IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, *Plaintiff*, v. FEDERAL BUREAU OF INVESTIGATION *Defendant*.	Civil Action No. 17-121

PLAINTIFF'S REPLY IN SUPPORT OF THE CROSS-MOTION FOR SUMMARY JUDGMENT

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SUMMARY

The Electronic Privacy Information Center ("EPIC") respectfully submits the following Reply in Support of the Cross-Motion for Summary Judgment. The Federal Bureau of Investigation's ("FBI") Reply brief and second declaration do not overcome the central flaws in the agency's argument. The agency conducted a woefully inadequate search, limited to a single investigatory file of a current criminal investigation. The FBI ignored the plain text of EPIC's FOIA request and failed to pursue a reasonable search that followed from evidence provided to the agency. The FBI's categorical Exemption 7(A) claim should be rejected because the agency improperly conflates FBI records related to the agency's prior public assessments of Russian interference, which are sought by EPIC, with a file system for the Special Counsel investigation that did not even exist at the time this case was filed. Finally, the Bureau may not rely on a generic national security claim to withhold FISA procedures for notifying targets of a cyberattack produced in response to category four of EPIC's FOIA request.

ARGUMENT

EPIC seeks public disclosure of records, in the possession of the FBI, related to the agency's response to the Russian interference in the 2016 U.S. presidential election. Special and midterm elections are rapidly approaching, and Americans have been left in the dark about the prior attacks on our democratic institutions and what we can do to secure our elections in the future. Despite this ongoing threat, the FBI argues that all records related to the agency's response to a foreign cyberattack on our election infrastructure must be withheld from the public simply because some subset of those actions are under investigation. The FBI also argues that the agency's procedures for notifying victims of cyber-attack should be withheld based on vague and conclusory statements about intelligence methods.

The agency's arguments should be rejected for four reasons. First, the FBI's opposition has failed to establish the agency conducted an adequate search, unreasonably construing categories one through three of EPIC's FOIA request as coextensive with one set of investigatory files contrary to the plain text of the request. The agency still fails to address "countervailing evidence" produced by EPIC that responsive records were excluded from the search. Second, the agency's categorical Exemption 7(A) claim is overbroad and relies upon an implausible allegation of the harm from disclosure, which is controverted by contrary evidence in the record. Courts have routinely rejected similarly impermissible blanket exemption claims. Third, the FBI's segregability claims are conclusory and entirely reliant on the overly broad, categorical 7(A) claim. Finally, the agency has not plausibly established that harm that would result from disclosure of the redacted portions of FISA procedures responsive to category four, particularly in light of the prior public disclosure of FISA procedures by other agencies within the U.S. Intelligence Community.

I. The FBI has failed to establish it has conducted an adequate search for records responsive to categories one through three of EPIC's FOIA request.

The search conducted by the FBI in this case woefully inadequate because the agency made no attempt to search any records beyond a single investigatory file and ignored the plain text of the request. Rather than explain how the agency's search was "reasonably calculated to uncover all relevant documents," the FBI sets out an inaccurate characterization of EPIC's request and cites cases that, unlike this case, did not have "countervailing evidence or apparent inconsistency of proof" in the agency's declarations. Def.'s Opp'n 4–8, ECF No. 27. The FBI Reply simply repeats the same flawed logic outlined in the Motion for Summary Judgment: that all relevant records must be contained in a single investigatory file, Def.'s Opp'n 5, even though the agency has issued two separate public assessments on Russian interference, Pl.'s SMF ¶¶ 34–

35, ECF No. 24-1, and the FBI declaration states that no "details" about the current investigation have been "publicly or officially acknowledged." Hardy Decl. ¶ 14, ECF No. 22-5. It is simply not possible for all of these statements to be true given the evidence in the record and arguments proffered by the FBI regarding their assertion of Exemption 7(A).

