

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
ELECTRONIC FRONTIER FOUNDATION,)	
)	
Plaintiff,)	
)	
v.)	Civ. A. No. 09-cv-1151
)	
DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
_____)	

DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am currently the Section Chief of the Record/Information Dissemination Section (“RIDS”), Records Management Division (“RMD”), formerly at Federal Bureau of Investigation Headquarters (“FBIHQ”) in Washington, D.C., and currently relocated to Winchester, Virginia. I have held this position since August 1, 2002. Prior to my joining the FBI, from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act (“FOIA”) policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 256 employees who staff a total of ten (10) units and two field operational service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the FOIA; Privacy Act of 1974; Executive

Order 12958, as amended; Presidential, Attorney General and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. My responsibilities also include the review of FBI information for classification purposes as mandated by Executive Order 12958, as amended,¹ and the preparation of declarations in support of Exemption 1 claims asserted under the FOIA.² I have been designated by the Attorney General of the United States as an original classification authority and a declassification authority pursuant to Executive Order 12958, as amended, §§ 1.3 and 3.1. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the FBI's response to plaintiff's FOIA request to FBIHQ for records pertaining to the Bureau's Domestic Investigative Operational Guidelines ("DIOG").

(4) The FBI has processed a total of 383 pages responsive to plaintiff's request. These 383 pages constitute a complete copy of the DIOG. Out of the pages released to plaintiff, 206 pages were released in full, 174 pages released in part, and three pages were withheld in full. In accordance with Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), this declaration, which is being submitted in support of defendant FBI's motion for summary judgment, will provide the Court and plaintiff with an explanation for the procedures used in reviewing and processing the

¹ 60 Fed. Reg. 19825 (1995) and 68 Fed. Reg. 15315 (2003).

² 5 U.S.C. § 552 (b)(1).

DIOG in response to plaintiff's FOIA request, and a justification for the FBI information which has been withheld from disclosure pursuant to FOIA Exemptions 1, 2, 5, 6, 7(A), 7(C) and 7(E), 5 U.S.C. §§ 552 (b)(1), (b)(2), (b)(5), (b)(6), (b)(7)(A), (b)(7)(C) and (b)(7)(E).

CORRESPONDENCE

(5) On December 5, 2008 plaintiff sent a FOIA request by facsimile to FBIHQ seeking "a complete copy of the FBI's Domestic Investigative Operational Guidelines ("DIOG"), which became effective on December 1, 2008, and which implement the Attorney General's Guidelines for Domestic FBI Operations." (See **Exhibit A**)

(6) The FBI acknowledged receipt of this request by letter dated December 16, 2008,³ and assigned it FOIPA Number 1123412. (See **Exhibit B**).

(7) On May 29, 2009 the FBI responded to plaintiff's request and stated:

The document you requested is currently undergoing a review by the FBI's Corporate Policy Office to determine which portions of the DIOG can be released to the public. Upon the completion of this review, the FBI will make those portions available to the public on the FBI's public website. The information that will be posted on the website would be the same information released in response to this request. Accordingly, the FBI is closing your request. The FBI will notify you when the information is available on the FBI's public website.

(See **Exhibit C**).

(8) On June 24, 2009, plaintiff filed a Complaint in the U.S. District Court for the District of Columbia, requesting a release of all records responsive to its December 5, 2008 FOIA request.

³ On December 8, 2008, the FBI sent plaintiff an acknowledgment letter. By letter dated December 12, 2008 plaintiff advised the FBI that the acknowledgment letter incorrectly listed the subject of the request as "Attorney General's Guidelines for Domestic FBI Operations." The FBI mailed an additional acknowledgment letter to the requester on December 16, 2009 with a revised subject line of "FBI's Domestic Investigative Operational Guidelines."

