

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

_____	)	
MATTACHINE SOCIETY OF	)	
WASHINGTON D.C.	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 16-0773 (RCL)
v.	)	
	)	
UNITED STATES DEPARTEMENT	)	
OF JUSTICE,	)	
	)	
Defendant.	)	
_____		

**DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

Defendant United States Department of Justice (“Defendant”), by and through undersigned counsel, respectfully moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, as no genuine issue of material fact exists that Defendant has satisfied all of its obligations pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. §552, in response to Plaintiff Mattachine Society of Washington D.C.’s (“Plaintiff”) request for information. As demonstrated by the attached Memorandum of Points and Authorities, Defendant is entitled to judgment as a matter of law as Defendant conducted a reasonable search, and produced documents responsive to Plaintiff’s request consistent with FOIA and its applicable Exemptions.

\* \* \*

Dated: December 6, 2016,  
Washington, DC

Respectfully Submitted,

CHANNING D. PHILLIPS, D.C. Bar #415793  
United States Attorney  
for the District of Columbia

DANIEL F. VAN HORN, D.C. Bar #924092  
Civil Chief

By: /s/ Carl E. Ross  
CARL EZEKIEL ROSS, D.C. Bar #492441  
Assistant United States Attorney  
Civil Division  
555 4th Street, N.W.  
Washington, D.C. 20530  
Tel: (202) 252-2533  
Fax: (202) 252-2505

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

	)	
MATTACHINE SOCIETY OF	)	
WASHINGTON D.C.	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 16-0773 (RCL)
v.	)	
	)	
UNITED STATES DEPARTEMENT	)	
OF JUSTICE,	)	
	)	
Defendant.	)	

**DEFENDANT’S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
ITS MOTION FOR SUMMARY JUDGMENT**

Defendant United States Department of Justice (“Defendant,” the “Bureau,” or the “Agency”), by and through undersigned counsel, files this Memorandum of Points and Authorities in support of its Motion for Summary Judgment. Defendant is entitled to judgment as a matter of law with respect to Plaintiff Mattachine Society of Washington D.C.’s (“Plaintiff”) request for information pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. §552. As demonstrated below, Defendant conducted a reasonable search and produced all documents responsive to Plaintiff’s request in accordance with the FOIA and its Exemptions 1, 3, 6, 7(C), and 7(D). Defendant, accordingly, now moves for summary judgment.

**SUMMARY OF RELEVANT FACTS**

Plaintiff’s FOIA Request

Plaintiff submitted his FOIA request to the Federal Bureau of Investigation by letter dated January 25, 2013. *See* December 6, 2016 Declaration of David M. Hardy (“Hardy Decl.”), attached hereto as Ex. 1, at ¶ 5. Plaintiff’s FOIA request sought copies of “any and all internal

FBI correspondence or communications regarding Executive Order 10450 and also specifically includes, but is not limited to, all files created by and communications to or from Warren E. Burger. The date range for this request is 1950-1990.” Amended Complaint (“Amend. Compl.”) (ECF# 26) at ¶ 15.

On February 5, 2013, the FBI acknowledged receipt of Plaintiff’s FOIA request and on March 13, 2013, the FBI informed Plaintiff that it located approximately 1,585 pages potentially responsive to the subject FOIA request. *See Hardy Decl.* at ¶¶ 6 – 7. Plaintiff informed Defendant it was willing to pay the requisite search and duplication costs and on April 17, 2015, the FBI made its first interim release of records to Plaintiff.<sup>1</sup> *See id.* at ¶ 11. The FBI advised that 539 pages of records were reviewed and 253 pages of records were being released in full or part, with certain information withheld pursuant to FOIA Exemptions 3, and 7D. *Id.* The FBI also advised that it was consulting with other government agencies and referring records originating from other government agencies (“OGAs”) to those agencies for review, disclosure determinations, and a direct response to Plaintiff. *Id.*

On May 12, 2015, the FBI made its second interim release of records to Plaintiff. The FBI advised that 552 pages of records were reviewed and 169 pages of records were being released in full or part, with certain information withheld pursuant to FOIA Exemptions 6 and 7(C).<sup>2</sup> *Hardy Decl.* at ¶ 12. The FBI once again advised Plaintiff that it was consulting with

---

<sup>1</sup> While Plaintiff indicated that it was willing to pay the requisite search and duplication costs, the FBI’s June 23, 2015, “letter [] advised plaintiff to make a \$15.00 payment for duplications cost incurred for the released records; however, plaintiff failed to submit the requested payment.” *Hardy Decl.* at ¶ 15.

<sup>2</sup> The FBI inadvertently cited Privacy Act Exemption (d)(5) as a justification for withholding information within its May 12, 2015 release. No information was withheld pursuant to this Privacy Act Exemption.

other government agencies regarding the recently reviewed records and that it referred records originating from other government agencies to those agencies for review, disclosure determinations, and a direct response to Plaintiff. *Id.*

On June 23, 2015, the FBI made its third interim release of records to Plaintiff. The FBI advised that 476 pages of records were reviewed and 254 pages of records were being released in full or part, with certain information withheld pursuant to FOIA Exemptions 1, 3, 6, 7(C), and 7(D). *Id.* at ¶ 15. The FBI once again advised Plaintiff that some of the documents necessitated consulting with other government agencies and that it referred other records originating from other government agencies to those agencies for review, disclosure determinations, and a direct response to Plaintiff. *Id.*

On October 30, 2015, the FBI released additional records to Plaintiff with which it consulted another government agency.<sup>3</sup> *See Hardy Decl.* at ¶ 18. The FBI advised that 140 pages of records were reviewed and 140 pages of records were being released in full or part, with certain information withheld pursuant to FOIA Exemptions 6, 7(C), and 7(D). *Id.*

On September 6, 2016, the FBI re-released all of the processed responsive records with Exemption codes and Bates Stamps. *See id.* at ¶ 21. The FBI advised that 1602 pages of records were reviewed and 1201 pages of records were being released in full or part, with certain information withheld pursuant to FOIA Exemptions (b)(1), (b)(3), (b)(6), (b)(7)(C), and

---

<sup>3</sup> Plaintiff avers at ¶ 69 of its Amended Complaint that the FBI only released 134 pages and not the 140 claimed on the letter. The FBI replicated the release process for this production and the result was 140 pages being outputted; therefore, the FBI cannot provide an explanation other than potentially human error when the CD was prepared and sent to Plaintiff at that time. These pages were released solely as a result of coordination responses from other government agencies. Consequently, all previously released pages were re-released with Exemption codes and Bates Stamps in Defendant's September 6, 2016 production.

(b)(7)(D). *Id.*

On October 6, 2016, the FBI informed Plaintiff that a number of files had previously been sent to the National Archives and Records Administration (“NARA”). See Hardy Decl. at ¶ 34. Defendant informed Plaintiff that files 100-HQ-468120 serial 12, 140-HQ-00 serials 921, 889, 904, 884, 878, 745, 879, 886, 725, 901, 893, 919, 738x, and 100-HQ-7254 serial 1582 had all previously been sent to NARA and were no longer in Defendant’s custody and control. See *id.* Defendant also informed Plaintiff that “[f]iles 105-HQ-12189 and 140-HQ-1397 serial 3 were destroyed on July 16, 2009 and July 10, 1998 respectively.” *Id.* ¶ at 33. The “FBI conducted [second] identical CRS searches using ACS/the UNI application, a Sentinel index search, and Manual Indices search for FBIHQ to confirm its previous search results and to identify potentially responsive cross-reference records.”<sup>4</sup> *Id.* at ¶ 32. In its search for potentially responsive cross-reference files, Defendant identified the aforementioned transferred and destroyed files as “potentially responsive cross-reference files.”<sup>5</sup> *Id.*

Defendant informed Plaintiff that since neither the destroyed files nor the transferred files were reviewed, “it is not known if they are actually responsive to Plaintiff’s FOIA request.” Hardy Decl. at ¶¶ 33, 34. The FBI also advised Plaintiff that if it wished to review the previously transferred records, Plaintiff would have to contact NARA. *Id.* ¶ 34.

On April 27, 2016, Plaintiff filed its Complaint in the instant action and on September 9,

---

<sup>4</sup> “A cross-reference is defined as a mere mention of, or passing reference to, other individuals, organizations, events, or activities contained in a ‘main’ file record about a different subject matter.” Hardy Decl. at ¶ 32 n.9.

<sup>5</sup> Defendant also “determined 66-HQ-03 serial 1143 to be responsive to Plaintiff’s request” during its search for cross-reference files “and released the serial in full in [its] September 6, 2016 production.” Hardy Decl. at ¶ 32

2016, Plaintiff filed an Amended Complaint. *See* ECF #1; ECF #26. On May 10, 2016, Defendant closed Plaintiff's administrative appeals due to the instant action. *See* Hardy Decl. at ¶ 20. Defendant now seeks summary judgment on Plaintiff's FOIA request.

## **ARGUMENT**

### **I. Standard of Review**

#### **a. Summary Judgment Generally**

Where no genuine dispute exists as to any material fact, summary judgment is required. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A genuine issue of material fact is one that would change the outcome of the litigation. *See id.* "The burden on the moving party may be discharged by 'showing' – that is, pointing out to the [Court] – that there is an absence of evidence to support the non-moving party's case." *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, 1563 (Fed. Cir. 1987) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). Once the moving party has met its burden, the non-movant may not rest on mere allegations, but must instead proffer specific facts showing that a genuine issue exists for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Thus, to avoid summary judgment here, Plaintiff must present some objective evidence that would enable the Court to find he is entitled to relief. In *Celotex Corp. v. Catrett*, the Supreme Court held that, in responding to a proper motion for summary judgment, the party who bears the burden of proof on an issue at trial must "make a sufficient showing on an essential element of [his] case" to establish a genuine dispute. 477 U.S. 317, 322-23 (1986). In *Anderson*, the Supreme Court further explained that "the mere existence of a scintilla of evidence in support of the Plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the Plaintiff." *Anderson*, 477 U.S. at 252; *see also Laningham v. Navy*, 813 F.2d 1236, 1242

(D.C. Cir. 1987) (establishing that the non-moving party is “required to provide evidence that would permit a reasonable jury to find” in its favor). In *Celotex*, the Supreme Court further instructed that the “[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’” 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

**b. Summary Judgment in FOIA Cases**

The summary judgment standards set forth above also apply to FOIA cases, which “typically and appropriately are decided on motions for summary judgment.” *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009). In a FOIA suit, an agency is entitled to summary judgment once it demonstrates that no material facts are in dispute when viewing the facts in the light most favorable to the non-moving party. *See Founding Church of Scientology of Washington, D. C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 836 (D.C. Cir. 1979). The moving party must show that each document that falls within the class requested either has been produced, not withheld, is unidentifiable, or is exempt from disclosure. *See Exxon Corp. v. F. T. C.*, 663 F.2d 120, 126 (D.C. Cir. 1980) (holding that an index of documents and two affidavits describing the search as well as which documents were produced and which were exempt was sufficient for the Commission to prevail on a summary judgment motion).

An agency satisfies the summary judgment requirements in a FOIA case by providing the Court and the Plaintiff with affidavits or declarations and other evidence which show that the documents in question were produced or are exempt from disclosure. *See Goland v. Cent. Intelligence Agency*, 607 F.2d 339, 353 (D.C. Cir. 1978) (holding that an affidavit that provides “detailed descriptions of the searches undertaken, and a detailed explanation of why further

searches would be unreasonably burdensome” is sufficient for the Agency to win on a motion for summary judgment); *McGehee v. C.I.A.*, 697 F.2d 1095, 1102 (D.C. Cir. 1983) (affirming that the district court may “rely upon affidavits submitted by the agency, describing its search procedures and explaining why a more thorough investigation would have been unduly burdensome”); *Trans Union LLC v. FTC*, 141 F. Supp. 2d 62, 67 (D.D.C. 2001) (reiterating that summary judgment in FOIA cases may be awarded solely on the basis of agency affidavits “when the affidavits describe ‘the documents and the justifications for non-disclosure 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 *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)).

With respect to an agency’s non-disclosure decisions in a FOIA action, the court may rely on affidavits or declarations if 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.” *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981); *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (affidavits and declarations are “accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents”).

“Ultimately, an agency’s justification for invoking a FOIA exemption is sufficient if it appears ‘logical’ or ‘plausible.’” *Larson v. Dep’t of State*, 565 F.3d 857, 862 (D.C. Cir. 2009) (quoting *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007)). In assessing the logic and plausibility of an agency assertion of an exemption, “reviewing courts [should] respect the

expertise of an agency” and avoid “overstep[ping] the proper limits of the judicial role in FOIA review.” *Hayden v. NSA*, 608 F.2d 1381, 1388 (D.C. Cir. 1979).

