UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER FOUNDATION, Plaintiff, vs. DEPARTMENT OF JUSTICE, Defendant.	)	Civil Action No. 06-cv-1773 (RBW)

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

PRELIMINARY STATEMENT

This action pertains to two Freedom of Information Act (FOIA) requests that the plaintiff, the Electronic Frontier Foundation (EFF), submitted to the Federal Bureau of Investigation (FBI), seeking "disclosure of records concerning the scope and privacy impact of the Federal Bureau of Investigation's Investigative Data Warehouse, a huge database that holds hundreds of millions of records containing personal information." Compl. for Inj. Relief ¶ 1 (dkt. no. 1). Defendant United States Department of Justice moves the Court to enter summary judgment in Defendant's favor pursuant to Rule 56(b) of the Federal Rules of Civil Procedure.

As outlined in this memorandum and in the attached Fifth Declaration of David M. Hardy, the FBI conducted a thorough search to identify documents responsive to EFF's requests. The FBI has released all responsive documents to the plaintiff except for certain documents or portions of documents that the FBI withheld based on statutory exemptions. The FBI's application of these exemptions was proper, and the FBI processed and released all reasonably segregable information. Accordingly, the Court should grant summary judgment in favor of the

defendant.

BACKGROUND

I. Electronic Frontier Foundation FOIA Requests at Issue in this Litigation

This action pertains to two FOIA requests submitted by the plaintiff seeking disclosure of records pertaining to the FBI's Investigative Data Warehouse (IDW), a "659 million-record database" described as "one of the most powerful data analysis tools available to law enforcement and counterterrorism [FBI] agents." See (First) Decl. of David M. Hardy ¶ 26 & Ex. A. (dkt. no. 7) [hereinafter "First Decl."].

By letter dated September 1, 2006, the plaintiff submitted a FOIA request to the FBI seeking information pertaining to the IDW. Specifically, the request sought disclosure of:

> . . . the following agency records (including, but not limited to, electronic records):
>
> 1. all records describing data expungement, restriction or correction procedures for the IDW;
>
> 2. all privacy impact statements created for the IDW; and
>
> 3. all results of audits conducted to ensure proper operation of the IDW.

First Decl. Ex. A; see also First Decl. ¶ 26. By letter dated September 21, 2006, the FBI acknowledged receipt of the plaintiff's FOIA request and notified the plaintiff that the request had been assigned FOIPA Request No. 1058805-000 and that a search was being conducted at FBI Headquarters. First Decl. ¶ 27 & Ex. B.

The plaintiff's complaint in this litigation, filed October 17, 2006, stated that the plaintiff had submitted an earlier request for records pertaining to the Investigative Data Warehouse by letter dated August 25, 2006. See Compl. for Injunctive Relief ¶ 11 (dkt. no. 1). The FBI has no record of having received plaintiff's request on that date. However, on November 29, 2006, the

plaintiff provided a copy of the request to the FBI, and the FBI agreed to treat the request as if it had been received on the August 25, 2006, date. See First Decl. ¶ 25 n.10, ¶ 28 & Ex. C; see also Def.'s Supplemental Answer (dkt. no. 5). This request sought disclosure of:

> . . . the following agency records (including, but not limited to, electronic records) concerning the FBI's "Investigative Data Warehouse" ("IDW"):
>
> 1) records listing, describing or discussing the categories of individuals covered by the IDW;
>
> 2) records listing, describing or discussing the categories of records in the IDW;
>
> 3) records listing, describing or discussing criteria for inclusion of information in the IDW;
>
> 4) records describing or discussing any FBI determination that the IDW is, or is not, subject to the requirements of the Privacy Act of 1974; and
>
> 5) records describing or discussing any FBI determination that the IDW is, or is not, subject to federal records retention requirements, including the filing of Standard Form (SF) 115, "Request for Records Disposition Authority."

First Decl. ¶ 28 & Ex. C.

The FBI conducted a standard search of its Central Records System for documents responsive to the plaintiff's FOIA requests. See First Decl. ¶¶ 35–36. The FBI also conducted an individualized inquiry of the most logical offices at FBI headquarters which could have potentially responsive records concerning the IDW. See First Decl. ¶¶ 35, 37. These steps identified approximately 72,000 pages of records potentially responsive to the Plaintiff's FOIA requests. See First Decl. ¶ 38; Fifth Decl. of David M. Hardy ¶ 5 (attached as Ex. 1) [hereinafter "Fifth Decl."].

II. Procedural History of this Litigation and Processing of Responsive Documents.

The plaintiff filed its complaint in this action on October 17, 2006. See Compl. for Injunctive Relief. Because exceptional circumstances prevented the FBI from processing the

plaintiff's requests within the statutory time limit, and based on the large volume of records identified as potentially responsive, the defendant sought a stay of this litigation for 71 months pursuant to 5 U.S.C. § 552(a)(6)(C) and Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976). See Mem. of P. & A. in Supp. of Mot. for Open America Stay (dkt. no. 7). The defendant's motion papers stated that the FBI expected that many of the documents identified as potentially responsive would likely turn out not to be responsive to the plaintiff's requests, and that therefore processing of the plaintiff's FOIA requests would likely be completed in less time than 71 months. At the time, however, the defendant did not have enough information to provide an estimate of how many documents would be eliminated as nonresponsive or when processing could be completed. The defendant therefore requested a stay of 71 months and proposed that the defendant file periodic reports to update the Court and the plaintiff on the status of the plaintiff's requests and provide updated estimates of the time needed to complete processing. See Mem. of P. & A. in Supp. of Mot. for Open America Stay at 2. The plaintiff opposed the defendant's motion for a stay. Pl.'s Opp'n to Def.'s Mot. for Open America Stay (dkt. no. 8).

While the defendant's motion for an Open America stay was pending, EFF submitted an administrative request to the Department of Justice Office of Public Affairs requesting expedited processing of the FOIA requests pursuant to 28 C.F.R. § 16.5(d)(1)(iv). Pl.'s Opp'n to Def.'s Mot. for Open America Stay (dkt. no. 8) Ex. 1. By letter dated August 3, 2007, the FBI informed EFF that this request for expedited treatment had been granted. Pl.'s Mot. for Prelim. Inj. Ex. A (dkt. no. 10). EFF then moved the Court to issue a preliminary injunction to require the defendant to process the plaintiff's requests on a more rapid timetable. Pl.'s Mot. for Prelim. Inj. The defendant opposed the motion for a preliminary injunction. Mem. of P. & A. in Opp'n to

Pl.'s Mot. for Prelim Inj. and Supplement to Mot. for Open America Stay (dkt. no. 11).

