paid or plans to pay in order to implement certain investigative techniques would in turn reveal the FBI's level of focus on certain types of law enforcement or intelligence gathering efforts. *Id.* ¶ 109. This is all valuable information to the criminal seeking to avoid detection by the FBI, and is properly protected by Exemption 7(E). *Id.*; *See Lewis-Bey v. DOJ*, 595 F. Supp. 2d 120, 138 (D.D.C. 2009) (upholding FBI withholding under Exemption 7(E) where disclosure "could aid persons" by revealing how a "confidential informant is able to receive funds").

Fourth, source recruitment and maintenance techniques identify and describe specific strategies and techniques for recruiting and maintaining effective CHSs. Hardy Decl. ¶ 110. "For example, revealing this category of information would reveal how FBI SAs identify potential sources in a current investigative activity of interest, how a source is vetted for reliability, how the information provided by a source is vetted for accuracy, and the maintenance, storage, and indexing into the CRS of records of investigative interest." *Id.* Release of this sensitive information would similarly would "allow criminals to predict the FBI's CHS recruitment strategies and gain insight regarding which of their associates might be likely recruitment targets, and whom they should intimidate, coerce, or even eliminate to prevent detection by the FBI's CHS program." *Id.*

Lastly, the FBI protected in part or in full search slips and computer generated search printouts pursuant to Exemption 7(E). "The search slips and printouts protected in part or in full by the FBI are related to vetting potential informants to become a CHS or CHSs receiving an

annual review to establish a continued need of the informant." *Id*. ¶ 111. Specifically, the search slips and printouts contain identifying information and details concerning the FBI's investigation or review of informants, which would all "provide key insight into the FBI's source vetting standards." *Id*. Among other harms, "[p]roviding any such information would also enable those wishing to gain the FBI's confidence and pose as a potential FBI CHSs the opportunity to judge what information they should manipulate/mask to avoid discovery of their nefarious intentions and ensure the FBI targets them for recruitment." *Id*. Because release of these search slips and computer printouts could reasonably be expected to risk circumvention of the law, the FBI properly withheld these records pursuant to Exemption 7(E). *See Shapiro v. DOJ*, 239 F. Supp. 3d 100, 114 (D.D.C. 2017) (upholding FBI's use of Exemption 7(E) to withhold a "limited universe of search slips[,]" where such records would disclose, among other things, "the scope and focus of [the FBI's] investigative efforts"); *Mezerhane de Schnapp v. USCIS*, 67 F. Supp. 3d 95, 101 (D.D.C. 2014) (upholding used of Exemption 7(E) to withhold database "printouts" where information would "enlighten asylum applicants with criminal backgrounds about what sort of law enforcement information . . . is consulted by USCIS").

## CONCLUSION

For all the reasons set forth above, the FBI respectfully requests that the Court grant summary judgment in favor of Defendant on all of Plaintiff's claims.

Respectfully submitted this 27th day of April, 2018.

CHAD A. READLER
Acting Assistant Attorney General

MARCIA BERMAN
Assistant Branch Director
Federal Programs Branch

_/s/ Michael L. Drezner_____
MICHAEL L. DREZNER (VA Bar No. 83836)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W. Room 7310
Washington, D.C. 20530
Tel: (202) 514-4505
Fax: (202) 616-8470
Email: Michael.L.Drezner@usdoj.gov

Attorney for Defendant.