## **II. The Agency Properly Conducted its Search for Relevant Documents**

“The standard for determining whether a search was adequate depends on the adequacy of the search for documents, not whether additional potentially responsive documents exist.” *Lardner v. F.B.I.*, 875 F. Supp. 2d 49, 55 (D.D.C. 2012) (quoting *Steinberg v. Dep’t of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994)). In the context of agency responses to FOIA requests, “[a]n adequate search consists of a good faith, reasonable search of those systems of records likely to possess the requested information.” *Id.* (citing *Oglesby v. Dep’t of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). Indeed, the adequacy of a search for records requested is “determined not by the fruits of the search, but by the appropriateness of its methods.” *Hodge v. F.B.I.*, 703 F.3d 575, 579 (D.C. Cir. 2013) (quoting *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C.Cir.2003)). Accordingly, the Agency’s affidavits need not “set forth with meticulous documentation the details of an epic search for the requested records,” but “affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA.” *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982).

The Hardy Declaration and accompanying exhibits provide detailed descriptions of the searches conducted on the FBI’s computer system, other locations searched, and details regarding the methodology used to conduct the searches. The Hardy Declaration also demonstrates that Defendant went further and conducted a second search for cross-reference files to determine if additional responsive documents, not netted in Defendant’s original search, exist.

The information provided by Defendant demonstrates an adequate search was conducted and that Defendant is entitled to summary judgment.

First, the Bureau conducted an adequate search by searching for records through its CRS and ACS systems. “The Central Records System (‘CRS’) is an extensive system of records consisting of applicant, investigative, intelligence, personnel, administrative, and general files compiled and maintained by the FBI in the course of fulfilling its integrated missions and functions as a law enforcement, counterterrorism, and intelligence agency to include performance of administrative and personnel functions. The CRS spans the entire FBI organization and encompasses the records of FBI Headquarters (‘FBIHQ’), FBI Field Offices, and FBI Legal Attaché Offices (‘Legats’) worldwide.” Hardy Decl. at ¶ 23.

“The general indices to the CRS are the index or ‘key’ to locating records within the enormous amount of information contained in the CRS. The CRS is indexed in a manner which meets the FBI’s investigative needs and priorities, and allows FBI personnel to reasonably and adequately locate pertinent files in the performance of their law enforcement duties. The general indices are arranged in alphabetical order and comprise an index on a variety of subject matters to include individuals, organizations, events, or other subjects of investigative interest that are indexed for future retrieval. The entries in the general indices fall into two category types:

- a. Main entry. This entry pertains to records indexed to the main subject(s) of a file, known as ‘main file’ records. The ‘main’ entry carries the name of an individual, organization, or other subject matter that is the designated subject of the file.
- b. Reference entry. This entry, or a ‘cross-reference,’ pertains to records that merely mention or reference an individual, organization, or other subject matter that is contained in a ‘main’ file record about a different subject matter.”

*Id.* at ¶ 25.

“FBI employees may index information in the CRS by individual (persons), by organization (organizational entities, places, and things), and by event (*e.g.*, a terrorist attack or bank robbery). Indexing information in the CRS is based on operational necessity, and the FBI only indexes that information considered relevant and necessary for future retrieval.

Accordingly, the FBI does not index every individual name or other subject matter in the general indices.” Hardy Decl. at ¶ 26.

“Automated Case Support (‘ACS’) is an electronic, integrated case management system that became effective for FBIHQ and all FBI Field Offices and Legats on October 1, 1995. As part of the ACS implementation process, over 105 million CRS records were converted from automated systems previously utilized by the FBI into a single, consolidated case management system accessible by all FBI offices. ACS has an operational purpose and design to enable the FBI to locate, retrieve, and maintain information in its files in the performance of its myriad missions and functions.<sup>6</sup>” Hardy Decl. at ¶ 27.

“The Universal Index (‘UNI’) is the automated index of the CRS and provides all offices of the FBI a centralized, electronic means of indexing pertinent investigative information to FBI files for future retrieval via index searching. Individual names may be recorded with applicable identifying information such as date of birth, race, sex, locality, Social Security Number, address, and/or date of an event.” *Id.* at ¶ 28. “Moreover, ACS implementation built upon and incorporated prior automated FBI indices; therefore, a search employing the UNI application of

---

<sup>6</sup> ACS and the next generation Sentinel system are relied upon by the FBI daily to fulfill essential functions such as conducting criminal, counterterrorism, and national security investigations; background investigations; citizenship and employment queries, and security screening, to include Presidential protection.

ACS encompasses data that was already indexed into the prior automated systems superseded by ACS. As such, a UNI index search in ACS is capable of locating FBI records created before its 1995 FBI-wide implementation to the present day in both paper and electronic format.<sup>7</sup> Currently, UNI consists of approximately 114.3 million searchable records and is updated daily with newly indexed material.” *Id.*

Finally, “Sentinel is the FBI’s next generation case management system that became effective FBI-wide on July 1, 2012. Sentinel provides a web-based interface to FBI users, and it includes the same automated applications that are utilized in ACS. After July 1, 2012, all FBI generated records are created electronically in case files via Sentinel; however, Sentinel did not replace ACS and its relevance as an important FBI search mechanism.” Hardy Decl. at ¶ 29. “Just as pertinent information was indexed into UNI for records generated in ACS before July 1, 2012, when a record is generated in Sentinel, information is indexed for future retrieval. Moreover, there is an index data sharing nexus between the Sentinel and ACS systems whereby components of information indexed into Sentinel are also replicated or ‘backfilled’ into ACS. In sum, the Sentinel case management system builds on ACS and shares its operational purpose; Sentinel provides another portal to locate information within the vast CRS for FBI records generated on or after July 1, 2012.” *Id.*

---

<sup>7</sup> Older CRS records that were not indexed into UNI as a result of the 1995 ACS consolidation remain searchable by manual review of index cards, known as the “manual indices.” A search of the manual indices is triggered for requests on individuals if the person was born on or before January 1, 1958; and for requests seeking information about organizations or events on or before January 1, 1973. Records created after these dates would be captured through a UNI search.

### III. Defendant's Search in the Instant Case

In the instant case Defendant searched for documents in the CRS, UNI, ACS, and Sentinel systems. Indeed, in direct response to Plaintiff's request, Defendant "conducted a CRS index search for responsive records employing the UNI application of ACS and although the date range of requested material was prior to the July 1, 2012 implementation of Sentinel, also conducted a Sentinel index search." Hardy Decl. at ¶ 31. Accordingly, while the date range requested by Plaintiff was for records between 1950 and 1990, Defendant extended its search to records created up through the date of the search. *See id*; Complaint at ¶ 15 ("The date range for this request is 1950 – 1990.").

Defendant's search of CRS, and its accompanying databases was "reasonably calculated to locate records responsive to Plaintiff's request." Hardy Decl. at ¶ 35. Indeed, "given its comprehensive nature and scope, the CRS is the principal records system searched by [Defendant], to locate information responsive to most FOIA requests, because the CRS is where the FBI indexes information about individuals, organizations, events, and other subjects of investigative interest for future retrieval. Second, given Plaintiff's request seeking information about copies of all communications, personnel or investigative files created in association with Executive Order 10450, including any and all internal FBI correspondence or communications regarding Executive Order 10450, and also specifically includes, but is not limited to, all files created by and communications to or from Warren E. Burger with date range 1950-1990, such information would reasonably be expected to be located in the CRS via the index search methodology." *Id.* Despite the comprehensive nature of its CRS search, Defendant also

conducted a search of its manual indices to determine if any additional responsive records existed that were not captured in its electronic search.<sup>8</sup> *See* Hardy Decl. at ¶ 31.

In an attempt to ensure a broad search for responsive records, the FBI searched the terms “Executive Order 10450”, “Sex Deviate”, and “Sex Deviate Program”. *Id.* The FBI’s search included a string<sup>9</sup> breakdown of the search term variations and ensured that the search included records from all FBI’s Field offices. *Id.* Defendant determined main file 66-HQ-A19000 to be responsive to Plaintiff’s request and then “carefully reviewed the responsive material, processed the records, and released all non-exempt portions of information from those records to Plaintiff by letters dated April, 17, 2015, May 12, 2015, June 23, 2015, October 30, 2015, and September 6, 2016.” *Id.*

In an attempt to be as thorough as possible, Defendant duplicated its search efforts a second time to ensure that no documents were missed and to allow for a search of any cross-reference files, which may contain responsive material even if that material was not in places where responsive material would likely be kept. Indeed in 2016, “the FBI conducted identical CRS searches using ACS/the UNI application, a Sentinel index search, and Manual Indices search for FBIHQ to confirm its previous search results and to identify potentially responsive

---

<sup>8</sup> In addition to the CRS Index search, the FBI conducts a Manual Indices search of FBIHQ files when the request is for records concerning an individual born before January 1, 1958 or an organization requested prior to that date range. This insures that any records created prior to the implementation of ACS are also captured in the FBI’s search efforts. Since Plaintiff requested a date range of 1950-1990, the FBI conducted a search of the Manual Indices for FBIHQ in addition to the CRS search using ACS and Sentinel. The FBI located records during the manual indices search, the ACS search and Sentinel search.

<sup>9</sup> A string (“ST”) search is a search of all names and/or terms whose starting characters match the characters typed into the name field; such a search will automatically capture variations of the names and/or terms searched.

cross-reference records.”<sup>10</sup> Hardy Decl. at ¶ 32. Defendant identified “potentially responsive cross-reference files [as] 100-HQ-468120 serial 12, 140-HQ-00 serials 921, 889, 904, 884, 878, 745, 879, 886, 725, 901, 893, 919, 738x, 140-HQ-1397 serial 3, 100-HQ-7254 serial 1582, 105-HQ-12189, and 66-HQ-03 serial 1143 in [its second] search.” *Id.* Defendant “determined 66-HQ-03 serial 1143 to be responsive to Plaintiff’s request and released the serial in full in the September 6, 2016 production.” *Id.*

With respect to the remaining cross reference files, Defendant determined that they were no longer in the FBI’s possession and control. Defendant determined that “Files 105-HQ-12189 and 140-HQ-1397 serial 3 were destroyed on July 16, 2009 and July 10, 1998 respectively.” Hardy Decl. at ¶ 33. Defendant also determined that Files 100-HQ-468120 serial 12, 140-HQ-00 serials 921, 889, 904, 884, 878, 745, 879, 886, 725, 901, 893, 919, 738x, and 100-HQ-7254 serial 1582 were no longer in the FBI’s possession and indeed had been sent to NARA. *Id.* at ¶ 34.

Defendant informed Plaintiff of the cross-reference files no longer in its possession on October 6, 2016 thus fulfilling its FOIA obligations with respect to those files. *Id.*; *DiBacco v. U.S. Army*, 795 F.3d 178, 192, (D.C. Cir. 2015) (“FOIA generally obligates covered agencies to disclose their records, unless they are exempted. But ‘possession or control is a prerequisite to FOIA disclosure duties[.]’ *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 152, 100 S.Ct. 960, 63 L.Ed.2d 267 (1980). Accordingly, when an agency does not possess or control the records a requester seeks, the agency’s non-disclosure does not violate FOIA

---

<sup>10</sup> A cross-reference is defined as a mere mention of, or passing reference to, other individuals, organizations, events, or activities contained in a “main” file record about a different subject matter.

because it has not ‘withheld’ anything. *Id.* at 150, 100 S.Ct. 960. ‘[A]n agency has no duty to retrieve and release documents it once possessed but that it *legitimately* disposed of *prior* to the date a FOIA request was received.’ *Chambers v. Department of Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009) (quoting *McGehee v. CIA*, 697 F.2d 1095, 1103 n. 33 (D.C. Cir. 1983))”.

Since, however, “these records were not reviewed, it is not known if they are actually responsive to Plaintiff’s FOIA request.” Hardy Decl. at ¶¶ 33 – 34. Defendant, accordingly, fulfilled its FOIA obligations and conducted a reasonable search.

The fact that the FBI did not locate as many documents as Plaintiff anticipated does not render its search inadequate. *See Hodge v. F.B.I.*, 703 F.3d 575, 579 (D.C. Cir. 2013) (the adequacy of a search for records requested is “determined not by the fruits of the search, but by the appropriateness of its methods.”). Defendant conducted a thorough search of the places where responsive information was most likely to be kept, and in doing so, fulfilled its FOIA obligations. *See Lardner v. F.B.I.*, 875 F. Supp. 2d at 55 (“An adequate search consists of a good faith, reasonable search of those systems of records likely to possess the requested information.”).

