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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY
INFORMATION CENTER

Plaintiff,

v.

UNITED STATES DEPARTMENT
OF JUSTICE

Defendant.

Civil Action No. 1:13-cv-01961(KBJ)

DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) (U) I am currently the Section Chief of the Record/Information Dissemination Section ("RIDS"), Records Management Division ("RMD"), in Winchester, Virginia. I have held this position since August 1, 2002. Prior to joining the Federal Bureau of Investigation ("FBI"), from May 1, 2001 to July 21, 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) (U) In my official capacity as Section Chief of RIDS, I supervise approximately 219 employees who staff a total of ten (10) Federal Bureau of Investigation Headquarters

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Reason: 1.4 C
Declassify on: 10/30/2039

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("FBIHQ") units and two (2) 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, amended by the OPEN Government Act of 2007; the Open FOIA Act of 2009; the Privacy Act of 1974; Executive Order 13526; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and other Presidential and Congressional directives. I have been designated by the Attorney General of the United States as an original classification authority and a declassification authority pursuant to E.O. 13526, §§ 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) (U) 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 handling of the Department of Justice referrals to the FBI from the National Security Division ("NSD"), pertaining to a Freedom of Information Act ("FOIA") request made by plaintiff, Electronic Privacy Information Center. The plaintiff requested records used to draft the semiannual reports on the use of pen registers and trap and trade ("PR/TT") devices for national security purposes.¹

(4) (U) NSD located FBI documents while processing plaintiff's FOIA request. The FBI received NSD's consult referral on and assigned it FOIA Number 1280972. All referred

¹ (U) The Foreign Intelligence Surveillance Act ("FISA") of 1978, P.L. 95-511, 50 U.S.C. § 1801 et seq, as amended, provides a statutory framework for the U.S. government to engage in electronic surveillance through the installation and use of pen registers and trap and trace devices for the purpose of obtaining foreign intelligence information. See Title IV of FISA, 50 U.S.C. §§ 1841-1846.

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documents are FISA-related and concern the use of electronic surveillance by the FBI in national security investigations through the use of PR/TT devices. Accordingly, the FBI carefully reviewed and processed the referred documents under the FOIA and provided its response to NSD on August 4, 2014.

(5) (U) On September 18, 2014, the plaintiff notified NSD of its intended challenges as required in the Joint Status Report and Proposed Schedule issued by the Court on August 8, 2014.²

(6) (U) In accordance with *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), this declaration is submitted in support of defendant's motion for summary judgment. The declaration will justify the FBI's withholding of information in full and in part pursuant to FOIA Exemptions 1, 3, and 7(E).³ 5 U.S.C. §§ 552 (b)(1), (b)(3), and (b)(7)(E).

BRIEF BACKGROUND ON FISA

(7) (U) The central subject of plaintiff's FOIA request concern the U.S. government's investigative method of conducting electronic surveillance through the installation and use of PR/TT devices. The Foreign Intelligence Surveillance Act of 1978 provides a statutory framework in which the U.S. government may conduct electronic surveillance and physical searches in order to collect foreign intelligence information. The statute allows for the installation and use of PR/TT devices in national security investigations. The statute reads as

² (U) Plaintiff indicated in its 9/18/2014 email that it had not received two documents entitled, "Westlaw Case Printout" and "Domestic Investigations and Operations Guide (FBI) December 16, 2008" listed in the index. The FBI inadvertently overlooked the documents and has since reviewed and processed them. The documents are being provided to plaintiff in a supplemental release. The FBI can provide the Court with a copy of this release upon request.

³ (U) The *Vaughn* Declaration only covers those FOIA Exemptions specifically challenged in plaintiff's 9/18/2014 email. Those exemptions are (b)(1), (b)(3), and (b)(7)(E).

follows:

Notwithstanding any other provision of law, the Attorney General or a designated attorney for the Government may make an application for an order or an extension of an order authorizing or approving the installation and use of a pen register or trap and trace device for any investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution which is being conducted by the Federal Bureau of Investigation under such guidelines as the Attorney General approves pursuant to Executive Order No. 12333, or a successor order.

See 50 U.S.C. § 1842(a).

(8) (U) The U.S. government must seek a court order from the Foreign Intelligence Surveillance Court ("FISC") before conducting electronic surveillance on suspected foreign intelligence agents within the United States. The FISC was created through FISA and is composed of 11 judges appointed by the Chief Justice of the United States. The FISC convenes to hear applications for, and grant orders approving, the installation and use of pen registers and trap and trace devices with the purpose of collecting foreign intelligence information. Each application submitted to the FISC must contain a statement by the Attorney General certifying that the target of the proposed electronic surveillance is either a "foreign power" or "the agent of a foreign power" and in the case of a U.S. citizen or resident alien, the target must be involved in the commission of a crime.

(9) (U) The FBI is the primary investigative agency of the federal government. The FBI is charged with the authority and responsibility to investigate all violations of federal law. This includes investigating terrorism threats and intelligence

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collection activities by our adversaries. The FBI performs a variety of functions on behalf of the U.S. government; however, some of the most important include the collecting and analyzing of foreign intelligence and counterintelligence information. The FBI is charged with the lofty responsibility of investigating known and/or suspected terrorists in order to protect the United States from harm. The ability to conduct electronic surveillance through the installation and use of pen registers and trap and trace devices has proven to be an indispensable investigative tool and continues to serve as a building block in many of the FBI's counterterrorism and counterintelligence investigations. This specific type of electronic surveillance has resulted in numerous benefits by providing the FBI valuable substantive information in connection with national security investigations. The information gathered has either confirmed prior investigative information or has contributed to the development of additional investigative information, and has been invaluable in providing investigative leads. Overall, the investigative method and technique utilized through the installation and use of PR/TT devices has been an important weapon in the FBI's arsenal for combating terrorism, and ensuring the safety and security of the United States. The ability to utilize this specific investigative method and technique has allowed the FBI to carry out its responsibilities as a law enforcement agency and fulfill its obligation to the American people.

