IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,	)	
Plaintiff,	)	
v.	)	Case No. 1:17-cv-121 (TNM)
FEDERAL BUREAU OF INVESTIGATION,	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This action arises from a Freedom of Information Act ("FOIA") request sent by the Electronic Privacy Information Center ("Plaintiff") to the Federal Bureau of Investigation ("FBI"). The request had four parts. The first three items sought records relating to the FBI's investigation into Russian interference in the 2016 Presidential Election; the fourth item sought records relating to the FBI's procedures for notifying targets of cyber attacks.

As explained in the FBI's opening brief, the FBI asserted FOIA Exemption 7(A) to withhold in full all records responsive to items 1 through 3 of Plaintiff's FOIA request, and produced records responsive to item 4 of that request, subject to limited redactions. The FBI's opening brief established that the FBI conducted a search for records responsive to items 1 through 3 and determined that any such records are part of an active FBI national security investigation into Russian interference in the 2016 presidential election (the "Russia investigation"). Consistent with procedures that have long been sanctioned in the D.C. Circuit, the FBI reviewed the records within its Russia investigation files, assigned those records to high-level functional categories, and described, in reasonably specific terms, how premature disclosure of documents in each category would interfere with the ongoing Russia investigation. Further, the FBI's opening brief established that the information it withheld in response to item 4 of Plaintiff's request would reveal information about intelligence sources and methods, and thus was properly withheld under FOIA Exemptions 1 and 3. With respect to its responses to each item of Plaintiff's FOIA request, the FBI explained that after conducting a review of all responsive records, it determined that no further reasonably segregable, non-exempt information existed for release.

Despite these representations, Plaintiff continues to challenge the adequacy of the FBI's search in response to items 1 through 3 of Plaintiff's request, the FBI's withholding of documents

responsive to items 1 through 3 pursuant to Exemption 7(A), the FBI's withholding of information responsive to item 4 of Plaintiff's request pursuant to Exemptions 1 and 3, and whether the FBI released reasonably segregable, non-exempt portions of responsive records. A common thread runs through Plaintiff's arguments in opposition: that the existence in the public domain of various FBI statements and documents relating in some manner to the records Plaintiff seeks undermines the FBI's declaration in support of withholding further, non-public records. This argument, however, ignores the well-established principle that an agency can make some degree of public disclosures regarding the subject matter of an active investigation or a classified matter without forfeiting its ability to withhold further records, the disclosure of which would interfere with the active investigation or that are themselves classified. Nor is Plaintiff's challenge to the adequacy of the FBI's search the least bit persuasive, as the very language of Plaintiff's request demonstrates. It was reasonable for the FBI to interpret Plaintiff's request for "records pertaining to the FBI's investigation of Russian interference in the 2016 U.S. Presidential election" as seeking records from the FBI's Russia interference investigation files.

Because the FBI has fulfilled its obligations under FOIA, the Court should grant its motion for summary judgment and deny Plaintiff's cross-motion.

ARGUMENT

I. THE FBI PROPERLY WITHHELD IN FULL ALL RECORDS RESPONSIVE TO ITEMS 1 THROUGH 3 OF PLAINTIFF'S REQUEST UNDER EXEMPTION 7(A)

A. The FBI Reasonably Interpreted Items 1 Through 3 Of Plaintiff's Request And Conducted An Adequate Search In Response

When assessing the adequacy of an agency's search under FOIA, a court's inquiry is simply whether the agency has conducted a search "reasonably calculated to uncover all relevant documents." *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994) (citation omitted). The focus is on the search itself, and whether the search was adequate – not on "whether there might exist

any other documents possibly responsive to the request." *Id*. In the absence of "countervailing evidence or apparent inconsistency of proof, affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice." *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982).