Indeed, Plaintiff’s challenge to the adequacy of Defendant’s search appears to be a thinly veiled challenge to the FBI’s document retention policy. The Supreme Court, however, has explained that FOIA “does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained.” *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980); *Piper v. United States Dep’t of Justice*, 294 F.Supp.2d 16, 22 (D.D.C.2003) (noting that “FOIA does not impose a document retention requirement on government agencies”); *Assassination Archives & Research Ctr., Inc. v. Cent. Intelligence Agency*, 720 F.Supp. 217, 219 (D.D.C.1989) (“[A]gencies are not required to

maintain their records or perform searches which are not compatible with their own document retrieval systems.”) (citation omitted). Accordingly, Plaintiff’s challenge is without merit.

Finally, the fact that a document may have existed at some time in the past, does not imply that the agency conducted an inadequate search. Defendant identified more than 1600 pages of potentially responsive records, released more than 1200 pages of records in full or part, and identified an additional seventeen (17) data files that may have responsive records but are no longer in the Agencies possession and control because they were either sent to NARA or destroyed decades ago. *See Hardy Decl.* at ¶¶ 21, 33 – 34. Plaintiff’s argument that Defendant’s search is inadequate because there *should* be additional documents from a 60-year old program currently in Defendant’s possession and control is without support. *See Goland v. Cent. Intelligence Agency*, 607 F.2d 339, 365 (D.C. Cir. 1978) (holding there was no reason to believe that documents created thirty years prior were still in the CIA’s possession, “unless there were some reason to believe that the supposed documents could be located without an unreasonably burdensome search”). Plaintiff is unable to proffer any evidence that Defendant’s search was unreasonable and Defendant, therefore, requests that the Court grant its motion for summary judgment.

#### **IV. Defendants’ Exemptions**

Defendant properly applied their exemptions to withhold information responsive to Plaintiffs’ FOIA requests. FOIA “recognizes limitations that compete with the general interest in disclosure, and that, in appropriate cases, can overcome it.” *Nat’l Archive & Records Admin. V. Favish*, 541 U.S. 157, 172 (2004). “Thus, while ‘disclosure, not secrecy, is the dominant objective of FOIA,’ there are [nine] exemptions from the statute’s broad reach[.]” *U.S. Dep’t of Def. v. FLRA*, 510 U.S. 487, 494 (1994) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361

(1976). “These exemptions stem from Congress’s recognition that the release of certain information may harm legitimate governmental or private interests.” *Summers v. DOJ*, 140 F.3d 1077, 1080 (D.C. Cir. 1998). “Ultimately, an agency’s justification for invoking a FOIA exemption is sufficient if it appears ‘logical’ or ‘plausible.’” *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982)). In the instant case, Defendant properly applied FOIA exemptions in a logical and plausible manner and Defendant now requests summary judgment.

A. Exemptions under (b)(1)

Exemption 1 permits the government to withhold information “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy” if that information has been “properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1). Because courts “lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case,” *Krikorian v. Dep’t of State*, 984 F.2d 461, 464 (D.C. Cir.1993), they “must accord substantial weight to an agency’s affidavit concerning the details of the classified status of the disputed record.” *Wolf v. C.I.A.*, 473 F.3d 370, 374 (D.C. Cir. 2007) (quotations omitted); *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984); *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981);

For information to be properly classified, and thus properly withheld from disclosure pursuant to Exemption 1, the information must meet the requirements set forth in E.O. 13,526 § 1.1(a):

- (1) an original classification authority must have classified the information;
- (2) the information must be owned by, produced by or for, or be under the control of the United States Government;

- (3) the information must fall within one or more of the categories of information listed E.O. 13,526 § 1.4; and
- (4) the original classification authority must determine that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority must be able to identify or describe the damage

*See Hardy Decl.* at ¶ 42. In addition to these substantive requirements, E.O. 13,526 sets forth certain procedural and administrative requirements that must be followed before information can be considered to be properly classified. Those requirements include the following:

- (1) Each document must be marked as required and stamped with the proper classification designation.
- (2) Each document must be marked to indicate clearly which portions are classified and which portions are exempt from declassification as set forth in E.O. 13,526 § 1.5(b).
- (3) The prohibitions and limitations on classification specified in E.O. 13,526 § 1.7 were adhered to.
- (4) The declassification policies set forth in E.O. 13,526 §§ 3.1 and 3.3 were followed.
- (5) Any reasonably segregable portion of the classified documents that did not meet the standards for classification under E.O. 13,526 were declassified and marked for release, unless withholding was otherwise warranted under applicable law.

*See Hardy Decl.* at ¶ 43.

In the instant case, Defendant's declarant, Mr. Hardy "personally and independently examined the information withheld from Plaintiff pursuant to FOIA Exemption 1 and determined that it is currently and properly classified pursuant to E.O. 13,526." *Id.* at ¶ 45. Mr. Hardy "determined that the classified information protected by the FBI in this case is owned by, was produced by or for, and is under the control of the U.S. Government, and that it was classified by

an original classification authority. I further determined that while the information at issue is over 25 years old, it is exempt from automatic declassification, and continues to warrant classification at the ‘Confidential’ level (as marked on the documents) to protect ‘the identity of a confidential human source, a human intelligence source, a relationship with an intelligence or security service of a foreign government or international organization, or a non-human intelligence source; or impair the effectiveness of an intelligence method currently in use, or under development’ pursuant to E.O. 13,526 § 3.3(b)(1); ;information, including foreign government information, which would cause serious harm to relations between the United States and a foreign government, or to ongoing diplomatic activities of the United States” pursuant to E.O. 13,526 § 3.3(b)(6).”<sup>11</sup> *Id.* at ¶ 46.

Mr. Hardy further explained that the information in question “was not examined in isolation. Instead, each piece of information was evaluated with careful consideration given to the impact that disclosure of this information will have on other sensitive information contained elsewhere in the United States intelligence community’s files. Equal consideration was given to the impact that other information either in the public domain or likely known or suspected by present or potential adversaries of the United States would have upon the information I examined.” Hardy Decl. at ¶ 47.

Finally, “[i]n those instances where, in [Mr. Hardy’s] judgment, the disclosure of this information could reasonably be expected to cause damage to national security, and its withholding outweighed the benefit of disclosure, [Mr. Hardy] exercised [his] prerogative as an

---

<sup>11</sup> Defendant used Exemption 1 to protect classified information located on the following Bates pages: FBI-1268-1269. The FBI also relied on FOIA Exemption 3 to protect the information in these records.

original classification authority and designated that information as classified in the interest of national security at the “Confidential” level, and invoked FOIA Exemption 1 to prevent disclosure. The explanations set forth justifying the FBI’s withholding of classified information were prepared with the intent that they be read with consideration given to the context in which the classified information is found. This context includes not only the surrounding unclassified information, but also other information already in the public domain, as well as information likely known or suspected by hostile intelligence entities. It is my judgment that any greater specificity in the descriptions and justifications set forth with respect to information relating to foreign government relations or foreign activities and intelligence sources and methods of the United States could reasonably be expected to jeopardize the national security of the United States.” *Id.* at ¶ 48.

Defendant, accordingly, properly exercised its authority and asserted Exemption 1 to protect classified information. *See Wolf*, 473 F.3d at 375 – 77 (upholding CIA’s assertion of Exemption 1 to protect source information); *American Civil Liberties Union v. U.S. Dept. of Defense*, 628 F.3d 612, 618 (D.C. Cir. 2011) (citing *Krikorian* and *Wolf* for the proposition that “we must accord substantial weight to an agency’s affidavit concerning the details of the classified status of the disputed record.”) (internal citations and quotations omitted). Defendant is, accordingly, entitled to summary judgment.

B. Exemptions under (b)(3)

Defendant also properly withheld information under Exemption 3. Exemption 3 proclaims that material will “be deemed ‘specifically exempted from disclosure by statute’ [] if the ‘statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.’” *American Jewish Congress v. Kreps*, 574 F.2d 624

(D.C. Cir. 1978) (quoting the Government in the Sunshine Act, 5 U.S.C. § 552(b)(3) (1976)).

The D.C. Circuit has explained that the breadth and reach of the disclosure prohibition need not be found on the face of the statute, but that the statute must at least “explicitly deal with public disclosure.” *Reports Comm. for Freedom of the Press v DOJ*, 816 F.2d 730, 735 – 36 (D.C. Cir. 1987); *see also id.* at 735 n.5 (noting that “it may be proper to give deference to an agency’s interpretation of what matters are covered by a statute, once the court is satisfied that the statute is in fact an Exemption 3 withholding statute, i.e., that it meets both the threshold test and one prong of the proviso.”).

Finally, once an Agency establishes that a statute is a nondisclosure statute and that it meets at least one of the two subparts of Exemption 3, an agency next must establish that the records in question fall within the withholding provision of the nondisclosure statute. *See CIA v. Sims*, 471 U.S. 159, 167 (1985) (to constitute proper withholding under Exemption 3, the statute must qualify as a proper Exemption 3 statute by meeting the requirements of subpart (A) or subpart (B) and the records in question must fall within the statute’s scope). In the instant case, Defendant asserted Exemption 3 to protect Federal Grand Jury information and information protected under the National Security Act of 1947. Defendant is, accordingly, entitled to summary judgment.

First, Defendant asserted Exemption 3 to protect Federal Grand Jury Information pursuant to Federal Rule of Criminal Procedure 6(e). With respect to grand jury information, the D.C. Circuit has “recognized that ‘requests for documents related to grand jury investigations implicate FOIA’s third exemption.’” *Murphy v. Executive Office for U.S. Attorneys*, 789 F.3d 204, 206, 416 (D.C. Cir. 2015) (quoting *Lopez v. DOJ*, 393 F.3d 1345, 1349 (D.C.Cir.2005)). “Rule 6(e) of the Federal Rules of Criminal Procedure prohibits certain persons designated

therein (including government attorneys) from ‘disclos[ing] a matter occurring before the grand jury,’ Fed.R.Crim.P. 6(e)(2)(B), and, although a rule is not generally considered to be a statute, it qualifies as one under FOIA because the Congress has enacted it into positive law.” *Id.* (citing *Fund for Constitutional Gov't v. Nat'l Archives and Records Serv.*, 656 F.2d 856, 867–68 (D.C. Cir. 1981) (citing Pub.L. No. 95–78, § 2(a), 91 Stat. 319 (1977))). Hence, information related to a grand jury matter may be withheld under Exemption 3 “if the disclosed material would tend to reveal some secret aspect of the grand jury’s investigation, including the identities of witnesses.” *Hodge v. FBI*, 703 F.3d 575, 580 (D.C. Cir. 2013)

In the instant case, some of “[t]he records responsive to Plaintiff’s request reflect that one or more federal grand juries were empaneled before United States Senate Internal Security Subcommittees, and information in the files responsive to Plaintiff’s request reveals matters occurring before the grand jury/juries.” Hardy Decl. at ¶ 50. “Specifically, the investigative files contain information about the names of individuals appearing before federal grand juries, and information identifying specific reasons why they appeared before a federal grand jury.” *Id.* “Any disclosure of this information would clearly violate the secrecy of the grand jury proceedings and could reveal the inner workings of a federal grand jury, and thus, the FBI is precluded from disclosing it. Accordingly, the FBI has withheld this information pursuant to Exemption 3, in conjunction with Rule 6(e).”<sup>12</sup> *Id.*

Defendant also asserted Exemption 3 to protect information pursuant to Section 102A(i)(1) of the National Security Act of 1947 (“NSA”), as amended by the Intelligence

---

<sup>12</sup> Grand Jury withheld under Exemption 3 is located on the following Bates pages: FBI-815-816, 824, 826.

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.”<sup>13</sup> Hardy Decl. at ¶ 51; *see also Goland v. Central Intelligence Agency*, 607 F.2d 339, 364 (D.C. Cir. 1978) (upholding assertion of Exemption 3 pursuant to the NSA and explaining that the NSA “specifically require[s] that ‘intelligence sources and methods’ be kept secret.”). On its face, this federal statute leaves no discretion to agencies about withholding from the public information about intelligence sources and methods. *See* 50 U.S.C. § 3024(i)(1). 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, 167 – 68 (1985) (“Section 102(d)(3) of the National Security Act of 1947, which calls for the Director of Central Intelligence to protect ‘intelligence sources and methods,’ clearly ‘refers to particular types of matters,’ 5 U.S.C. § 552(b)(3)(B), and thus qualifies as a withholding statute under Exemption 3. The ‘plain meaning’ of the relevant statutory provisions is sufficient to resolve the question, *see, e.g., Garcia v. United States*, 469 U.S. 70, 75, 105 S.Ct. 479, 483, 83 L.Ed.2d 472 (1984); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 798, 104 S.Ct. 1488, 1492, 79 L.Ed.2d 814 (1984). Moreover, the legislative history of the FOIA confirms that Congress intended § 102(d)(3) to be a withholding statute under Exemption 3. Indeed, this is the uniform view among other federal courts.”).