The FBI Reply acknowledges EPIC's central contention that the agency "'unreasonably limited' its search for records responsive" to categories 1 through 3 in the request. Def.'s Opp'n 3. The fatal flaw in the FBI's search was to construe "the universe of records responsive to items 1 through 3" as being "co-extensive with the content of the investigative files" from the current and ongoing investigation led by Special Counsel Mueller. Def.'s Mem. 9, ECF No. 22-2. The limitation of the search to this set of files was unreasonable for numerous reasons set out in EPIC's Motion for Summary Judgment, not the least of which is the fact that investigation led by Special Counsel Mueller did not begin until months after EPIC filed its FOIA request. Pl.'s Mem. 15–16, ECF No. 24-2.

Indeed, the FBI relies heavily on the claim that, other than "disclosing the investigation's existence," no "other details about the [Special Counsel] investigation, including, for example, its subjects, scope, or focus" have been "publicly or officially acknowledged." Hardy Decl. ¶ 14. The agency now acknowledges that, in the interim, the Special Counsel has made several "public disclosures about the investigation," including in the "indictments of Paul Manafort and Robert Gates, and the guilty pleas of George Papadopoulos and Lieutenant General Michael Flynn." Second Hardy Decl. ¶ 11, ECF No. 27-2. But even before these new disclosures, the FBI's declaration revealed the contradiction at the heart of the agency's argument. If nothing about the *current* investigation has been publicly or officially acknowledged, then the two public assessments issued by in December 2016 and January 2017 must have been separate and distinct

from the current investigation. Therefore, the FBI's search limited to files in the current investigation could not have been "reasonably calculated to uncover all relevant documents." *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994). This is not "unsupported speculation," Def.'s Opp'n 6, but is the logical conclusion of the evidence on the record.

The FBI nowhere substantively addresses this argument from EPIC and attempts to sidestep it instead. In fact, the FBI's new statements concerning search in the Reply brief and Second Hardy Declaration only reinforce the fact that these records were not included in the search. The FBI now admits that "the FBI had determined the publicly disclosed information [in the JAR and ODNI assessment] is not as specific as and does not match any information protected in the investigative files." Second Hardy Decl. ¶ 9.[1] Thus, as EPIC had argued, neither the reports themselves nor the documents with information underlying them were included in the search, rendering that search unreasonable.

In the face of this countervailing evidence, the FBI's primary defense is a single district court case currently on appeal. *Agrama v. IRS*, ___ F. Supp. 3d ___, 2017 WL 4773109 (D.D.C. Oct. 20, 2017), *appeal filed*, No. 17-5270, 2017 WL 4773109 (D.C. Cir Nov. 30, 2017). This case is clearly distinguishable for several reasons. First, the plaintiff in *Agrama* had filed the FOIA request in an effort to render inadmissible a report on her foreign income and "to persuade IRS to withdraw its intention to penalize her for unpaid taxes rather than be required to pay the penalty and late taxes . . . ." *Id*. at *1. Second, the agency had conducted "multiple" exhaustive searches for responsive records: an initial search of a centralized database revealing no records, a follow up search by two IRS agents familiar with the matter which fact turned up

[1] Because EPIC does not make a "waiver" claim, EPIC does not have any burden of demonstrating the standard for FOIA exemption waiver referenced by the FBI that information in the public domain "duplicate[s] that information being withheld." Def.'s Opp'n 5-6 n.3 (quoting *Davis v. DOJ*, 968 F.2d 1276, 1279 (D.C. Cir. 1992)).

eighty-nine responsive pages, an independent review by the attorney on the case after the complaint was filed which "demonstrated that some of the records were incomplete," and a file where those missing records were stored was "manually" searched "to identify fully any responsive records" uncovering an additional twenty-seven responsive pages. *Id*. at *1–2. The plaintiff's search sufficiency claims in *Agrama* were based entirely on speculation. *Id*. at *5–6.

Agrama is no analog to this case. Here, EPIC seeks public release of records related to the FBI response to the Russian interference. The FBI conducted one search of a single set of investigative files, as opposed to multiple automated and manual searches. The agency's declaration in this case is also inconsistent with evidence on the record: the FBI's prior public assessments regarding Russian interference in the 2016 election. Those public statements necessarily rely on records in possession of the agency.