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**EXPLANATION OF THE CODED FORMAT USED FOR THE
JUSTIFICATION OF DELETED MATERIAL**

(10) (U) All documents have been thoroughly reviewed to achieve maximum disclosure consistent with the access provisions of the FOIA. Every effort has been made to provide plaintiff with all material in the public domain and with all reasonably segregable portions of releasable material. All material withheld by the FBI is exempt from disclosure pursuant to a FOIA exemption. Each page released in full or in part has been consecutively numbered - "EPIC-1 through EPIC-240⁴" in the lower right-hand corner of the page. Additionally, pages withheld in their entirety have been replaced by a Deleted Page Information Sheet, which identifies the reason and/or applicable FOIA exemptions relied upon to withhold the page in full as well as the corresponding Bates number. These Bates-numbered pages have been provided to plaintiff and will be made available to the Court upon request.⁵

(11) (U) The Bates stamped documents contain coded categories of exemptions which detail the nature of the withheld information. The coded categories are provided to aid the Court and plaintiff in reviewing the FBI's explanation for invoking various FOIA exemptions to protect exempt material. A review of this information will reveal that all withheld material is exempt from disclosure pursuant to a FOIA exemption, or is not reasonably segregable from exempt information.

4 (U) Bates pages EPIC-6 through EPIC-23 are not included in the release of coded material. The FBI discovered that the document entitled, "Detailed Declaration concerning techniques and capabilities used in FBI Investigations" was not one of the challenged documents outlined in plaintiff's 9/18/2014 email.

5 (U) A copy of the coded release is being provided to plaintiff. The FBI can provide the court with a copy of the release, if so requested.

**MECHANICS OF USING THE CODED FORMAT
WITH THE EXEMPTION CATEGORIES**

(12) (U) Each withholding has a marking next to it denoting the applicable FOIA exemption as well as a numerical designation identifying the specific nature of the withheld information. For example, on Bates page EPIC-3, Exemption (b)(7)(E)-2 is cited to protect the FBI's collection and/or analysis of information. The "(b)(7)(E)" designation refers to FOIA Exemption 7(E) concerning Investigative Techniques and Procedures. The numerical designation "2" following the (b)(7)(E) narrows the category of protected information from the main category to a more specific subcategory, "Collection and/or Analysis of Information." The coded categories are used to assist the Court and plaintiff in their review of the FBI's withholdings among the challenged documents.

SUMMARY OF JUSTIFICATION CATEGORIES

SUMMARY OF JUSTIFICATION CATEGORIES	
CODED CATEGORIES	INFORMATION WITHHELD
Category (b)(1)	CLASSIFIED INFORMATION
(b)(1)-1	1.4(c) Intelligence Activities Sources and Methods [cited, at times, in conjunction with (b)(3) and/or (b)(7)(E)]
Category (b)(3)	INFORMATION PROTECTED BY STATUTE
(b)(3)-1	Information Specifically Exempted by 50 U.S.C. § 3024 (i)(1) (National Security Act of 1947) [cited, at times, in conjunction with (b)(1) and/or (b)(7)(E)]
Category (b)(7)(E)	INVESTIGATIVE TECHNIQUES AND PROCEDURES
(b)(7)(E)-1	Investigative Techniques and Procedures [cited, at times, in conjunctions with (b)(1) and/or (b)(3)]

SUMMARY OF JUSTIFICATION CATEGORIES	
CODED CATEGORIES	INFORMATION WITHHELD
(b)(7)(E)-2	Collection/Analysis of Information [cited, at times, in conjunctions with (b)(1) and/or (b)(3)]
(b)(7)(E)-3	Operational Directives (DIOG/CHS Manual/etc.) [cited, at times, in conjunctions with (b)(1) and/or (b)(3)]
(b)(7)(E)-4	Dates/Types of Investigation (Preliminary/Full Investigations) [cited, at times, in conjunctions with (b)(1) and/or (b)(3)]
(b)(7)(E)-5	Specific Law Enforcement Technique Utilized to Conduct National Security Investigations [cited, at times, in conjunctions with (b)(1) and/or (b)(3)]

JUSTIFICATION FOR NON-DISCLOSURE UNDER THE FOIA

(13) (U) The FBI has processed and released all non-exempt portions of records provided by NSD in connection with plaintiff's FOIA request. Listed below are descriptions of the individual documents, the asserted FOIA exemptions, and the nature of the withheld information.

DESCRIPTION OF DOCUMENTS

(14) (U) The documents at issue are as follows:

1. Domestic Investigations and Operations Guide ("DIOG") (Bates pages EPIC-1-5);
2. Verified Memorandum of Law in Response to FISC Supplemental Order (Bates pages EPIC-24-102);
3. Verified Memorandum of Law Submitted to the FISC (Bates pages EPIC-103-117);⁶
4. PR/TT Report to FISC (Bates pages EPIC-118-154);
5. Memorandum of Law in Response to FISC Order (Bates pages EPIC-155-192);
6. Westlaw Printout (Bates pages EPIC-193-211);

⁶ (U) See *supra* fn. 3.

7. FISA PR/BR Motion for Authority to Retain the Results of Court-Authorized Pen Register and Trap and Trace Surveillance (Bates pages EPIC-212-220);⁷ and
8. Memorandum of Law Regarding the Collection of Information Through Pen Register and Trap and Trace Surveillance Under the Foreign Intelligence Surveillance Act (Bates pages EPIC-221-240).

(15) (U) All of the documents listed above involve descriptions of specific methods utilized by the FBI in collecting foreign intelligence and the techniques used in gathering such information under a FISA Pen Register order. The FBI employs these methods and techniques⁸ in its national security investigations with the purpose of collecting intelligence and the goal of protecting the United States from international terrorism.