In the instant case Mr. Hardy has explained that “[g]iven the plain Congressional mandate to protect the [Intelligence Community’s] sources and methods of gathering

---

<sup>13</sup> Section 102A(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).

intelligence, the FBI has determined that intelligence sources and methods would be revealed if any of the withheld information is disclosed to plaintiff. Therefore, the FBI is prohibited from disclosing such information under § 3024 (i)(1).”<sup>14</sup> Hardy Decl. at ¶ 53. Finally, Mr. Hardy explains that “the FBI is asserting Exemption 3 in this case, in conjunction with Exemption 1 to protect information relating to foreign government relations or foreign activities and intelligence sources and methods of the United States. In these instances, information would also reveal classified intelligence sources and methods protected by Exemption 1. Notably, § 3024 (i)(1) protects sources and methods regardless of whether they are classified. *See Sims*, 471 U.S. at 176. Accordingly, the FBI has withheld this information pursuant to Exemption 3, in conjunction with § 3024 (i)(1).”<sup>15</sup> *Id.* at ¶ 54.

C. Exemptions under (b)(6) and (b)(7)(C)

Defendant properly withheld the names and / or identifying information of third parties merely mentioned, the names of non-FBI Federal Government personnel, the names and/or identifying information of third parties who provided information, and the names of FBI special agents to prevent disclosure that would constitute an unwarranted invasion of personal privacy in compliance with FOIA exemptions (b)(6) and (b)(7)(C).

---

<sup>14</sup> “Although § 3024 (i)(1) does not impose a requirement to articulate harm, disclosure of this information presents a bona fide opportunity for individuals to develop and implement countermeasures, resulting in the loss of significant intelligence information, sources, and methods relied upon by national policymakers and the IC to safeguard national security.” Hardy Decl. at ¶ 53 n.18.

<sup>15</sup> Exemption 3 information withheld pursuant to the NSA is located on the following Bates pages: FBI-1268-1269. The FBI also relied upon Exemption 1 to protect this information.

1. Exemption (b)(6)

FOIA Exemption 6 protects from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). The term “similar files” has been interpreted “to cover detailed Government records on an individual which can be identified as applying to that individual.” *See U.S. Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982). “The information in the file ‘need not be intimate’ for the file to satisfy the standard, and the threshold for determining whether information applies to a particular individual is minimal.” *Milton v. DOJ*, 783 F.Supp.2d 55, 58 (D.D.C. 2011) (quoting *N.Y. Times Co., v. NASA*, 920 F.2d 1002, 1006 (D.C. Cir. 1990)).

“Once this threshold determination is met, a court next inquires whether disclosure would compromise a ‘substantial’ privacy interest because FOIA requires the release of information ‘if no significant privacy interest is implicated.’” *Ayuda Inc. v. Federal Trade Commission*, 70 F.Supp.3d 247, 264 (D.D.C. 2014) (quoting *Multi Ag Media LLC v. U.S. Dep’t of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008)). “This standard, however, ‘means less than it might seem,’ as a substantial privacy interest is ‘anything greater than a *de minimis* privacy interest.’ If a substantial privacy interest exists, a court next tests whether release of such information would constitute a ‘clearly unwarranted invasion of personal privacy,’ by balancing ‘the privacy interest that would be compromised by disclosure against any public interest in the requested information.’” *Id.* (internal citations omitted).

2. Exemptions under (b)(7)(C)

FOIA Exemption 7(C) protects from disclosure information in law enforcement records that “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C). “Though Exemptions 6 and 7(C) both require agencies and reviewing

courts to undertake the same weighing of interests, the balance under Exemption 7(C) ‘tilts more strongly toward nondisclosure’ because its “privacy language is broader than the comparable language in Exemption 6[.]” *Ayuda Inc.*, 70 F.Supp.3d at 272 – 73 (quoting *DOJ v. Reporters Com. for the Freedom of Press*, 489 U.S. 749, 756 (1989)). “The Supreme Court has explained that these phrasing differences reflect Congress’s choice to provide ‘greater protection’ to law enforcement materials than to ‘personnel, medical, and other similar files.’ Thus, the D.C. Circuit consistently has held that Exemption 7(C) ‘establishes a lower bar for withholding material [than Exemption 6].” *Id* at 273 (quoting *ACLU v. DOJ*, 655 F.3d 1, 6 (D.C. Cir. 2011)) (internal citations omitted).

In the instant case, the records for which Defendant asserts Exemptions 6 and 7(C) were compiled for law enforcement purposes. “Pursuant to 28 USC §§ 533, 534, and Executive Order 12333 as implemented by the Attorney General’s Guidelines for Domestic FBI Operations (“AGG-DOM”) and 28 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 national security, and further the foreign intelligence objectives of the United States, and to conduct personnel investigations requisite to the work of the Department of Justice and whenever required by statute or otherwise. Under this investigative authority, the responsive records herein were compiled for the following specific law enforcement purpose.” Hardy Decl. at ¶ 55.

In the instant case, “the pertinent records were compiled and/or created in furtherance of FBI’s authority to conduct personnel background checks concerning applicants and employees under federal personnel security programs. To accomplish its law enforcement, national

security, and intelligence missions effectively, the FBI must ensure the appropriate character of FBI employees, applicants, and at times, other government agency personnel when required by statute or otherwise by conducting suitability investigations (i.e. background/personnel checks).” *Id.* at ¶ 56. Accordingly, these records “squarely fall within the law enforcement duties of the FBI” and “were compiled for a law enforcement purpose.” *Id.* at ¶ 57; *see Gosen v. United States Citizenship and Immigration Services*, 75 F.Supp.3d 279, 288–90 (D.D.C. 2014) (upholding assertion of Exemption 7(C) to withhold information from background checks despite the fact that, unlike the FBI, the United States Citizenship and Immigration Services does not have an express law enforcement mandate).

**Names and/or Identifying Information of Third Parties Merely Mentioned**

Defendant asserts Exemptions 6 and 7(C) to protect the names and identifying information of third parties merely mentioned. Mr. Hardy has explained that the “FBI has information about these third-parties in its files because these individuals were related either directly or indirectly with the subjects of suitability investigations for sensitive positions within the government pursuant to Executive Order 10450.” Hardy Decl. at ¶ 61. “These individuals were not of investigative interest to the FBI,” and “[d]espite the age of the documents, these third-parties maintain substantial and legitimate privacy interests in avoiding disclosure of this information and thereby being connected with a criminal investigation.” *Id.* “Disclosure of these third-parties’ names and/or identifying information in connection with an FBI investigation carries an extremely negative connotation. Disclosure of their identities would subject these individuals to possible harassment or criticism and focus derogatory inferences and suspicion on them.” *Id.* Accordingly, Defendant properly applied exemptions 6 and 7(C) to protect these individual’s privacy interest.

Furthermore, the FBI “considered whether there was any public interest that would override these privacy interests, and concluded that disclosing information about individuals merely mentioned in an FBI file would not significantly increase the public’s understanding of the operations and activities of the FBI. Accordingly, the FBI properly protected these individuals’ privacy interests pursuant to FOIA Exemptions (b)(6) and (b)(7)(C).”<sup>16</sup> *Id.*

### **Names of Non-FBI Federal Government Personnel**

Defendant also asserted Exemptions 6 and 7(C) to protect the names and identifying information of non-FBI federal government personnel mentioned in records responsive to Plaintiff’s request. “Specifically, the FBI protected the names of Departments of the Air Force, Army, Navy, General Services Administration, Government Printing Office, and Veterans Administration personnel.” Hardy Decl. at ¶ 62. Mr. Hardy explains that the “rationale for protecting non-FBI federal employees is the same as that for FBI employees” and that “[d]espite the age of the documents, disclosure of their identities and identifying information could subject these personnel, to unauthorized inquiries and harassment and would constitute a clearly unwarranted invasion of their personal privacy.” *Id.* “In balancing the legitimate privacy interest of these individuals against any public interest in disclosure, the FBI determined that there is a complete lack of bona fide public interest in this information because its disclosure will not shed light on the operations and activities of the federal government. Accordingly, the FBI has concluded that the disclosure of this information would ‘constitute a clearly unwarranted’

---

<sup>16</sup> The names and identifying information of third parties merely mentioned protected by Exemptions 6 and 7(C) is located on the following Bates pages: FBI-940, 952, 962, 972, 975-976, 980, 988, 991, 994-995, 998-999, 1003, 1007-1008, 1019, 1026, 1029-1030, 1032, 1041-1042, 1051, 1054, 1214.

and ‘unwarranted invasion of their personal privacy.’” *Id.* Accordingly, Defendant properly asserted Exemptions 6 and 7(C) to protect the names and identifying information of non-FBI federal government personnel included in law enforcement documents.<sup>17</sup>

**Names and/or Identifying Information of Third Parties Who Provided Information**

Defendant also asserted Exemptions 6 and 7(C) to protect “the names and identifying information of individuals who were interviewed and provided information to the FBI during the course of its investigations of others for suitability for sensitive government positions in accordance with Executive Order 10450.” Hardy Decl. at ¶ 63.

“The FBI has found that information provided by individuals during an interview is one of the most productive investigative tools used by law enforcement agencies. The largest roadblock to successfully obtaining the desired information through an interview is fear by the interviewee that his/her identity will be exposed and consequently, that he/she could be harassed, intimidated, or threatened with legal or economic reprisal, possible physical harm, or even death. In order to surmount these obstacles, persons interviewed by the FBI or other law enforcement agencies must be assured that their names and personally-identifying information will be held in the strictest confidence.” *Id.* at ¶ 64. “The continued access by the FBI or other law enforcement agencies to persons willing to honestly relate pertinent facts bearing upon a particular investigation far outweighs any benefit the public might derive from disclosure of the names of those who cooperated with the FBI or other law enforcement agencies. Thus, the FBI has determined that these individuals maintain substantial privacy interests in not having their

---

<sup>17</sup> The names of non-FBI federal government personnel protected through Exemptions 6 and 7(C) are located on the following Bates pages: FBI-941, 943-945, 962-963, 972-976, 978, 980-982, 986-991, 995-1000, 1002-1003, 1007-1008, 1014, 1017-1020, 1026, 1028-1033, 1038-1044, 1048, 1051, 1053, 1056, 1058-1061 1151-1152, 1361.

identity disclosed.” Hardy Decl. at ¶ 64. “At times, the FBI also cited FOIA Exemption (b)(7)(D)-2 in conjunction with FOIA Exemptions (b)(6)-3 and (b)(7)(C)-3 to protect the names of individuals under an implied assurance of confidentiality.”<sup>18</sup> *Id.*

“In contrast, the FBI could identify no public interest in the disclosure of this information because disclosure of this third party name and/or identifying information would not shed light on or significantly increase the public’s understanding of the operations and activities of the FBI or other law enforcement agencies.” *Id.* Defendant, accordingly, properly asserted Exemptions 6 and 7(C) to protect the privacy interests of individuals providing information to the FBI.