JUSTIFICATION OF REDACTED MATERIAL UNDER THE FOIA

(9) The FBI processed the DIOG to achieve maximum disclosure consistent with the access provisions of the FOIA. In late September 2009, the FBI posted a redacted version of the DIOG on its website. The FBI sent plaintiff a separately-processed version of the DIOG on October 13, 2009. In connection with the FBI's review of the DIOG during the preparation of this Declaration, we determined that additional portions of the DIOG could be released. Accordingly, attached to this Declaration as **Exhibit D** is a release of the DIOG containing fewer redactions than the version provided to EFF on October 13, 2009. Each page of Exhibit D is consecutively numbered "DIOG-1" through "DIOG-383" at the bottom of each page. Every effort has been made to provide plaintiff with all material in the public domain and with all reasonably segregable portions of releasable material. No reasonably segregable, nonexempt portions were withheld from plaintiff. A further description of the information withheld could identify the very material which the FBI seeks to protect. The exemptions asserted by the FBI as grounds for non-disclosure of portions of documents are FOIA Exemptions 1, 2, 5, 6, 7(A), 7(C) and 7(E), 5 U.S.C. §§ 552 (b)(1), (b)(2), (b)(5), (b)(6), (b)(7)(A), (b)(7)(C) and (b)(7)(E). Listed below are the FOIA exemptions asserted to withhold the protected material:

SUMMARY OF JUSTIFICATION CATEGORIES

Category (b)(1)	Classified Information
(b)(1)	Information Properly Classified by an FBI Official Pursuant to Executive Order 12958, As Amended
Category (b)(2)	Information Related Solely to the Internal Rules and Practices of an Agency
(b)(2)	Investigative Techniques and Procedures

[Cited in Conjunction with Exemption (b)(7)(E)]

Category (b)(5)

Privileged Information

(b)(5)

Deliberative Process Privilege

Category (b)(7)(A)

Pending Law Enforcement Investigations

**Category (b)(6)
and (b)(7)(C)**

**Clearly Unwarranted Invasion of Personal Privacy
and Unwarranted Invasion of Personal Privacy**

(b)(6) and (b)(7)(C)

Name and/or Identifying Information of FBI
Special Agent (SA)

Category (b)(7)(E)

Investigative Techniques and Procedures

(b)(7)(E)

Investigative Techniques and Procedures
[Cited in Conjunction with Exemption (b)(2)]

(10) The paragraphs that follow explain defendant's rationale for withholding each particular category of information under the specific exemption categories described above. In addition, the FBI is concurrently submitting the Declaration of John S. Pistole, Deputy Director of the FBI. Deputy Director Pistole's declaration provides additional explanations for the FBI's redaction of certain portions of the DIOG pursuant to Exemptions (b)(2) and (b)(7)(E). I have attached to this Declaration as **Exhibit E** an index of each redaction along with a summary of the justification for each individual withholding, cross-referenced to either my declaration or Deputy Director Pistole's declaration.

EXEMPTION (b)(1)
CLASSIFIED INFORMATION

(11) 5 U.S.C. § 552 (b)(1) exempts from disclosure those records that are:
“(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy; and (B) are in fact properly classified pursuant

to such Executive Order”

(12) Before I consider an Exemption (b)(1) claim for withholding agency records, I determine whether the information in those records is information that satisfies the requirements of E.O. 12958, as amended, which governs the classification and protection of information that affects the national security, and complies with the various substantive and procedural criteria of the Executive Order. E.O. 12958, as amended on March 25, 2003, is the Executive Order that currently applies to the protection of national security information. I am bound by the requirements of E.O. 12958, as amended, when making classification determinations.

(13) For information to be properly classified, and thus properly withheld from disclosure pursuant to Exemption (b)(1), the information must meet the requirements set forth in E.O. 12958, as amended, § 1.1 (a):

(a) an original classification authority is classifying the information;

(b) the information is owned by, produced by or for, or is under the control of the United States Government;

(c) the information falls within one or more of the categories of information listed in §1.4 of this order; and

(d) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

(14) All information which I determined to be classified, and which is under the control of the United States government, is marked at the “Secret” level since the unauthorized disclosure of this information reasonably could be expected to cause serious damage (“Secret”) to national security. See E.O. 12958, as amended, § 1.2 (a)(2). In addition to these substantive

requirements, certain procedural and administrative requirements of E.O. 12958, as amended, must be followed before information can be considered to be properly classified, such as proper identification and marking of documents. I made certain that all procedural requirements of E.O. 12958, as amended, were followed in order to ensure that the information was properly classified. I made certain that:

- (a) each document was marked as required and stamped with the proper classification designation;
- (b) each document was marked to indicate clearly which portions are classified and which portions are exempt from declassification as set forth in E.O. 12958, as amended, § 1.5 (b);
- (c) the prohibitions and limitations on classification specified in E.O. 12958, as amended, § 1.7, were adhered to;
- (d) the declassification policies set forth in E.O. 12958, as amended, §§ 3.1 and 3.3 were followed; and
- (e) any reasonably segregable portion of these classified documents that did not meet the standards for classification under E.O. 12958, as amended, were declassified and marked for release, unless withholding was otherwise warranted under applicable law.