On September 27, 2007, the Court issued an order denying the plaintiff's motion for a preliminary injunction, and on March 28, 2008, the Court issued an order granting the defendant's motion for a stay. Order Denying Mot. for Prelim. Inj. (Sept. 27, 2007) (dkt. no. 16); Order (Mar. 28, 2008) (dkt. no. 18). The Court's orders instructed the defendant to file periodic reports on the FBI's progress in processing the plaintiff's FOIA requests. See Order Denying Mot. for Prelim. Inj. (Sept. 27, 2007) at 11; Order (Mar. 28, 2008) at 1–2. On June 30, 2008, the Court modified the March 28, 2008, stay order to provide that the stay would extend until August 1, 2008, or until the defendant had fully responded to the plaintiff's FOIA requests. See Amended Order (June 30, 2008) at 1 (dkt. no. 21). The Court further ordered the parties to advise the Court once the defendant had fully responded to the plaintiff's FOIA requests. See Amended Order (June 30, 2008) at 1.

Meanwhile, the FBI continued processing the plaintiff's FOIA requests. Between September 28, 2007, and June 9, 2008, the FBI made six releases of documents to the plaintiff. See Fifth Decl. ¶¶ 11–16. On January 23, 2009, the FBI made a corrected release including five additional pages that had been inadvertently omitted from the previous releases. See Fifth Decl. ¶ 5 n.3, ¶ 18. These releases of documents together accounted for a total of 878 pages reviewed, of which 802 pages were released to the plaintiff in full or in part.[1] See Fifth Decl. ¶ 5. The remainder of the 72,000 pages that had earlier been identified as potentially responsive to the

[1]The Defendant's Status Report (dkt. no. 17) filed with the Court on January 25, 2008, and the letter sent by the FBI to the plaintiff in connection with the September 28, 2007, interim release of documents inadvertently misstated the number of responsive documents reviewed in connection with the September 28, 2007, release. The defendant's earlier reports and the letter incorrectly stated that the release accounted for 204 pages of responsive documents reviewed. In fact, the September 28, 2007, release accounted for 173 pages of responsive documents. See Fifth Decl. ¶ 11 & n.6.

plaintiff's FOIA requests were eliminated as not responsive. In accordance with the Court's instructions, the defendant advised the Court of these releases in status reports filed January 25, 2008 and May 27, 2008, and a status report filed jointly with the plaintiff on July 8, 2008. See Def.'s Status Report (dkt. no. 17); Def.'s Status Report (dkt. no. 19); Joint Status Report (dkt. no. 22).

ARGUMENT

I. Statutory Background and Standard of Review.

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, generally mandates disclosure, upon request, of government records held by an agency of the federal government except to the extent such records are protected from disclosure by one of nine exemptions. The "fundamental principle" that animates FOIA is "public access to Government documents." John Doe Agency v. John Doe Corp., 493 U.S. 146, 151 (1989). "The basic purpose of FOIA 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). At the same time, Congress recognized "that legitimate governmental and private interests could be harmed by release of certain types of information and provided nine specific exemptions under which disclosure could be refused." FBI v. Abramson, 456 U.S. 615, 621 (1982); see also 5 U.S.C. § 552(b). While these exemptions are to be "narrowly construed," Abramson, 456 U.S. at 630, courts must not fail to give the exemptions "meaningful reach and application." John Doe Agency, 493 U.S. at 152. The FOIA thus "represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 925 (D.C. Cir. 2003).

Summary judgment is the procedure by which courts resolve nearly all FOIA actions. "In order to obtain summary judgment the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990). "There is no requirement that an agency search every record system." Id. "[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984); see also Meeropol v. Meese, 790 F.2d 942, 952–53 (D.C. Cir. 1986) ("A search is not unreasonable simply because it fails to produce all relevant material."); Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982).

In evaluating the adequacy of a search, courts accord agency affidavits "a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991); see also Ground Saucer Watch, Inc. v. CIA, 692 F.2d 770, 771 (D.C. Cir. 1981). The statute does not require "meticulous documentation [of] the details of an epic search." Perry, 684 F.2d at 127. "[A]ffidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA." Id.

To sustain its burden of justifying nondisclosure of information, see 5 U.S.C. § 552(a)(4)(B), the agency must provide declarations that identify the information at issue and the bases for the exemptions claimed. See Summers v. Dep't of Justice, 140 F.3d 1077, 1080 (D.C. Cir. 1998). Courts review de novo the agency's use of a FOIA exemption to withhold documents. Wolf v. CIA, 473 F.3d 370, 374 (D.C. Cir. 2007). "Yet in conducting de novo

review in the context of national security concerns, courts must accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." Id. (internal quotation marks omitted); see also Krikorian v. Dep't of State, 984 F.2d 461, 464 (D.C. Cir. 1993) (noting deference to expertise of agencies engaged in national security and foreign policy). "[S]ummary judgment is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail . . . and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." Wolf, 473 F.3d at 374 (internal quotation marks omitted) (omission in original). "Moreover, a reviewing court 'must take into account . . . that any affidavit or other agency statement of threatened harm to national security will always be speculative to some extent, in the sense that it describes a potential future harm.'" Id. (quoting Halperin v. CIA, 629 F.2d 144, 149 (D.C. Cir. 1980)) (omission in original). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" Id. at 374–75.

II. The FBI Conducted an Adequate Search for Responsive Documents.

The FBI's search for documents responsive to EFF's request was reasonably calculated to uncover all documents responsive to EFF's requests. As explained in the first Declaration of David M. Hardy, the FBI employed two search methods to identify documents responsive to the plaintiff's requests. See First Decl. ¶¶ 35–37. First, on September 21, 2006, FBI conducted a standard search of records in the FBI's Central Records System, which consists of administrative, applicant, criminal, personnel, and other files compiled for law enforcement purposes. First Decl. ¶¶ 29, 35–36. The search employed the following terms: "Investigative Data Warehouse," "IDW", "Investigative Data Warehouse Account Password," "Investigative Data Warehouse Regional Training," "Investigative Data Warehouse Version One Three Day

Regional Training," "Investigative Data Warehouse Version One," "Investigative Data Warehouse Version One Training," and "Investigative Data Warehouse Version 1.3." First Decl. ¶ 36. The date parameters for the search were for any responsive records created on or before the date of the search. First Decl. ¶ 36. The search extended to cross-references as well as main files. See First Decl. ¶ 36.