### **Names of FBI Special Agents**

Defendant also asserted Exemptions 6 and 7(C) to protect the names of FBI Special Agents (“SAs”) who were responsible for conducting, supervising, and/or maintaining the suitability investigative activities reflected in the documents responsive to Plaintiff’s FOIA request. “Assignments of SAs to any particular investigation are not by choice. Publicity (adverse or otherwise) regarding any particular investigation to which they have been assigned may seriously prejudice their effectiveness in conducting other investigations.” Hardy Decl. at ¶ 65. “The privacy consideration is also to protect FBI SAs, as individuals, from unnecessary, unofficial questioning as to the conduct of this or other investigations, whether or not they are currently employed by the FBI. FBI SAs conduct official inquiries into various criminal and national security violation cases. They come into contact with all strata of society, conducting searches and making arrests, both of which result in reasonable but nonetheless serious

---

<sup>18</sup> The names of third-party individuals providing information protected pursuant to Exemptions 6, 7(C), and cited in conjunction with Exemption (7)(D) is located on the following Bates pages: FBI-1025, 1048.

disturbances to people and their lives. It is possible for an individual targeted by such law enforcement actions to carry a grudge which may last for years. These individuals may seek revenge on the agents and other federal employees involved in a particular investigation. The publicity associated with the release of an agent's identity in connection with a particular investigation could trigger hostility toward a particular agent. Thus, SAs maintain substantial privacy interests in information about them in criminal investigative files." *Id.*

In contrast, Defendant asserts that "there is no public interest to be served by disclosing the identities of the SAs to the public because their identities would not, themselves, significantly increase the public's understanding of the FBI's operations and activities. Accordingly, after balancing these SAs' substantial privacy interests against the non-existent public interest, the FBI properly protected the names of SAs pursuant to Exemptions 6 and 7(C)." <sup>19</sup> *Id.*

#### **Disclosure of the Name of an ICE Employee Seeking Employment**

As previously stated, a number of responsive documents were referred to other agencies for review and response to Plaintiff's FOIA request. In the instant case a two-page document concerning an applicant for employment with the legacy Immigration and Naturalization Service was referred to Immigration and Customs Enforcement ("ICE") for review and for ICE to "make any deletions it deemed appropriate." *See* November 21, 2016 Declaration of Fernando Pineiro, ("Pineiro Decl.") attached hereto as Ex 2, at ¶ 6. ICE chose to redact the name of the individual seeking employment pursuant to Exemptions 6 and 7(C) as the document was compiled for law enforcement purposes and after ICE balanced the individual's personal privacy interest against

---

<sup>19</sup> The names of FBI special agents, protected by Exemptions 6 and 7(C) are located on the following Bates pages: FBI-1162, 1168, 1170, 1172, 1182, 1189, 1191, 1193, 1198, 1214, 1216, 1236, 1242, 1283-1284, 1288, 1300.

any public interest. Defendant now seeks summary judgment.

“The Immigration and Naturalization Service (INS) was created by Executive Order 6166, which granted it the authority to administer and enforce laws relating to admission, exclusion, deportation, and naturalization of aliens, and investigate alleged violations of those laws.” Pineiro Decl. at ¶ 15. “Pursuant to the Homeland Security Act of 2002, the INS was dismantled and the DHS was vested with the authority to carry out the immigration enforcement functions vested by statute in, or performed by, the Commissioner of Immigration and Naturalization.” *Id.* “ICE is the largest investigative arm of DHS,” and “ICE is tasked with preventing any activities that threaten national security and public safety by investigating the people, money, and materials that support illegal enterprises.” *Id.* “Under [ICE’s] enforcement authority, the responsive records [at issue] were compiled for the [ ] specific law enforcement purpose” of “vet[ing] and individual for employment with legacy-INS, in furtherance of its law enforcement efforts.” *Id.* at ¶¶ 15, 17.

ICE chose to withhold the name of the individual seeking employment and explained that “[b]y virtue of the positions held by the Federal government employee referenced in the responsive record, he is permitted access to official government information.” Pineiro Decl. at ¶ 20. “ICE gave consideration to the privacy interests of this Federal employee in not becoming a target of harassment – including, but not limited to, harassment in the form of requests for authorized access to government information – and [his] interest in remaining free from interference with the performance of his duties.” *Id.* ICE determined that disclosure of the name of the individual referenced in the records would “constitute an unwarranted invasion of personal privacy and subject the individual to embarrassment, harassment, and undue public attention. Such information, if disclosed to the public or to a third party requester without the permission of

the individual, could expose the individual to identity theft and may reasonably lead to unwanted contact from persons that might seek to harm the individual.” *Id.* at ¶ 22. Finally, ICE determined that the cognizable privacy interest outweighed any public interest as “the redaction was limited to the name of the individual, which if released, would not shed [any light] as to the operations or activities of ICE or INS.” *Id.* at ¶¶ 23 – 25. Defendant, accordingly, properly applied Exemption 6 and 7(C) and is, therefore, entitled to summary judgment.

#### **Disclosure of Names of Employees by DOJ National Security Division**

In addition to other referral documents, the FBI referred documents to the National Security Division of the United States Department of Justice (“NSD”) for direct response to Plaintiff. *See* December 6, 2016 Declaration of Susan L. Kim (“Kim Decl.”), attached hereto as Ex. 3, at ¶ 4. On May 5, 2015, NSD informed Plaintiff that it was releasing the referral records in part and withholding portions of these records “from disclosure pursuant to FOIA Exemptions (b)(6) and (b)(7)(C).” *Id.* NSD asserted Exemptions 6 and 7(C) “to protect the name and identifying information of [Federal Government] employees” “against whom the Department would have considered termination proceedings.” Kim Decl. at ¶ 6.

“For each withholding under Exemption (b)(6) and (b)(7)(C), NSD determined that the privacy rights of the individuals outweighed the public interest, if any, in the disclosure of the information.” *Id.* NSD went on to explain that “[t]hese individuals and their families have privacy interests in avoiding publicity in connection with having been considered for employment termination because such an association could subject these individuals and their families to both harassment and embarrassment. At the same time, there is no discernible public interest in identifying these individuals because providing the names and/or identifying information of particular employees would not shed light on the government’s operations. As a

result, releasing this information would constitute a clearly unwarranted invasion of their privacy which outweighs the public interest in disclosure.” *Id.* at ¶ 7. Defendant, accordingly, properly withheld the names and other identifying information for whom the Department of Justice was considering termination.

In the end, Defendant properly asserted Exemptions 6 and 7(C) to protect the privacy interest associated with the names and identities of individuals contained in law enforcement-related investigative files. Defendant is entitled to summary judgment under either Exemption 6 and respectfully requests that the Court grant summary judgment in its favor. *See Dunkelberger v. DOJ*, 906 F.2d 779, 781 (D.C. Cir. 1990) (Exemption 7(C) “takes particular note of the strong interest of individuals, whether they be suspects, witnesses, or investigators, in not being associated unwarrantedly with alleged criminal activity.”); *Stern v. FBI*, 737 F.2d 84, 91 (D.C. Cir. 1984) (“Because Exemption 7(C) provides protection for a somewhat broader range of privacy interests than Exemption 6, privacy interests cognizable under Exemption 6 are cognizable under Exemption 7(C).”). *Fischer v. DOJ*, 596 F.Supp.2d 34, 47 (D.D.C. 2009) (“The D.C. Circuit has consistently held that Exemption 7(C) protects the privacy interests of all persons mentioned in law enforcement records, including investigators, suspects, witnesses, and informants.”). Defendant is, accordingly, entitled to summary judgment.

**D. Exemptions under (b)(7)(D)**

(1) Exemption 7(D) protects “records or information compiled for law enforcement purposes” when disclosure:

could reasonably be expected to disclose the identity of a confidential source, including a State, local or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement agency conducting a

lawful national security intelligence investigation, information furnished by a confidential source.

5 U.S.C. § 552(b)(7)(D). “The agency invoking Exemption 7(D) bears the burden of proving that it applies, and with respect to the FBI, it is not enough for the agency to claim that all sources providing information in the course of a criminal investigation do so on a confidential basis. *Roth v. U.S. Dept. of Justice*, 642 F.3d 1161, 1184 (D.C. Cir. 2011) (citing *U.S. Dep’t of Justice v. Landano*, 508 U.S. 165, 171, 181 (1993)). “Instead, ‘the FBI must point to more narrowly defined circumstances that ... support the inference of confidentiality.’” *Id.* (quoting *Landano*). Exemption 7(D) provides categorical protection for the identities of confidential sources, as well as the information provided by such sources in a criminal or national security investigation. No balancing of interests is required and the public’s interest in the information is not a factor. *See id.* (“Unlike Exemptions 6 and 7(C), Exemption 7(D) requires no balancing of public and private interests.”) (citing *Parker v. Dep’t of Justice*, 934 F.2d 375, 380 (D.C. Cir. 1991)).

In his declaration, Mr. Hardy explains that “confidential sources report to the FBI on a regular basis in furtherance of the FBI’s criminal law enforcement and national security mission. Some provide information under express assurances of confidentiality and are “informants” within the common meaning of the term. Others are interviewed and/or provide information under circumstances from which assurances of confidentiality may be inferred. In either situation, these sources are considered to be confidential because they furnish information only with the understanding that their identities and the information they provided will not be divulged outside the FBI.” Hardy Decl. at ¶ 67.

“Information provided by confidential sources is singular in nature, and if released, could

reveal their identities. The FBI has learned through experience that sources assisting, cooperating with, and providing information to the FBI must be free to do so without fear of reprisal. The FBI has also learned that sources must be free to furnish information to the FBI with complete candor and without the understandable tendency to hedge or withhold information because of fear that their cooperation with the FBI will later be made public. Sources providing information to the FBI must be secure in the knowledge that their assistance and their identities will be held in confidence.” *Id.* at ¶ 68. “Given this need for confidentiality, the release of a source’s identity would forever eliminate that source as a future means of obtaining information. In addition, when the identity of one source is revealed, that revelation has a chilling effect on the activities and cooperation of other sources. Such a result would eliminate one of the FBI’s most important means of collecting information and thereby severely hamper law enforcement efforts to detect and apprehend individuals engaged in the violation of federal criminal laws.” *Id.*

#### **Foreign Government Agency Information Under Express Confidentiality**

In the instant case, Defendant asserted Exemption 7(D) “to withhold information provided to the FBI by a foreign government and/or foreign law enforcement entity under an express assurance of confidentiality.” Hardy Decl. at ¶ 69. “During the course of the FBI’s intelligence investigations it received information from a foreign government regarding the on-going investigations. The FBI has many agreements with foreign governments under which security and/or criminal law enforcement information is exchanged. The agreements specify the extent of confidentiality requested by the respective foreign government entity. In some circumstances, a foreign government or entity may request confidentiality for its identity and information provided, while in other circumstances, a foreign government or entity might request

classification for both its identity and information provided, and yet a third foreign government or entity may request that its information be protected while it does not object to the disclosure of its relationship and interaction with the FBI.” *Id.*

“In this case, the FBI has express confidentiality agreements with these foreign governments and/or foreign law enforcement entities which provided information to the FBI during the conduct of suitability investigations. The FBI’s agreements with these law enforcement entities provide assurance that the FBI will not disclose their identities, as well as the information that they provided to the FBI. If the FBI were to disclose the identities and the information provided by these foreign law enforcement entities under an express assurances of confidentiality, such a disclosure would have a chilling effect on the FBI’s relationship with these entities.” *Id.* at ¶ 70. “Furthermore, the disclosure would have a chilling effect on the FBI’s relationship with other foreign law enforcement agencies which have entered into similar agreements with the FBI.” In that the information withheld pursuant to Exemption 7(D) is subject to express confidentiality agreements with foreign entities, Defendant has properly withheld that information and is entitled to summary judgment.<sup>20</sup>

**Names, Identifying Information Data and/or Information Provided By Individuals Under an Implied Assurance of Confidentiality**

Defendant also withheld “the names, identifying information about, and information provided by third parties under circumstances in which confidentiality can be inferred” pursuant to Exemption 7(D). Hardy Decl. at ¶ 71. “These third parties provided information concerning the Communist Party activities of subjects who were of investigative interest to the FBI or other

---

<sup>20</sup> The Foreign Entity Information protected under Exemption 7D is located on the following Bates pages: FBI-75, 458-460.

law enforcement agencies. Specifically, within the responsive documents, the FBI inferred that individuals provided information to the FBI only because they believed their cooperation with, and the information they provided, would remain confidential under the following circumstances:

“The FBI protected identifying information about and information provided by individuals who had provided information over a period of time that had proven to be reliable. These individuals were in a position to have ready access to and/or knowledge about individuals involved in Communist Party activities. Such access exposed them to potential significant harms should their association and cooperation with the FBI be publicly disclosed. These third party sources provided specific detailed information that is singular in nature concerning the activities of certain subjects regarding the FBI’s investigation of Communist Party activities. The disclosure of the identities of these sources and the information they provided could have dire consequences because disclosure could subject these third parties, as well as their families, to embarrassment, humiliation, and/or physical or mental harm.” *Id.*

“These third parties provided information of value to the FBI concerning its investigations, and in doing so, placed themselves in harm’s way should their identity and cooperation with the FBI become known. Under these circumstances, it is reasonable to infer that these third parties cooperated with the FBI only with the expectation of confidentiality. Thus, the FBI properly protected the sources’ identities and the information they provided

pursuant to FOIA Exemption (b)(7)(D).”<sup>21</sup> *Id.* Defendant, accordingly, properly applied Exemption 7(D) to protect the identities of the aforementioned individuals.