**FINDINGS OF DECLARANT REGARDING
EXEMPTION (b)(1)**

(15) With the above requirements in mind, I personally and independently examined the information withheld from plaintiff pursuant to FOIA Exemption 1. I determined that the classified information continues to warrant classification at the "Secret" level, and is exempt from disclosure pursuant to E.O. 12958, as amended, §1.4, categories (c) intelligence activities, sources and methods and (d) foreign relations or foreign activities.

INTELLIGENCE ACTIVITIES SOURCES OR METHODS

(16) E.O. 12958, as amended, § 1.4 (c), exempts from disclosure "intelligence

activities (including special activities), intelligence sources or methods, or cryptology.”

Classified information is withheld on DIOG-379 to DIOG-382 to protect intelligence activities and methods utilized by the FBI for gathering intelligence data.⁴ An intelligence activity or method includes any intelligence action or technique utilized by the FBI against a targeted individual or organization that has been determined to be of national security interest. An intelligence method is used to indicate any procedure (human or non-human) utilized to obtain information concerning such individual or organization. An intelligence activity or method has two characteristics. First, the intelligence activity or method, and information generated by it, is needed by U.S. Intelligence/Counterintelligence agencies to carry out their missions. Second, confidentiality must be maintained with respect to the activity or method if the viability, productivity and usefulness of THE information is to be preserved.

(17) The FBI protected the certain pages of the DIOG specific to intelligence activities and methods because disclosure reasonably could be expected to cause serious damage to the national security. The withheld information on DIOG-379-382 contains detailed intelligence information gathered on specific individuals or organizations of national security interest. This information represents an effective means for the FBI to gather, store or disseminate intelligence information. The criteria utilized by the FBI in these instances to decide what actions by an individual or organization warranted the commencement of an investigation, or caused a certain activity to be given investigative attention over others, could be revealed through disclosure of this information. The criteria applied and priorities assigned are used in the FBI’s present intelligence or counterintelligence investigations, and are in accordance with the Attorney General’s guidelines on FBI intelligence or counterintelligence investigations. The

⁴ Exemption (b)(1) has been asserted to protect “Intelligence Activities or Methods” on the following Bates-stamped pages of Exhibit D: DIOG-379-382.

information obtained from the intelligence activities or methods is very specific in nature, provided during a specific time period, and known to very few individuals.

(18) It is my determination that the disclosure of the specific information which describes the intelligence activities or methods withheld in this case are still used by the FBI today to gather intelligence information. The release of this information could reasonably be expected to cause serious damage to the national security for the following reasons: (1) disclosure would allow hostile entities to discover the current intelligence gathering methods used; (2) disclosure would reveal current specific targets of the FBI's national security investigations; and (3) disclosure would reveal the determination of the criteria used and priorities assigned to current intelligence or counterintelligence investigations. With the aid of this detailed information hostile entities could develop countermeasures which could severely disrupt the FBI's intelligence-gathering capabilities. This would severely damage the FBI's efforts to detect and apprehend violators of the national security and criminal laws of the United States. The information withheld is properly classified at the "Secret" level and withheld pursuant to E.O. 12958, as amended, § 1.4 (c).

Detailed Intelligence Activities

(19) The classified information withheld on DIOG-379-382 also contains information regarding detailed intelligence activities gathered or compiled by the FBI on a specific individual or organization of national security interest as the DIOG applies to all intelligence collection activities conducted by the FBI within the United States or outside the territories of all countries. The disclosure of this information would cause the same harm as previously cited in ¶¶ 16-18, supra. This information is properly classified at the "Secret" level and withheld pursuant to E.O. 12958, as amended, § 1.4 (c), and therefore exempt from disclosure pursuant to FOIA Exemption 1.