Consistent with these standards, and as set forth in the FBI's opening brief and in a declaration submitted with that brief (the "First Hardy Declaration"), the FBI conducted a search reasonably calculated to discover records responsive to items 1 through 3 of Plaintiff's FOIA request, which on its face requested "records pertaining to the FBI's investigation of Russian interference in the 2016 U.S. Presidential election," Ex. A to First Hardy Declaration (ECF No. 22-5) at 1. *See* Def.'s Mem. of P. & A. in Supp. of its Mot. for Summ. J. ("Def.'s Brief") at 22-24, ECF No. 22-2. Plaintiff does not contend that the FBI's search of its Russia investigation files was inadequate. Rather, it argues that the FBI, in interpreting items 1 through 3 as seeking records pertaining to its Russia investigation, "unreasonably limited" its search for records responsive to those portions of Plaintiff's request. *See* Mem. of P. & A. in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Opp.") at 15, ECF No. 24-2. Plaintiff's argument seems to be based on its assumptions that (1) the FBI has in its custody some set of records related to "Russian interference" that is not contained in its Russia investigation files; and (2) that items 1 through 3 of Plaintiff's request are reasonably construed as seeking this broader set of records. Because the FBI reasonably interpreted Plaintiff's request as seeking investigative records related to Russian interference in the 2016 presidential election, and because "[m]ere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them," *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991), Plaintiff's assumptions are unwarranted and its argument lacks merit.

As noted above, Plaintiff summarized its FOIA request, in the first line, as seeking "records pertaining to the FBI's investigation of Russian interference in the 2016 U.S. Presidential election." Ex. A to First Hardy Decl. at 1. The request is then broken out into four subparts, or items. Item 1 seeks records pertaining to "the FBI's investigation of the Russian-sponsored cyber attack on the RNC, DNC, and DCCC," *id*. at 6, which, the request explains, occurred during the 2016 election season, *id*. at 1-2. Item 2, while not containing the word "investigation," is an off-shot of item 1, in that it seeks "[a]ll records of communications to the RNC, DNC, and DCCC regarding the threat of Russian interference in the 2016 Presidential election." *Id*. at 6. And item 3, seeking "[a]ll records of communications with other federal agencies regarding Russian interference in the 2016 Presidential election," *id*., is another subset of the overall topic of the request for "records pertaining to the FBI's investigation of Russian interference in the 2016 U.S. Presidential election." *Id*. at 1. Although unconfirmed at the time of Plaintiff's request, the FBI is in fact conducting an investigation into Russian interference in the 2016 Presidential election, and it reasonably concluded that records responsive to items 1 through 3 would be contained in those investigative files. *See* Second Declaration of David M. Hardy ("Second Hardy Decl.") ¶¶ 4-8 (attached hereto as Ex. 1).[1]

Plaintiff's argument that the FBI's interpretation of its request was unreasonable because the request actually sought – from an investigative agency conducting an investigation into the topic about which it sought records – records not related to that investigation ignores the foundational principle that "reasonableness is the hallmark of an adequate FOIA search."

[1] Agencies often provide – and courts rely on – supplemental declaration filed with reply briefs to clarify the agency's search process and withholding of responsive records. *See, e.g.*, *Manning v. DOJ*, 234 F. Supp. 3d 26, 34 (D.D.C. 2017); *DeSilva v. HUD*, 36 F. Supp. 3d 65, 72 (D.D.C. 2014); *Am. Immigration Council v. DHS*, 950 F. Supp. 2d 221, 229 (D.D.C. 2013); *Judicial Watch v. FDA*, 514 F. Supp. 2d 84, 89 (D.D.C. 2007).

Landmark Legal Found. v. EPA, 272 F. Supp. 2d 59, 64 (D.D.C. 2003). A search "need not be perfect, only adequate," *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986), and "reasonably calculated to discover the requested documents," *SafeCard*, 926 F.2d at 1201. Here, the practical reality is that "the FBI is a law enforcement agency," and interprets FOIA requests from that perspective; where a request "explicitly ties itself to a particular investigation," – here, the FBI's investigation into Russian interference in the 2016 presidential election – "the FBI reasonably and logically interprets such requests as seeking investigative records." Second Hardy Decl. ¶ 5. It is not reasonable to conclude that Plaintiff's requests from the nation's top law enforcement agency for records related to Russian interference in the 2016 presidential election would somehow be seeking records other than those contained in the investigative files of the FBI's active and ongoing investigation into that very subject.[2]

Plaintiff also contends that "there is reason to believe" that the FBI's search "did in fact exclude records about the Russian active measures more generally" because, Plaintiff claims, it "excluded the records related to two public reports on the Russian interference jointly authored by the FBI," a Joint Analysis Report produced by the FBI and Department of Homeland Security, and a joint assessment on the Russian interference released by the Office of the Director of National Intelligence. Pl.'s Opp. at 16-17. Plaintiff does not assert that the reports *themselves* should have been disclosed because they are part of the public domain,[3] but rather that the reports "must