## V. SEGREGABILITY

“The focus of the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material. It has long been a rule in this Circuit that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions. In 1974, Congress expressly incorporated that requirement into the FOIA,<sup>52</sup> which now states that ‘(a)ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt.’” *Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977) (quoting 5 U.S.C. § 552(b)). In the instant case Defendant has produced all reasonably segregable portions of the record.

In his declaration, Mr. Hardy explains that Defendant conducted a complete segregability review. Mr. Hardy explains that “there were 1,602 responsive pages identified: 1,110 Released in Full (“RIF”), 93 Released in Part (“RIP”), and 399 Withheld in Full (“WIF”). Each of these categories is discussed below to further address segregability.

A. Pages RIF. Following the segregability review, RIDS determined that 1,110 pages could be released in full without redaction as there was no foreseeable harm to an interest protected by a FOIA exemption.

B. Pages RIP. Following the segregability review, RIDS determined that 93 pages

---

<sup>21</sup> The names and identifying information subject to an implied assurance of confidentiality and withheld pursuant to Exemption 7D is located on the following Bates pages: FBI-973, 1025, 1048.

could be released in part with redactions per the identified FOIA exemptions herein. These pages comprise a mixture of material that could be segregated for release and material that was withheld as release would trigger foreseeable harm to one or more interests protected by the cited FOIA exemptions on these pages.

C. Pages WIF. Following the segregability review, RIDS determined that 399 pages were required to be withheld in their entirety. Of these, 324 pages were withheld in their entirety because they were referred to other government agencies for direct response to Plaintiff, 72 pages were withheld in their entirety because they were duplicative of other pages, and 3 pages (FBI-458-460) were withheld in their entirety because RIDS determined that all information on these pages was fully covered by FOIA Exemption (b)(7)(D)-1. RIDS determined that any non-exempt information on these pages was so intertwined with exempt material, that no information could be reasonably segregated for release. Any further segregation of this intertwined material would employ finite resources only to produce disjointed words, phrases, or sentences, that taken separately or together, would have minimal or no informational content.”

Hardy Decl. at ¶ 92. Mr. Hardy attests that “[a]fter extensive review of the documents at issue, I have determined that there is no further non-exempt information that can be reasonably segregated and released without revealing exempt information,” and concludes that the “FBI performed adequate and reasonable searches for responsive records; processed all such records and released all reasonably segregable non-exempt information from documents responsive to Plaintiff’s FOIA requests that are subject to FOIA.” *Id.* at ¶ 93. In that Defendant has fulfilled its obligations under the FOIA, Defendant is entitled to summary judgment.

**CONCLUSION**

For the foregoing reasons, Defendant respectfully requests that the Court enter judgment in its favor. A proposed order is attached.

\* \* \*

Dated: December 6, 2016

Respectfully Submitted,

CHANNING D. PHILLIPS, D.C. Bar #415793  
United States Attorney  
for the District of Columbia

DANIEL F. VAN HORN, D.C. Bar #924092  
Civil Chief

By: /s/ Carl E. Ross  
CARL EZEKIEL ROSS, D.C. Bar #492441  
Assistant United States Attorney  
Civil Division  
555 4th Street, N.W.  
Washington, D.C. 20530  
Tel: (202) 252-2533  
Fax: (202) 252-2505

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MATTACHINE SOCIETY OF  
WASHINGTON, D.C.

Plaintiff,

v.

UNITED STATES DEPARTMENT  
OF JUSTICE,

Defendant.

Civ. A. No. 1:16-cv-00773-RCL

**DECLARATION OF DAVID M. HARDY**

I, David M. Hardy, declare as follows:

(1) I am 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 my joining the Federal Bureau of Investigation (“FBI”), from May 1, 2001 to July 31, 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) In my official capacity as Section Chief of RIDS, I supervise approximately 246 employees who staff a total of ten (10) Federal Bureau of Investigation Headquarters (“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 as amended by the OPEN Government Act of 2007 and 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 Presidential and Congressional directives. My responsibilities also include the review of FBI information for classification purposes as mandated by Executive Order 13526,<sup>1</sup> and the preparation of declarations in support of Exemption 1 claims asserted under the FOIA. I have been designated by the Attorney General of the United States as an original classification authority and a declassification authority pursuant to Executive Order 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) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to Plaintiff's request 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 Plaintiff's FOIA request to FBIHQ, seeking access to records concerning Executive Order 10450.

(4) In response to Plaintiff's request, the FBI processed a total of 1,602 responsive pages. Of these pages, 1,110 pages were released in full, 93 pages released in part, and 399 pages were withheld in full. In accordance with *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), this declaration is being submitted in support of defendant's motion for summary judgment in order to provide the Court and Plaintiff with an explanation of the FBI's recordkeeping system, the procedures used to search for, review, and process the responsive records, and of the FBI's

---

<sup>1</sup> 75 Fed. Reg. 707 (2010).

justification for withholding records in full or in part pursuant to FOIA Exemptions (b)(1), (b)(3), (b)(6), (b)(7)(C), and (b)(7)(D).

**ADMINISTRATIVE HISTORY OF PLAINTIFF'S FOIA REQUEST**

(5) By letter dated January 25, 2013, Plaintiff submitted a FOIA request seeking copies of all communications, personnel or investigative files created in association with Executive Order 10450 including any and all internal FBI correspondence or communications regarding Executive Order 10450 and also specifically includes, but is not limited to, all files created by and communications to or from Warren E. Burger with date range 1950-1990. Plaintiff also indicated her willingness to pay administrative fees associated with this request up to \$500.00. (*See Exhibit A.*)

(6) By letter dated February 5, 2013, the FBI acknowledged receipt of Plaintiff's request and assigned it FOIPA Request Number 1207786-000. The FBI advised that it was searching the indices to the Central Records System for information responsive to her request. (*See Exhibit B.*)

(7) By letter dated March 13, 2013, the FBI informed Plaintiff that it located approximately 1,585 pages potentially responsive to her FOIA request (FOIPA Request Number 1207786-000); and pursuant to Department of Justice ("DOJ") regulations, the FBI is required to notify requesters when anticipated fees exceed \$25.00. The FBI advised that releases are made via CD unless otherwise requested; each CD contains up to approximately 500 reviewed pages; the first 100 pages or the cost equivalent (\$10.00) is free of charge; and if all potentially responsive pages were processed for release, Plaintiff would owe \$35.00 in duplication fees (3 CDs at \$15.00 less \$10.00), or \$148.50 if the Plaintiff requested the release in paper. The FBI reminded Plaintiff that the anticipated fees associated with her request were only an estimate, as some information

may be withheld in full pursuant to FOIA exemptions, or may be non-responsive to the Plaintiff's FOIA request. Thus, the actual charges could be less than the estimate provided. Plaintiff was instructed to notify RIDS in writing within thirty (30) days from the date of its letter of the desired release format (CD or paper) and her commitment to pay the estimated fees. RIDS noted that if Plaintiff's written format decision and commitment to pay fees was not received within thirty (30) days from the date of its letter, the request would be closed. Lastly, the FBI advised Plaintiff that if she wished to reduce the scope of the FOIA request, costs associated with the request would be less and receipt of the requested information would be timelier. **(See Exhibit C.)**

(8) By letter dated March 25, 2013, Plaintiff indicated her willingness to pay estimated search and duplication costs, and requested records be provided on CD and on a rolling basis. Plaintiff also indicated she did not wish to reduce the scope of the FOIPA request. **(See Exhibit D.)**

(9) By letter dated May 16, 2013, Plaintiff submitted a status response reiterating her willingness to pay estimated search and duplication costs, and requested records be provided on CD and on a rolling basis. Plaintiff also indicated she did not wish to reduce the scope of the FOIPA request. **(See Exhibit E.)**

(10) By letter dated December 13, 2013, Plaintiff submitted a second status response addressing her willingness to pay estimated search and duplication costs, and requested records be provided on CD and on a rolling basis. Plaintiff again stated she did not wish to reduce the scope of her request. **(See Exhibit F.)**

(11) By letter dated April 17, 2015, the FBI made its first interim release of records to Plaintiff. The FBI advised that 539 pages of records were reviewed and 253 pages of records were being released in full or part, with certain information withheld pursuant to FOIA

Exemptions 3, and 7D. Additionally, the FBI advised that it referred records originating from other government agencies (“OGAs”) to those agencies for review, disclosure determinations, and a direct response to Plaintiff. The FBI also advised it was consulting with other government agencies. The FBI advised Plaintiff she could appeal the FBI’s determination by filing an administrative appeal with the Department of Justice (“DOJ”), Office of Information Policy (“OIP”) within sixty days. **(See Exhibit G.)**

(12) By letter dated May 12, 2015, the FBI made its second interim release of records to Plaintiff. The FBI advised that 552 pages of records were reviewed and 169 pages of records were being released in full or part, with certain information withheld pursuant to FOIA Exemptions 6 and 7(C).<sup>2</sup> Additionally, the FBI advised that it referred records originating from other government agencies (“OGAs”) to those agencies for review, disclosure determinations, and a direct response to Plaintiff. The FBI also advised it was consulting with other government agencies. Finally, Plaintiff was advised she could appeal the FBI’s determination by filing an administrative appeal with OIP within sixty days. **(See Exhibit H.)**

(13) By check dated May 22, 2015, Plaintiff submitted payment to the FBI in the amount of \$20.00. **(See Exhibit I.)**

(14) By letter dated June 12, 2015, Plaintiff submitted an appeal to OIP contesting the FBI’s determination as described in its April 17, 2015 response letter. **(See Exhibit J.)**

(15) By letter dated June 23, 2015, the FBI made its third interim release of records to Plaintiff. The FBI advised that 476 pages of records were reviewed and 254 pages of records were being released in full or part, with certain information withheld pursuant to FOIA

---

<sup>2</sup> The FBI inadvertently cited Privacy Act Exemption (d)(5) as a justification for withholding information within this release. No information was withheld pursuant to this Privacy Act Exemption.

Exemptions 1, 3, 6, 7(C), and 7(D). The FBI advised that it referred records originating from other government agencies (“OGAs”) to those agencies for review, disclosure determinations, and a direct response to Plaintiff. The FBI also advised it was consulting with other government agencies. Finally, Plaintiff was advised she could appeal the FBI’s determination by filing an administrative appeal with OIP within sixty days. This letter also advised plaintiff to make a \$15.00 payment for duplications cost incurred for the released records; however, plaintiff failed to submit the requested payment. **(See Exhibit K.)**

(16) By letter dated July 14, 2015, OIP acknowledged receipt of Plaintiff’s appeal and assigned it appeal number AP-2015-04578. **(See Exhibit L.)**

(17) By letter dated August 13, 2015, Plaintiff submitted an appeal to OIP contesting the FBI’s determination as described in its June 22, 2015 response letter. **(See Exhibit M.)**

(18) By letter<sup>3</sup> dated October 30, 2015, the FBI released records to Plaintiff with which it consulted another government agency. The FBI advised that 140 pages of records were reviewed and 140 pages of records were being released in full or part, with certain information withheld pursuant to FOIA Exemptions 6, 7(C), and 7(D). The FBI also advised Plaintiff she could appeal the FBI’s determination by filing an administrative appeal with OIP within sixty days. **(See Exhibit N.)**

(19) On April 27, 2016, Plaintiff filed her complaint in the instant action. **(See ECF Docket Number 1.)**

(20) By letter dated May 10, 2016, OIP closed Plaintiff’s appeals due to the instant

---

<sup>3</sup> Plaintiff avers at ¶ 69 of her amended complaint that the FBI only released 134 pages and not the 140 claimed on the letter. The FBI replicated the release process for this production and the result was 140 pages being outputted; therefore, the FBI cannot provide an explanation other than potentially human error when the CD was prepared and sent to Plaintiff at that time. These pages were released solely as a result of coordination responses from other government agencies. Consequently, all previously released pages were re-released with Exemption codes and Bates Stamps in the September 6, 2016 production. See ¶ 21, *infra*.

action. (*See Exhibit O.*)

(21) By letter dated September 6, 2016, the FBI re-released all of the processed responsive records with Exemption codes and Bates Stamps. The FBI advised that 1602 pages of records were reviewed and 1201 pages of records were being released in full or part, with certain information withheld pursuant to FOIA Exemptions (b)(1), (b)(3), (b)(6), (b)(7)(C), and (b)(7)(D). The FBI also advised Plaintiff she could appeal the FBI's determination by filing an administrative appeal with OIP within sixty days. (*See Exhibit P.*)

(22) On November 14, 2016, the FBI checked with OIP to determine if there were any additional outstanding referrals. OIP advised they have no additional referrals besides the June and August 2015 referrals. *See* ¶¶ 14 & 17, *supra*.