(16) (U) The first document is comprised of pages 186-189 of the DIOG. The DIOG is a manual used by FBI Special Agents in conducting and carrying out investigations. This particular excerpt of the DIOG provides a step-by-step guide in assisting Special Agents in determining whether to utilize a specific method⁹ in collecting information such as (1) when to use the method and technique; (2) factors to consider when making this determination; (3) how to go about using the specific method and technique; and (4) the type of information that can be gleaned from it.

(17) (U) Documents 2 through 6 and 8 detail a specific investigative method and technique¹⁰ used by the FBI in conducting electronic surveillance under a pen register and trap and trace device. The same investigative method and technique is discussed in all six documents; however, each provides different levels of detail or discusses various aspects of it.

⁷ The document was initially withheld in full, but upon a subsequent review, additional non-exempt material was segregated and will be released to the plaintiff.

⁸ (U) See *infra* ¶ 31.

⁹ (U) See *infra* ¶ 31.

¹⁰ (U) See *infra* ¶ 31.

For example, the second document is a verified memorandum of law submitted in response to a supplemental order issued by the FISC. In the supplemental order, the FISC requested the FBI to provide information on the particular method and technique used in collecting information through a PR/TT device. The memorandum included a discussion on its use as well as provided detailed facts, legal analysis intertwined with classified information,¹¹ and the parameters used when collecting and using information derived from such method and technique. The memorandum specifically describes its strengths, weaknesses, areas for improvement, and explains the method's history and future in national security investigations.

(18) (U) Similarly, the third document is a verified memorandum of law submitted to the FISC. The verified memorandum describes the same method and technique¹² mentioned above as well as details the factual and legal basis for the FBI's use in national security investigations. The legal information contained therein is closely intertwined with classified information.¹³ This document is closely related to the previously-mentioned document both in method and technique, and in substance. The verified memorandum is discussed in detail and cited several times in document 2.

(19) (U) The fourth document is a PR/TT report submitted to the FISC detailing the same investigative method and technique¹⁴ discussed in documents 2 and 3 above. The report provides the following: (1) background information on the method and technique; (2) how it is used to gather information; (3) the process for collecting information and transferring it into FBI databases; (4) procedures for controlling the collection and use of information; (5) a description

11 (U) See *infra* fn. 18.

12 (U) See *infra* ¶ 31.

13 (U) See *infra* fn. 18.

14 (U) See *infra* ¶ 31.

of the FBI's internal processes and how the collected information is incorporated into FBI's databases and systems; and (6) additional guidance is provided to FBI field offices and Headquarters personnel on the handling of information gleaned from this specific investigative method and technique.

(20) (U) The fifth document is a memorandum of law in response to a FISC Order regarding the same method and technique mentioned in documents 2 through 4 and discussed at paragraph 31, *infra*. See ¶¶ 16-19, *supra*. The memorandum of law relates to the same PR/TT case as the verified memorandum of law detailed in ¶ 18. In this matter, the FISC ordered the government to explain the method and technique used in collecting information electronically and its authority for doing so. The government explained the plain text of the pen register statute as well as its legislative history. The memorandum also provides background information on the specific investigation and details the verified memorandum of law discussed in ¶ 18, *supra*. Additionally, the document cites other FISC opinions and provides a distinction between cases as well as articulates justifications for the investigative method and technique used in this particular national security investigation. It also includes statements of law, references to court opinions, and statements made by Congress regarding pen registers and trap and trace devices. Even though parts of the memorandum may appear to be innocuous, when such parts are read in conjunction with the other documents, the pieces of seemingly "innocuous" information connect to provide details about an extremely important investigative method and technique¹⁵. The

15 (U) The FBI's use of PR/TT in criminal and national security investigations is well known and documented. However, the legal analysis concerning the FBI's authority and ability to use these techniques is still classified. The co-mingling of legal analysis and the FBI's techniques and methods would inadvertently expose the FBI's investigative methods and hinder the FBI's ability to effectively use these techniques and methods in ongoing investigations. See also ¶ 53, *infra*.

innocuous material, when read or viewed in the context of other available documents and information, could reveal highly sensitive information to our adversaries. Thus, the disclosure of this information could reasonably be expected to assist sophisticated adversaries in discovering specific intelligence activities or sources and potentially lead to the development of countermeasures which may deprive the United States of the ability to obtain critical intelligence. The FBI runs an incalculable risk of harming current and future national security investigations by releasing what could be, in another context, "harmless" pieces of information. In the context of plaintiff's FOIA request and the documents at issue, releasing such information would provide details about a highly-sensitive investigative method and technique and thus could reasonably be expected to trigger circumvention of law as the FBI's ability to collect valuable foreign intelligence information through this means would be compromised.¹⁶

(21) (U) The sixth document is a Westlaw case print out of a court opinion. The document was withheld in full because the subject matter directly relates to the method and technique¹⁷ discussed in documents 2 through 5 above. The Westlaw case was cited in the Verified Memorandum of Law discussed in ¶ 17, supra. The investigative method and technique discussed in this case is the same investigative method and technique referenced in the previous documents. The FBI is withholding this otherwise public source document in full under the same line of reasoning discussed in ¶¶ 20 and 53. The release of seemingly "innocuous"

¹⁶ (S//NF) [REDACTED]

¹⁷(U) See infra ¶ 31.