[2] Indeed, as explained in the Second Hardy Declaration, an interpretation of Plaintiff's request as seeking something more than investigative records, *e.g.*, any mention or reference to the investigation or its subject matter, would render it "overly broad," "unduly burdensome," and "inadequate to describe the records sought because the FBI would have been unable to craft a reasonable search for non-investigative records." Second Hardy Decl. ¶ 8. *See Pub. Citizen v. Dep't of Educ.*, 292 F. Supp. 2d 1, 6 (D.D.C. 2003) ("Generally, an agency need not honor a FOIA request that requires it to conduct an unduly burdensome search").

[3] Plaintiff has not invoked the D.C. Circuit's "public domain" doctrine or attempted to carry its burden of "pointing to specific information in the public domain that appears to duplicate that

necessarily have been based on" some set of records that were ultimately not disclosed to Plaintiff, thus casting doubt on the adequacy of the search. *Id*. But Plaintiff's claim that records relating to these reports were excluded from the FBI's search, or are not included in the FBI's Russia interference investigation files, is pure, unsupported speculation. As made clear in the Second Hardy Declaration, "the FBI reasonably interpreted plaintiff's request to seek records from the Russian interference investigation, searched for and located the investigative files to identify responsive records, assigned all responsive records within the investigative files into functional categories, and explained the basis for protecting each category." Second Hardy Decl. ¶ 8. Further, the FBI determined that those categories, described in Mr. Hardy's first declaration, "cover all responsive records as of the search cut-off date for plaintiff's request." *Id*. ¶ 10. Plaintiff's speculation about the existence of further responsive records related to the public reports, and their location, is not sufficient "countervailing evidence" to create a genuine issue of material fact with respect to the adequacy of the FBI's search, which has been "reasonably detailed" in two agency declarations. *See Pinson v. DOJ*, 189 F. Supp. 3d 137, 149 (D.D.C. 2016) (citation omitted).

Indeed, Plaintiff's argument is based on the same type of faulty "logical syllogism" that was recently rejected in *Agrama v. IRS*, --- F. Supp. 3d ----, 2017 WL 4773109 (D.D.C. Oct. 20, 2016). There, as here, the plaintiff pointed to a public record, surmised that there must be a "paper trail behind it," and concluded, based on the fact that no records in the hypothesized paper trail were released, that the agency's search was inadequate because "there must be some unsearched

being withheld." *Davis v. DOJ*, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (citation omitted). In any event, Mr. Hardy states in his second declaration 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.

further records somewhere." *Id*. at *5. In response, the court concluded that its own "speculation" was "no better than" the plaintiff's, and that the plaintiff's conjecture about the existence of further records was insufficient to "overcome the declarations of [the agency] or cast doubt upon the adequacy of its searches." *Id*. at 6. Similarly here, Plaintiff's speculation about the existence of records underlying the FBI's participation in two publicly released intelligence assessments in no way calls into question the FBI's assertion that it conducted a search reasonably calculated to locate responsive records.

Plaintiff's argument that the FBI's search was inadequate because the FBI looked only for correspondence from the FBI to the entities described in items 2 and 3, and not for correspondence from those entities to the FBI, fails for similar reasons. *See* Pl.'s Opp. at 18. Mr. Hardy's original declaration described the various types of responsive records found in the investigation files, including "FBI Letters" and "FD-340 (1A Envelope)." First Hardy Decl. ¶ 31. The declaration explains that "FBI Letters" are "[f]ormal correspondence . . . used by the FBI to communicate with DOJ, U.S. Attorneys' Offices, [other government agencies], other law enforcement agencies (including federal, state, local, and tribal), commercial businesses, and private citizens." *Id.* The "FD-340 (1A Envelope)" category is described as "an envelope used to hold materials other than formal FBI-created documents . . . in a case." *Id.* There is no reason why the incoming correspondence that Plaintiff seeks would not be included in these categories, so long as it is pertinent to the investigation, and Plaintiff provides none. Plaintiff's baseless assumption should be rejected on its face. In any event, Mr. Hardy confirms in his second declaration that the incoming correspondence that Plaintiff speculates exists "would be encompassed within the categories for FBI letters or FD-340s," discussed in his original declaration, if they in fact exist. Second Hardy Decl. ¶ 10