The FBI also attempts to defend its search by focusing on its role as an "investigative agency." Def.'s Opp'n 4. But EPIC has never argued otherwise. The question is not whether the FBI is an investigative agency but, rather, whether FBI "communications" records with "the RNC, DNC, and DCCC" and with "other federal agencies" regarding "the threat of Russian interference in the 2016 Presidential election," EPIC Compl. ¶ 23, ECF No. 1, are likely to be found outside of a single set of files. And the FBI concedes that the agency previously stated publicly in January 2017 that: "We assess Russian intelligence services collected against the US primary campaigns, think tanks, and lobbying groups they viewed as likely to shape future US policies. In July 2015, Russian intelligence gained access to Democratic National Committee (DNC) networks and maintained that access until at least June 2016." Pl.'s SMF ¶ 36; Def.'s Resp. ¶ 36, ECF No. 27-1. The FBI also concedes that the public FBI assessments were issued jointly with other federal agencies, including the DHS, the ODNI, the CIA, and the NSA. Pl.'s

SMF ¶¶ 34–35; Def.'s Resp. ¶¶ 34–35. It is not at all speculative to infer that the FBI has records related to these public assessments, including relevant communications with "other federal agencies" involved and with the DNC. Yet the FBI search did not include, or even reference, records related to those public assessments. The FBI failed its "duty to construe [FOIA requests] liberally." *Nation Magazine, Wash. Bureau v. U.S. Customs Serv.,* 71 F.3d 885, 890 (D.C. Cir. 1995).

EPIC's request was not limited to records in the current Special Counsel investigation, which was not even announced until months after this case was filed. The phrase "investigation" only appeared in one of the four categories requested by EPIC, and a plain interpretation of categories two and three is necessarily broader in scope. EPIC Compl. ¶ 23.[2] The plain interpretation of EPIC's request is further supported by broad introductory term "all records" in categories two and three. EPIC Compl. ¶ 23. The FBI's only response is to point to a sentence in the background of the request where EPIC referred to the public interest in "records pertaining to FBI's investigation of Russian interference." Def.'s Opp'n 3. But as EPIC's request made clear, the intent was not to gain access to the Mueller file but, rather, to give the public a better understanding the FBI's response to the interference, which occurred in 2015 and 2016. EPIC provided five pages of extensive background material to this effect in the request. Hardy Decl., Ex. A ("EPIC FOIA Request") at 1–5, ECF No. 22-5. The impetus for the EPIC request were reports of an insufficient FBI response to cyberattacks. EPIC FOIA Request 1–2; *see also* EPIC FOIA Request 5 ("The American public, thus, has a great interest in understanding the nature of

[2] The FBI asserts in a footnote, without any supporting evidence, that the plain interpretation would render the request "overly broad." Def.'s Opp'n at 5, n. 2. This assertion contradicts the description in the agency's declaration that the "first step is to conduct a search of the FBI's Central Records System." Second Hardy Decl. ¶ 17. The FBI offers no reason why it could not have searched its Central Records System for communications responsive to categories 2 and 3.

the FBI's response to the Russian interference with the 2016 Presidential election, as well as the agency procedures for responding to unlawful hacks."). EPIC's request was in no way limited to a single file.

In short, the FBI has not met its burden to demonstrate "beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Nation Magazine*, 71 F.3d at 890. The agency unreasonably narrowed the search to a single set of files in an ongoing investigation that was not discussed until after EPIC filed suit. The FBI also failed to address the substantial countervailing evidence that indicates the agency's search was not "reasonably calculated to uncover all relevant documents." The Court should order the agency to conduct a search, at a minimum, through its Central Records System for communications responsive to categories two and three of EPIC's FOIA request, and to search records related to the two public assessments.

II. The FBI has not justified its categorical assertion of Exemption 7(A) to withhold all records located in response to categories 1, 2, and 3 of EPIC's FOIA request.