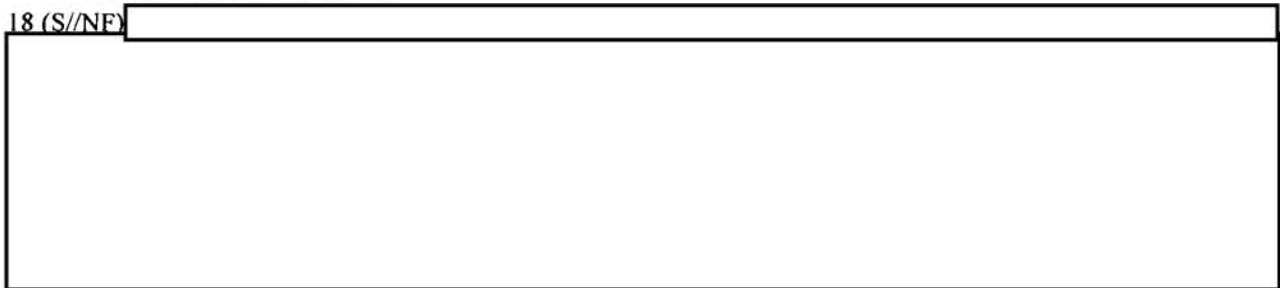
information, when read in conjunction with the other documents, would reveal critical details about an important investigative method and technique used by the FBI in national security investigations.¹⁸

(22) (U) The seventh document is a FISA PR/BR motion for authority to retain the results of a court-authorized pen register and trap and trace surveillance. Even though this document does not involve the same investigative method and technique discussed in ¶¶ 16-21, it does, however, detail the use of PR/TT surveillance on a specified target in a national security investigation. The motion discusses the general use of the PR/TT surveillance method and technique and explains the authority for renewing the surveillance on the specified target.¹⁹

(23) (U) The eighth and final document is a memorandum of law regarding the collection of information through pen register and trap and trace surveillance under the Foreign Intelligence Surveillance Act. The document is classified Top Secret and details the collection and use of information through Court-authorized electronic surveillance as well as the installation of a pen register and trap and trace device on a specified target.

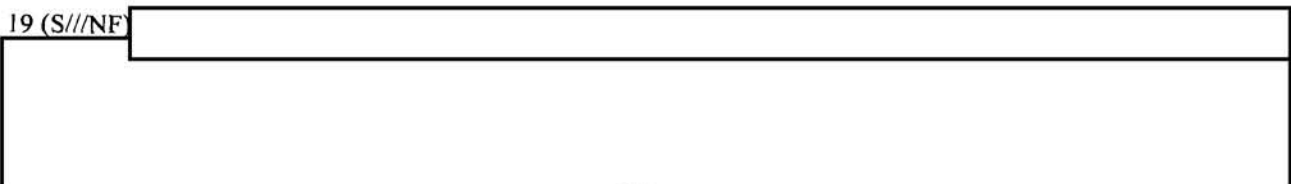
EXEMPTION (b)(1)
CLASSIFIED INFORMATION

18 (S//NF)



b1

19 (S//NF)



b1

- (24) (U) 5 U.S.C. § 552 (b)(1) exempts from disclosure 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.

(25) (U) Before I consider an Exemption 1 claim for withholding agency records, I determine whether the information in those records is information that satisfies the requirements of E.O. 13526, the Executive Order that governs the classification and protection of information that affects the national security,²⁰ and whether the information complies with the various substantive and procedural criteria of the Executive Order. E.O. 13526, signed by President Barack Obama on December 29, 2009, is the Executive Order that currently applies to the protection of national security information. I am bound by the requirements of E.O. 13526, when making classification determinations.²¹

(26) (U) 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. 13526, §1.1 (a):

- (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 §1.4 of this order; and
- (4) the original classification authority determines that the unauthorized

²⁰ (U) Section 6.1 (cc) of E.O. 13526, defines "National Security" as "the national defense of foreign relations of the United States."

²¹ (U) The FBI can provide an *in camera, ex parte* declaration detailing its use of (b)(1) if requested by the Court.

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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.

(27) (U) As I will explain in further detail below, in my role as an original classification authority, I have determined that the information withheld pursuant to Exemption (b)(1) is under the control of the United States Government, is classified and requires a classification marking at the "Secret" level because "the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security" and at the "Top Secret" because "the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security." See E.O. 13526, §1.2(a)(1)and(2). In addition to these substantive requirements, certain procedural and administrative requirements of E.O. 13526 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. 13526 were followed in order to ensure the information was properly classified. I made certain that:

- (1) each document was marked as required and stamped with the proper classification designation;
- (2) each document was marked to indicate clearly which portions are classified, which portions are exempt from declassification as set forth in E.O. 13526, §1.5 (b), and which portions are unclassified;
- (3) the prohibitions and limitations on classification specified in E.O. 13526, §1.7, were adhered to;
- (4) the declassification policies set forth in E.O. 13526, §§3.1 and 3.3 were followed; and

- (5) any reasonably segregable portions of these classified documents that did not meet the standards for classification under E.O. 13526 were declassified and marked for release, unless withholding was otherwise warranted under applicable law.

Findings of Declarant

(28) (U) With the above requirements in mind, I personally and independently examined the information withheld from plaintiff pursuant to FOIA Exemption 1. I determined that this classified information is owned by, was produced by or for, and/or is under the control of the U.S. Government. I further determined that the classified information continues to warrant classification at the "Secret" and "Top Secret" levels and is exempt from disclosure pursuant to E.O. 13526, §1.4, categories (c) intelligence activities (including covert action), intelligence sources and methods, or cryptology.

(b)(1)-1: E.O. 13526, § 1.4(c) – Intelligence Activities, Sources and Methods

(29) (U) E.O. 13526, § 1.4(c), exempts intelligence activities (including covert action), intelligence sources or methods, or cryptology from disclosure. An intelligence activity or method includes any intelligence action or technique utilized by the FBI against a targeted individual or organization who 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 Community to carry out its foreign intelligence and counterintelligence missions. Second, confidentiality must be maintained with respect to the activity or method if the viability, productivity and usefulness of its information is to be

preserved. As described in detail below, the withheld information is protected by Exemption 1 because it describes intelligence activities, sources, and methods utilized by the FBI in gathering intelligence information. The information falls squarely within the meaning of §1.4(c).

