IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER FOUNDATION, Plaintiff, v. DEPARTMENT OF JUSTICE, Defendants.	Civil Case No. 17-cv-1039-DLF

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In this Freedom of Information Act ("FOIA") case, plaintiff Electronic Frontier Foundation ("EFF") seeks records documenting the extent to which the Federal Bureau of Investigation ("FBI") directed, paid, or incentivized computer repair technicians employed by Best Buy and other companies to search customers' devices for illegal material. EFF is a member-supported, non-profit legal foundation that litigates to protect free speech and privacy rights in the digital age. As part of its work, it frequently files and litigates FOIA requests to learn more about the conduct of domestic law enforcement and national security surveillance programs.

Documents disclosed in this case and a criminal case against a doctor who sent his devices to a Best Buy Geek Squad facility demonstrate that the FBI has been working with employees at the company's Brooks, Kentucky repair facility since 2008, including conducting meetings and taking tours. The documents also describe a series of payments the FBI made to four Best Buy employees and describe relationships with a total of eight employees. *See* Tom Jackman, *Records show deep ties between FBI and Best Buy computer technicians looking for child porn*, Washington Post (April 3, 2017) ;[1] Aaron Mackey, *Geek Squad's Relationship With FBI Is Cozier Than We Thought*, EFF Deeplinks (March 6, 2018).[2]

The information disclosed raises significant questions about whether Geek Squad employees were acting as agents of the FBI and conducting searches of people's devices or taking other actions beyond the scope of their employment duties. If that were the case, the

[1] https://www.washingtonpost.com/news/true-crime/wp/2017/04/03/records-show-deep-ties-between-fbi-and-best-buy-computer-technicians-looking-for-child-porn/.

[2] https://www.eff.org/deeplinks/2018/03/geek-squads-relationship-fbi-cozier-we-thought.

searches they conducted could have violated the Fourth Amendment's prohibition on warrantless searches by law enforcement or its agents. Disclosure of the records withheld in this case will shed further light on the FBI's activities.

BACKGROUND

Plaintiff adopts defendant's factual background regarding its response to plaintiff's FOIA request. Defendant's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment ("Def. Mem.") at 2-4. Plaintiff also adopts defendant's statements regarding *U.S. v. Rettenmaier*, No. 14-cr-188 (C.D. Cal.), save for defendant's statement regarding the number of Best Buy Geek Squad employees the government publicly identified in that prosecution. Def. Mem. at 1-2. Plaintiff's review of the materials in that case indicate five Geek Squad employees were publicly identified as interacting with the FBI.

ARGUMENT SUMMARY

Summary judgment should be granted to plaintiff because the FBI has improperly refused to confirm or deny whether records responsive to some aspects of plaintiff's request exist, and the Bureau has failed to justify its withholding of other records in part and in full under Exemptions 7(D), 7(E), and 6 and 7(C). The FBI's attempt to use a partial *Glomar* response, in which it refused to confirm or deny that records exist responsive to EFF's request and refused to search for those records, is improper because it is a well-known law enforcement technique to investigate reports of illegal material through the cooperation of computer repair technicians. Since such techniques are well known, the FBI's reliance on Exemption 7(E) to justify its *Glomar* response is inappropriate. The Bureau may have legitimate FOIA exemption claims regarding specific information that it has refused to confirm exist and process in response to plaintiff's FOIA request. FOIA, however, requires the agency to conduct a search for those

records and to process them, rather than use a *Glomar* response to broadly shield any information from being disclosed.

The FBI also cannot withhold informant files and narrative descriptions provided by Geek Squad employees under Exemption 7(D) because an FBI agent with direct knowledge of the agency's relationship with those employees has testified that the Bureau did not provide them with an express grant of confidentiality. Because such a showing is required in the first instance to justify withholding records under Exemption 7(D), these records must be disclosed. Alternatively, because five Geek Squad employees and the federal government have confirmed in other cases that they provided information to the FBI, the Bureau has waived its claim to withhold information under Exemption 7(D).

The FBI has also failed to justify its withholding of two categories of information under Exemptions 6 and 7(C): (1) the names of individuals suspected of crimes for which there was a public conviction or guilty plea and (2) the names of Geek Squad employees who have been previously publicly identified. Regarding identifying information of suspects, controlling law requires the agency to release that information if those individuals have been subject to public adjudications or have pleaded guilty. Because the FBI has not provided this detailed information as required under FOIA, it has failed to meet its burden. Regarding the names of Geek Squad employees who have been previously identified, because the federal government has publicly acknowledged their identities, the FBI has waived its privacy exemption claims here. Alternatively, in light of that public disclosure, further identification of those individuals here represents a *de minimus* privacy invasion and there is a strong public interest in disclosure to further illuminate the FBI's activities with respect to its relationship with Geek Squad employees.

Additionally, law enforcement's well-known cooperation with computer repair technicians as leads or sources of criminal investigations makes the Bureau's withholdings of certain records under Exemption 7(E) inappropriate. Just as the FBI cannot rely on Exemption 7(E) to justify its *Glomar* response, it similarly cannot claim the exemption to withhold information (1) about its informant program or (2) internal search slips and related materials describing its internal review of Geek Squad employees.

Finally, the Court should reject the FBI's claims that it can withhold specific portions of the informant files in this case under Exemptions 3, 6, 7(C), 7(A), 7(D), and 7(E). The FBI has failed to substantiate these claims and instead has made hypothetical claims regarding the exemptions that might be applicable to the underlying materials. FOIA prohibits such unfocused and equivocal exemptions claims. Further, the FBI has not put forward sufficient information or an adequate description of what information it is withholding, as required by FOIA. In any event, the claims to withhold particular information under Exemptions 6, 7(C), 7(D), and 7(E) are already foreclosed for the reasons described above.