The second search method that FBI employed was an individualized inquiry of the most logical offices at FBI headquarters that could have documents potentially responsive to the plaintiff's FOIA requests. First Decl. ¶¶ 35, 37. As explained in the first Declaration of David M. Hardy, the FBI's Record/Information Dissemination Section (RIDS) prepared and circulated an Electronic Communication to the FBI headquarters divisions and offices most likely to possess potentially responsive records: the Director's Office, the Intelligence Directorate, the Office of the Chief Information Officer, the Cyber Division, the Information Technology Operations Division, the Office of Information Technology Policy and Planning, the Office of Information Technology Program Management, the Office of Operational Technology, the Office of the General Counsel, the Office of Congressional Affairs, the Office of Public Affairs, the Critical Incident Response Group, the Criminal Justice Information Services Division, the Counterintelligence Division, the Counterterrorism Division, the Criminal Investigative Division, the Finance Division, the Inspection Division, the Security Division, and the Training and Development Division. First Decl. ¶ 37. The Electronic Communication requested that all personnel conduct a thorough search of documents in their possession for any responsive records created on or before September 21, 2006. First Decl. ¶ 37. The Electronic Communication requested that each division or office conduct the requested searches, reply to RIDS personnel by October 23, 2006, and forward copies of any potentially responsive records to RIDS personnel.

First Decl. ¶ 37.

The steps the FBI took to identify responsive records, as documented in detail in the first Declaration of David M. Hardy, constituted an adequate search meeting the defendant's obligations under FOIA.

III. The FBI Properly Withheld Records Under Applicable FOIA Exemptions.

The FBI processed the responsive records in accordance with FOIA and withheld certain information pursuant to FOIA exemptions 1, 2, 4, 5, 6, 7(A), 7(C), and 7(E), as explained in detail below and in the attached Fifth Declaration of David M. Hardy. The FBI properly invoked these exemptions, and the FBI processed and released all reasonably segregable information from the responsive records. Accordingly, the FBI is entitled to summary judgment.

A. The FBI Processed and Released All Reasonably Segregable Information from the Responsive Records.

As required by FOIA, the FBI has provided all "reasonably segregable" responsive information that is not protected under a FOIA exemption. 5 U.S.C. § 552(b). The FBI processed all documents to achieve maximum disclosure consistent with the access provisions of the FOIA, and made every effort to provide plaintiff with all material in the public domain and with all reasonably segregable portions of releasable material. See Fifth Decl. ¶ 19. No reasonably segregable, nonexempt portions were withheld. See Fifth Decl. ¶ 19. The FBI indicated where any material was withheld in the documents it released to EFF and provided coded categories to indicate the nature of any information withheld. See Fifth Decl. ¶ 20. All the material the FBI withheld is exempt from disclosure pursuant to FOIA exemptions or is so intertwined with protected material that segregation is not possible without revealing the underlying protected material. See Fifth Decl. ¶ 20.

B. The FBI Properly Withheld Classified File Numbers Pursuant to FOIA Exemption 1.

The FBI properly withheld two classified file numbers pursuant to FOIA Exemption 1.[2] Exemption 1 protects records that are: "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Section 1.1(a)(4) of Executive Order 12958[3] states that an agency may classify information that fits into one or more of the Executive Order's categories for classification when the appropriate classification authority "determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security." Exec. Order No. 12958, § 1.1(a)(4).

An agency can demonstrate that it has properly withheld information under Exemption 1 if it establishes that it has met the requirements of the Executive Order. Substantively, the agency must show that the records at issue logically fall within the exemption, that is, that Executive Order 12958 authorizes the classification of the information at issue. Procedurally, the agency must demonstrate that it followed the proper procedures in classifying the information. See Salisbury v. United States, 690 F.2d 966, 970–73 (D.C. Cir. 1982); Military Audit Project v. Casey, 656 F.2d 724, 737–38 (D.C. Cir. 1981). An agency meeting both tests is entitled to summary judgment. See, e.g., Abbotts v. Nuclear Regulatory Comm'n, 766 F.2d 604, 606–08 (D.C. Cir. 1985); Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984).

---

[2]The FBI asserted Exemption 1 on Bates numbered page 553.

[3]Executive Order 12958 was amended by Executive Order 13292, effective March 25, 2003. See Exec. Order No. 12958, 3 C.F.R. (1995), reprinted as amended in 50 U.S.C. § 435 note; see also Exec. Order No. 13292, 68 Fed. Reg. 15,315 (March 28, 2003). All citations herein to Executive Order 12958 are to the Order as amended by Executive Order 13292.

Agency decisions to withhold classified information under FOIA are reviewed de novo by the district court, and the agency bears the burden of proving its claim for exemption. See 5 U.S.C. § 552(a)(4)(B); Miller, 730 F.2d at 776. Nevertheless, because agencies have "unique insights" into the adverse effects that might result from public disclosure of classified information, the courts must accord "substantial weight" to an agency's affidavits justifying classification. Military Audit Project, 656 F.2d at 738 (emphasis removed); cf. Miller, 730 F.2d at 776 (court must "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record"). "[T]he court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions . . . ." Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980); see Weissman v. CIA, 565 F.2d 692, 697 (D.C. Cir. 1977) ("Few judges have the skill or experience to weigh the repercussions of disclosure of intelligence information.").

The relevant Executive Order currently in effect is Executive Order 12958, as amended, "Classified National Security Information." An agency can demonstrate that it has properly withheld information under Exemption 1 if it establishes that it has met the substantive and procedural requirements of Executive Order 12958. Under § 1.1(a) of Executive Order 12958, as amended, information may be classified if:

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

Exec. Order No. 12958, § 1.1(a). Procedurally, the agency must ensure that:

(1) each document is marked as required and stamped with the proper classification designation, Exec. Order No. 12958, § 1.6(a);

(2) each document is marked to indicate clearly which portions are classified, which portions are exempt from declassification as set forth in Executive Order No. 12958, § 1.5(b), and which portions are unclassified, Exec. Order No. 12958, § 1.6(c);

(3) the prohibitions and limitations on classification specified in Executive Order No. 12958, § 1.7, are adhered to;

(4) the declassification policies set forth in Executive Order No. 12958, §§ 3.1 and 3.3, are followed; and

(5) any reasonably segregable portion of the classified documents are declassified and marked for release, unless withholding is otherwise warranted under the law.

The Hardy Declaration demonstrates that the FBI has adhered to the mandated procedures in determining that the information withheld under Exemption 1 is classified. The Attorney General has designated Mr. Hardy as an original classification and declassification authority. See Exec. Order No. 12958, §§ 1.3, 3.1; Fifth Decl. ¶ 2. The classified information, which is under the control of the United States Government, contains information relating to intelligence sources or methods and foreign relations or foreign activities of the United States, see Exec. Order No. 12958, § 1.4(c), (d). See Fifth Decl. ¶ 27. Mr. Hardy determined that release of this information could cause serious damage to the national security and the war on transnational terrorism as described in more detail below. See Fifth Decl. ¶¶ 27–30. Mr. Hardy made certain that all of the procedural and administrative requirements of Executive Order 12958 were followed, including proper identification and marking of documents. See Fifth Decl. ¶ 26.