Additionally, the FBI is also asserting FOIA Exemption (b)(3) [50 U.S.C. § 3024 (i)(1)] (National Security Act of 1947) in conjunction with (b)(1) and is, at times, claiming (b)(7)(E).

(30) (U) The FBI has protected information under FOIA Exemption (b)(1) because it is classified and the release of such information would reveal actual intelligence activities and methods used by the FBI against specific targets who are the subject of foreign counterintelligence investigations or operations; identify a target of a foreign counterintelligence investigation; or disclose the intelligence gathering capabilities of the activities or methods directed at specific targets. The 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.

(31) (S//NF)

b1



(32) (U) It is my determination that disclosure of specific information describing the intelligence activities or methods that have been or are being used within these documents, and are still used by the FBI in gathering intelligence information in other cases, could reasonably be expected to cause serious damage and exceptionally grave damage to the national security for the following reasons: (1) disclosure would allow hostile entities to discover the current intelligence

gathering methods used by the FBI; (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 and individuals could develop countermeasures which would, in turn, severely disrupt the FBI's intelligence gathering capabilities. This major disruption could result in severe damage to the FBI's efforts to detect and apprehend violators of the United States' national security and criminal laws.

(33) (U) The documents at issue were originally submitted to the FISC in support of the U.S. government's application for an order granting the installation and use of a pen register and trap and trace device, to be used on particular targets, in relation to national security investigations. The classified information within these documents pertains to a specific investigative method and technique²² used by the FBI in collecting foreign intelligence information. The FBI's ability to use this method and technique while conducting electronic surveillance on a specified target through the use of a pen register and trap and trace device is an important tool in gathering intelligence information. Revealing the details about this specific investigative method and technique would interfere with the FBI's ability to effectively conduct national security investigations. The classified information withheld in these documents contains detailed intelligence activity information gathered or compiled and intelligence sources and methods used by the FBI on specific individuals or groups who are the subject of national security investigations. The disclosure of this information and the investigative method and technique detailed within could reasonably be expected to cause serious or exceptionally grave

22 (U) See supra ¶ 31.

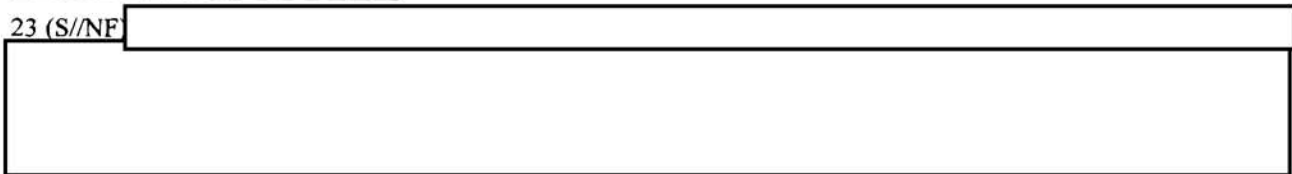
damage to our national security, as it would: (a) reveal the actual intelligence activity or method utilized by the FBI against a specific target; (b) disclose the intelligence-gathering capabilities of the method²³; and (c) provide an assessment of the intelligence source penetration of a specific target during a specific period of time. This information is properly classified at the "Secret" and "Top Secret" levels and withheld pursuant to E.O. 13526, § 1.4(c). Accordingly, this information is exempt from disclosure pursuant to Exemption 1.

(34) (U) It is my determination that the release of this information could permit hostile non-U.S. persons, entities, and foreign governments to appraise the scope, focus, location, target and capabilities of the FBI's intelligence-gathering methods and activities, and allow hostile agents to devise countermeasures to circumvent these intelligence activities or methods and render them useless in providing intelligence information. This revelation of intelligence activities and methods would severely disrupt the FBI's intelligence-gathering capabilities and could cause serious or exceptionally grave damage to our national security. This information is properly classified at the "Secret" and "Top Secret" levels and withheld pursuant to E.O. 13526, § 1.4(c). Thus, the information is exempt from disclosure pursuant to Exemption 1.²⁴

EXEMPTION (b)(3)
INFORMATION PROTECTED BY STATUTE

(35) (U) 5 U.S.C. § 552 (b)(3) exempts from disclosure information that is specifically

23 (S//NF)



b1

²⁴ (U) Exemption (b)(1)-1 has been cited in conjunction with (b)(3) and, at times, in conjunction with (b)(7)(E) on the following pages: EPIC-28-35; 43-4; 48-9; 52-3; 56; 88-90; 100-02; 103-08; 113-17; 118-153; 155; 157-61; 165-7; 189-92; 212-17 and 221-40.

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protected by statute...provided that such statute (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph. The FBI asserted Exemption (b)(3) in conjunction with Exemption (b)(1) and, at times, in connection with (b)(7)(E) to protect the intelligence sources and methods described above. The basis for the FBI's invocation of Exemption (b)(3) is detailed below.

(b)(3)-1: Information Specifically Exempted by 50 U.S.C. § 3024 (i)(1) (National Security Act of 1947)

(36) (U) The FBI has asserted Exemption (b)(3)-1 in conjunction with Exemption (b)(1) and at times, with (b)(7)(E) to protect information pursuant to Section 102A(i)(1) of the National Security Act of 1947 ("NSA"), as amended by the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), 50 U.S.C. § 3024 (i)(1), which provides that the Director of National Intelligence ("DNI") "shall protect from unauthorized disclosure intelligence sources and methods."²⁵ As relevant to U.S.C. § 552 (b)(3)(B), the National Security Act of 1947 was enacted before the date of enactment of the OPEN FOIA Act of 2009. On its face, this federal statute leaves no discretion to the DNI about withholding from the public information about intelligence sources and methods. Thus, the protection afforded to intelligence sources and methods by 50 U.S.C. § 3024(i)(1) is absolute. See CIA v. Sims, 471 U.S. 159 (1985).

