

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

|                                  |   |   |                            |
|----------------------------------|---|---|----------------------------|
| <hr/>                            |   | ) |                            |
| ELECTRONIC PRIVACY               | ) | ) |                            |
| INFORMATION CENTER,              | ) | ) |                            |
|                                  | ) | ) |                            |
| Plaintiff,                       | ) | ) |                            |
|                                  | ) | ) |                            |
| v.                               | ) | ) | Case No. 1:17-cv-121 (RCL) |
|                                  | ) | ) |                            |
| FEDERAL BUREAU OF INVESTIGATION, | ) | ) |                            |
|                                  | ) | ) |                            |
| Defendant.                       | ) | ) |                            |
| <hr/>                            |   | ) |                            |

**DEFENDANT’S STATEMENT OF MATERIAL FACTS  
AS TO WHICH THERE IS NO GENUINE ISSUE**

Pursuant to Local Civil Rule 7(h)(1), Defendant Federal Bureau of Investigation (“FBI”) respectfully submits the following statement of material facts as to which there is no genuine issue:

1. Through an email, the Electronic Privacy Information Center (“EPIC”) submitted a FOIA request to the FBI dated December 22, 2016. That request sought the following records:
  - (1) All records including, but not limited to, memos, reports, guidelines, procedures, summaries, and emails pertaining to the FBI’s investigation of Russian-sponsored cyber attack on the RNC, DNC, and DCCC;
  - (2) All records of communications to the RNC, DNC, and DCCC regarding the threat of Russian interference in the 2016 Presidential election;
  - (3) All records of communications with other federal agencies regarding Russian interference in the 2016 Presidential election;
  - (4) All records including, but not limited to, memos, reports, guidelines, and procedures pertaining to the FBI’s procedure to notify targets of cyber attacks.

Declaration of David M. Hardy (“Hardy Decl.”) ¶ 4 & Ex. A.

2. The FBI assigned Plaintiff's request FOIA Request No. 1364562. Hardy Decl.

¶ 6.

3. On January 18, 2017, Plaintiff filed the instant lawsuit. *Id.* ¶ 7.

**I. Items 1 through 3 of Plaintiff's FOIA Request**

4. By letters dated May 26, 2017, and July 21, 2017, the FBI notified Plaintiff that it was withholding all recording responsive to Items 1-3 of Plaintiff's FOIA request pursuant to FOIA Exemption (b)(7)(A), 5 U.S.C. § 552(b)(7)(A). Hardy Decl. ¶ 10 and Exs. C & D.

5. On March 20, 2017, former FBI Director James B. Comey testified before Congress, and made the following statement:

I have been authorized by the Department of Justice to confirm that the FBI, as part of our counterintelligence mission, is investigating the Russian government's efforts to interfere in the 2016 presidential election, and that includes investigating the nature of any links between individuals associated with the Trump campaign and the Russian government and whether there was any coordination between the campaign and Russia's efforts. As with any counterintelligence investigation, this will also include an assessment of whether any crimes were committed.

Hardy Decl. ¶ 12.

6. This statement by former Director Comey was the first public, authorized, official FBI acknowledgement of the existence of such an investigation.

7. David M. Hardy is the Section Chief of the FBI's Record/Information Dissemination Section ("RIDS"), Records Management Division ("RMD"). *Id.* ¶ 1.

8. The Hardy Declaration, in justifying the FBI's response to items 1 through 3 of Plaintiff's FOIA request under Exemption 7(A), details the process used by the FBI to search for responsive records, which was carried out by "subject-matter experts" who were already familiar with the records in question. *See id.* ¶¶ 16-20.

9. The Hardy Declaration establishes that any records responsive to items 1 through 3 of Plaintiff's FOIA request were compiled for law enforcement purposes, that is, "to detect and undertake counterintelligence and national security investigations, and to investigate possible violations of Federal criminal laws." *Id.* ¶ 24.

10. The Hardy Declaration establishes that these records would be "part of [the FBI's] investigation into Russian interference in the 2016 presidential election," which investigation is "actively pending." *Id.* ¶ 25.

11. The Hardy Declaration also establishes that a premature disclosure of the records could reasonably be expected to interfere with the investigation and any enforcement proceedings that may result. *Id.* ¶ 26.

12. The Hardy Declaration details the functional categories of responsive records that are being withheld, on a categorical basis, under Exemption 7(A). *See id.* ¶ 32.

13. The Hardy Declaration details the reasonable expectation of harm that would result from disclosing "investigative information," which "includes records of law enforcement methods or procedures undertaken in furtherance of the investigation, to include requests for authority to engage in various investigatory activities or employ particular methods or procedures; the results of such activities, methods, or procedures; and the collection, analysis, and dissemination of information obtained through utilization of these activities, methods, or procedures." *Id.* ¶¶ 34-36.

