

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER FOUNDATION,)	
)	
Plaintiff,)	
)	
v.)	C.A. No.17-CV-01039-DLF
)	
DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	

RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITY

In its recent Notice of Supplemental Authority, ECF No. 22, Plaintiff alerted the Court to *Reporters Committee for Freedom of the Press v. Federal Bureau of Investigation*, 2019 WL 1003627 (D.D.C. March 1, 2019), and presented over three pages of argument about its application to this case. *Reporters Committee* is, however, plainly distinguishable. The FOIA request at issue there sought FBI documents related to the impersonation of documentary filmmakers. *Reporters Comm.*, 2019 WL 1003627, at *1. First observing that “law enforcement impersonation of journalists is a practice that has been documented for decades,” the court detailed how FBI efforts to impersonate both journalists and filmmakers had been reported and officially acknowledged numerous times in recent years, apart from the one publicized instance that sparked the FOIA request. *Id.* at *1-2. A public 2016 DOJ Office of Inspector General report further revealed that the “FBI had implemented new guidelines for the procedures FBI agents were to follow before impersonating members of the news media or documentary filmmakers in connection with investigations.” *Id.* at *2. And in response to the FOIA request in *Reporters Committee*, the FBI in fact released both “current and past” guidelines which governed FBI impersonation of media and documentary filmmakers. *Id.*

The repeated and general acknowledgement of the FBI impersonating journalists and filmmakers was the basis of the *Reporters Committee* holding that the FBI could not refuse to confirm or deny whether additional records on this subject existed. *See id.* at *9 (“This publicly available information suggests that the impersonation of documentary film workers in the Bundy standoff investigation was not an isolated instance, and that the FBI has either used the technique elsewhere, or may use it elsewhere.”); *see also id.* (“[G]iven the information already publicly available to criminals, this would not reduce or nullify the effectiveness of the technique when it is actually used.”).

In contrast, in this matter, the FBI has never acknowledged the use of cooperating human sources (“CHSs”) at computer repair facilities, apart from those at one Best Buy facility from 2007 to 2016, a point which Plaintiff does not dispute. *See* Def’s Opp’n at 6 n. 3, ECF No. 18. Nor has the FBI officially acknowledged, let alone produced, guidelines for the use of CHSs at computer repair facilities; indeed, it has refused to do so in this very case. *See* Def’s Mot. for Summ. Judgment at 16, ECF No. 13-2. Thus, disclosing whether further documents exist on this topic would inform criminals as to whether their crimes might be uncovered by CHSs at computer repair facilities, enabling criminals to take steps to avoid detection or to continue their activities without fear of interdiction. *See* Declaration of David Hardy (“Hardy Decl.”) ¶¶ 57, 59, 61-65, ECF No. 13-3. Accordingly, in refusing to confirm or deny whether additional records exist concerning CHSs at computer repair facilities, the FBI’s response was proper. *See Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011) (holding that Exemption 7(E) presents a “relatively low bar” which is cleared where disclosure “might create a risk of circumvention of the law”) (citation omitted).

Dated: March 13, 2019

Respectfully submitted,

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/s/ Michael L. Drezner

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2019 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Michael L. Drezner

MICHAEL L. DREZNER

Trial Attorney