(37) (U) To fulfill its obligation of protecting intelligence sources and methods, the DNI is authorized to establish and implement guidelines for the Intelligence Community ("IC")

²⁵ (U) Section 1024(i)(1) of the National Security Act was previously codified at 50 U.S.C. § 403(i)(1). As a result of the reorganization of Title 50 of the U.S. Code, Section 102A(i)(1) is now codified at 50 U.S.C. § 3024(i)(1).

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for the classification of information under applicable laws, Executive Orders, or other Presidential Directives, and for access to and dissemination of intelligence. 50 U.S.C. § 3024(i)(1). The FBI is one of 17 member agencies comprising the IC, and as such must protect intelligence sources and methods.

(38) (U) As described above, Congress enacted the NSA, as amended by the IRTPA, to protect the IC's sources and methods of gathering intelligence. Disclosure of such information presents the potential for individuals to develop and implement countermeasures, which would result in the loss of significant intelligence information, relied upon by national policymakers and the IC. Given that Congress specifically prohibited the disclosure of information pertaining to intelligence sources and methods used by the IC as a whole, I have determined that the FBI's intelligence sources and methods would be revealed if any of the withheld information is disclosed to plaintiff. Thus, the FBI is prohibited from disclosing information falling under 50 U.S.C. § 3024(i)(1). Accordingly, this information was properly withheld pursuant to Exemption 3, based on 50 U.S.C. § 3024(i)(1).²⁶

EXEMPTION (b)(7) THRESHOLD

(39) (U) Exemption (b)(7) of the FOIA protects from mandatory disclosure records or information compiled for law enforcement purposes, but only to the extent that disclosure could reasonably be expected to cause one of the six sets of harms enumerated in the subpart of the exemption. See 5 U.S.C. § 552 (b)(7). The enumerated harm that could reasonably be expected to result is - the disclosed information could reasonably be expected to interfere with and reveal

²⁶ (U) Exemption (b)(3)-1 has been cited in conjunction with (b)(1) and, at times, in conjunction with (b)(E) on the following pages: EPIC-28-35; 43-4; 48-9; 52-3; 56; 88-9; 100-02; 103-08; 113-17; 118-153; 155; 157-61; 165-7; 189-92; 212-17 and 221-40.

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law enforcement techniques and procedures which, if made public, could be used to circumvent the law.

(40) (U) Before an agency can invoke any of the harms enumerated in Exemption (b)(7), it must first demonstrate that the records or information at issue were compiled for law enforcement purposes. Pursuant to 28 U.S.C. §§ 533, 534, and Executive Order 12,333 as implemented by the Attorney General's Guidelines for Domestic FBI Operations (AGG-DOM) and CFR § 0.85, the FBI is the primary investigative agency of the federal government with authority and responsibility to investigate all violations of federal law not exclusively assigned to another agency, to conduct investigations and activities to protect the United States and its people from terrorism and threats to its national security, and further the foreign intelligence objectives of the United States. Under this investigative authority, the responsive records herein were compiled for the purposes of investigating and gathering intelligence information, and apprehending and prosecuting subjects who have committed acts of terrorism against the United States, and such records relate to the enforcement of federal laws and such activity is within the law enforcement duty of the FBI. Accordingly, the responsive records were generated pursuant to the law enforcement duties of the FBI as articulated above. The FBI is responsible for detecting and investigating violations of Federal criminal laws, international terrorism, and threats to national security. All records responsive to plaintiff's request and referred to the FBI pertain to national security investigations of non-U.S. persons and specifies the techniques used in gathering intelligence information through FISA-related documents submitted to and issued by the FISC. The documents relate to matters before the FISC and detail the FBI's request for the use of pen registers and trap and trace devices in regards to national security investigations of

non-U.S. persons, who are suspected or known terrorists. These records were compiled for law enforcement purposes; squarely within the law enforcement duties of the FBI; and therefore, readily meet the threshold requirement of Exemption (b)(7). The remaining inquiry concerns whether the disclosure of such records could reasonably be expected to unveil investigative techniques and procedures utilized by the FBI.

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

(41) (U) 5 U.S.C. § 552 (b)(7)(E) provides protection for:

law enforcement records which 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.

(42) (U) Exemption (b)(7)(E) has been asserted to protect information which contains internal and highly sensitive investigatory techniques and procedures that are authorized for use by the FBI. This exemption affords categorical protection to these techniques and procedures used in such investigations; it protects techniques and procedures not well-known to the public as well as non-public details about the use of well-known techniques and procedures. While these FISA documents could easily be characterized as completely consisting of information that would disclose investigative techniques and procedures, and thus, would be eligible for protection under (b)(7)(E) in its entirety, the FBI endeavored to release as much segregable information as possible to the plaintiff. The release of additional information would disclose techniques and/or procedures used in law enforcement and national security investigations or prosecutions, or would disclose guidelines for law enforcement and national security investigations or prosecutions, that could reasonably be expected to risk circumvention of the

law.

(43) (U) A description of the coded categories for the information protected under (b)(7)(E) is outlined below. The coded categories will explain the basis for applying the exemption to particular information. To describe the protected information in any further detail would identify and highlight the sensitive information the FBI seeks to protect. The revelation of such details could enable the targets of these techniques to develop countermeasures or avoid detection in order to circumvent the FBI's law enforcement efforts.²⁷

(44) (U) The FBI's reasoning for protecting this information cannot be examined in a vacuum, but must be analyzed within the larger context of our country's current national security climate. The FBI is charged with protecting the nation from security risks posed by U.S. and non-U.S. individuals, organizations (such as terrorist groups), and foreign nations that seek harm against the United States. Thus, if specific investigative techniques or procedures are made public, then those individuals, organizations, and terrorist groups can use the information to learn the FBI's tactics in gathering information and can develop countermeasures to avoid detection.