Ultimately, the FBI determined that all records responsive to items 1 through 3 of Plaintiff's request are contained in its Russia investigation files and withheld those documents in full on that basis. Plaintiff's rank speculation about what records are included within those investigative files, or are excluded from those files, is insufficient to cast doubt on the adequacy of the agency's search, as set forth in the Hardy Declarations. *See Hooker v. HHS*, 887 F. Supp. 2d 40, 49 (D.D.C. 2012) ("[A] plaintiff cannot rebut the good faith presumption afforded to an agency's supporting affidavits through purely speculative claims about the existence and discoverability of other documents." (citations omitted)).

B. Exemption 7(A) Protects From Disclosure All Records Responsive To Items 1 Through 3 Of Plaintiff's Request

Plaintiff does not dispute that the records responsive to items 1 through 3 of its request were compiled for law enforcement purposes. *See* Pl.'s Opp. at 20. To justify its withholding of records compiled for that purpose, the FBI need only demonstrate that their disclosure "(1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or reasonably anticipated." *Citizens for Responsibility & Ethics in Wash. v. DOJ*, 746 F.3d 1082, 1096 (D.C. Cir. 2014) (quoting *Mapother v. DOJ*, 3 F.3d 1533, 1540 (D.C. Cir. 1993)). As explained in the FBI's opening brief, the First Hardy Declaration establishes, through its description of functional categories of documents, each of these elements. *See* Def.'s Brief at 13-19; First Hardy Decl. ¶¶ 25-45. Nor does Plaintiff challenge that categorical approach to Exemption 7(A), long accepted by the D.C. Circuit. Pl.'s Opp. at 22.

Rather, Plaintiff's challenges to the FBI's Exemption 7(A) withholding in this case seek to substitute Plaintiff's speculative judgment about the effect that disclosure of records would have on the FBI's ongoing investigation for the FBI's good faith prediction of harm in a matter of national security. Plaintiff's arguments are insufficient to undermine the FBI's justification for

withholding records pursuant to Exemption 7(A), as set forth with reasonably specific detail in the Hardy Declarations. *See Am. Immigration Council v. DHS*, 950 F. Supp. 2d 221, 229 (D.D.C. 2013) ("In a FOIA case, a court may grant summary judgment based solely on information provided in an agency's affidavits or declarations when they 'describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009))).

First, Plaintiff contends that the FBI has not demonstrated that "all records" located in response to items 1 through 3 of Plaintiff's FOIA request pertain to a reasonably anticipated enforcement proceeding. Pl.'s Opp. at 21. The precise nature of Plaintiff's argument on this point is opaque, but it once again points to the FBI's "prior assessments and public reports," this time as evidence for the assertion that "the agency's review and analysis of certain cyber intrusions and active measures have already been completed." *Id.* There is no dispute, however, that the Russia investigation is currently active and ongoing, and the issue is simply whether disclosure of any records responsive to items 1 through 3 of Plaintiff's request could reasonably be expected to interfere with this investigation or any enforcement proceedings resulting therefrom. Plaintiff provides no support for its contention that the public reports it cites – which, as Plaintiff describes, relate directly to the topic of Russian interference in the 2016 presidential election – or the information supporting them, are unrelated to the ongoing investigation into this very subject. And, as the Second Hardy Declaration confirms, "the public availability of a JAR concerning Russian hacking of political parties in 2015 and 2016 or of a declassified [assessment] about Russia's activities and intentions in recent elections does not mean that the records in the FBI's

Russian interference investigation files that have been protected here would not, if disclosed, cause harm to that investigation." Second Hardy Decl. ¶ 9.