Exemption 7(A) does not permit categorical withholding of the records located in response to categories one through three of EPIC's FOIA request because the FBI has not shown that disclosure of *all* such records could reasonably risk interference with enforcement proceedings. The FBI has both failed to identify all relevant categories of responsive records and failed to respond to "contrary evidence in the record" provided by EPIC. Instead the agency attempts to rely on general statements about deference to agency declarations in national security cases, Def.'s Opp'n 11, and fails to distinguish other similar cases where an agency's public disclosures have narrowed the permissible scope of a 7(A) claim, Def.'s Opp'n 12–13. Finally, the FBI relies on precisely the type of blanket exemption that courts have previously rejected, claiming records are exempt simply because they are located in a particular file. Pl.'s Mem. 22.

The same flaw that defeats the FBI's search sufficiency argument also defeats the agency's Exemption 7(A) claim. The entire premise of the FBI's categorical Exemption 7(A) claim is that no "details" of the Special Counsel investigation have been "publicly or officially acknowledged." Hardy Decl. ¶ 14. But the agency has already conceded that it issued two separate public assessments concerning Russian interference in the 2016 election. Def.'s Resp. ¶¶ 34–35, ECF No. 27-1. So either (1) those public assessments are not part of the current investigation, and the records they were based on are not subject to Exemption 7(A), or (2) those public assessments were part of the current investigation but the FBI has failed to justify withholding that subcategory of investigatory records. Neither the First nor Second Declaration includes evidence that satisfies the FBI's burden to "demonstrate that the information withheld logically falls within the claimed exemption" and to overcome "contrary evidence in the record." *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009) (citation omitted).

The heart of the dispute here is over the agency's contention that the agency's prior public assessments should not be taken into account in the FBI's analysis of the potential impact of disclosure under Exemption 7(A). Second Hardy Decl. ¶ 9; Def.'s Opp'n 9–10. It is simply not plausible that the disclosure of all records, including those records supporting the agency's own public assessments, would impermissibly reveal the "scope" and "focus" of the investigation, First Hardy Decl. ¶¶ 35, 38–39, 42, the participation and cooperation of agency and law enforcement partners, First Hardy Decl. ¶¶ 35, 39, 42, or risk affecting certain targets behavior, First Hardy Decl. ¶¶ 35, 38, 42–43, in a way that harms the current investigation. The public assessments were not "about the general topic of Russian interference," but were detailed assessments of what happened, when, and who was responsible. *See* Pl.'s Mot., Exs. 6, 7, ECF No. 24-3. The FBI has not established that it reviewed the facts publicly acknowledged in the

two prior assessments or that it processed or otherwise analyzed the category of documents that compiled in support of those assessments.

Absent such review, the agency has not satisfied its burden under the test laid out in *CREW v. DOJ*, 746 F.3d 1082, 1098 (D.C. Cir. 2014). The D.C. Circuit made clear in *CREW* that "it is not sufficient for the agency to simply assert that disclosure will interfere with enforcement proceedings; 'it must rather demonstrate *how* disclosure' will do so." *Id*. This requires "specific information about the impact of the disclosures." *Id*. at 1099. *See, e.g., Stein v. SEC*, ___ F.Supp.3d ___, 2017 WL 3141903, at *9 (D.D.C. July 24, 2017) (quoting *CREW*, 746 F.3d at 1098). Here the FBI has not even addressed or properly reviewed an entire category of responsive records: those records created or compiled in support of the two public assessments on Russian interference. When documents related to an individual investigation are "intertwined and interrelated" with other records "more information" is required and the court "cannot say that the circumstances 'characteristically support an inference' that disclosure would interfere with any pending enforcement proceeding. *CREW*, 746 F.3d at 1099. The FBI's arguments are premised on the theory that EPIC seeks access to files about the current investigation, but the court should recognize that not the case. *See Campbell v. HHS,* 682 F.2d 256, 259–60 (D.C. Cir. 1982) ("Throughout this litigation . . .the FDA has responded to a case other than the one [the Plaintiff] brought . . . . The government's submissions appear to assume that [the Plaintiff] seeks a full accounting of the investigation in progress.").