Plaintiff's challenge to the FBI's withholdings is limited to the issues described above and discussed in more detail below. EFF thus does not challenge the following:

- The adequacy of the FBI's search for records that it acknowledged existed and searched for as a result of EFF's request. Plaintiff *does* challenge the adequacy of the search to the extent the agency failed to search for records in reliance upon its *Glomar* response. Defendant's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment ("Def. Mem.") at 5-12.
- The FBI's withholding of file numbers and investigative leads under Exemption 7(A). Def. Mem. at 23.

- The FBI's withholding of identifying information under Exemptions 6 & 7(C) of certain categories of individuals, Def. Mem. at 24-26, including:
    - FBI special agents and support personnel
    - Third-party victims
    - Non-FBI federal government personnel
    - Local law enforcement personnel
    - Other third parties merely mentioned
- The FBI's withholding of the names of Geek Squad employees not publicly identified by the federal government under Exemptions 6 and 7(C). Def. Mem. at 19-22, 24. The FBI should redact that information and otherwise disclose these records in light of its failure to withhold non-identifying information under Exemptions 7(D) and 7(E).
- The FBI's withholding of "source symbol numbers" under Exemptions 7(D) and 7(E). Def. Mem. at 26, 27.
- The FBI's withholding of file and sub-file names and numbers under Exemption 7(E). Def. Mem. at 27-28.

ARGUMENT

I. FOIA Establishes a Presumption of Disclosure and Requires DOJ to Make a Detailed and Specific Showing that Each Responsive Agency Record Is Properly Exempt from Disclosure.

The Freedom of Information Act safeguards American citizens' right to know "what their government is up to." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). The central purpose of the statute is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214,

242 (1978). "[D]isclosure, not secrecy, is the dominant objective of [FOIA]." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

The statute requires disclosure of agency records when requested by the public unless the records fall within one of nine exemptions. *See* 5 U.S.C. § 552(b) (1) - (9). If requested information does not fit squarely into one of these enumerated categories, the law requires federal agencies to disclose the information. *NLRB,* 437 U.S. at 221. FOIA's exemptions "have been consistently given a narrow compass," and requested agency records that "do not fall within one of the exemptions are improperly withheld." *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (internal quotation marks omitted).

Disputes involving the propriety of agency withholdings are commonly resolved at the summary judgment stage in FOIA cases. *Harrison v. EOUSA*, 377 F. Supp. 2d 141, 145 (D.D.C. 2005). The Court reviews the government's withholding of agency records *de novo*, and the government bears the burden of proving that a particular document falls within one of the nine narrow exemptions to FOIA's broad mandate of disclosure. 5 U.S.C. § 552(a)(4)(B); *Reporters Comm.*, 489 U.S. at 755. "Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action.'" *Id.* (quoting 5 U.S.C. § 552(a)(4)(B)).

To be entitled to summary judgment, an agency must prove that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978) (internal citation and quotation omitted). When claiming one of the FOIA's exemptions, the agency bears the burden of providing a "'relatively detailed justification' for assertion of an exemption, and must demonstrate to a reviewing court that records withheld are *clearly* exempt."

Birch v. U.S. Postal Serv., 803 F.2d 1206, 1209 (D.C. Cir. 1986) (emphasis added) (citing *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977). In *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973), the D.C. Circuit established the "procedural requirements" that "an agency seeking to avoid disclosure" must follow in order to carry its burden. *Vaughn* requires that "when an agency seeks to withhold information it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Mead Data Cent., Inc.*, 566 F.2d at 251 (citations omitted).

The *Vaughn* requirements are typically satisfied through an agency's submission of an affidavit describing the basis for its withholdings, and providing justifications for redactions, accompanied by an index listing responsive records and indicating the precise redactions made to the records. As the D.C. Circuit has emphasized,

> under our case law, agencies invoking a FOIA exemption must provide a specific, detailed explanation of why the exemption applies to the withheld materials. . . . Requiring agencies to provide public explanations for their redactions allows for adversarial testing of the agencies' claims, which helps focus the court's attention on the most important issues in the litigation and may reveal not otherwise apparent flaws in the agencies' reasoning.

Roth v. U.S. Dep't of Justice, 642 F.3d 1161, 1185 (D.C. Cir. 2011) (citations omitted).

Here, defendant DOJ, on behalf of its component the FBI, has not even attempted to make the requisite showing that "*each* document that falls within the class requested" is exempt from disclosure. *Goland*, 607 F.2d at 352 (emphasis added). Under the facts of this case and the relevant caselaw, defendant's action cannot be sustained.

II. The FBI Improperly Refused to Confirm or Deny the Existence of Responsive Records Beyond the Disclosures Made in *Rettenmaier.*

Seeking to rely upon the extremely limited search it conducted for records responsive to plaintiff's FOIA request,[3] the FBI has invoked a so-called "*Glomar* response," refusing to confirm or deny whether records other than those identified in the *Rettenmaier* criminal prosecution may exist. Basing its *Glomar* claim on Exemption 7(E), the Bureau asserts that

> 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.

Def. Mem. at 15. Under the unique circumstances of this case, the FBI's novel assertion of the *Glomar* doctrine cannot be sustained.

It is well established that 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). The origin of the term "*Glomar*" illustrates the logic behind allowing an agency, under some circumstances, to rely upon a refusal to confirm or deny the existence of responsive records. In *Phillipi v. CIA*, 655 F 2d. 1325 (D.C. Cir. 1981), the requester submitted a FOIA request for agency records concerning a vessel named the "Hughes Glomar Explorer," and the CIA refused to confirm or deny any knowledge of the vessel on the ground that any other response would divulge intelligence sources and methods. The D.C. Circuit upheld the CIA's handling of the request.

[3] As noted, plaintiff does not challenge the adequacy of the search the FBI actually conducted; rather, plaintiff submits that the Bureau improperly limited the scope of its search, as discussed herein.