#### **THE FBI'S CENTRAL RECORDS SYSTEM**

(23) The Central Records System ("CRS") is an extensive system of records consisting of applicant, investigative, intelligence, personnel, administrative, and general files compiled and maintained by the FBI in the course of fulfilling its integrated missions and functions as a law enforcement, counterterrorism, and intelligence agency to include performance of administrative and personnel functions. The CRS spans the entire FBI organization and encompasses the records of FBI Headquarters ("FBIHQ"), FBI Field Offices, and FBI Legal Attaché Offices ("Legats") worldwide.

(24) The CRS consists of a numerical sequence of files, called FBI "classifications," which are organized according to designated subject categories. The broad array of CRS file classification categories include types of criminal conduct and investigations conducted by the FBI, as well as categorical subjects pertaining to counterterrorism, intelligence, counterintelligence, personnel, and administrative matters. For identification and retrieval

purposes across the FBI, when a case file is opened, it is assigned a Universal Case File Number (“UCFN”) consisting of three sequential components: (a) the CRS file classification number, (b) the abbreviation of the FBI Office of Origin (“OO”) initiating the file, and (c) the assigned individual case file number for that particular subject matter.<sup>4</sup> Within each case file, pertinent documents of interest are “serialized,” or assigned a document number in the order which the document is added to the file, typically in chronological order.

### **THE CRS GENERAL INDICES AND INDEXING**

(25) The general indices to the CRS are the index or “key” to locating records within the enormous amount of information contained in the CRS. The CRS is indexed in a manner which meets the FBI’s investigative needs and priorities, and allows FBI personnel to reasonably and adequately locate pertinent files in the performance of their law enforcement duties. The general indices are arranged in alphabetical order and comprise an index on a variety of subject matters to include individuals, organizations, events, or other subjects of investigative interest that are indexed for future retrieval. The entries in the general indices fall into two category types:

- a. **Main entry.** This entry pertains to records indexed to the main subject(s) of a file, known as “main file” records. The “main” entry carries the name of an individual, organization, or other subject matter that is the designated subject of the file.
- b. **Reference entry.** This entry, or a “cross-reference,” pertains to records that merely mention or reference an individual, organization, or other subject matter that is contained in a “main” file record about a different subject matter.

(26) FBI employees may index information in the CRS by individual (persons), by organization (organizational entities, places, and things), and by event (*e.g.*, a terrorist attack or

---

<sup>4</sup> For example, in a fictitious file number of “11Z-HQ-56789;” the “11Z” component indicates the file classification, “HQ” indicates that FBI Headquarters is the FBI OO of the file, and “56789” is the assigned case specific file number.

bank robbery). Indexing information in the CRS is based on operational necessity, and the FBI only indexes that information considered relevant and necessary for future retrieval.

Accordingly, the FBI does not index every individual name or other subject matter in the general indices.

### **AUTOMATED CASE SUPPORT**

(27) Automated Case Support (“ACS”) is an electronic, integrated case management system that became effective for FBIHQ and all FBI Field Offices and Legats on October 1, 1995. As part of the ACS implementation process, over 105 million CRS records were converted from automated systems previously utilized by the FBI into a single, consolidated case management system accessible by all FBI offices. ACS has an operational purpose and design to enable the FBI to locate, retrieve, and maintain information in its files in the performance of its myriad missions and functions.<sup>5</sup>

(28) The Universal Index (“UNI”) is the automated index of the CRS and provides all offices of the FBI a centralized, electronic means of indexing pertinent investigative information to FBI files for future retrieval via index searching. Individual names may be recorded with applicable identifying information such as date of birth, race, sex, locality, Social Security Number, address, and/or date of an event. Moreover, ACS implementation built upon and incorporated prior automated FBI indices; therefore, a search employing the UNI application of ACS encompasses data that was already indexed into the prior automated systems superseded by ACS. As such, a UNI index search in ACS is capable of locating FBI records created before its

---

<sup>5</sup> ACS and the next generation Sentinel system are relied upon by the FBI daily to fulfill essential functions such as conducting criminal, counterterrorism, and national security investigations; background investigations; citizenship and employment queries, and security screening, to include Presidential protection.

1995 FBI-wide implementation to the present day in both paper and electronic format.<sup>6</sup>

Currently, UNI consists of approximately 114.3 million searchable records and is updated daily with newly indexed material.

#### **ACS and SENTINEL**

(29) Sentinel is the FBI's next generation case management system that became effective FBI-wide on July 1, 2012. Sentinel provides a web-based interface to FBI users, and it includes the same automated applications that are utilized in ACS. After July 1, 2012, all FBI generated records are created electronically in case files via Sentinel; however, Sentinel did not replace ACS and its relevance as an important FBI search mechanism. Just as pertinent information was indexed into UNI for records generated in ACS before July 1, 2012, when a record is generated in Sentinel, information is indexed for future retrieval. Moreover, there is an index data sharing nexus between the Sentinel and ACS systems whereby components of information indexed into Sentinel are also replicated or "backfilled" into ACS. In sum, the Sentinel case management system builds on ACS and shares its operational purpose; Sentinel provides another portal to locate information within the vast CRS for FBI records generated on or after July 1, 2012.

#### **SEARCH FOR RECORDS RESPONSIVE TO PLAINTIFF'S FOIPA REQUESTS**

(30) Index Searching. To locate CRS information, RIDS employs an index search methodology. Index searches of the CRS are reasonably expected to locate responsive material

---

<sup>6</sup> Older CRS records that were not indexed into UNI as a result of the 1995 ACS consolidation remain searchable by manual review of index cards, known as the "manual indices." A search of the manual indices is triggered for requests on individuals if the person was born on or before January 1, 1958; and for requests seeking information about organizations or events on or before January 1, 1973. Records created after these dates would be captured through a UNI search.

within the vast CRS since the FBI indexes pertinent information into the CRS to facilitate retrieval based on operational necessity. Given the broad range of indexed material in terms of both time frame and subject matter that it can locate in FBI files, the automated UNI application of ACS is the mechanism RIDS employs to conduct CRS index searches. If a request seeks records that may have been generated on or after July 1, 2012, an overlapping search of ACS via the UNI application and a Sentinel index search are performed at the litigation stage to ensure adequacy of the CRS index search.

(31) CRS Search and Results. In response to Plaintiff's request, RIDS conducted a CRS index search for responsive records employing the UNI application of ACS and although the date range of requested material was prior to the July 1, 2012 implementation of Sentinel, also conducted a Sentinel index search. The FBI searched the terms "Executive Order 10450", "Sex Deviate", and "Sex Deviate Program" in order to identify investigative files responsive to Plaintiff's request and subject to the FOIA. The FBI's search included a string<sup>7</sup> breakdown of the search term variations as discussed and would include records from all FBI's Field offices. Furthermore, the FBI also conducted a search of its manual indices.<sup>8</sup> The FBI determined main file 66-HQ-A19000 to be responsive to Plaintiff's request. The FBI carefully reviewed the responsive material, processed the records, and released all non-exempt portions of information

---

<sup>7</sup> A string ("ST") search is a search of all names and/or terms whose starting characters match the characters typed into the name field; such a search will automatically capture variations of the names and/or terms searched.

<sup>8</sup> In addition to the CRS Index search, the FBI conducts a Manual Indices search of FBIHQ files when the request is for records concerning an individual born before January 1, 1958 or an organization requested prior to that date range. This insures that any records created prior to the implementation of ACS are also captured in the FBI's search efforts. Since Plaintiff requested a date range of 1950-1990, the FBI conducted a search of the Manual Indices for FBIHQ in addition to the CRS search using ACS and Sentinel. The FBI located records during the manual indices search, the ACS search and Sentinel search.

from those records to Plaintiff by letters dated April, 17, 2015, May 12, 2015, June 23, 2015, October 30, 2015, and September 6, 2016. (See ¶¶ 11, 12, 15, 18, 21, *supra*).

(32) After receiving notice of Plaintiff's lawsuit, the FBI conducted identical CRS searches using ACS/the UNI application, a Sentinel index search, and Manual Indices search for FBIHQ to confirm its previous search results and to identify potentially responsive cross-reference records.<sup>9</sup> These searches were conducted by using the same search terms as in its original search. The FBI located potentially responsive cross-reference files 100-HQ-468120 serial 12, 140-HQ-00 serials 921, 889, 904, 884, 878, 745, 879, 886, 725, 901, 893, 919, 738x, 140-HQ-1397 serial 3, 100-HQ-7254 serial 1582, 105-HQ-12189, and 66-HQ-03 serial 1143 in this search. The FBI determined 66-HQ-03 serial 1143 to be responsive to Plaintiff's request and released the serial in full in the September 6, 2016 production.<sup>10</sup>

#### **DESTROYED FILES**

(33) Files 105-HQ-12189 and 140-HQ-1397 serial 3 were destroyed on July 16, 2009 and July 10, 1998 respectively. Since these files could not be reviewed, it is not known if they were responsive to Plaintiff's FOIA request. The FBI advised Plaintiff of this by letter dated October 6, 2016. (*See Exhibit Q*).

#### **FILES SENT TO NARA**

(34) Files 100-HQ-468120 serial 12, 140-HQ-00 serials 921, 889, 904, 884, 878, 745, 879, 886, 725, 901, 893, 919, 738x, and 100-HQ-7254 serial 1582 were sent to NARA. Since these records were not reviewed, it is not known if they are actually responsive to Plaintiff's FOIA

---

<sup>9</sup> A cross-reference is defined as a mere mention of, or passing reference to, other individuals, organizations, events, or activities contained in a "main" file record about a different subject matter. *See* ¶ 25(b).

<sup>10</sup> This serial is Bates Stamped FBI-1568-1602, and was also sent for coordination. *See* ¶ 91, *infra*.

request. By letter dated October 6, 2016, the FBI advised Plaintiff if she wished to review these potentially responsive records, she would have to contact NARA. (*See Exhibit Q*).

(35) Scope of Search. RIDS conducted a search reasonably calculated to locate records responsive to Plaintiff's request. First, given its comprehensive nature and scope, the CRS is the principal records system searched by RIDS, to locate information responsive to most FOIPA requests, because the CRS is where the FBI indexes information about individuals, organizations, events, and other subjects of investigative interest for future retrieval. Second, given Plaintiff's request seeking information about copies of all communications, personnel or investigative files created in association with Executive Order 10450 including any and all internal FBI correspondence or communications regarding Executive Order 10450 and also specifically includes, but is not limited to, all files created by and communications to or from Warren E. Burger with date range 1950-1990, such information would reasonably be expected to be located in the CRS via the index search methodology.

**JUSTIFICATION FOR NONDISCLOSURE UNDER THE FOIA**

(36) All documents responsive to Plaintiff's request were processed to achieve maximum disclosure consistent with the access provisions of the FOIA. Every effort was made to provide Plaintiff with all material in the public domain and with all reasonably segregable, non-exempt information in the responsive records. No reasonably segregable, nonexempt portions have been withheld from Plaintiff. Further description of the information withheld, beyond what is provided in this declaration could identify the actual exempt information that the FBI has protected. Copies of the pages released in part and in full have been consecutively numbered "FBI-1 through FBI-1602" at the bottom of each page. Pages withheld in their entirety (e.g., removed per exemption, referral, or duplicates) were replaced by a "Deleted Page

Information Sheet” (“DPIS”), which identifies the reason and/or the applicable FOIA exemptions relied upon to withhold the page in full, as well as the Bates numbers for the withheld material. The DPISs and Bates-numbered pages that were withheld in part have been provided to Plaintiff by letter dated September 6, 2016 and will be made available to the Court upon request. (*See Exhibit P.*) The exemptions asserted by the FBI as grounds for non-disclosure of portions of documents are Exemptions 1, 3, 6, 7(C), and 7(D).

*Explanation of the Coded Format Used to Describe and Justify Withholdings*

(37) The Bates-numbered documents contain, on their faces, coded categories of exemptions that detail the nature of the information withheld pursuant to the provisions of the FOIA. The coded categories are provided to aid the Court’s and Plaintiff’s review of the FBI’s explanations of the FOIA exemptions it has asserted to withhold the material. The coded, Bates-numbered pages together with this declaration demonstrate that all material withheld by the FBI is exempt from disclosure pursuant to the cited FOIA exemptions, or is so intertwined with protected material that segregation is not possible without revealing the underlying protected material.