The FBI has also failed to address how the more recent public disclosures have impacted the harm analysis under Exemption 7(A). The FBI acknowledges that the Special Counsel has issued indictments of two individuals, and an unsealed guilty plea, Second Hardy Decl. ¶ 11, which necessarily disclosed details of the "scope" and "focus" of the FBI investigation. The

indictments against Paul Manafort and Richard Gates contain thirty-one pages of the facts and charges, Indictment, *United States v. Manafort*, No. 17-cr-201 (D.D.C. Oct. 27, 2017). Multiple plea agreements have also now been entered in the Special Counsel investigation, and still the FBI has not reevaluated its Exemption 7(A) claims or conducted a sufficiently detailed analysis of what, if any, harm would result from disclosure of specific documents. The George Papadopoulos guilty plea contained additional details related to Russian interference including his contacts with specific Russian nationals and associates, Statement of the Offense at 1, 3–9, *United States v. Papadopoulos*, No. 17-cr-182 (RDM) (D.D.C. Oct. 5, 2017). The FBI also released further material concerning the Russian interference in the guilty plea former National Security Advisor Michael Flynn for making false statements to the FBI. Statement of the Offense, *United States v. Flynn*, No. 17-cr-232 (RC) (D.D.C. Dec. 1, 2017). The plea lists Mr. Flynn's contacts with the Russian Ambassador over U.S. sanctions for the interference in the election, his direction by a "very senior" member of the Trump Transition Team to influence an Egyptian UN resolution on Israeli settlements, and his involvement in advancing Turkey's interests. *See id*. Yet the FBI has not provided any analysis or "specific information about the impact of disclosures" of the responsive records in light of these publicly acknowledged facts. *See also Campbell*, 682 F.2d at 259–265 (finding "the district court must conduct a more focused and particularized review of the documentation on which the government bases its claim that the information [the Plaintiff] seeks would interfere with the investigation" where the information was requested by a third party was already known to the target of the investigation).

In the Reply and Second Declaration, FBI does not address these flaws or provide more detailed evidence that would be necessary to support the categorical Exemption 7(A) claim. The FBI does not add any new allegations or clarify its prior assertions of harm to bolster the claim.

Instead, the FBI responds with the bare, generalized assertions that "for the reasons discussed in [the] first declaration" the investigation would still be harmed. Def.'s Opp'n 11–12; Second Hardy Decl. ¶ 9. The FBI also relies on a string citation of cases that call for deference to agency affidavits in national security cases. Def.'s Reply at 11. Even assuming that these declarations are entitled to some deference, which EPIC does not concede, that does not eliminate the requirement that the agency establish a reasonable risk of harm from disclosure. *See Ctr. for National Security Studies v. DOJ*, 331 F.3d 918, 926–32 (D.C. Cir. 2003) (evaluating 7(A) declaration involving national security concerns for reasonableness); *Kidder v. FBI*, 517 F. Supp. 2d 17, 28–31 (D.D.C. 2007). Deference "is not equivalent to acquiescence." *Campbell v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998). The very cornerstone of Exemption 7(A) is that the alleged risk of interference with law enforcement proceedings must be "reasonabl[e]." 5 U.S.C. § 552(b)(7)(A).

As explained in EPIC's Motion for Summary Judgment, courts have weighed public disclosures against agency 7(A) claims, and the agency failed to address this point. In fact, the FBI ignored EPIC's citation to *UtahAmerican Energy, Inc. v. Dep't of Labor*. 700 F. Supp. 2d 99 (D.D.C. 2010), *rev'd in part*, *vacated in part as moot*, 685 F.3d 1118 (D.C. Cir. 2012) (vacating the agency 7(A) claims as moot where the underlying investigation concluded in a plea agreement). There the court rejected a 7(A) claim where it found "less than convincing" the Department of Labor's allegations of the risk of witness tampering from the records' disclosure where reports on a witness interview had been previously released. *Id*. at 107–109. The reports in *UtahAmerican Energy* were available on the Department of Labor website, similar to the FBI assessments on Russian interference. *Id*. at 108. Even if it was "difficult to know exactly how much of these witness accounts were not included in the final published reports," the burden was

on the agency to describe with "greater particularity how that information could compromise those ongoing investigations." *Id*. at 108. The court evaluated the allegations of harm from the agency against the prior disclosures, and found that the claimed harms were "exaggerated." *Id*.