Here, in contrast, the FBI has publicly acknowledged, both in the *Rettenmaier* case and in the records disclosed to plaintiff, that it has had relationships with individuals it describes as "cooperating human sources" ("CHSs"), or informants, for the purpose of discovering child pornography on devices sent to computer repair facilities. The Bureau argues that its public acknowledgement has been limited to the Best Buy facility in Brooks, Kentucky, in "the 2007-2016 timeframe," and that admitting the existence of records concerning other facilities, or a different time period, would result in harm of the kind Exemption 7(E) seeks to prevent. The FBI's *Glomar* claim will thus rise or fall depending upon the applicability of the exemption.

When seeking to withhold information under Exemption 7(E), an agency must demonstrate that the information was "compiled for law enforcement purposes" and that its public release "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).[4] As defendant acknowledges, an agency must demonstrate "*logically* how the release of [the requested] information might create a risk of circumvention of the law." Def. Mem. at 14, quoting *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011) (emphasis added); *see also id*. ("justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible'"), quoting *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007).

To assess whether the FBI's position here is "logical," the Court must consider a fundamental requirement of Exemption 7(E) caselaw that is tellingly absent from the agency's recitation of the applicable legal standard. This Court has long held that the exemption permits

[4] Plaintiff concedes that the information at issue here was "compiled for law enforcement purposes."

"the withholding of material which describes *secret* investigative techniques and procedures." *Jaffe v. CIA*, 573 F. Supp. 377, 387 (D.D.C. 1983) (emphasis added). Thus, Exemption 7(E) "extends to information regarding obscure or secret techniques," and protects "documents which assertedly relate to law enforcement procedures *not known to the public*." *Id*. (emphasis added). *See also Myrick v. Johnson*, 199 F. Supp. 3d 120, 125 (D.D.C. 2016) (same); *Smith v. BATF*, 977 F. Supp. 496, 501 (D.D.C. 1997) (agency "must provide greater detail as to why the release of the information . . . would compromise law enforcement by revealing information about investigatory techniques that are not widely known to the general public").

This Court's application of the "not known to the public" standard in a variety of cases demonstrates that the FBI's position here must be rejected. In *Albuquerque Pub. Co. v. Dep't of Justice*, 726 F. Supp. 851 (D.D.C. 1989), the Court noted that "[a]s construed in the [legislative history] and case law in this Circuit, [Exemption 7(E)] pertains to investigative techniques and procedures generally unknown to the public." *Id*. at 857 (citations omitted). In a passage relevant to the circumstances present here, the Court emphasized that it

> saw nothing exceptional or secret about the techniques [the agency] described—namely, the use of wired informants and "bugs" secretly placed in rooms that are under surveillance. Anyone who is familiar with the media, both television and print, is aware that the police use these and similar techniques in the course of criminal investigations. DEA's position in this respect disregards reality. Therefore, the government should avoid burdening the Court with an *in camera* inspection of information pertaining to techniques that are commonly described or depicted in movies, popular novels, stories or magazines, or on television. These would include, it would seem to us, techniques such as eavesdropping, wiretapping, and surreptitious tape recording and photographing. Instead, the government should release such information to plaintiff voluntarily.

Id. at 857-858.

Likewise, in *Goldstein v. Office of Indep. Counsel*, 1999 U.S. Dist. LEXIS 22969 (D.D.C. July 29, 1999), the FBI sought to withhold a document because it "claims it is

information which would disclose investigative techniques and procedures regarding the installation of technical equipment." *Id.* at *49. The Court ordered the document released, noting that "[a]lthough it does discuss a specific investigative technique, this memorandum regarding a technique is over ten years old and I find that the information is now commonly known by the public and is not properly withheld under Exemption 7(E)." *Id*. at *49-50. In *Campbell v. Dep't of Justice*, 1996 U.S. Dist. LEXIS 14996 (D.D.C. September 19, 1996), the agency "applied the exemption to commonly known procedures such as pretext telephone calls." *Id*. at *34. The Court rejected the claim, holding that "[t]he technique information at issue . . . does not directly comport with the general class of information protected under Exemption 7 as 'obscure or secret.'" *Id*.

Applying the applicable standard here, it is clear that there is nothing "obscure or secret" about law enforcement cooperation with technicians employed at computer repair facilities. More than twenty years ago, in one reported case, an individual "took his computer to a shop to be repaired [and] [w]hile searching for computer viruses, a computer repair technician discovered files containing child pornography on the computer's hard drive." *United States v. Stevens*, 197 F.3d 1263, 1264 (9th Cir. 1999). The technician contacted the local police, who in turn referred the case to the FBI. *Id.*; *see also United States v. Hill*, 459 F.3d 966 (9th Cir. 2006) (same). Several states have explicit statutory provisions requiring computer technicians to report any suspected child pornography they may encounter to law enforcement. *See*, *e.g.*, NC Gen Stat § 66-67.4 (2014) (North Carolina); Tex. Bus. & Com. Code § 110.002 (2017) (Texas); S.D. Codified Laws § 22-24A-18 (2016) (South Dakota).

As a result of the *Rettenmaier* prosecution, law enforcement cooperation with computer repair technicians and facilities has become even more well-known, with widespread reporting

by major news outlets. *See*, *e.g.*, Tom Jackman, *Records show deep ties between FBI and Best Buy computer technicians looking for child porn*, Washington Post (April 3, 2017)[5]; Sean Emory, *Relationship between Geek Squad, FBI explored in Newport Beach doctor's child porn photo case*, Orange County Register (January 13, 2017)[6]; Laurel Wamsley, *FBI Used Paid Informants On Best Buy's Geek Squad To Flag Child Pornography*, National Public Radio (March 7, 2018)[7]; Josh Hafner, *FBI hired Best Buy's Geek Squad employees as paid informants to flag child pornography*, USA Today (March 8, 2018).[8] If, as the Court has held, the government may not invoke Exemption 7(E) to protect "techniques that are commonly described or depicted in movies, popular novels, stories or magazines, or on television," *Albuquerque Pub. Co.,* 726 F. Supp. at 858, then it surely cannot conceal information about its collaboration with computer repair facilities – a technique not depicted in fictional entertainment, but rather revealed in court proceedings that have garnered widespread public attention.