Intelligence Sources or Methods. The classified information withheld relates to

intelligence sources or methods. See Fifth Decl. ¶¶ 27–29. Information that reveals intelligence sources or methods is exempt from disclosure pursuant to Executive Order 12958, as amended, § 1.4(c). As stated in Mr. Hardy's declaration, the FBI withheld classified file numbers that are assigned to specific intelligence activities and whose disclosure would lead to exposure of the particular intelligence activities and methods at issue. See Fifth Decl. ¶¶ 27–29. Disclosure of the file numbers would permit hostile analysts to piece together information to determine the actual use of the application of intelligence sources or methods. See Fifth Decl. ¶ 29. This would hamper the effectiveness of the intelligence sources or methods at issue and otherwise cause damage to national security. See Fifth Decl. ¶ 29.

Foreign Relations or Foreign Activities of the United States. The classified information withheld also relates to foreign relations or foreign activities of the United States. The classified file numbers withheld identify intelligence investigations containing sensitive information gathered by the United States either about or from a foreign country. See Fifth Decl. ¶ 30. The delicate liaison established between the United States and these foreign governments could be severely damaged if the United States were to disclose the investigations. See Fifth Decl. ¶ 30. Unauthorized disclosure of such information can reasonably be expected to lead to diplomatic or economic retaliation against the United States; identify the target, scope, or time frame of U.S. intelligence activities; enable hostile entities to assess U.S. intelligence-gathering activities and devise countermeasures against those activities; or compromise cooperative foreign sources. See Fifth Decl. ¶ 30.

Thus, based on its detailed declaration and the absence of any evidence of bad faith, the FBI has properly withheld information pursuant to Exemption (b)(1).

C. The FBI Properly Withheld Material Related to Internal Personnel Rules and Practices Pursuant to Exemption 2.

The FBI properly withheld certain FBI internal information pursuant to FOIA Exemption 2. Exemption 2 protects information "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Exemption 2 applies to materials "'used for predominantly internal purposes.'" Schiller v. NLRB, 964 F.2d 1205, 1207 (D.C. Cir. 1992) (quoting Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1073 (D.C. Cir. 1981) (en banc)). This exemption has been held to protect two types of information: (1) information the release of which would "risk[] circumvention of agency regulations or statutes," Crooker, 670 F.2d at 1074, and (2) "routine matters of merely internal interest," id. at 1069. See also Founding Church of Scientology of Washington, D.C., Inc. v. Smith, 721 F.2d 828, 830 n.4 (D.C. Cir. 1983) (exemption applies to material that "relates to trivial administrative matters of no genuine public interest"); Schiller, 964 F.2d at 1207 (explaining "high 2" and "low 2" exemptions).

1. The FBI Properly Withheld Internal System Information Pursuant to Exemption 2.

The FBI withheld data source, data process, computer application, and systems design information pertaining to the IDW pursuant to Exemption 2.[4] As explained in the attached Fifth Declaration of David M. Hardy, knowledge of the data sources from which information in the

[4]The FBI asserted Exemption 2 in withholding data source, data process, computer application, and systems design information on the following Bates numbered pages: 2–6, 9, 11, 13, 15–18, 22–36, 40–49, 51–58, 61–63, 66–67, 69–70, 78–81, 87, 90, 95–123, 125–189, 193–225, 227–254, 256–286, 288, 294, 300–303, 305, 311, 313, 315, 317, 319, 321, 326–328, 330–333, 338, 340, 346–347, 349–353, 357–360, 363–366, 371–378, 385–386, 388–392, 396, 400, 402, 405–406, 409, 411, 413–417, 420, 422, 428–431, 433, 437–447, 449–451, 453–472, 474–532, 534–553, 557–558, 561–562, 565–570, 574, 577, 594–622, 642, 658–665, 668–669, 671, 682–683, 688, 690, 692, 709–721, 723–730, 735–738, 740–743, 749–757, 761–763, 766–767, 780, 782–794, 796, 798–799, 802, 804–805, 807, 809–810, 812, 814, 818, 822, 828–830, 836, 841, 843, 845, 847, 849, 851, 853, 857–858, and 872–873.

IDW is obtained would enable individuals involved in criminal or terrorist activities to adapt their activities and methods to avoid detection. See Fifth Decl. ¶ 41. Furthermore, disclosure of technical details pertaining to the IDW could facilitate unauthorized intrusions into or interference with the IDW. See Fifth Decl. ¶ 41.

Exemption 2 permits the withholding of information relating to the nature and identity of information sources used in law enforcement and national security activities when release of the information could help criminals evade detection. See, e.g., PHE, Inc. v. Dep't of Justice, 983 F.2d 248, 251 (D.C. Cir. 1993) (holding that Exemption 2 authorized withholding of information relating to the "specific documents, records and sources of information available to [FBI] Agents" and concluding that "release of FBI guidelines as to what sources of information are available to its agents might encourage violators to tamper with those sources of information and thus inhibit investigative efforts").

A danger that disclosure of technical information may facilitate unauthorized intrusion into a system also amounts to a risk of circumvention justifying withholding under Exemption 2. See, e.g., Singh v. FBI, 574 F. Supp. 2d 32, 44–45 (D.D.C. 2008) (Lamberth, J.) (holding that Exemption 2 permitted agency to withhold information that could facilitate unauthorized access into computer systems); Miller v. U.S. Dep't of Justice, 562 F. Supp. 2d 82, 109 (D.D.C. 2008) (Kennedy, J.) (same); Keys v. Dep't of Homeland Sec., 510 F. Supp. 2d 121, 127–28 (D.D.C. 2007) (Kay, Mag. J.) (same); Boyd v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 496 F. Supp. 2d 167, 171 (D.D.C. 2007) (Urbina, J.) (same). Accordingly, the FBI properly withheld this systems design and technical information pursuant to Exemption 2. Furthermore, Exemption 7(E) provides an additional basis for withholding this data source, data process, computer application, and systems design information. See infra section III.G.3.

2. The FBI Properly Withheld FBI Internal Telephone and Fax Numbers and Network Addresses Pursuant to Exemption 2.

The FBI also properly invoked Exemption 2 in withholding internal telephone and fax numbers, e-mail addresses, and Web site addresses of FBI Special Agents and support personnel.[5]

As explained in the attached Fifth Declaration of David M. Hardy, disclosure of contact information and network information could subject FBI personnel to harassing telephone calls or e-mails that could disrupt official business, including law enforcement investigations. See Fifth Decl. ¶ 42. Such information is internal to the FBI, and its disclosure would not serve any public interest. See Fifth Decl. ¶ 42.