The FBI has also failed to rebut EPC's argument that the agency has made an impermissible blanket exemption claim. To justify a 7(A) claim, the agency may take a "generic" approach to describing the documents at issue. As explained in EPIC's Motion for Summary Judgment, this type of "functional" test is intended to serve as a "middle ground" between an impermissible blanket exemption claim and a document-by-document analysis. *Gould, Inc. v. GSA*, 688 F. Supp. 689, 704 n.34 (D.D.C. 1988). Here, the FBI shifted too far from that "middle ground" that the court carefully approved; the FBI has created the appearance of functional categories, but, in effect, impermissibly asks for an "exemption claimed for all records in a file simply because they are in the file" - namely the Mueller investigation file. *Crooker v. Bureau of Alcohol, Tobacco & Firearms,* 789 F.2d 64, 66 (D.C. Cir. 1986).

Neither the Reply nor the Second Declaration resolve the flaws in the FBI's original Brief and First Declaration. The FBI still fails to demonstrate how that release of records located by the FBI could "reasonably" be expected to harm proceedings. The FBI also nowhere contests that here it attempts to assert an impermissible blanket exemption claim. The FBI has failed to carry its burden to withhold in full all records located based on categories one through three of EPIC's FOIA request, and the 7(A) claim should be denied.

III. The FBI has failed to demonstrate that it released reasonably segregable portions of records located in response to categories one through three of EPIC's FOIA Request.

The FBI has failed to establish that there are no reasonably segregable portions of records responsive to categories one through three of EPIC's FOIA Request. If a document contains exempt information, the agency must still release 'any reasonably segregable portion' after

deletion of the nondisclosable portions" while merely asserting a segregability review was conducted is insufficient. Pl.'s Mem 26 (quoting *Oglesby v. U.S. Dep't of Army*, 79 F.3d 1172, 1176, 1180–181 (D.C. Cir. 1996)). Nonetheless, the FBI continues to flatly assert it has satisfied the duty to segregate and to rely on cases, unlike this one, in which the categorical 7(A) claim was upheld. Def.'s Opp'n 14–15. Here, EPIC has "rebut[ted] the presumption" that the agency has fulfilled its duty to segregate, and the FBI must demonstrate it has complied with the FOIA. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007).

The Second Declaration does not strengthen the FBI's segregability analysis or provide the "detailed justification" for material's non-segregability required by law. *See* Pl.'s Mem. 26 (quoting *Johnson v. EOUSA*, 310 F.3d 771, 776 (D.C. Cir. 2002)). Instead, the FBI's Reply merely restates the same points in the agency's prior Brief. Def's Reply at 14–15 (relying on *Kidder v. FBI*, 517 F. Supp. 2d 17, 32 (D.D.C. 2007), *Dillon v. DOJ*, 102 F. Supp. 3d 272, 298 (D.D.C. 2015), and other cases cited therein)); *see also* Def.'s Brief at 20–21 (citing both similar and identical cases). These citations still have no bearing; in those cases, unlike this one, the plaintiff did not identify factual issues with the agency's 7(A) exemption claim and the categorical claim was upheld. The FBI is "entitled to a presumption that [it] complied with the obligation to disclose reasonably segregable material," but, where "the requester successfully rebuts [the] presumption" that the agency has complied with its duty to segregate, "the burden lies with the government to demonstrate that no segregable, nonexempt portions were withheld." Pl.'s Mem. 27 (quoting *Sussman v. U.S. Marshals Serv.*, 494 F.3d at 1117