To the extent that the FBI seeks to distinguish between its relationship with the Best Buy Kentucky facility during "the 2007-2016 timeframe," on the one hand, and relationships with different facilities and during different time periods, on the other, any legitimate concerns can be easily addressed through an instrument less blunt than its *Glomar* claim. Through the redaction, where appropriate, of the identities of specific computer repair facilities, the Bureau could

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[5] https://www.washingtonpost.com/news/true-crime/wp/2017/04/03/records-show-deep-ties-between-fbi-and-best-buy-computer-technicians-looking-for-child-porn/.

[6] https://www.ocregister.com/2017/01/13/relationship-between-geek-squad-fbi-explored-in-newport-beach-doctors-child-porn-photo-case/.

[7] https://www.npr.org/sections/thetwo-way/2018/03/07/591698708/fbi-used-paid-informants-on-best-buys-geek-squad-to-flag-child-pornography.

[8] https://www.usatoday.com/story/tech/nation-now/2018/03/08/fbi-hired-best-buys-geek-squad-employees-paid-informants-flag-child-pornography/406822002/.

protect the confidential nature of particular relationships while disclosing the non-sensitive information contained in responsive records. Likewise, to the extent necessary, dates could be redacted from records created outside of the 2007-2016 time period to prevent disclosure of heretofore unrevealed details of the Bureau's activities. *But see Goldstein*, 1999 U.S. Dist. LEXIS 22969 at *49-50 (where "technique is over ten years old," information "not properly withheld under Exemption 7(E)").

Because there is nothing "obscure or secret" about the FBI's cooperation with personnel at computer repair facilities – a technique that is widely known to the public – the information at issue here is not protected by Exemption 7(E). As such, the Bureau's *Glomar* claim must be rejected and the agency should be ordered to conduct a search for records responsive to plaintiff's request.

III. Certain Records the FBI Withheld Under Exemptions 7(D), 6, 7(C), and 7(E) Should Be Released Because the Bureau Has Failed to Meet Its Burden.

Beyond its *Glomar* claim, the FBI seeks to withhold some of the information it located as a result of the limited search it did conduct. Plaintiff now addresses the propriety of the various withholding claims advanced by the Bureau.

A. The FBI Cannot Meet Its Burden to Withhold Records Under Exemption 7(D).

1. Defendant Has Failed to Show Geek Squad Employees Were Given an Express Grant of Confidentiality.

Defendant cannot withhold informant files and other information provided by Geek Squad employees under Exemption 7(D) because an FBI agent with direct personal knowledge of the agency's relationship with those employees has testified that they (1) were not granted

confidentiality or (2) that the FBI did not consider them to be informants.[9] To withhold material under Exemption 7(D), an agency must show that a source provided information to law enforcement under an express or implied assurance of confidentiality.[10] *Dep't of Justice v. Landano*, 508 U.S. 165, 170-74 (1993). Under Exemption 7(D) "the question is not whether the requested *document* is of the type that the agency usually treats as confidential, but whether the particular *source* spoke with an understanding that the communication would remain confidential." *Id*. at 172 (emphasis in original). There is no presumption that a source is confidential for purposes of Exemption 7(D) solely because the source provides information to law enforcement in the course of a criminal investigation. *Id*. at 181. Rather, a source's confidentiality is determined on a case-by-case basis. *Id.* at 179–81.

Geek Squad employees were never granted an express assurance of confidentiality, according to an FBI agent assigned to investigate crime reported at the Best Buy facility in Brooks, Kentucky. In a declaration filed on behalf of the government in *U.S. v. Rettenmaier*, FBI Special Agent Tracy Riley testified that one employee, Justin Meade, "was not a typical

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[9] Plaintiff does not challenge the withholding of actual source symbol numbers under Exemptions 7(D) and 7(E). Plaintiff is challenging the withholding of the information provided to the FBI by Geek Squad employees and all identifying information of employees who have been previously identified by the agency. As explained below, plaintiff does not challenge the withholding of the names of Geek Squad employees who have not been publicly identified under Exemptions 6 and 7(C). Defendant should redact that identifying information and release the remainder of the material.

[10] Exemption 7(D) permits the Bureau to withhold law enforcement records that "could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation . . ., information furnished by a confidential source." 5 U.S.C. § 552(b)(7)(D).

CHS in the sense his identity did not warrant confidential handling and he was not, to my knowledge, ever asked by the FBI to assist in an investigation on behalf of the FBI." Decl. of FBI Special Agent Tracey L. Riley ¶ 10, Sobel Decl. Exhibit 1 ("Riley Decl.").

Further, the Bureau did not consider Geek Squad employees to even be informants. Regarding another Geek Squad employee, John "Trey" Westphal, Special Agent Riley stated, "I never opened Trey Westphal as a CHS and, to the best of my knowledge, neither has any other FBI agent." *Id*. at ¶ 11.

In another prosecution stemming from materials found at the Best Buy facility in Kentucky, Special Agent Riley testified that the Geek Squad employees she interacted with were "not truly confidential human sources." *Commonwealth v. Hogg*, No. 16-CR-002986 (Jefferson Circuit Court, Division 13, Kentucky), Motion to Suppress Hr'g Tr. 24 (Oct. 5, 2017), Sobel Decl. Exhibit 2. She went on to state that "these are not typical confidential human sources." *Id.* And earlier in her testimony, Special Agent Riley contrasted the FBI's relationship with Geek Squad employees with the Bureau's relationship with other confidential informants, saying, "[i]nformants in the FBI – and they aren't really an informant. I don't know what you'd call them." *Id*. at 22-23.