14. The Hardy Declaration details the reasonable expectation of harm that would result from disclosing "evidentiary information," which "includes copies of records or evidence, analyses of evidence, and derivative communications discussing or incorporating evidence." *Id.* ¶¶ 37-40.

15. The Hardy Declaration details the reasonable expectation of harm that would result from disclosing “administrative information,” which “includes administrative information contained in other records, such as case captions, serial numbers, identities of FBI field offices, dates of investigations, and administrative instructions designed to ensure that investigative procedures are conducted within the appropriate FBI and DOJ guidelines.” *Id.* ¶¶ 41-44.

16. The Hardy Declaration also details the type of records the FBI identified and located that are responsive to items 1 through 3 of Plaintiff’s FOIA request. *See id.* ¶ 31.

17. The Hardy Declaration confirms that “responsive records in this case were reviewed to determine whether any existed that could be segregated and released to Plaintiff,” in response to items 1 through 3 of its FOIA request, but that, “given the on-going nature of the investigation, the sensitivities of the materials, and the reasonable expectation of harm from premature disclosure of investigative materials here, the FBI has concluded that no non-exempt information exists that can be reasonably segregated and released to plaintiff.” *Id.* ¶ 45.

18. The FBI’s investigation, now supervised by Special Counsel Robert Mueller, remains ongoing as of the date of this filing. *See id.* ¶ 14.

## **II. Item 4 of Plaintiff’s FOIA Request**

20. Item 4 of Plaintiff’s FOIA request sought “[a]ll records including, but not limited to, memos, reports, guidelines, and procedures pertaining to the FBI’s procedure to notify targets of cyber attacks.” Hardy Decl. ¶ 4 & Ex. A.

21. In response to this portion of Plaintiff’s request, the FBI performed an “adequate and reasonable search[ ] for responsive records,” Hardy Decl. ¶ 83, including of the official location where the FBI maintains current agency policies and policy guides/guidance, *id.* ¶¶ 53-

54. The FBI also contacted subject matter experts at other offices most likely to have knowledge of the policy items requested in item 4 of Plaintiff's FOIA request. *Id.* ¶ 55.

22. As a result of these searches, the FBI located and process a total of 106 pages of records responsive to item 4 of Plaintiff's FOIA request. *Id.* ¶ 48.

23. On May 11, 2017, the FBI released 89 pages in full, and 17 pages in partially redacted form. Hardy Decl. ¶¶ 49-50 and Ex. D.

24. In the pages released in partially redacted form, the FBI withheld certain information pursuant to FOIA Exemptions 1, 3, and/or 7(E). Hardy Decl. ¶ 50.

25. No pages were withheld in full. *Id.* ¶ 51.

26. Plaintiffs do not dispute the propriety of the redactions that rely upon Exemption 7(E). Plaintiffs do dispute the adequacy of the FBI's search for responsive records; whether the FBI released reasonably segregable, non-exempt portions of responsive records, and the FBI's redactions of four pages of its Foreign Intelligence Surveillance Act and Standard Minimization Procedures Policy Guide under Exemptions 1 and 3. *Id.* ¶ 11.

27. The FBI withheld certain information responsive to Plaintiffs' request pursuant to Exemption 1 to protect classified information. *Id.* ¶¶ 57-74.

28. The Hardy Declaration justifies and sets forth the basis for the FBI's Exemption 1 withholdings, including how these documents were properly classified in accordance with the substantive and procedural requirements of Executive Order 13526. *Id.*

29. The FBI withheld certain information responsive to Plaintiff's request pursuant to Exemption 3 to protect information that is exempted from disclosure by statute. *See id.* ¶¶ 75-80.

30. The Hardy Declaration justifies and sets forth the basis for the FBI's Exemption 3 withholdings, establishing that the information would reveal intelligence sources and methods which are protected from disclosure by the National Security Act of 1947. *Id.*

31. In processing Plaintiff's request, the FBI individually reviewed each page of each responsive record, line by line, to identify non-exempt information that could be reasonably segregated from exempt information for release. *Id.* ¶ 82.

32. The FBI released all reasonably segregable information to Plaintiff. *Id.*

Dated: October 12, 2017

Respectfully submitted,

CHAD A. READLER  
Acting Assistant Attorney General

MARCIA BERMAN  
Assistant Branch Director

/s/ R. Charlie Merritt  
R. CHARLIE MERRITT  
Trial Attorney (VA Bar No. 89400)  
U.S. Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Ave. NW  
Washington, DC 20530  
Tel.: (202) 616-8098  
Fax: (202) 616-8470  
Email: robert.c.merritt@usdoj.gov

*Counsel for Defendant*