Here, EPIC has "rebut[ted] the presumption" that the agency fulfilled its duty to segregate, based on numerous prior disclosures concerning the Russian interference. *See, supra,* Sec. II. The burden is now on the FBI to demonstrate it has complied with the FOIA by releasing all

reasonably segregable, non-exempt portions of the responsive records. These disclosures also demonstrate that the agency can segregate material related to the Russian interference for public disclosure. The FBI attempt to address these shortcomings with *Center for National Security Studies v. Department of Justice*, 331 F.3d 918 (D.C. Cir. 2003), *see* Def.'s Reply at 14, is again meritless for the same reasons as set out above. Even if deference may be given to declarations in cases involving national security, that deference does not eliminate review nor relieve the agency of its obligations under the FOIA. *See* Section II. The agency's decision to withhold records in full despite numerous disclosures concerning the details of the Russian interference, at a minimum, warrants a robust explanation of the description of the contents of the record is necessary for "both litigants and judges . . . to test the validity of the agency's claim that the non-exempt material is not segregable." *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

The FBI acknowledges the duty to segregate but has made no attempt to supplement the record or to provide any evidentiary support for the conclusory attestation in the Hardy Declaration. EPIC has provided clear evidence to rebut the FBI's categorical 7(A) claim and, accordingly, the Court should order the agency to reprocess and release segregable material.

IV. The FBI has not justified withholding material located in response to category four under either Exemption 1 or 3, or its failure to release reasonably segregable portions of the record to EPIC.

The FBI has failed to justify, under either Exemption 1 or Exemption 3, the withholding of FISA procedures produced in response to EPIC's FOIA request, as well as the decision not to release reasonably segregable portions of that record. The FBI's sweeping allegations of harm from release of these procedures are less than credible after countless disclosures of similar records by the FBI and other federal agencies. Def.'s Opp'n 16–18. Despite the fatal vulnerability in its position, the FBI makes no attempt to distinguish the procedures contested here from those in the public domain. Def.'s Opp'n 16–18. Instead, the FBI responds with

conclusory assertions that this information was "compared" with previously disclosed information, and refers to a test for "waiver" EPIC does not purport to employ. Second Hardy Decl. ¶ 13. Accordingly, the FBI has not made a "plausible assertion" that the pages of the FISA procedures withheld are properly classified as required to withhold under Exemption 1, that they must be withheld under Exemption 3 to protect "intelligence sources and methods" as required by Section 3024(i)(1) of the National Security Act of 1947, nor provided a sufficient basis to demonstrate it has satisfied the duty to provide reasonably segregable material.

Despite the FBI's mischaracterization of the argument, EPIC does "seriously challenge [the agency's] prediction of harm," Def.'s Opp'n 16, from release of the FISA procedures at issue here. The FBI has not made a "plausible assertion" that disclosure of the redacted material could reasonably be expected to cause identifiable or describable damage to the national security commensurate with SECRET level classification. Pl. Mem. 30–31. The Second Declaration does nothing to alter the basic flaw in the agency's position: that the allegations of harm from the FBI are so general as to "protect any FISA-related information from disclosure," and yet, many procedures have in fact been released. Pl.'s Mem. 31–33 (citing numerous publicized FISA procedures therein). The Second Declaration offers two rationales. First, the declaration includes the observation that the information was "compared" with previously disclosed information—but the agency offers no further details about what information it was compared to or what conclusions the agency reached in that comparison. Second Hardy Decl. ¶ 13. This statement is entirely conclusory and uninformative.

Second, the FBI responds to a point that EPIC never raised by noting that the redacted material does not "match or mirror any information previously made public by the FBI through an official disclosure." Second Hardy Decl. ¶ 13. Such an analysis would only be relevant if