Special Agent Riley has direct personal knowledge of the Bureau's relationship with Geek Squad employees at the Kentucky facility and whether the agency granted those employees confidentiality. Special Agent Riley worked in the Louisville field office for 17 years and investigated reports of child pornography for nine and a half years. *Id*. at 2-3. She regularly responded to the Best Buy facility several times a year and interacted with multiple employees as part of her investigative work. *Id.* at 5-6; *see also* Riley Decl. ¶ 8 (stating that the Louisville

field office was "frequently notified" by Geek Squad employees when they found child pornography).

Because Special Agent Riley's testimony in two different criminal proceedings involving interactions with Geek Squad employees establishes that the FBI never provided Geek Squad employees with an express grant of confidentiality, defendant cannot properly withhold records under Exemption 7(D). *Landano*, 508 U.S. 165, 170-74. Moreover, Special Agent Riley's testimony shows that the Bureau did not view Geek Squad employees as informants or cooperating human sources, and in some cases, the employees were never even identified as such by field agents conducting criminal investigations.

Defendant's boilerplate and conclusory statements that there was an express grant of confidentiality for employees who worked at Geek Squad are thus insufficient to withhold records under Exemption 7(D) because the agency fails to put forward *specific* testimony showing that there was *in fact* such a grant of confidentiality. Defendant argues that because the FBI created "source symbol numbers" for eight Geek Squad employees, that is evidence of an express grant of confidentiality. *See* Def. Mem. at 18, 26; Hardy Decl. ¶¶ 89-91, 96-97. The use of source symbol numbers as a proxy for an express grant of confidentiality fails in light of testimony from an FBI agent who regularly interacted with the relevant employees stating that their identities "did not warrant confidential handling" and that others were never even considered cooperating human sources by the FBI.

The two cases defendant relies upon to support its source symbol number as a proxy for an express grant of confidentiality are easily distinguishable. In both *Clemente v. FBI*, 741 F. Supp. 2d 64, 877 (D.D.C. 2010) and *Amuso v. FBI*, 600 F. Supp. 2d 78, 99 (D.D.C. 2009), the same affiant as in this case, David M. Hardy, testified that the FBI's policy and practice is that

when the Bureau provides individuals with source numbers, it does so under an express grant of confidentiality. The Court affirmed the FBI's withholdings on the basis of that testimony in both cases.

In neither case, however, was there other, specific evidence from an FBI official demonstrating that the individuals in question were not granted confidentiality or were not considered to be cooperating sources in the first place. Such evidence is present here. Justifying withholdings under Exemption 7(D) requires fact-specific, rather than categorical, showings by agencies. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 223 (1978). Thus, defendant's conclusory statements regarding the FBI's express grant of confidentiality to Geek Squad employees based upon the FBI's general policies and practices is insufficient in light of Special Agent Riley's testimony to the contrary. This is particularly true given that defendant's declarant, David M. Hardy, lacks personal knowledge or familiarity with the Geek Squad employees, unlike Special Agent Riley. Agencies withholding records under Exemption 7(D) must provide probative evidence of an express grant of confidentiality, including, for example, "the personal knowledge of an official familiar with the source," *Campbell v. Dep't of Justice*, 164 F.3d 20, 34 (D.C. Cir. 1998). At minimum, Special Agent Riley's testimony shows that the standard policies and practices were not followed here. As a consequence, without any facts demonstrating that Geek Squad employees were expressly granted confidentiality, notwithstanding Special Agent Riley's testimony to the contrary, defendant has failed to meet its burden.

2. At Minimum, The FBI Has Waived Claims of Confidentiality Regarding its Interactions with Geek Squad Employees at the Brooks, Kentucky Facility Whom the Bureau Publicly Identified.

Alternatively, the FBI's disclosure of the identities of five Geek Squad employees, coupled with those individuals and the Bureau admitting that they regularly interacted with one another as part of investigations stemming from the Brooks, Kentucky Geek Squad facility, waives claims that those individuals were considered "confidential" for purposes of Exemption 7(D).[11] The agency thus cannot withhold any materials involving those five identified Geek Squad employees, including both the informant files it has withheld in full and any materials it has withheld in part relating to those employees. The Bureau is deemed to have waived claims under Exemption 7(D) when "the exact information given to the FBI has already become public, and the fact that the informant gave the same information to the FBI is also public." *Parker v. Dep't of Justice*, 934 F.2d 375, 378-79 (D.C. Cir. 1991) (quoting *Dow Jones & Co., Inc. v. Dep't of Justice*, 908 F.2d 1006, 1011 (D.C. Cir. 1990)). This is because the core of Exemption 7(D)'s protection concerns keeping individuals' identities confidential, as identification could potentially result in injury or harm to the individual. *See Landano*, 508 U.S. at 172.

In this case, the identities of five Geek Squad employees – Justin Meade, John "Trey" Westphal, Randall Ratliff, Michael Hans, and James Christophel – were publicly disclosed in the *Rettenmaier* prosecution, and those individuals testified that they routinely interacted with FBI agents in the course of their investigations. Declaration of Justin Meade ¶¶ 4-7, Sobel Decl. Exhibit 3; Declaration of John Westphal ¶¶ 5-7, Sobel Decl. Exhibit 4; Declaration of Randall

[11] Defendant states in its brief that four Geek Squad employees were identified in the *Rettenmaier* investigation. Def. Mem. at 19. Plaintiff's review of the filings in that case indicate that *five* employees were identified as having regularly contacted and interacted with the FBI.