This Court has repeatedly held that government telephone numbers, email addresses, and like information may be withheld pursuant to Exemption 2 under such circumstances. See, e.g., Antonelli v. Fed. Bureau of Prisons, 569 F. Supp. 2d 61, 65 (D.D.C. 2008) (Kollar-Kotelly, J.); Miller, 562 F. Supp. 2d at 110; Truesdale v. U.S. Dep't of Justice, 2005 WL 3294004 at *5 (D.D.C. 2005) (Kessler, J.). Accordingly, the FBI properly withheld this information pursuant to Exemption 2. The FBI also asserted Exemption 6 and 7(C) as an additional basis for withholding some of this information. See infra sections III.F and III.G.2.

3. The FBI Properly Withheld Internal File Classification Numbers and File Numbers Pursuant to Exemption 2.

The FBI also withheld file classification numbers and file numbers pursuant to

[5]The FBI asserted Exemption 2 in withholding internal telephone and fax numbers, e-mail addresses, and Web site addresses on Bates numbered pages 61, 306, 309, 432, 436, 452, 471, 482, 491, 513, 531, 595, 600, 666, 669–670, 676–688, 690–692, 695–702, 685A, 697A, 705–708, 710–718, 720–723, 727–743, 747–748, 758–760, 762, 765–766, 780, 782, 786, 791, 794, 798–799, 807–808, 813, 815, 820, and 839.

Exemption (b)(2).[6] As explained in the attached Fifth Declaration of David M. Hardy, these numbers are used for the purpose of organizing case-related information, such as correspondence, reports, and other investigative material. See Fifth Decl. ¶ 43. They are used exclusively for administrative control and efficient retrieval of information and have no bearing on the substance of the information. See Fifth Decl. ¶ 43. The designation of file numbers is a purely internal practice and the disclosure of these numbers would not provide any public benefit. See Fifth Decl. ¶ 43. Accordingly, the FBI properly withheld these numbers pursuant to Exemption 2. See, e.g., Summers v. U.S. Dep't of Justice, 517 F. Supp. 2d 231, 239 (D.D.C. 2007) (Sullivan, J.) (finding that FBI file numbers and source symbol numbers were "a matter of internal significance in which the public has no substantial interest"); Coleman v. FBI, 13 F. Supp. 2d 75, 79 (D.D.C. 1998) (Lamberth, J.) (finding that the FBI properly withheld source symbol numbers and file numbers used for administrative purposes under Exemption 2).

D. The FBI Properly Withheld Confidential Commercial or Financial Information Pursuant to Exemption 4.

The FBI also withheld certain confidential commercial information pursuant to FOIA Exemption 4.[7] Exemption 4 protects records from disclosure that contain "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). To fall within the exemption, records must contain information that is (1) commercial or financial in character, (2) obtained from a person, and (3) privileged or confidential.

---

[6]The FBI asserted Exemption 2 in withholding file classification numbers and file numbers with respect to Bates numbered pages 66, 306, 309, 482, 535, 551–553, 658, 737–738, 751, 753, 756, 762, 784, 789, and 793–794.

[7]The FBI asserted Exemption 4 on Bates numbered pages 642–646.

Courts have recognized that the terms "commercial" and "financial" should be given their "ordinary meanings" and merely require that the submitter has a "commercial interest" in the records. See Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing Washington Post Co. v. U.S. Dep't of Health & Human Servs., 690 F.2d 252, 266 (D.C. Cir. 1982) and Bd. of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 403 (D.C. Cir.1980)). Under National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), private commercial information that has been submitted to the government under compulsion is "confidential" for purposes of Exemption 4 if disclosure is likely either "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." Id. at 770 (footnote omitted). A slightly different standard applies to private commercial information that is provided to the government voluntarily. Such information is confidential for purposes of Exemption 4 "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 879 (D.C. Cir. 1992). These two tests recognize that Exemption 4 is designed to protect the government's interest in the availability and reliability of commercial and financial information obtained from third parties and also to protect the interests of persons who provide such information to the government. See id. at 877–79.

In this case, the FBI withheld certain information to protect proprietary information provided by an FBI contractor. See Fifth Decl. ¶ 44. A contractor provided a draft Requirements Traceability Matrix revealing details of a process that is not customary disclosed to the public. See Fifth Decl. ¶ 44. Release of these details would impair the FBI's ability to obtain similar products from other contractors in the future. See Fifth Decl. ¶ 44. Accordingly, the FBI's

withholding of this information was proper under Exemption 4.

E. The FBI Properly Withheld Privileged Inter- or Intra-Agency Communications Pursuant to Exemption 5.

The FBI properly withheld privileged inter- or intra-agency communications pursuant to FOIA Exemption 5. Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). Such a record is exempt from disclosure if it would be "normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). Exemption 5 thus incorporates the privileges that are available to an agency in civil litigation, the three principal ones being the deliberative process privilege, the attorney-client privilege, and the attorney work product doctrine. See id. at 148–49.

Deliberative Process Privilege. The purpose of the deliberative process privilege is to encourage frank discussion of legal and policy issues within the government, and to protect against public confusion resulting from disclosure of reasons and rationales that were not ultimately the bases for the agency's action. See, e.g., Mapother v. Dep't of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993); Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Montrose Chem. Corp. of Cal. v. Train, 491 F.2d 63, 70 (D.C. Cir. 1974). The deliberative process privilege protects "predecisional communications." Sears, Roebuck, 421 U.S. at 151. Accordingly, the privilege applies to "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980)). The privilege has been held to apply to recommendations, see Sears, Roebuck, 421 U.S. at 150, and to drafts, see Dudman Commc'ns Corp. v. Dep't of the Air Force, 815 F.2d 1565, 1569 (D.C. Cir. 1987).

The FBI properly withheld internal FBI documents based on the deliberative process privilege pursuant to Exemption 5: FBI internal emails, FBI policy documents, and a draft memorandum of understanding ("MOU") between the FBI and two other federal agencies.[8] See Fifth Decl. ¶¶ 47–51. The majority of documents withheld on this basis were internal FBI emails dating from April 2002 to October 2006, produced from the computers of employees in the FBI Office of General Counsel. See Fifth Decl. ¶ 48. These emails contained predecisional discussions of policies, processes, or IDW systems content or design, and their release would hamper the quality of FBI decisionmaking. See Fifth Decl. ¶ 48. The FBI also asserted Exemption 2 based on the deliberative process privilege in withholding FBI planning and assessment documents, all of which were predecisional in nature. See Fifth Decl. ¶¶ 49, 51. The documents withheld include material within a draft program-level acquisition plan, drafts of an IDW Privacy Impact Assessment, and portions of a meeting agenda. See Fifth Decl. ¶ 49. Finally, the FBI asserted Exemption 5 based on the deliberative process privilege in withholding a draft memorandum of understanding (MOU) among the Department of Homeland Security, the FBI, and the Department of State. See Fifth Decl. ¶ 50. The contents of this draft differ from the contents of the final document, and disclosure of the draft would chill full and frank negotiations among agencies. See Fifth Decl. ¶ 50.