Thus, "Exemption 7(A) applies" because the FBI's investigation "continues to gather evidence for a possible future . . . case, and that case would be jeopardized by the premature release" of the records at issue here. *Juarez v. Dep't of Justice*, 518 F.3d 54, 59 (D.C. Cir. 2008); *see also Owens v. DOJ*, No. 04-1701 2007 WL 778980, at *6 (D.D.C. Mar. 9, 2007) (concluding that the D.C. Circuit does not place a "heavy burden" on an agency's identification of a prospective law enforcement proceeding, and citing D.C. Circuit precedent for the proposition that an agency can meet this burden "by identifying in general terms the targets of the investigation and by averring that data continued to be collected as part of a 'still active' investigation" (citing *Boyd v. DOJ*, 475 F.3d 381, 386 (D.C. Cir. 2007))).

Plaintiff also relies on the two public reports, as well as recent indictments and guilty pleas connected to the investigation, to argue that the FBI's assertions of the harm that would result from disclosure of any records responsive to items 1 through 3 are "undercut" by various purported public disclosures regarding the Russia investigation. Pl.'s Opp. at 22-25. Once again, Plaintiff does not argue that any particular record itself is a part of the public domain and thus should have been disclosed to Plaintiff. Instead, it is arguing that the public disclosure of information about the general topic of Russian interference in the election, or some limited aspects of the FBI's ongoing Russia investigation, prevents the FBI from plausibly claiming that the release of additional, non-public records in its investigative files would interfere with its still ongoing investigation.

This type of argument has been soundly rejected by the D.C. Circuit, which has recognized, in the context of an agency's assertion of Exemption 7(A) to withhold records of a pending

investigation, that "strategic disclosures can be important weapons in the government's arsenal during a law enforcement investigation," and held that the "disclosure of a few pieces of information" does not undermine an agency's assertion that "complete disclosure would provide a composite picture of its investigation and have negative effects on the investigation." *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 930-31 (D.C. Cir. 2003); *accord. Agrama*, 2017 WL 4773109, at *7 (recognizing "valid law enforcement interest" in withholding documents that underlie, or are described in, a publicly available report, because they "may contain much more information than just a summary included in another report"). *See also Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) ("[W]e have unequivocally recognized that the fact that information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to intelligence, sources, methods, and operations."); *Military Audit Project v. Casey*, 656 F.2d 724, 753 (D.C. Cir 1981) (collecting cases for the proposition that the D.C. Circuit has rejected argument that "an agency's rationale for nondisclosure is inherently implausible simply because the information at issue might already be a matter of public knowledge").

Thus, the mere existence of a limited set public of records bearing on the topic of Russian interference in the 2016 election generally, or the FBI's investigation into that interference, does not undermine the FBI's assertion, set forth in the First Hardy Declaration, that release of any further, non-public records relating to that investigation would tend to reveal "information about the scope or focus of the investigation, the extent to and manner in which certain allegations or activities fit within the larger investigation as a whole, [and] the relative significance of such allegations or activities (or lack thereof) to the investigation." First Hardy Decl. ¶ 30. That prediction of harm is in no way undercut by the various public disclosures that Plaintiff cites. *See* Second Hardy Decl. ¶ 9 ("That a modest amount of intelligence information on related topics has

been publicly disclosed does not negate the need to protect records of an active investigation, for the reasons discussed in my first declaration.").

In addition, regardless of the occurrence of certain criminal court proceedings since the time the FBI conducted its search, it remains the case, as stated in the First Hardy Declaration, that the release of further investigative records (that the FBI has not itself deemed appropriate for public disclosure), would "reveal the scope and focus of the investigation; identify and tip off individuals of the FBI's interest in them; and provide suspects or targets the opportunity to destroy evidence and alter their behavior to avoid detection." First Hardy Decl. ¶ 35. Indeed, an attorney for the Office of Special Counsel stated at a plea hearing for one of the individuals that has pled guilty, George Papadopoulos, that Mr. Papadopoulos' case played a "small part" in a "large scale ongoing investigation." Transcript of Arraignment/Plea Agreement Hearing at 15:11-13, *United States v. Papadopoulos*, No. 17-cr-00182-RDM (D.D.C. Oct. 5, 2017), available at https://www.scribd.com/document/363089413/USA-vs-Papadopoulos-Plea. And the Second Hardy Declaration confirms that the "limited public disclosures related to Messrs. Manafort, Gates, and Papadopoulos, and Lt. General Flynn, do not require it to disclose any investigative records or alter its determination that disclosure of such records in this case would adversely affect the pending investigation and any resulting enforcement proceedings." Second Hardy Decl. ¶ 11. "Such predictive judgments of harm are entitled to deference, especially where, as here, the investigation concerns matters of national security." *Manning*, 234 F. Supp. 3d at 36 (citing *CREW*, 746 F.3d at 1098 & *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927–28).