(45) (U) The FBI has provided a description of the information protected under Exemption (b)(7)(E) and its corresponding coded category below. The FBI will provide as much information on the public record as possible without risking the release of sensitive FBI techniques or procedures.

(b)(7)(E)-1: Investigative Techniques and Procedures

(46) (U) Exemption (b)(7)(E) has been asserted, at times in conjunction with Exemption 1 and 3, to protect information regarding the techniques and procedures utilized by

²⁷(U) Exemption (b)(7)(E) is oftentimes cited in conjunction with FOIA Exemptions (b)(1) and (b)(3).

the FBI in conducting national security investigations including information that would reveal what types of techniques and procedures are routinely used in such investigations, and are not publicly known public as well as non-public details about the use of well-known techniques and procedures. The government's use of pen registers and trap and trace devices is a known public fact; however, the techniques used in connection with a PR/TT to collect intelligence information is not well-known. All documents, at issue, contain sensitive information about this specific investigative method and technique²⁸ used by the FBI in conducting national security investigations. The investigative technique is detailed throughout the various memoranda of law, the DIOG, the Westlaw case print out²⁹, and the FISA PR/BR Motion for Authority. For example, the PR/TT Report to the FISC contains detailed information on the investigative technique that the FBI seeks to protect. More specifically, the report provides background information on the investigative method and technique, how it is used to gather intelligence information, the procedures for controlling the collection and use of this information, a description of the FBI's internal processes and how the collected information is incorporated into FBI's databases as well as guidance to FBI field offices and Headquarters personnel on the handling of information gleaned from this specific investigative method and technique.

(47) (U) To describe the investigative technique in further detail would highlight the very information the FBI seeks to protect pursuant to this exemption. Revealing details about information-gathering techniques commonly used in national security investigations, and the circumstances under which they are used, would enable the targets of those techniques to avoid

28 (U) See *supra* ¶ 31.

29 (S//NF)

See ¶ 31, *supra*.

detection or develop countermeasures to circumvent the FBI's ability to effectively use such critical law enforcement techniques in current and future national security investigations; therefore, allowing for circumvention of the law. Accordingly, the FBI properly withheld this information pursuant to FOIA Exemption 7(E).³⁰

(b)(7)(E)-2: Collection/Analysis of Information

(48) (U) Exemption (b)(7)(E) has been asserted to protect methods the FBI uses to collect and analyze information in connection with national security investigations. The release of this information would disclose the identity of methods used in collecting and analyzing information, including how and from where the FBI collects information, and the methodologies employed to analyze it. Such disclosures would enable investigative subjects to circumvent similar and currently used techniques. The relative utility of these techniques could be diminished if the actual techniques were released. In turn, this would facilitate in the accumulation of information by investigative subjects regarding the circumstances under which specific techniques were used or requested, and the usefulness of the information obtained. Release of this information would enable terrorists to educate themselves on techniques employed by the FBI in collecting and analyzing information, and would allow these individuals to take countermeasures to circumvent the effectiveness of these techniques.

(49) (U) Similar to the reasoning articulated in ¶¶ 45-6, the use of pen registers and trap and trace devices is a known public fact; however, the methods that the FBI utilizes to collect and analyze the information is not well known. Each of the documents contains sensitive

³⁰ (U) Exemption (b)(7)(E)-1 has been asserted, at times in conjunction with (b)(1) and (b)(3), on the following pages: EPIC – 3-5; 24-72; 74-109; 111-153; 155-217; and 221-40.

information about an investigative method used by the FBI in conducting national security investigations. The methods are detailed throughout the documents in varying degrees of specificity. Releasing information on this specific method and its use would, in essence, highlight the types of activities, facts, or occurrences that are of particular interest to the FBI in national security investigations. Publicly disclosing this investigative method, analysis of information gleaned from the method, or any other sort of details regarding it would inform individuals of the kinds of information the FBI is interested in capturing and would afford them the opportunity to employ countermeasures to circumvent detection. Accordingly, the FBI properly withheld this information pursuant to FOIA Exemption 7(E).³¹

(b)(7)(E)-3: Operational Directives Concerning Sensitive Investigative Techniques and Strategies

(50) (U) The Domestic Investigations and Operations Guide (“DIOG”) dated December 16, 2008 is an operational directive that provides information and instructs FBI employees on the proper use of certain sensitive FBI procedures, techniques, and strategies for conducting investigations. In the course of providing these instructions, it identifies the procedures, techniques, and strategies at issue. Releasing such information would not only provide sensitive, unknown investigative techniques,³² it would also reveal sensitive unknown uses of these specific techniques and procedures. If released in its entirety, the information would provide individuals and entities with a unique look inside the FBI’s law enforcement and national security “playbook.” Armed with such information, criminals could predict how and when the FBI will respond to certain suspicious/criminal activities, and the investigative

31 (U) Exemption (b)(7)(E)-2 has been asserted, at times, in conjunction with (b)(1) and (b)(3) on the following pages: EPIC – 3-5; 25-72; 74-109; 111-153; 155-216; and 221-40.