Attorney-Client Privilege. The attorney-client privilege protects confidential communications made between clients and their attorneys when the communications are for the purpose of securing legal advice or services. See In re Sealed Case, 737 F.2d 94, 98–99 (D.C.

[8]The FBI withheld material protected by the deliberative process privilege under Exemption 5 on Bates numbered pages 21–24, 95–123, 125–191, 193–287, 290–292, 400, 402, 594–622, 641A, 647–650, 664–668, 670–681, 686–692, 694–695, 700–711, 769–779, 790, and 836.

Cir. 1984). A government agency, like a private party, "needs . . . assurance of confidentiality so it will not be deterred from full and frank communications with its counselors." In re Lindsey, 148 F.3d 1100, 1105 (D.C. Cir. 1998). The FBI properly withheld documents protected by the attorney-client privilege pursuant to Exemption 5.[9]

The FBI properly withheld internal FBI documents based on the attorney-client privilege pursuant to Exemption 5: FBI internal emails, FBI policy documents, and an internal Electronic Communication ("EC"). See Fifth Decl. ¶ 53. All of these documents were produced from the computers of employees in the FBI Office of General Counsel. See Fifth Decl. ¶ 53. The internal emails date from August 2003 to October 2006 and all entail legal advice given by employees in the Office of General Counsel with respect to the IDW. See Fifth Decl. ¶¶ 53–54. The FBI also withheld a draft Privacy Impact Assessment for the IDW containing handwritten comments by staff within the Office of General Counsel and an Electronic Communication from the Office of General Counsel Investigative Law Unit to Information Resources containing an Office of General Counsel opinion. See Fifth Decl. ¶¶ 55–56. Each of the documents withheld contain OGC attorneys' opinions on legal issues related to the IDW discussed within an internal FBI email system. See Fifth Decl. ¶ 57. Accordingly, the FBI properly asserted Exemption 5 with respect to these documents.

F. The FBI Properly Withheld Names and Identifying Information Pursuant to Exemption 6.

The FBI properly withheld names and identifying information of FBI support personnel and special agents, third parties of investigative interest, and other Federal Government

[9]The FBI withheld material protected by the attorney-client privilege under Exemption 5 on Bates numbered pages 596–622, 641A, 647–650, 666–668, 670–681, 686–692, 694–695, and 700–711.

personnel pursuant to Exemption 6.

Exemption 6 allows withholding of information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). See U.S. Dep't of State v. Washington Post Co., 456 U.S. 595, 599–600 (1982) ("[T]he primary concern of Congress in drafting Exemption 6 was to provide for the confidentiality of personal matters."). For this exemption to apply, the information at issue must be maintained in a government file and "appl[y] to a particular individual." Id. at 602. Once this threshold requirement is met, Exemption 6 requires the agency to balance the individual's right to privacy against the public's interest in disclosure. See Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976); see also Reed v. NLRB, 927 F.2d 1249, 1251 (D.C. Cir. 1991).

The balancing analysis required by Exemption 6 is similar to the balancing analysis required by Exemption 7(C), which permits withholding of "records or information compiled for law enforcement purposes . . . 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." 5 U.S.C. § 552(b)(7), (b)(7)(C). Case law pertaining to Exemption 7(C) therefore is sometimes germane in Exemption 6 analysis. See, e.g., Reed, 927 F.2d at 1251. Also, as discussed in further detail below, see infra section III.G.2, the FBI has asserted Exemption 7(C) as an additional basis for withholding the material that it withheld under Exemption 6.

Names and/or Identifying Information of FBI Support Personnel and Special Agents. The FBI properly asserted Exemption 6 as to documents that identify FBI support personnel, including staff from the Information and Technology Branch, the Counterterrorism Division, the

Records Management Division, the Office of Congressional Affairs, and the Office of General Counsel.[10] See Fifth Decl. ¶ 63. These employees have access to information regarding computer systems designs and security, and they could become targets of harassing inquiries for unauthorized access to these systems if their identities were released. See Fifth Decl. ¶ 63. These individuals maintain substantial privacy interests in not having their identities disclosed. See Fifth Decl. ¶ 63. There is no public interest to be served by releasing the identities of these individuals. See Fifth Decl. ¶ 63. Thus, disclosure of this information would constitute a clearly unwarranted invasion of their personal privacy. See Fifth Decl. ¶ 63. It is well-established that "government officials have a legitimate interest in preserving the secrecy of matters that conceivably could subject them to annoyance or harassment in either their official or private lives." Baez v. U.S. Dep't of Justice, 647 F.2d 1328, 1339 (D.C. Cir. 1980); Lesar v. U.S. Dep't of Justice, 636 F.2d 472, 487 (D.C. Cir. 1980). Accordingly, withholding the specified documents to protect the privacy interests of these government employees is justified under Exemption 6.

The FBI also properly asserted Exemption 6 as to documents that identify FBI Special Agents. FBI Special Agents conduct official inquiries into various criminal and national security violation cases. See Fifth Decl. ¶ 62. There is no public interest to be served by disclosing the identities of the Special Agents to the public. See Fifth Decl. ¶ 62. Thus, disclosure of this information would constitute a clearly unwarranted invasion of their personal privacy. See Fifth

[10]The FBI asserted Exemption 6 in withholding names and identifying information of FBI support personnel and Special Agents on the following Bates numbered pages: 21–25, 61, 64, 68, 88–89, 91–92, 94, 287, 289–293, 306–309, 432, 436, 438, 452, 471, 473–475, 478, 482, 491, 513, 531, 533, 541, 551–553, 564, 571–577, 594–595, 600, 641A, 647–651, 657, 664, 666–667, 669–673, 675–703, 682A, 685A, 697A, 699A, 704–730, 732–752, 754–761, 764–768, 781–783, 785–787, 789–820, 834, and 855.

Decl. ¶ 62. Accordingly, withholding the specified documents to protect the privacy interests of these Special Agents is justified under Exemption 6.

Names and/or Identifying Information of Third Parties of Investigative Interest. The FBI also withheld information to protect the names and identifying information of third parties of investigative interest pursuant to Exemption (b)(6).[11] The information withheld includes file numbers, addresses, dates of birth, Social Security numbers, and other personal information. See Fifth Decl. ¶ 64.