Ratliff ¶¶ 3-7, Sobel Decl. Exhibit 5; Declaration of James Christophel ¶¶ 3-6, Sobel Decl. Exhibit 6; Declaration of Michael Hans ¶¶ 3-6, Sobel Decl. Exhibit 7. All five testified that in the course of their work, they would contact the FBI when they came across potentially illegal material on customers' computers and that they regularly interacted with FBI agents. *See* Meade Decl. ¶¶ 4-5 (describing how he became "a liaison" to the local FBI office); Westphal Decl. ¶ 6 (describing that he would contact the FBI when he suspected the presence of illegal material on a customer's device); Ratliff Decl. ¶ 3 (same); Christophel Decl. ¶ 6 (same); Hans Decl. ¶ 5 (same). The individuals thus publicly disclosed that they interacted with law enforcement well beyond the single instance that resulted in the *Rettenmaier* prosecution. Moreover, by lodging these declarations in the *Rettenmaier* prosecution, the federal government confirmed that the five employees served as sources of information in criminal investigations.

In sum: the government has publicly acknowledged that the five named individuals were sources and that they provided information to the FBI in a number of investigations, not merely the one that led to the *Rettenmaier* prosecution. The agency thus waived any reliance on Exemption 7(D) for these individuals. *Parker*, 934 F.2d at 378-79.

Defendant asserts that it has not waived protection of Exemption 7(D) in light of the identification of Geek Squad employees in *Rettenmaier*. Def. Mem. at 19. But the agency's argument and the authorities it relies upon mischaracterize its broad waiver here and the facts showing that there was clear public acknowledgement that these employees regularly provided information to the FBI well beyond the *Rettenmaier* case. The five individual Geek Squad employees did not merely testify that they were sources in the *Rettenmaier* investigation; rather, they publicly disclosed that they routinely acted as sources in many FBI investigations stemming from material encountered by Geek Squad employees.

The waiver here is thus much broader than those at issue in *Borda v. Dep't of Justice*, 245 F. Supp. 2d 52, 61 (D.D.C. 2011) (claims that informant potentially testified at trial was not sufficient to waive Exemption 7(D)) and *Bullock v. FBI*, 577 F. Supp. 2d 75, 80 (D.D.C. 2011). In both cases, law enforcement maintained that the source's identity remained confidential notwithstanding the fact that they may have testified in a criminal proceeding. But as explained above, there is no confidentiality here because both the FBI and the named Geek Squad employees have publicly acknowledged their relationship – and that they regularly worked together in the course of investigations.

Defendant's reliance on *Parker* is also misplaced. Although the court in *Parker* held that public testimony at trial may not necessarily be enough to waive Exemption 7(D), it also held that waiver would be appropriate when there was evidence demonstrating that "the exact information given to the FBI has already become public, and the fact that the informant gave the same information to the FBI is also public." *Parker*, 934 F.2d at 378 (quoting *Dow Jones & Co.*, 908 F.2d at 1011). As explained above, this is the precise situation here and *Parker* thus undercuts the agency's argument.

To the extent that the materials defendant has withheld in full or in part under Exemption 7(D) include information provided by any of the five publicly identified Geek Squad employees, the Bureau has waived its claims. *See* Def. Mem. at 26. Defendant has failed to provide any specific information that would indicate whether the materials withheld under Exemption 7(D) came from the individuals identified in the *Rettenmaier* investigation. Defendant thus must release the information if it came from one of the five Geek Squad employees publicly identified in *Rettenmaier* or provide additional facts establishing that such information did not come from any Geek Squad employees.

For the reasons stated above in Section III.A.1., because Special Agent Riley has testified that she did not consider Geek Squad employees to be confidential informants, plaintiff submits that the information provided by any employee cannot be withheld under Exemption 7(D). Geek Squad employees who were not publicly identified as working with the FBI may have legitimate concerns about disclosure of their identities, but that is a concern protected by Exemptions 6 and 7(C), as discussed below. The information provided by these individuals in the course of law enforcement investigations, however, cannot be withheld under Exemption 7(D). Even if such identifying information could be withheld under Exemption 7(D), the non-identifying material – such as narrative descriptions of the information provided by Geek Squad employees – should be released. Redaction of identifying information, rather than wholesale withholding, is thus required under FOIA. This is particularly true in light of defendant's obligation to segregate and disclose records even if they contain some exempt material, as agencies are not permitted to issue "sweeping, generalized claims of exemption for documents." *Mead Data Cent., Inc.*, 566 F.2d at 260.

B. Defendant Has Failed to Justify Withholding Certain Records Withheld Under Exemptions 6 and 7(C).

1. Defendant Has Failed to Justify Withholding the Names of Individuals Convicted or Who Pleaded Guilty as a Result of Investigations Originating from Best Buy.

By failing to describe whether the identities of criminal suspects withheld in the records here involve individuals who were convicted or entered public guilty pleas, and to correspondingly disclose the identities of those individuals who were subject to such criminal proceedings, defendant has failed to meet its burden under FOIA to withhold that information

under Exemptions 6 and 7(C).[12] *ACLU v. Dep't of Justice*, 655 F.3d 1 (D.C. Cir. 2011) ("*ACLU I*"). Individuals who were convicted or entered guilty pleas as a result of investigations originating at the Kentucky Best Buy facility have minimal privacy interests in further disclosure of their names, while there is substantial public interest in learning more about the FBI's practice surrounding the use of Best Buy employees in criminal investigations. *Id*. at 12, 16.

In *ACLU I*, the D.C. Circuit held that the names of individuals prosecuted, or who publicly pleaded guilty in criminal proceedings involving warrantless cell phone tracking, should be disclosed because the privacy interest was minimal and the public interest in disclosing names of individuals subjected to such tracking was strong, such that further disclosure would not constitute an unwarranted invasion of privacy under Exemption 7(C).[13] *Id*. at 16.

The same analysis and result applies here. To the extent the information withheld under the privacy exemptions concerns individuals who were convicted or entered public guilty pleas

[12] Plaintiff's challenge to defendant's withholdings under Exemptions 6 and 7(C) is limited to the names or identifying data of third parties of investigative interest, or defendant's "Category 2" of privacy exemption withholdings, and a narrow challenge to commercial institution personnel, or defendant's "Category 3," as described below. *See* Hardy Decl., Exhibit K (Dkt. 13-4) at A-1. Plaintiff does not challenge the agency's withholding of identifying or other personal information under Exemptions 6 and 7(C) regarding FBI Special Agents/support personnel (Category 1), third-party victims (Category 4), non-FBI federal government personnel (Category 5), local law enforcement personnel (Category 6), or other third parties merely mentioned (Category 7). *See* Def. Mem. at 24-25.