EPIC had made a "waiver" argument, which it did not, and has no bearing on whether the agency must make a "plausible" claim as to proper classification. And, while EPIC does not dispute the FBI's contention that simply because there is some information in the "public domain does not eliminate the possibility that further disclosures can cause harm to intelligence, sources, methods, and operations," Def.'s Reply at 16, it is the FBI's own failure to distinguish the information released without harm from the information at issue here, or to otherwise bolster its claim beyond the assertion that FISA is an intelligence activity, that undermines the claim to Exemption 1. The failure to account for contradictory evidence precludes the award of summary judgment on behalf of the agency. *King v. DOJ*, 830 F.2d 210, 217 (D.C. Cir. 1987) ("[A] district court may award summary judgment to an agency invoking Exemption 1 only if (1) the agency affidavits describe the documents withheld and the justifications for nondisclosure in enough detail and with sufficient specificity to demonstrate that material withheld is logically within the domain of the exemption claimed, and (2) the affidavits are neither controverted by contrary record evidence nor impugned by bad faith on the part of the agency."). As the D.C. Circuit explained in *Campbell*:

> deference is not equivalent to acquiescence; the declaration may justify summary judgment only if it is sufficient "to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *King*, 830 F.2d at 218. Among the reasons that a declaration might be insufficient are lack of detail and specificity, bad faith, and failure to account for contrary record evidence.

Campbell, 164 F.3d at 30 (finding an agency declaration insufficient to satisfy the (b)(1) exemption and remanding to the district court for further proceedings).

As to Exemption 3, the FBI merely reiterate its prior arguments and fails to establish that pages of the FISA procedures must be withheld to protect "intelligence sources and methods" as required by Section 3024(i)(1) of the National Security Act of 1947. Second Hardy Decl. ¶ 12–

13; Def's Opp'n 17–18. The fundamental argument rests on the same conclusory point that the pages must be redacted because FISA itself "is an intelligence activity or method," and therefore disclosure of FBI FISA procedures necessarily risks harm. Def.'s Opp'n 17-18 (citing First Hardy Decl. ¶ 70). But this statement clearly proves too much, as EPIC has shown based on extensive disclosures of other FISA procedures. As a result, this FBI still fails to meaningfully account for the "contrary evidence in the record": the numerous disclosures of FISA activities and procedures without harm. Pl.'s Mem. 33–35. Just because the redacted portions concern the FISA does not support a "logical" nor "plausible" claim that the material is subject to Exemption 3. *Larson*, 565 F.3d at 862. The FBI's only response is to rely on general statements in the Second Declaration that publicly available information was "reviewed" and "does not match or mirror" the information withheld. Def.'s Opp'n 17 (citing Second Hardy Decl. ¶ 13). Yet again, as noted above, this is a test for a waiver doctrine that EPIC never asserted.

Finally, the agency has done nothing to support its segregability claims. Def.'s Opp'n 35–37. As with the agency's attestations concerning the Exemption 1 and Exemption 3, the FBI does not add to or modify the original segregability analysis, or even attempt distinguish other agency's release of the FISA procedures, without incident, from the information at issue here. Instead, the FBI relies once again on the statement in the Second Declaration that the public disclosures noted by EPIC in its Motion for Summary Judgment were in fact "reviewed" by the agency – which is meritless for the same reasons as delineated above - and states that information was either exempt or "inextricably intertwined with such information." Def.'s Opp'n 19; Second Hardy Decl. ¶ 13. Against the backdrop of the countless publicly disclosed FISA procedures the FBI has failed to distinguish, this conclusory argument amount to a simple

"empty invocation of the segregability standard." Pl.'s Mem. 37 (quoting *Judicial Watch, Inc. v. DHS*, 841 F. Supp. 2d 142, 161 (D.D.C. 2012)).

The agency's declarations in this case remain fail to establish that either Exemption 1 or 3 apply to justify its withholding of portions of FISA procedures produced in response to category four of EPIC's FOIA request, or that it has satisfied its duty to provide reasonably segregable portions of the record.

CONCLUSION

For the foregoing reasons, the Court should grant EPIC's Motion for Summary Judgment and deny the FBI's Motion for Summary Judgment.

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Respectfully submitted,

MARC ROTENBERG, D.C. BAR # 422825
EPIC President

/s/ Alan Butler
ALAN BUTLER, D.C. BAR # 1012128
EPIC Senior Counsel
Electronic Privacy Information Center
1718 Connecticut Ave. NW, Suite 200
Washington, DC 20009
(202) 483-1140
butler@epic.org

Counsel for Plaintiff