Plaintiff's citation to *Detroit Free Press* does not support its position. *See* Pl.'s Opp. at 22-23. That case involved a FOIA request seeking records from the FBI about the disappearance of Jimmy Hoffa twenty-six years after the fact. *Detroit Free Press v. DOJ*, 174 F. Supp. 2d 597, 598-

99 (E.D. Mich. 2001). Given the "inordinate amount of time that the Hoffa investigation ha[d] remained an allegedly pending and active investigation," and the direct "incompatibility of allegations made in FBI declarations with disclosures subsequently made public by FBI personnel," *id*. at 600, the court "question[ed] the veracity of the FBI's justification" for asserting Exemption 7(A), going so far as to raise "questions of bad faith," *id*. at 601. Here, on the other hand, the FBI is invoking Exemption 7(A) to withhold documents relating to an ongoing investigation into Russian interference into a presidential election that occurred just over a year ago, and, as explained above, there is no incompatibility between the limited public disclosures the FBI has made regarding that investigation and its assertion that further disclosure of non-public information would "adversely affect the pending investigation and any resulting enforcement proceedings." Second Hardy Decl. ¶ 11. There is thus no basis to doubt the veracity of the FBI's invocation of Exemption 7(A) (and Plaintiff does not even attempt to question the FBI's good faith).

In short, as described in the FBI's opening brief with respect to the fact that the Russia investigation has been disclosed at all, the judgment that the FBI has deemed it appropriate to make some limited public disclosure related to the ongoing investigation and its subject matter does not undermine the critical law-enforcement need to protect any further details regarding the non-public scope and targets of the investigation or the future direction of the investigation. Because the Russia investigation remains ongoing, and because release of any records responsive to items 1 through 3 of Plaintiff's FOIA request is reasonably likely to impede that ongoing investigation, the FBI's categorical assertion of Exemption 7(A) remains valid, notwithstanding Plaintiff's attempt to undermine the FBI's assertion of harm based on its assertion that "the public

has, or thinks it has, partial knowledge of the outlines" of the Russia investigation. *Military Audit Project*, 656 F.2d at 752.

C. No Reasonably Segregated Non-Exempt Information Exists

In its original declaration, the FBI made clear that it had reviewed all records responsive to items 1 through 3 and determined that no non-exempt information could be reasonably segregated and released to Plaintiff. *See* First Hardy Decl. ¶ 46. Based on this declaration, the FBI is "entitled to a presumption that [it] complied with the obligation to disclose reasonably segregable material." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007).

Plaintiff attempts to overcome this presumption by once again describing the FBI's purported "extensive public disclosures . . . concerning the subject and scope of the records sought." Pl.'s Opp. at 26-27. As described above, however, the limited public disclosures that Plaintiff describes do not lessen the FBI's argument that further disclosure of records related to the investigation "would provide a composite picture of its investigation and have negative effects on the investigation." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 931; *see also id*. (recognizing that "strategic disclosures can be important weapons in the government's arsenal during a law enforcement investigation," and refusing to "second-guess the executive's judgment in this area"). The existence of these public records thus does not cast any doubt on the FBI's conclusion with respect to segregability, or prevent it from relying on the same type of generic showing regarding segregability that it is entitled to rely upon in justifying its withholdings. *See Kidder v. FBI*, 517 F. Supp. 2d 17, 32 (D.D.C. 2007) (where defendant declared all information categorically exempt under 7(A), holding that it "has satisfied its burden, and its failure to make a document-by-document segregability determination is of no moment"); *Manning*, 234 F. Supp. 3d at 38 (agency's review of all responsive records to determine whether any reasonably segregable, non-exempt information existed, and finding that no such information exists, "combined with the

presumption that agencies comply with their duty of segregation, is sufficient to demonstrate [ ] compliance with FOIA's segregability requirement").