[13] Although the balancing tests under both Exemptions and 7(C) are similar, "Exemption 7(C) is more protective of privacy than Exemption 6" and thus establishes a lower bar for withholding material. *Dep't of Defense v. FLRA,* 510 U.S. 487, 496 n. 6 (1994). Exemption 7(C) allows agencies to withhold records if disclosure would constitute an "unwarranted" invasion of personal privacy, while Exemption 6 requires a "clearly unwarranted" invasion to justify nondisclosure. Thus if plaintiff demonstrates that disclosure would not constitute an unwarranted invasion under Exemption 7(C), it likewise would not constitute a clearly unwarranted invasion of privacy under Exemption 6.

arising from the investigations initiated as a result of material encountered by Best Buy employees, the additional disclosure of identifying information would not implicate more than a *de minimus* privacy interest. *ACLU I*, 655 F.3d at 12. It would not disclose information beyond that which is already publicly available on federal court dockets, nor would it make the information more accessible than it already is via docket searches. *Id*. In short: "the cat is out of the bag" regarding law enforcement proceedings against these individuals, such that they have only minimal privacy interests in keeping their names out of the records at issue here. *Showing Animals Respect & Kindness v. Dep't of the Interior*, 730 F. Supp. 2d 180, 191 (D.D.C. 2010).

On the other side of the balance, the public interest in knowing more about the government's activities with respect to the cooperative program it coordinated with several Best Buy employees is significant. Like in *ACLU I*, disclosure of these records would shed light on the government's activities – specifically how FBI agents used Best Buy employees in their investigation and prosecution of individuals who sent their computers or other devices to the company for repair. *Id*.

Defendant's argument that plaintiff has put forward no evidence or allegation of illegal activity to defeat its privacy exemption claims is irrelevant. Def. Mem. at 25. Here, even though plaintiff "alleges no impropriety on the part of the FBI or the DOJ," it has "nonetheless established a sufficient reason for disclosure independent of any impropriety: '[M]atters of substantive law enforcement policy are properly the subject of public concern, whether or not the policy in question is lawful.'" *Citizens for Responsibility & Ethics in Washington v. Dep't of Justice*, 746 F.3d 1082, 1095 (D.C. Cir. 2014) ("*CREW*"), quoting *ACLU I*, 655 F.3d at 14 (internal quotes omitted). "Whether government impropriety might be exposed in the process is beside the point." *Id*.

To the extent that any of the records at issue here deal with individuals who were charged with, but not convicted of, a crime, or in which no charges have been filed, plaintiff concedes that such withholdings are proper under Exemption 7(C).[14] *See ACLU v. Dep't of Justice*, 750 F.3d 927, 935 (D.C. Cir. 2014) ("*ACLU II*") (holding that because the privacy interests of individuals who had not been convicted or pleaded guilty were more significant than those who had, identifying information for that category of information could be withheld). Because defendant has failed to provide any information regarding the outcome of these investigations, including whether they led to charges, convictions, guilty pleas, or not, it has failed to meet its burden under FOIA.

2. Exemptions 6 and 7(C) Cannot be Used to Shield Identifying Information of Geek Squad Employees Whom Defendant Has Previously Identified Publicly.

The names and identifying information of Geek Squad employees whom the FBI has already publicly identified cannot be withheld under Exemptions 6 and 7(C) because the Bureau has waived the exemptions. "Under the public domain doctrine, FOIA-exempt information may not be withheld if it was previously 'disclosed and preserved in a permanent public record.'" *Chesapeake Bay Foundation v. Army Corps of Engineers*, 772 F. Supp. 2d 66, 72 (D.D.C. 2010) (quoting *Cottone v. Reno*, 195 F.3d 550, 554 (D.C. Cir. 1999)). This includes names withheld under Exemptions 6 and 7(C), as "FOIA exemptions do not apply once the information is in the public domain." *Hall v. Dep't of Justice*, 552 F. Supp. 2d 23, 30-31 (D.D.C. 2008). As

[14] This may be true for records withheld both under Exemptions 6 and 7(C) and Exemption 7(A) – records which involve pending or anticipated law enforcement proceedings. But defendant has provided insufficient information in its *Vaughn* index and declaration for plaintiff to determine whether such withholdings are proper.

explained above, the federal government has already publicly identified five Geek Squad employees as individuals who routinely interacted with FBI agents. The fact that those five employees worked with the FBI is thus already in the public domain, such that Exemptions 6 and 7(C) do not apply. *Id*.

Even if defendant did not waive claims of Exemptions 6 and 7(C) with respect to publicly identified Geek Squad employees — which it has — disclosure would nonetheless be required because the public interest significantly outweighs any claimed privacy harm for individuals who have already acknowledged their interactions with the FBI. Specifically, the additional disclosure here of the names of Geek Squad employees who already acknowledged such a relationship with the Bureau represents a *de minimus* privacy invasion because it would not disclose anything beyond what is already publicly available. *See ACLU I*, 655 F.3d at 12. On the other side of the scale, the public interest in disclosing these names is significant because it would further shed light on government activity: defendant's interactions with these particular Geek Squad employees.

To the extent that the information defendant has withheld under Exemptions 6 and 7(C) involves Geek Squad employees who have not been publicly identified, application of the privacy exemptions may be valid. Def. Mem. at 25 (describing that it withheld information identifying "commercial institution personnel," which it calls "Category 3"). Defendant, however, has failed to provide any information in its *Vaughn* submission or elsewhere that clarifies that the FBI is only withholding the names of Geek Squad employees who have not been publicly identified. Defendant has thus failed to meet its burden under FOIA.