FOREIGN RELATIONS OR FOREIGN ACTIVITIES⁵

(20) E.O. 12958, as amended, § 1.4 (d), exempts from disclosure foreign relations or foreign activities of the United States, including confidential sources. The information withheld on DIOG-379 to DIOG-381 consists of sensitive intelligence information gathered by the United States either about or from a foreign country as the DIOG applies to all intelligence collection activities conducted by the FBI within the United States or outside territories of all countries. This condition exists due in part to the delicate nature of international diplomacy. This information must be handled with care so as to not jeopardize the fragile relationships that exist among the United States and certain foreign governments.

(21) The unauthorized disclosure of information concerning foreign relations or foreign activities of the United States can reasonably be expected to lead to diplomatic or economic retaliation against the United States; identify the target, scope or time frame of intelligence activities of the United States in or about a foreign country, which may result in the curtailment or cessation of these activities; enable hostile entities to assess United States intelligence gathering activities in or about a foreign country and devise countermeasures against these activities; or compromise cooperative foreign sources which may jeopardize their safety and curtail the flow of information from these sources. Thus, the foreign relations or foreign activities withheld by the FBI are properly classified at the "Secret" level and withheld in accordance with E.O. 12958, § 1.4 (d) as amended, and therefore exempt from disclosure pursuant to FOIA Exemption (b)(1).

⁵ Exemption (b)(1) has been asserted to protect "Foreign Relations" or "Foreign Activities" on the following Bates-stamped pages of Exhibit D: DIOG-379-381.

DEFENDANT'S BURDEN OF ESTABLISHING
EXEMPTION (b)(1) CLAIMS

(22) The information withheld in this case pursuant to Exemption 1 was examined in light of the body of information available to me concerning the national defense and foreign relations of the United States. This information was not examined in isolation. Instead, each piece of information was evaluated with careful consideration given to the impact that disclosure of this information will have on other sensitive information contained elsewhere in the United States intelligence community's files. Equal consideration was given to the impact that other information either in the public domain or likely known or suspected by present or potential adversaries of the United States, would have upon the information I examined.

(23) In those instances where, in my judgment, the disclosure of this information could reasonably be expected to cause serious damage to the national security, and its withholding outweighed the benefit of disclosure, I exercised my prerogative as an original classification authority and designated that information as classified in the interest of national security, and invoked Exemption 1 of the FOIA to prevent disclosure. Likewise, the justifications for the withheld classified information were prepared with the intent that they be read with consideration given to the context in which the classified information is found. This context includes not only the surrounding unclassified information, but also other information already in the public domain, as well as information likely known or suspected by other hostile intelligence entities. It is my judgment that any greater specificity in the descriptions and justifications set forth with respect to information relating to foreign government relations or foreign activities and intelligence sources and methods of the United States could reasonably be expected to jeopardize the national security of the United States.

EXEMPTION (b)(2)
INFORMATION RELATED SOLELY TO THE
INTERNAL PERSONNEL RULES AND PRACTICES OF AN AGENCY

(24) 5 U.S.C. § 552 (b)(2) exempts from disclosure information “related solely to the internal personnel rules and practices of an agency.”

(25) This exemption protects routine internal administrative matters and functions of the FBI which have no effect on the public at large, commonly referred to as “LOW” (b)(2). Moreover, FOIA Exemption (b)(2) also protects internal personnel rules and practices of the FBI where disclosure may risk circumvention of the law, commonly referred to as “HIGH” (b)(2). Disclosure of this information could impede the effectiveness of the FBI's internal law enforcement procedures and may risk circumvention of the law. FOIA Exemption (b)(2) (HIGH) has been used to protect certain investigative techniques and procedures as well as to withhold mundane administrative details of no interest to the general public (but potentially of significant interest to entities or individuals contemplating engaging in illegal activities, such as espionage against the United States.)

(b)(2) Investigative Techniques and Procedures

(26) The FBI has asserted Exemption (b)(2) in conjunction with (b)(7)(E) to protect information consisting of specific internal investigatory techniques and procedures that are used by the FBI as the DIOG applies to all investigative activities conducted by the FBI within the United States or outside the territories of all countries. To describe this information in further detail than what is provided here on the public record would identify the very information which the FBI seeks to protect pursuant to this exemption. The revelation of these details could enable the targets of these techniques to avoid detection or develop countermeasures to circumvent the

ability of the FBI to effectively use these important national security law enforcement techniques. In addition, knowledge of the FBI's internal procedures and processes could enlighten or embolden entities or individuals intent on engaging in espionage or counterintelligence by identifying specific targets (including information systems and personnel) for attempted compromise. Accordingly, the FBI has properly withheld this information pursuant to Exemption (b)(2).⁶