It is sufficient that the FBI has asserted that it completed a segregability review, concluded that no information is reasonably segregable, and explained in its categorical analysis the harms that may arise should the information be disclosed. *See Dillon v. DOJ*, 102 F. Supp. 3d 272, 298 (D.D.C. 2015) (holding that FBI satisfied its segregability obligation under FOIA by explaining that segregability was not possible for a majority of records because they were exempt from disclosure in their entirety pursuant to Exemption 7(A)); *EPIC v. DOJ*, 82 F. Supp. 3d 307, 322 (D.D.C. 2015) (holding that the government supported its determination that there was no segregable material in the investigative records withheld under Exemption 7(A)).

II. THE FBI PROPERLY REDACTED EXEMPT PORTIONS OF RECORDS RESPONSIVE TO ITEM 4 OF PLAINTIFF'S REQUEST

Plaintiff does not challenge the adequacy of the FBI's search in response to item 4 of its request. Its challenge is limited to whether the FBI adequately justified its withholding of four pages of its Foreign Intelligence Surveillance Act ("FISA") and Standard Minimization Procedures Policy Guide, and to the FBI's determination that no reasonably segregable non-exempt information existed for release. Plaintiff's only real basis for challenging these withholding is that what Plaintiff describes as "similar FISA procedures," Pl.'s Opp. at 28, have already been released to the public. As was the case with Plaintiff's challenge to the FBI's assertion of Exemption 7(A) to withhold records responsive to items 1 through 3, Plaintiff ignores the fact that an agency can make some records available for public consumption without losing the ability to withhold other documents that in any way relate, in the estimation of a particular FOIA requester, to the publicly available records. And Plaintiff's belief that the information that has been released is the same as the withheld information is, of course, purely speculative.

As set forth in the FBI's opening brief and in the First Hardy Declaration, the responsive portions of the FBI's FISA policy guide were properly classified (and thus properly withheld pursuant to Exemption 1) in order to protect intelligence activities, sources, or methods based on the determination by Mr. Hardy, an original classification authority, that unauthorized disclosure "could be expected to cause exceptionally serious damage to national security." First Hardy Decl. ¶ 64. Plaintiff does not seriously challenge this prediction of harm, which is entitled to significant deference given the serious national security concerns it identifies. *See, e.g.*, *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927 ("[W]e have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review." (citing *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980)).

What Plaintiff does contend is that the FBI's theory of harm in this case "would protect any FISA-related information from disclosure," a result which Plaintiff deems anomalous because the FBI and other agencies have made various public disclosures regarding FISA activities and procedures. *See* Pl.'s Opp. at 31-33. As discussed above however, "the fact that information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to intelligence, sources, methods, and operations." *Fitzgibbon*, 911 F.2d at 766. Indeed, the D.C. Circuit has been clear in rejecting the argument that an agency's affidavit in support of classification is undermined by "contrary evidence," and thus summary judgment improper, "in an Exemption 1 case in which the public has, or thinks it has, partial knowledge of the outlines of a classified undertaking." *Military Audit Project*, 656 F.2d at 752–53.

Regardless of whether and the extent to which the FBI (or other members of the intelligence community) have chosen to make various records related to FISA procedures publicly available, the question here is whether the FBI has carried its burden of demonstrating that the records

withheld in this case – which Plaintiff does not suggest have themselves been publicly disclosed – were properly classified. On that point, the First Hardy Declaration established proper classification, and the Second Hardy Declaration makes clear that the FBI "compared publicly disclosed information with the information protected here," and determined that the "information protected here does not match or mirror any information previously made public by the FBI through an official disclosure." Second Hardy Decl. ¶ 13. That declaration confirms that the information currently being withheld "was currently and properly classified, and also precluded from disclosure under the National Security Act of 1947 as intelligence source and method information, or is inextricably intertwined with such information and therefore not reasonably segregable." *Id.* On that judgment, the FBI is owed deference with respect to its determination as to "when to disclose information that may compromise intelligence sources and methods." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 931 (quoting *CIA v. Sims*, 471 U.S. 159, 180 (1985)).[4]