C. The FBI Cannot Withhold Information Regarding Its Informant Program Under Exemption 7(E); Working with Computer Technicians Is a Well-Known Law Enforcement Technique.

Because it is well known that law enforcement agencies use computer repair technicians as investigative leads, the FBI cannot withhold records in full or in part under Exemption 7(E) that describe those aspects of its informant program. As described above in Section II, Exemption 7(E) is inapplicable to law enforcement techniques that are publicly known and not "secret or obscure." *Albuquerque Pub. Co.*, 726 F. Supp. 851. In addition to basing its *Glomar* response on Exemption 7(E), the FBI has also withheld records in full and in part arguing that they describe investigative techniques and procedures of its informant program along with internal search slips and related materials describing its internal review of Geek Squad employees.[15] Def. Mem. at 28-31. These arguments fail for the same reasons the FBI's *Glomar* response does: the well-known technique of developing criminal cases based on material found on computers by repair technicians obviates any concern that disclosure would create a risk of circumvention of the law. See Section II; Jaffe, 573 F. Supp. at 387 (limiting Exemption 7(E)'s application to secret or non-public law enforcement techniques or procedures).

To the extent that the withheld records describe techniques or procedures that are not public and do not describe the Bureau's interaction with computer repair technicians, Exemption 7(E) may properly apply. But defendant has failed to provide enough information in its Vaughn submission to know whether this is the case here. As a result, the agency has failed to meet its burden.

[15] Plaintiff does not challenge the FBI's withholding of file and sub-file names and numbers under Exemption 7(E). Def. Mem. at 27-28.

D. The FBI Has Failed to Adequately Substantiate Its Argument that Portions of Informant Files Can Be Withheld Under Additional FOIA Exemptions.

The Court should reject the FBI's attempt to reserve several exemptions to withhold portions of the eight informant files because the agency has failed to substantiate its claims as required under FOIA. The FBI states 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)," and refers the Court to Mr. Hardy's declaration for more information about those claims. Def. Mem. at 22-23. Regarding the claimed reliance on Exemption 3, Mr. Hardy states that, "I have determined the FBI's intelligence sources and methods *are likely* present within the CHS records at issue" and that disclosure is barred by the National Security Act of 1947, 50 U.S.C. § 3024(i)(1). Hardy Decl. ¶ 143 (emphasis added). Regarding its reservation of additional Exemptions 6 and 7(C) claims, Mr. Hardy states that "there *are likely* additional types of information exempt from disclosure pursuant to these Exemptions." *Id*. at 144 (emphasis added). Regarding Exemption 7(D), Mr. Hardy states "the following types of (b)(7)(D) exempt information *are typically* found within informant records." *Id*. at ¶ 145 (emphasis added). Similarly, regarding Exemption 7(E), Mr. Hardy states that "the following types of (b)(7)(E) exempt information *are typically* found within informant records." *Id*. at ¶ 146.

Controlling precedent bars the FBI's attempt to reserve additional exemption claims based on claims that exempt information is "likely" to be or is "typically" found in these types of records. The D.C. Circuit has repeatedly prohibited agencies from reserving FOIA exemption claims for a later date. *Maydak v. Dep't of Justice*, 218 F.3d 760, 764-65 (D.C. Cir. 2000). "We have said explicitly in the past that merely stating that 'for example' an exemption might apply is inadequate to raise a FOIA exemption." *Id*. at 765. "Instead the government must assert the

exemption in such a manner that the district court can rule on the issue." *Id*. Formally raising and substantiating an exemption claim requires that agencies do more than merely mention "the *potential* applicability of other exemptions," or provide "cursory, equivocal, and inconsistent assertions." *Id*. (emphasis added).

As in *Maydak*, the FBI has fallen short of adequately substantiating the reserved exemptions it claims here. The most the Bureau can muster are claims that exempt material "are likely" to be found in the informant files, or that exempt materials "are typically found" within similar records. These hypothetical and hedged claims are precisely the kind of claims rejected in *Maydak*, where DOJ claimed that certain exemptions "may be applicable." *Id*.

Even setting aside Mr. Hardy's equivocal language, the FBI has also failed to provide plaintiff and the Court with sufficient information that identifies the precise material it is applying these exemptions to, or to offer sufficient information justifying its withholdings. It is well settled that "courts will simply no longer accept conclusory and generalized allegations of exemptions." *Vaughn*, 484 F.2d at 826. To meet its burden in withholding information under FOIA, the agency must identify the information withheld and provide a detailed justification for its decision to withhold the records. *Id*. at 826-28. Although an agency need not provide a *Vaughn* index to satisfy its burden, it still must demonstrate the applicability of an exemption and identify the information withheld in some detail. *Maydak*, 218 F.3d at 766. Although the Bureau has failed to meet its burden for all the exemptions it asserts regarding information in the informant files, the FBI's claims under Exemptions 3, 7(D), and 7(E) are particularly weak. Just as in *CREW*, Mr. Hardy's declaration "never specifies how many responsive documents exist and makes no attempt to link each exemption to specific documents." Moreover, "the explanation for the applicability of each exemption is inadequate." *CREW*, 746 F.3d at 1100.

Specifically, the Bureau's "conclusory explanation" regarding its Exemption 3 claim "is insufficient;" its claims regarding 7(D) amount to "boilerplate;" and its 7(E) claim fails to "at least provide *some* explanation of what procedures are involved and how they would be disclosed." *Id*. at 1100-02 (emphasis in original).

In any event, to the extent the FBI's claims to withhold specific portions of the informant files under Exemptions 6, 7(C), 7(D), and 7(E) concern material plaintiff is challenging here, they fail for the same reasons as described above in Sections III.A.-III.C.

CONCLUSION

For the reasons described above, plaintiff respectfully requests that the Court grant its cross-motion for summary judgment and deny defendant's motion for summary judgment.

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Respectfully Submitted,

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