EXEMPTION (b)(5)
DELIBERATIVE PROCESS PRIVILEGE

(27) 5 U.S.C. § 552 (b)(5) exempts from disclosure:

inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

(b)(5) Deliberative Process Privilege

(28) Exemption (b)(5) has been asserted to protect the internal deliberations of the FBI by exempting from release drafts, recommendations, analyses, speculation, and other non-factual information prepared in anticipation of agency decision making. The general purpose of the deliberative process privilege is to prevent injury to the quality of agency decisions. Thus, material that contains or was prepared in connection with the formulation of opinions, advice, evaluations, deliberations, policy formulation, proposals, conclusions or recommendations may properly be withheld. Release of this type of information would have an inhibitive effect upon

⁶ Exemption (b)(2) is cited as a basis for withholding information on the following Bates-stamped pages of Exhibit D:DIOG-19-20, 28, 50-54, 57-73, 75-86, 89-91, 93-94, 96, 98-99, 101, 103-104, 107, 109-110, 112, 116, 119-122, 127-131, 135-139, 141-145, 147, 150-152, 155, 157, 163-165, 167-168, 170-177, 180-191, 193, 195-205, 207-213, 221-223, 226, 228, 232-238, 247-248, 250-267, 269, 363-364, 366, 368, 372 and 378-383.

the development of policy and administrative direction of an agency because it would chill the full and frank discussion between agency personnel regarding a decision. If agency personnel knew that their preliminary opinions, evaluations and comments would be released for public consumption, they may be more circumspect in what they put in writing, and thereby impede a candid discussion of the issues surrounding a decision. In this case, the DIOG contains draft provisions relating to a proposed, but not yet formalized entity called the Special Operations Review Committee (“SORC”). The FBI is still defining the role, responsibilities and composition of the SORC. If information of this nature were to become routinely public, the FBI would be impeded from having free internal discussions about such arrangements in the future. Accordingly, the FBI has properly withheld this information pursuant to Exemption (b)(5).⁷

EXEMPTION (b)(7)
THRESHOLD

(29) Exemption 7 of the FOIA protects from mandatory disclosure records or information compiled for law enforcement purposes, but only to the extent that such disclosure could reasonably be expected to cause one of the harms enumerated in the subparts of the exemption. See 5 U.S.C. § 552(b)(7). In this case, the harm that could reasonably be expected to result from disclosure concerns interference with pending law enforcement proceedings, invasion of personal privacy and revealing sensitive law enforcement techniques. Before an agency can invoke any of the harms enumerated in Exemption 7, it must first demonstrate that the records or information at issue were compiled for law enforcement purposes. Law enforcement agencies such as the FBI must demonstrate that the records at issue are related to the enforcement of

⁷ Exemption (b)(5) is cited as a basis for withholding information on the following Bates-stamped pages of Exhibit D: DIOG-34, 122, 258-259, 262-266, 357-359.

federal laws and that the enforcement activity is within the law enforcement duty of that agency. The records responsive to plaintiff's request concern a complete copy of the FBI's "DIOG". The DIOG is an essential investigatory tool used by FBI personnel. It applies to all investigative activities and intelligence collection activities conducted by the FBI within the United States or outside the territories of all countries. The purpose of the DIOG is to standardize policy so that criminal, national security, and foreign intelligence investigative activities are consistently and uniformly accomplished whenever possible. Thus, there is no doubt that these guidelines fall within the law enforcement duties of the FBI. Accordingly, the information readily meets the threshold requirement of Exemption (b)(7).

(30) Because the records squarely satisfy the Exemption 7 threshold standard, the remaining inquiry is whether their disclosure would "interfere with pending law enforcement proceedings," "invade personal privacy" and/or "reveal sensitive law enforcement techniques."

EXEMPTION (b)(7)(A)
PENDING LAW ENFORCEMENT INVESTIGATIONS

(31) 5 U.S.C. § 552 (b)(7)(A) exempts from disclosure:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings

(32) Application of this exemption requires the existence of law enforcement records; a pending or prospective law enforcement proceeding; and a reasonable expectation that release of the information would interfere with the enforcement proceeding. Furthermore, normally the assertion of this exemption to withhold documents involves documents found in an investigatory file. In this case, the information in question relates to a pending law enforcement proceeding.