It is axiomatic that anything that would associate a third party with a criminal or national security investigation would invade the third party's privacy and damage his reputation. See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 770–71 (1989) (concluding that disclosure of an individual's criminal history implicates that individual's privacy interests). Individuals have a "strong interest . . . in not being associated unwarrantedly with alleged criminal activity." Fitzgibbon v. CIA, 911 F.2d 755, 767 (D.C. Cir. 1990) (internal quotation marks omitted). Indeed, "an individual whose name surfaces in connection with an investigation may, without more, become the subject of rumor and innuendo." Cong. News Syndicate v. U.S. Dep't of Justice, 438 F. Supp. 538, 541 (D.D.C. 1977) (Pratt. J.). Those whose names may surface in an investigation, even if they are not targets, have a strong privacy interest. See Fitzgibbon, 911 F.2d at 767("[P]ersons involved in FBI investigations—even if they are not the subject of the investigation—have a substantial interest in seeing that their participation remains secret." (internal quotation marks omitted)); Quiñon v. FBI, 86 F.3d 1222, 1230 (D.C. Cir. 1996); see also, e.g., Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 896

[11]The FBI asserted Exemption 6 in withholding names and identifying information of third parties of investigative interest on the following Bates numbered pages: 66, 484, 535, 542, 751, 753, 756, 762, 784, 789, and 793.

(D.C. Cir. 1995) (stating that portions of law enforcement investigatory records that would reveal the identities of subjects, witnesses, or informants are categorically exempt from disclosure under FOIA). The FBI determined that the individuals to whom the information pertains maintain a substantial privacy interest in not having their identities disclosed, and balanced those privacy interests against the public's interest in disclosure. See Fifth Decl. ¶ 64. The FBI determined that the information withheld would not enlighten the public on how the FBI conducts its internal operations and investigations, and therefore concluded that the disclosure of the information would constitute a clearly unwarranted invasion of their personal privacy. See Fifth Decl. ¶ 64. Accordingly, withholding the specified documents to protect the privacy interests of these Special Agents is justified under Exemption 6.

Names and/or Identifying Information of Non-FBI Federal Government Personnel. The FBI also withheld certain information to protect the names and identifying information of non-FBI Federal Government personnel, specifically, Congressional staff.[12] See Fifth Decl. ¶ 65. The FBI determined that disclosure of these staff members' identifying information could subject these employees to unwanted inquiries and harassment which would constitute a clearly unwarranted invasion of their personal privacy, for the same reasons discussed above in connection with the withholding of names and identifying information of FBI personnel. See Fifth Decl. ¶ 65.

The FBI balanced these privacy interest of these individuals against any public interest in disclosure. See Fifth Decl. ¶ 66. The FBI determined that there is a complete lack of any bona fide public interest in disclosing this information, because it will not shed light on the operations

[12]The FBI asserted Exemption 6 in withholding names and identifying information of non-FBI Federal Government personnel on Bates numbered pages 573–577.

and activities of the federal government, and that disclosure of the information would constitute a clearly unwarranted invasion of personal privacy. See Fifth Decl. ¶ 66. Accordingly, the FBI properly withheld this material pursuant to Exemption (b)(6).

G. The FBI Properly Withheld Law Enforcement Information Pursuant to Exemption 7

The FBI withheld law enforcement materials pursuant to FOIA Exemption 7. Exemption 7 permits withholding of "records or information compiled for law enforcement purposes" meeting certain specified criteria. 5 U.S.C. § 552(b)(7). "In assessing whether records are compiled for law enforcement purposes, . . . the focus is on how and under what circumstances the requested files were compiled, and 'whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding.'" Jefferson v. Dep't of Justice, 284 F.3d 172, 176–77 (D.C. Cir. 2002) (citations omitted). The range of law enforcement purposes falling within the scope of Exemption 7 includes government national security and counterterrorism activities. See, e.g., Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 926 (D.C. Cir. 2003); Kidder v. FBI, 517 F. Supp. 2d 17, 27 (D.D.C. 2007) (Walton, J.). Furthermore, the FBI, as a law enforcement agency, is entitled to deference when it identifies material as having been compiled for law enforcement purposes under Exemption 7. See Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 32 (D.C. Cir. 1999).

The records at issue in this litigation were compiled for law enforcement purposes within the meaning of Exemption 7, because, as explained in the attached Fifth Declaration of David M. Hardy, the records responsive to the plaintiffs' requests concern the creation and implementation of a centralized repository of counterterrorism and investigative data, and the IDW is an essential investigatory tool used by FBI personnel. See Fifth Decl. ¶ 60. Accordingly, the records at issue in this litigation meet the threshold requirement for application of Exemption 7.

1. The FBI Properly Withheld File Numbers of Pending FBI Investigations Pursuant to Exemption 7(A).

The FBI withheld file numbers of currently pending FBI investigations pursuant to FOIA Exemption 7(A).[13] Exemption 7(A) exempts from disclosure "records or information compiled for law enforcement purposes . . . to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). In enacting this exemption, "Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978). However, as the D.C. Circuit has made clear, "Exemption 7(A) does not require a presently pending 'enforcement proceeding'"; rather, it is sufficient that ongoing investigations are likely to lead to such proceedings. Ctr. for Nat'l Sec. Studies, 331 F.3d at 926. Moreover, a court can accept an agency's assertion of Exemption 7(A) based on a generic determination that the disclosure of particular kinds of documents would likely interfere with enforcement proceedings; that is, an agency does not need to identify specific harms that are likely to follow from disclosure for each individual document withheld. See Robbins Tire & Rubber Co., 437 U.S. at 234–36.

The file numbers that the FBI withheld pertain to pending investigations. See Fifth Decl. ¶ 69. Disclosure of the file numbers could confirm the existence of a pending investigation and could result in the identification of suspects in ongoing counterterrorism and criminal investigations, which could jeopardize those investigations. See Fifth Decl. ¶ 62. Accordingly, FBI's withholding of this information was proper under Exemption 7(A). See Judicial Watch,

[13]The FBI asserted Exemption 7(A) on Bates numbered pages 551–553.

Inc. v. FBI, 2001 WL 35612541 at *5 (D.D.C. 2001) (Hogan, J.) (upholding assertion of Exemption 7(A) in withholding FBI investigative file numbers).

2. The FBI Properly Withheld Names and Identifying Information Pursuant to Exemption 7(C).

Exemption 7(C) exempts from disclosure "records or information compiled for law enforcement purposes . . . 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." 5 U.S.C. § 552(b)(7), (b)(7)(C). If the records at issue were compiled for law enforcement purposes, Exemption 7(C) requires the agency to balance the relevant individual privacy rights against the public interest in disclosure. See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762 (1989); Davis v. U.S. Dep't of Justice, 968 F.2d 1276, 1281 (D.C. Cir. 1992). The balancing analysis is similar to the analysis conducted under Exemption 6, but the analysis under Exemption 7(C) tilts more in favor of nondisclosure. See Reporters Comm., 489 U.S. at 756 (comparing statutory language of Exemption 6 and Exemption 7(C)); Reed v. NLRB, 927 F.2d 1249, 1251 (D.C. Cir. 1991) (explaining similarity of Exemption 6 analysis and Exemption 7(C) analysis).