As noted in the FBI's opening brief, its withholdings under Exemption 3 are coextensive with its withholding under Exemption 1, and the Court need not reach the parties' arguments regarding Exemption 3 if it finds that the records at issue were properly classified and withheld pursuant to Exemption 1. *See* Def.'s Brief at 29. As described in the Hardy Declaration, the records are withheld under the National Security Act of 1947, 50 U.S.C. § 3024(i)(1), because they would reveal FBI intelligence sources and methods. *See* First Hardy Decl. ¶ 79. In its discussion regarding the FBI's Exemption 1 withholdings, the First Hardy Declaration described, in reasonably specific detail, the manner in which the withheld documents would reveal intelligence activities, sources, or methods. *See id.* ¶ 70 ("The Foreign Intelligence Surveillance Act (FISA) is

[4] As the FBI stated in its opening brief, it cannot provide any further explanation with respect to its Exemption 1 withholdings on the public record without revealing classified information. If necessary, the FBI can provide the Court further information in an *in camera, ex parte* submission.

an intelligence activity or method. Disclosure of procedures for how the FBI conducts surveillance under the FISA, handles FISA-derived information, and otherwise implements and utilizes the technique would reveal classified information about this intelligence activity/method, and would undermine or potentially negate the effectiveness of this very important intelligence-gathering technique, thereby risking serious harm to the national security."). Plaintiff's assertion that the FBI's justification in support of its Exemption 3 withholding "is only a single, conclusory sentence," Pl.'s Opp. at 34, ignores this explanation and the practical reality that, in cases like this one involving "national security equities," there is "generally significant overlap between the information covered by Exemption 1 and that covered by Exemption 3." *Hall v. CIA*, --- F. Supp. 3d ----, 2017 WL 3328149, at *5 (D.D.C. Aug. 3, 2017).

Moreover, Plaintiff's argument that the "widespread public disclosures of FISA minimization and other procedures by the FBI and other FISA participants," undermines the FBI's Exemption 3 claim over the records, Pl.'s Opp. at 35, merely repeats Plaintiff's prior argument with respect to Exemption 1 and is meritless for the same reasons discussed above. *See* Second Hardy Decl. ¶ 13 (stating that the FBI had reviewed the publicly available information described in Plaintiff's brief and concluded it "does not match or mirror any information previously made public by the FBI through an official disclosure," and confirming that the information is "precluded from disclosure under the National Security Act of 1947 as intelligence source and method information, or is inextricably intertwined with such information and therefore not reasonably segregable").

Plaintiff's arguments regarding segregability fail for similar reasons: the prior public disclosures of *different* records does not affect the analysis of whether the records at issue in this

case are properly classified and properly withheld under the National Security Act of 1947.[5] Because, as explained in the Hardy Declarations, the FBI adequately justified its withholding of records responsive to item 4 of Plaintiff's request, conducted a "line-by-line review" of such records, and determined that all information not released to the Plaintiff was either exempt or not reasonably segregable, *see* First Hardy Decl. ¶ 82, the FBI's segregability analysis was sufficient notwithstanding the existence of other FISA-related documents in the public sphere. As made clear in the Second Hardy Declaration, the FBI reviewed the public disclosures that Plaintiff references and determined that the records responsive to item 4 of Plaintiff's request were either exempt under Exemptions 1 and 3, or "inextricably intertwined with" information protected under those exemptions, "and therefore not reasonably segregable." Second Hardy Decl. ¶ 13. As discussed above, "[a]gencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material." *Sussman*, 494 F.3d at 1117. Given that presumption, and the FBI's declarations, the FBI has carried its burden of releasing reasonably segregable non-exempt information. *See, e.g., Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776–77 (D.C. Cir. 2002) (agency demonstrated there was no reasonably segregable non-exempt information where it submitted affidavit showing that agency had conducted line-by-line review of each document withheld in full).

[5] It is also worth noting that the claim on which Plaintiff begins its segregability argument – that the "FBI has withheld all substantive portions of the Foreign Intelligence Surveillance Act and Standard Minimization Procedures" Policy Guide, Pl.'s Opp. at 36 – is not entirely accurate. As explained in the Second Hardy Declaration, only four pages of the relevant policy manual were withheld from Plaintiff; the remainder of the manual was not produced because it was not responsive to item 4 of Plaintiff's FOIA request. Second Hardy Decl. ¶ 14.

CONCLUSION

For the foregoing reasons, and those stated in the FBI's opening brief, the FBI respectfully requests that the Court grant its motion for summary judgment and deny Plaintiff's cross-motion.

Dated: December 11, 2017

Respectfully submitted,

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