Specifically, Exemption (b)(7)(A) has been asserted to protect the names of the subjects of pending investigation.

(33) Any release of information from the responsive portions of the DIOG would be inappropriate due to the harm which could ensue. Once information is released and is in the public domain, the information concerning the investigation could reach the individuals or entities who are under investigation. In this regard, the following potential harms from the release of this information exist:

(a) The use of information released to counteract evidence developed by investigators;

(b) The locations in the United States, as well as foreign countries, where the FBI is focusing the investigation and collection of investigative and source material.

(34) Furthermore, the release of this information to third parties not directly involved in these matters could allow these third parties to interfere with the pending proceedings by harassment, intimidations, and creation of false evidence. Once a release is made to the plaintiff under the FOIA, the use and dissemination of the that same information to third parties is unrestricted.

(35) The FBI makes every effort to provide information which will not interfere with the pending law enforcement proceedings. The FBI is continuously working in conjunction with other federal agencies in pending investigations; any waiver of FOIA Exemption (b)(7)(A) would inhibit the FBI's assistance to the justice system at the Federal level. Accordingly, the FBI has properly withheld this information pursuant to Exemption (b)(7)(A)-1.⁸

⁸ Exemption (b)(7)(A) is cited as a basis for withholding information on the following Bates-stamped pages of Exhibit D: DIOG-83, 110. Exemption (b)(7)(A) was inadvertently left off of DIOG-83 in the release provided to EFF on October 13, and the FBI is hereby rectifying that as

FOIA EXEMPTIONS (b)(6) AND (b)(7)(C):
CLEARLY UNWARRANTED AND UNWARRANTED
INVASION OF PERSONAL PRIVACY

- (36) 5 U.S.C. § 552 (b)(6) exempts from disclosure

personnel and medical files and similar files when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.

- (37) 5 U.S.C. § 552(b)(7)(C) exempts from disclosure

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 constitute an unwarranted invasion of personal privacy.⁹

(38) When withholding information pursuant to these two exemptions, the FBI is required to balance the privacy interests of the individual mentioned in these records against any public interest in disclosure. In asserting these exemptions, each piece of information was scrutinized to determine the nature and strength of the privacy interest of the individual whose name and/or identifying information appears in the documents at issue. When withholding the information, the individual's privacy interest was balanced against the public's interest in disclosure. In making this analysis, the public interest in the information was determined to be information which would shed light on the FBI's performance of its mission to protect and defend the United States against terrorist and foreign intelligence threats, to uphold and enforce

reflected in Exhibit D.

⁹ The practice of the FBI is to assert Exemption (b)(6) in conjunction with (b)(7)(C). Although the balancing test for (b)(6) uses a "would constitute a clearly unwarranted invasion of personal privacy," and the test for (b)(7)(C) uses the lower standard of "could reasonably be expected to constitute an unwarranted invasion of personal privacy," the analysis and balancing required by both exemptions is sufficiently similar to warrant a consolidated discussion. The privacy interests are balanced against the public's interests in disclosure under the analysis of both exemptions.

the criminal laws of the United States, and to provide leadership and criminal justice services to federal, state, municipal, and international agencies and partners. In the instance where information was withheld pursuant to Exemptions (b)(6) and (b)(7)(C), the FBI determined that the individual's privacy interests were not outweighed by any public interest in disclosure. Every effort has been made to release all segregable information contained in these records without invading the privacy interests of this individual.

(b)(6) and (b)(7)(C)

**Name and/or Identifying Information of FBI
Special Agent (SA)**

(39) Exemptions (b)(6) and (b)(7)(C) have been asserted to protect the name and identifying information of an FBI SA who was responsible for compiling the information contained in the DIOG. The SA mentioned did not choose his or her assignment. Publicity, adverse or otherwise, regarding any particular investigation conducted by the SA may seriously impair the SA's effectiveness in conducting future investigations. This privacy consideration also protects the SA from unnecessary, unofficial questioning as to the conduct of an investigation, whether or not he or she is currently employed by the FBI.