The FBI has asserted Exemption 7(C) in conjunction with Exemption 6 in withholding names and identifying information of FBI support personnel and special agents, third parties of investigative interest, and other Federal Government personnel, specifically, Congressional staff.[14] As explained in the accompanying Fifth Declaration of David M. Hardy, and above in the

[14]The FBI asserted Exemption 7(C) in withholding names and identifying information of FBI support personnel and Special Agents on the following Bates numbered pages: 21–25, 61, 64, 68, 88–89, 91–92, 94, 287, 289–293, 306–309, 432, 436, 438, 452, 471, 473–475, 478, 482, 491, 513, 531, 533, 541, 551–553, 564, 571–577, 594–595, 600, 641A, 647–651, 657, 664, 666–667, 669–673, 675–703, 682A, 685A, 697A, 699A, 704–730, 732–752, 754–761, 764–768, (continued...)

discussion pertaining to Exemption 6, see supra section III.F, the individuals to whom the information pertains have significant privacy interests in preventing disclosure of the information, and disclosure of the information would not advance any public interest. See Fifth Decl. ¶¶ 62–66. Accordingly, disclosure of the information could reasonably be expected to constitute an unwarranted invasion of personal privacy, see Fifth Decl. ¶¶ 62–66, and the information is exempt from disclosure pursuant to Exemption 7(C).

3. The FBI Properly Withheld System Design Information Pursuant to Exemption 7(E).

The FBI withheld system information pursuant to Exemption 7(E).[15] Exemption 7(E) permits withholding of information compiled for law enforcement purposes if release of the information "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). Congress intended that Exemption 7(E) protect from disclosure techniques and

---

[14](...continued)
781–783, 785–787, 789–820, 834, and 855.

The FBI asserted Exemption 7(C) in withholding names and identifying information of third parties of investigative interest on the following Bates numbered pages: 66, 484, 535, 542, 751, 753, 756, 762, 784, 789, and 793.

The FBI asserted Exemption 7(C) in withholding names and identifying information of other federal government personnel on Bates numbered pages 573–577.

[15]The FBI asserted Exemption 7(E) in withholding internal system information on the following Bates numbered pages: 2–6, 9, 11, 13, 15–18, 22–36, 40–49, 51–58, 61–63, 66–67, 69–70, 78–81, 87, 90, 95–123, 125–189, 193–225, 227–254, 256–286, 288, 294, 300–303, 305, 311, 313, 315, 317, 319, 321, 326–328, 330–333, 338, 340, 346–347, 349–353, 357–360, 363–366, 371–378, 385–386, 388–392, 396, 400, 402, 405–406, 409, 411, 413–417, 420, 422, 428–431, 433, 437–447, 449–451, 453–472, 474–532, 534–553, 557–558, 561–562, 565–570, 574, 577, 594–622, 642, 658–665, 668–669, 671, 682–683, 688, 690, 692, 709–721, 723–730, 735–738, 740–743, 749–757, 761–763, 766–767, 780, 782–794, 796, 798–799, 802, 804–805, 807, 809–810, 812, 814, 818, 822, 828–830, 836, 841, 843, 845, 847, 849, 851, 853, 857–858, and 872–873.

procedures used to prevent and protect against crimes, as well as techniques and procedures used to investigate crimes after they have been committed. See, e.g., PHE, Inc. v. Dep't of Justice, 983 F.2d 248, 250–51 (D.C. Cir. 1993) (holding that portions of FBI manual describing patterns of violations, investigative techniques, and sources of information available to investigators were protected by Exemption 7(E)). Exemption 7(E) applies even when the identity of the techniques has been disclosed, but the manner and circumstances of the techniques are not generally known, or the disclosure of the details could reduce their effectiveness. See Blanton v. U.S. Dep't of Justice, 63 F. Supp. 2d 35, 49–50 (D.D.C. 1999) (Friedman, J.); Coleman v. FBI, 13 F. Supp. 2d 75, 83 (D.D.C. 1998) (Lamberth, J.). Exemption 7(E) does not require a particular determination of harm that would result from disclosure of specific records or information; rather, the exemption categorically protects information related to law enforcement techniques. See Smith v. Bureau of Alcohol, Tobacco & Firearms, 977 F. Supp. 496, 501 (D.D.C. 1997) (Friedman, J.) ("Exemption 7(E) provides categorical protection to information related to law enforcement techniques."); Fisher v. U.S. Dep't of Justice, 772 F. Supp. 7, 12 n. 9 (D.D.C. 1991) (Richey, J.), aff'd, 968 F.2d 92 (D.C. Cir. 1992).

As explained above, see supra section III.C.1, and in the accompanying Fifth Declaration of David M. Hardy, knowledge of the data sources from which information in the IDW is obtained would enable individuals involved in criminal or terrorist activities to adapt their activities and methods to avoid detection. See Fifth Decl. ¶¶ 41, 74. Exemption 7(E) permits the withholding of information relating to the nature and identity of information sources used in law enforcement and national security activities when release of the information could help criminals evade detection. See, e.g., PHE, Inc., 983 F.2d at 251 (holding that Exemption 7(E) authorized withholding of information relating to the "specific documents, records and sources of

information available to [FBI] Agents" and concluding that "release of FBI guidelines as to what sources of information are available to its agents might encourage violators to tamper with those sources of information and thus inhibit investigative efforts"); Tax Analysts v. IRS, 294 F.3d 71, 79 (D.C. Cir. 2002) ("It is clear that, under . . . Exemption 7, an agency may seek to block the disclosure of internal agency materials relating to guidelines, techniques, sources, and procedures for law enforcement investigations and prosecutions, even when the materials have not been compiled in the course of a specific investigation."). Furthermore, as explained above, disclosure of technical details pertaining to the IDW could facilitate unauthorized intrusions into or interference with the IDW. See Fifth Decl. ¶¶ 41, 74.

CONCLUSION

For the reasons above, the defendant respectfully requests that the Court grant summary judgment in favor of the defendant.

Dated: January 23, 2009

Respectfully submitted,

MICHAEL F. HERTZ
Acting Assistant Attorney General

JEFFREY A. TAYLOR
United States Attorney

ELIZABETH J. SHAPIRO
Deputy Director

/s/ JAMES C. LUH
JAMES C. LUH
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave NW
Washington DC 20530
Tel: (202) 514-4938
Fax: (202) 616-8460
E-mail: James.Luh@usdoj.gov
Attorneys for Defendant