32 (U) See *supra* ¶ 31.

techniques the FBI is most likely to employ in those situations. This would afford criminals the ability to preemptively modify their behavior in a manner that avoids detection and disrupt the very investigative procedures, techniques, and strategies that this FBI guide is intended to protect. Consequently, the release of this information in full would increase the risk that targets of these national security investigations could develop countermeasures and avoid detection by interfering with the FBI's abilities to effectively use these important national security law enforcement techniques. A release of this information would allow individuals and entities seeking to commit crimes or threaten the United States' national security an opportunity to avoid detection and circumvent the law. Thus, the FBI properly withheld this information pursuant to FOIA Exemption 7(E).³³

(b)(7)(E)-4: Dates/Types of Investigations (Preliminary/Full Investigations)

(51) (U) Exemption (b)(7) (E) has been asserted to protect from disclosure information pertaining to the types and dates of investigations referenced in records as well as information detailing the basis for initiating these investigations. Specifically, the information withheld, when referenced in connection with an actual investigation and not in general discussion, pertains to the type of investigation, whether it is a "preliminary" or "full" investigation and the date it was initiated. Disclosure of this information would allow individuals to know the types of activities that would trigger a full investigation as opposed to a preliminary investigation, and the particular dates that the investigation covers, which would allow individuals to adjust their behavior accordingly. Moreover, the knowledge that a specific

³³ (U) Exemption (b)(7)(E)-3 has been asserted, at times, in conjunction with (b)(1) and (b)(3) on the following pages: EPIC – 3-5; 155; and 215-216.

activity warrants an investigation could likewise cause individuals to adjust their conduct to avoid detection. Because disclosure of this information could reasonably be expected to impede the FBI's effectiveness and potentially aid in circumvention of the law, the FBI has properly withheld this information pursuant to Exemption 7(E).³⁴

(b)(7)(E)-5: Sensitive Law Enforcement Techniques Utilized to Conduct National Security Investigations

(52) (U) The FBI has transformed into an intelligence-driven agency that uses the information it gathers to aid its mission of detecting and preventing harm to the national security. The two essential components of this effort can be found in the techniques used to collect and analyze intelligence information. The FBI has described this new mandate in the IRTPA; however, the FBI has not disclosed details about the sensitive intelligence gathering/analysis methods, techniques, and procedures by which it intends to accomplish its mission. These sensitive techniques are primarily used in conducting national security investigations. All documents, at issue in this litigation, contain information involving sensitive law enforcement techniques³⁵ utilized by the FBI in collecting intelligence on individuals who are the subject of national security investigations. More specifically, the memoranda of law and the PR/TT Report to the FISC contain specific details about this important investigative method. For example, the first-listed verified memorandum of law includes a discussion on the use of this particular technique as well as provides detailed facts, legal analysis, and the parameters used when collecting and using information derived from this investigative technique. The memorandum also describes the strength and weakness of the technique as well as details the

34 (U) Exemption (b)(7)(E)-4 has been asserted, at times, in conjunction with (b)(1) and (b)(3) on the following pages: EPIC – 24 and 155.

35 (U) See *supra* ¶ 31.

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areas for improvement, and explains the technique's history and future in national security investigations. The release of such information would reveal sensitive techniques used by the FBI in collecting intelligence information in national security investigations, and would afford individuals and terrorist groups the opportunity to develop countermeasures aimed at diminishing the effectiveness of these techniques. The information protected under this exemption contain details about sensitive law enforcement techniques used by the FBI in gathering valuable intelligence information in current and prospective criminal, counterintelligence, and national security investigations. Revealing specific details on how these techniques are employed, any potential targets of the technique, and the nature of the information collected would enable individuals and terrorist groups to avoid detection by developing countermeasures in order circumvent the law and rendering the technique useless. Thus, the FBI properly withheld this information pursuant to FOIA Exemption 7(E).³⁶

SEGREGABILITY

(53) (U) All responsive, non-exempt records or portions of records referred to the FBI by NSD have been provided to the plaintiff. During the processing of these records, each page was individually examined to identify all non-exempt information and to determine whether it could be reasonably segregated from the exempt information. Even though some information, if examined in isolation, would appear benign or not sensitive, when it is read in conjunction with the other responsive documents, it reveals sensitive information about FBI techniques and procedures used in national security investigations. The otherwise innocuous portions of

³⁶ (U) Exemption (b)(7)(E)-5 has been asserted, at times, in conjunction with (b)(1) and (b)(3) on the following pages: EPIC – 25-72; 74-109; 111-53; 155-217; and 221-40.

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information contained within the memoranda of law and the West Law case print out could, when read or viewed within the context of other available documents and information, reveal highly sensitive information to sophisticated adversaries. For example, portions of the legal analyses in the challenged FISC materials could be considered unclassified if viewed in isolation; however, when viewed in connection with the balance of the document as well as in conjunction with other documents at issue in this case, the information would tend to reveal classified intelligence sources, methods, and activities. Even something as seemingly innocuous as a case citation or statutory provision, when read in connection with a document containing significant legal analysis of an FISA PR/TT application, could reveal the particular issue being examined and could risk disclosure of the existence, nature, or scope of an underlying intelligence method and technique. Additionally, in applying a mosaic analysis, the information, if released, could be pieced together revealing highly sensitive information to our adversaries as well as exposing important information about techniques used by the FBI. This revelation would render the technique ineffective and afford our adversaries the opportunity to change their pattern of behavior, develop countermeasures, and avoid detection by the FBI.

(54) (U) All segregable information has been provided to the plaintiff. The FBI only withheld information that was classified, protected by statute, or information, if released, would trigger reasonably foreseeable harm to one or more interests protected by the cited FOIA Exemptions.

CONCLUSION

(55) (U) The FBI has reviewed, processed, and released all non-exempt information from records provided by NSD. All exempt information involves sensitive, and, at times, Secret

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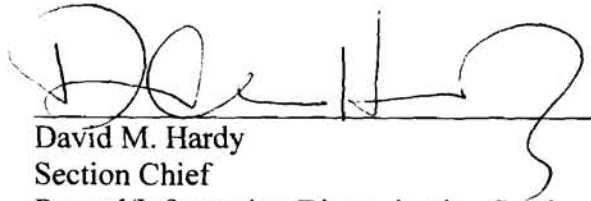
and Top Secret, investigative techniques and procedures used in national security investigations.

This exempt information has been protected under FOIA Exemptions 1, 3, and 7(E).

Accordingly, all reasonably segregable, non-exempt information has been released to plaintiff and the FBI's justification for withholding such information has been detailed in this declaration.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of October, 2014.



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