(40) FBI SAs conduct official inquiries into violations of various criminal statutes and national security cases. They come into contact with all strata of society, conducting searches and making arrests, all of which result in reasonable but nonetheless serious disturbances to individuals and their lives. It is possible for an individual targeted by such law enforcement actions to carry a grudge which may last for years, and to seek revenge on the agents and other federal employees involved in the investigation. The FBI determined that the SA whose name and information appear in these documents maintains a substantial privacy interest in not having

his or her identities disclosed. Thus, disclosure of this information would constitute a clearly unwarranted invasion of personal privacy, and could reasonably be expected to constitute an unwarranted invasion of personal privacy.

(41) The FBI next examined the records at issue to determine whether there was any public interest that outweighed the substantial privacy interests of the FBI SA referenced in the responsive records. The FBI could not identify any discernible public interest. Accordingly, the FBI determined that the disclosure of the name of the FBI SA would shed no light on the FBI's performance of its statutory duties in the investigation of the plaintiff. Thus, the FBI determined that the SA's privacy interests outweighed any public interest in disclosure, and that disclosure of the name and identifying information of the FBI SA would constitute a clearly unwarranted invasion of personal privacy, and could reasonably be expected to constitute an unwarranted invasion of personal privacy, and has therefore withheld this information pursuant to FOIA Exemption (b)(6) and (b)(7)(C).¹⁰

EXEMPTION (b)(7)(E)
INVESTIGATIVE TECHNIQUES AND PROCEDURES

(42) 5 U.S.C. § 552 (b)(7)(E) provides for the withholding of:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (E) 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.

(b)(7)(E) Investigative Techniques and Procedures

¹⁰ Exemptions (b)(6) and (b)(7)(C) are cited as a basis for withholding information on the following Bates-stamped pages of Exhibit D: DIOG-2.

(43) The FBI has asserted Exemption (b)(2) in conjunction with (b)(7)(E) to protect information consisting of specific internal investigatory techniques and procedures that are used by the FBI as the DIOG applies to all investigative activities conducted by the FBI within the United States or outside the territories of all countries. This exemption protects guidelines prepared for law enforcement investigations and prosecutions if release could reasonably be expected to give anyone with that particular knowledge the ability to circumvent the law. In addition, it exempts from disclosure, documents concerning investigative procedures and techniques. While the entire DIOG could fairly be characterized as a set of investigative procedures, the FBI has endeavored to make as much of it public as possible. To describe this information in further detail on the public record would identify that very information which the FBI seeks to protect pursuant to this exemption. The revelation of these details could enable the targets of these techniques to avoid detection or develop countermeasures to circumvent the ability of the FBI to effectively use this important national security law enforcement technique. Accordingly, the FBI has properly withheld this information pursuant to Exemption (b)(7)(E).¹¹

CONCLUSION

(44) The FBI has processed and released all reasonably segregable information from the records responsive to plaintiff's request to the FBI. The remaining information has been withheld pursuant to FOIA Exemptions 1, 2, 5, 6, 7(A), 7(C) and 7(E), 5 U.S.C. §§ 552 (b)(1), (b)(2), (b)(5), (b)(6), (b)(7)(A), (b)(7)(C), and (b)(7)(E). The FBI has carefully examined the

¹¹ Exemption (b)(7)(E) is cited as a basis for withholding information on the following Bates-stamped pages of Exhibit D:DIOG-19-20, 28, 50-54, 57-73, 75-86, 89-91, 93-94, 96, 98-99, 101, 103-104, 107, 109-110, 112, 116, 119-122, 127-131, 135-139, 141-145, 147, 150-152, 155, 157, 163-165, 167-168, 170-177, 180-191, 193, 195-205, 207-213, 221-223, 226, 228, 232-238, 247-248, 250-267, 269, 363-364, 366, 368, 372 and 378-383.

responsive documents and has determined that the information withheld from plaintiff, if disclosed, could reasonably be expected to damage national security, impede the effectiveness of the FBI's internal law enforcement procedures, could reveal privileged information, could interfere with law enforcement proceedings, cause clearly unwarranted and unwarranted invasions of the privacy interests of numerous individuals, and reveal investigative techniques and procedures. Accordingly, the FBI has released all reasonably segregable, nonexempt information to plaintiff in response to its FOIA requests to the FBI.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that Exhibits A through E attached hereto are true and correct copies.

Executed this 12th day of November, 2009.



DAVID M. HARDY

Section Chief

Record/Information Dissemination Section

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Winchester, Virginia