(38) Each instance of information withheld on the Bates-numbered documents is accompanied by a coded designation that corresponds to the categories listed below. For example, if “(b)(7)(C)-1” appears on a document, the “(b)(7)(C)” designation refers to FOIA Exemption 7(C) protecting against unwarranted invasions of personal privacy. The numerical designation of “1” following the “(b)(7)(C)” narrows the main category into a more specific subcategory, such as “Names and/or Identifying Information of Third Parties Merely Mentioned.”

(39) Listed below are the categories used to explain the FOIA exemptions asserted to withhold the protected material:

<b>SUMMARY OF JUSTIFICATION CATEGORIES</b>	
<b>CODED CATEGORIES</b>	<b>INFORMATION WITHHELD</b>
<b>Category (b)(1)</b>	<b>CLASSIFIED INFORMATION</b>
(b)(1)-1	Intelligence Activities, Sources, and Methods (E.O. 13526 § 1.4(c)) [cited in conjunction with (b)(3)-2]
<b>Category (b)(3)</b>	<b>INFORMATION PROTECTED BY STATUTE</b>
(b)(3)-1	Federal Grand Jury information (Federal Rule of Criminal Procedure 6(e))
(b)(3)-2	Information Specifically Exempted by 50 U.S.C. § 3024(i)(1) (National Security Act of 1947) [cited in conjunction with (b)(1)-1]
<b>Category (b)(6) and (b)(7)(C)</b>	<b>CLEARLY UNWARRANTED INVASION OF PRIVACY AND UNWARRANTED INVASION OF PERSONAL PRIVACY</b>
(b)(6)-1 and (b)(7)(C)-1	Names and/or Identifying Information of Third Parties Merely Mentioned
(b)(6)-2 and (b)(7)(C)-2	Names of Non-FBI Federal Government Personnel
(b)(6)-3 and (b)(7)(C)-3	Names of Third Parties Who Provided Information to the FBI [cited at times in conjunction with (b)(7)(D)-2]
(b)(6)-4 and (b)(7)(C)-4	Names of FBI Special Agents
<b>Category (b)(7)(D)</b>	<b>CONFIDENTIAL SOURCE INFORMATION</b>
(b)(7)(D)-1	Foreign Government Agency Information Under Express Confidentiality
(b)(7)(D)-2	Names, Identifying Information Data and/or Information Provided By Individuals Under an Implied Assurance of Confidentiality [cited at times in conjunction with (b)(6)-3 and (b)(7)(C)-3]

***Exemption 1 – Classified Information***

(40) Exemption 1 protects records that are “(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy; and (B) are in fact properly classified pursuant to such Executive Order . . . .” *See* 5 U.S.C. § 552(b)(1). The FBI also relied on Exemption 3 to protect information in these records.

(41) Before I consider an Exemption (b)(1) claim for withholding agency records, I

determine whether the information in those records is information that is currently and properly classified – *i.e.*, satisfies the requirements of Executive Order (“E.O.”) 13,526 and complies with the various substantive and procedural criteria of the E.O. The E.O. 13,526 was signed by President Barack Obama on December 29, 2009, and is the Executive Order that currently governs the classification and protection of national security information.<sup>11</sup> I am bound by the requirements of E.O. 13,526 when making classification determinations.

(42) For information to be properly classified, and thus properly withheld from disclosure pursuant to Exemption 1, the information must meet the requirements set forth in E.O. 13,526 § 1.1(a):

- (1) an original classification authority must have classified the information;
- (2) the information must be owned by, produced by or for, or be under the control of the United States Government;
- (3) the information must fall within one or more of the categories of information listed E.O. 13,526 § 1.4; and
- (4) the original classification authority must determine that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority must be able to identify or describe the damage

(43) In addition to these substantive requirements, E.O. 13,526 sets forth certain procedural and administrative requirements that must be followed before information can be considered to be properly classified. Those requirements include the following:

- (1) Each document must be marked as required and stamped with the proper classification designation.

---

<sup>11</sup> E.O. 13,526 § 6.1(cc) defines “National Security” as “the national defense or foreign relations of the United States.”

- (2) Each document must be marked to indicate clearly which portions are classified and which portions are exempt from declassification as set forth in E.O. 13,526 § 1.5(b).
- (3) The prohibitions and limitations on classification specified in E.O. 13,526 § 1.7 were adhered to.
- (4) The declassification policies set forth in E.O. 13,526 §§ 3.1 and 3.3 were followed.
- (5) Any reasonably segregable portion of the classified documents that did not meet the standards for classification under E.O. 13,526 were declassified and marked for release, unless withholding was otherwise warranted under applicable law.

(44) All information which I determined to be classified is marked at the "Confidential" level, since the unauthorized disclosure of this information reasonably could be expected to cause damage to national security.

#### **Findings of the Declarant Regarding Exemption 1**

(45) With the above requirements in mind, I personally and independently examined the information withheld from Plaintiff pursuant to FOIA Exemption 1 and determined that it is currently and properly classified pursuant to E.O. 13,526.

(46) I determined that this information satisfies the substantive requirements of the Executive Order. Specifically, I have determined that the classified information protected by the FBI in this case is owned by, was produced by or for, and is under the control of the U.S. Government, and that it was classified by an original classification authority. I further determined that while the information at issue is over 25 years old, it is exempt from automatic declassification, and continues to warrant classification at the "Confidential" level (as marked on the documents) to protect "the identity of a confidential human source, a human intelligence source, a relationship with an intelligence or security service of a foreign government or international organization, or a non-human intelligence source; or impair the effectiveness of an

intelligence method currently in use, or under development” pursuant to E.O. 13,526 § 3.3(b)(1); “information, including foreign government information, which would cause serious harm to relations between the United States and a foreign government, or to ongoing diplomatic activities of the United States” pursuant to E.O. 13,526 § 3.3(b)(6).<sup>12</sup>

**Defendant’s Burden of Establishing Exemption (b)(1) Claims**

(47) The information withheld in this case pursuant to Exemption 1 was examined in light of the body of information available to me concerning the national defense and foreign relations of the United States. This information was not examined in isolation. Instead, each piece of information was evaluated with careful consideration given to the impact that disclosure of this information will have on other sensitive information contained elsewhere in the United States intelligence community’s files. Equal consideration was given to the impact that other information either in the public domain or likely known or suspected by present or potential adversaries of the United States would have upon the information I examined.

(48) In those instances where, in my judgment, the disclosure of this information could reasonably be expected to cause damage to national security, and its withholding outweighed the benefit of disclosure, I exercised my prerogative as an original classification authority and designated that information as classified in the interest of national security at the “Confidential” level, and invoked FOIA Exemption 1 to prevent disclosure. The explanations set forth justifying the FBI’s withholding of classified information were prepared with the intent that they be read with consideration given to the context in which the classified information is found. This context includes not only the surrounding unclassified information, but also other information already in the public domain, as well as information likely known or suspected by

---

<sup>12</sup> Classified information is located on the following Bates pages: FBI-1268-1269. The FBI also relied on FOIA Exemption (b)(3)-2 to protect the information in these records. See ¶¶ 51-54, *infra*.

hostile intelligence entities. It is my judgment that any greater specificity in the descriptions and justifications set forth with respect to information relating to foreign government relations or foreign activities and intelligence sources and methods of the United States could reasonably be expected to jeopardize the national security of the United States.

***Exemption 3 – Information Protected By Statute***

(49) Exemption 3 exempts information when another federal statute prohibits its disclosure provided that either the statute “requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue,” or the statute “establishes particular criteria for withholding or refers to particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3). Moreover, if the withholding statute was enacted after October 28, 2009 (the date of enactment of the OPEN FOIA Act of 2009), then it must specifically cite to § 552(b)(3).

**(b)(3)-1 Federal Grand Jury information (Federal Rule of Criminal Procedure 6(e))**

(50) In Category (b)(3)-1, the FBI protected Federal Grand Jury information pursuant to Federal Rule of Criminal Procedure 6(e). As relevant to 5 U.S.C. § 552(b)(3)(B), Rule 6(e) is a statute<sup>13</sup> enacted before the date of enactment of the OPEN FOIA Act of 2009.<sup>14</sup> It is well established that Rule 6(e) embodies a broad, sweeping policy of preserving the secrecy of grand jury material regardless of the substance in which the material is contained. The records

---

<sup>13</sup> As prescribed by 18 U.S.C. § 3771, proposed rules become effective ninety days after the Chief Justice reports them to Congress. By order of April 26, 1976, the Supreme Court adopted amendments to the Federal Rules of Criminal Procedure which included Rule 6(e) and reported the amendments to Congress. Congress voted to delay the effective date of several of the proposed rules, to include Rule 6(e), “until August 1, 1977, or until and to the extent approved by Act of Congress, whichever is earlier.” Pub.L. No. 94-349 § 1, 90 Stat. 822 (1976). Subsequently, Congress, by statute, enacted a modified version of Rule 6(e). See Pub.L. No. 95-78, § 2(a), 91 Stat. 319 (1977), FED. R. CRIM. P. 6(e).

<sup>14</sup> The OPEN FOIA Act of 2009 was enacted October 28, 2009. See Pub.L. 111-83, 123 Stat. 2142, 2184.

responsive to Plaintiff's request reflect that one or more federal grand juries were empanelled before United States Senate Internal Security Subcommittees, and information in the files responsive to Plaintiff's request reveals matters occurring before the grand jury/juries. Specifically, the investigative files contain information about the names of individuals appearing before federal grand juries, and information identifying specific reasons why they appeared before a federal grand jury. Any disclosure of this information would clearly violate the secrecy of the grand jury proceedings and could reveal the inner workings of a federal grand jury, and thus, the FBI is precluded from disclosing it. Accordingly, the FBI has withheld this information pursuant to Exemption 3, in conjunction with Rule 6(e).<sup>15</sup>

**National Security Act of 1947, 50 U.S.C. § 3024 (i)(1)**

(51) In Category (b)(3)-2, the FBI withheld 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."<sup>16</sup> 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 agencies 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).

(52) In order to fulfill its obligation of protecting intelligence sources and methods, the

---

<sup>15</sup> Category (b)(3)-1 is located on the following Bates pages: FBI-815-816, 824, 826.

<sup>16</sup> Section 102A(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).

DNI is authorized to establish and implement guidelines for the Intelligence Community (“IC”) 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). In implementing this authority, the DNI promulgated Intelligence Community Directive 700, which provides that IC elements shall protect “national intelligence and intelligence sources and methods and activities from unauthorized disclosure.”<sup>17</sup> The FBI is one of 17 member agencies comprising the IC, and as such must protect intelligence sources and methods.

(53) Given the plain Congressional mandate to protect the IC’s sources and methods of gathering intelligence, the FBI has determined that intelligence sources and methods would be revealed if any of the withheld information is disclosed to plaintiffs. Therefore, the FBI is prohibited from disclosing such information under § 3024 (i)(1).<sup>18</sup>

(54) The FBI is asserting Exemption 3 in this case, in conjunction with Exemption 1 to protect information relating to foreign government relations or foreign activities and intelligence sources and methods of the United States. In these instances, information would also reveal classified intelligence sources and methods protected by Exemption 1. Notably, § 3024 (i)(1) protects sources and methods regardless of whether they are classified. *See Sims*, 471 U.S. at 176. Accordingly, the FBI has withheld this information pursuant to Exemption 3, in conjunction with § 3024 (i)(1).<sup>19</sup>

---

<sup>17</sup> Intelligence Community Directive (ICD) 700, date June 7 2012, at ¶ 2a.

<sup>18</sup> Although § 3024 (i)(1) does not impose a requirement to articulate harm, disclosure of this information presents a bona fide opportunity for individuals to develop and implement countermeasures, resulting in the loss of significant intelligence information, sources, and methods relied upon by national policymakers and the IC to safeguard national security.

<sup>19</sup> Category (b)(3)-2 is located on the following Bates pages: FBI-1268-1269. The FBI also relied on FOIA Exemption (b)(1)-1 to protect the information in these records. *See* ¶¶ 39-48, *supra*.

**EXEMPTION 7 THRESHOLD**

(55) 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 USC §§ 533, 534, and Executive Order 12333 as implemented by the Attorney General's Guidelines for Domestic FBI Operations ("AGG-DOM") and 28 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 national security, and further the foreign intelligence objectives of the United States, and to conduct personnel investigations requisite to the work of the Department of Justice and whenever required by statute or otherwise. Under this investigative authority, the responsive records herein were compiled for the following specific law enforcement purpose.

(56) As prescribed by AGG-DOM, paragraph I.D.4., the pertinent records were compiled and/or created in furtherance of FBI's authority to conduct personnel background checks concerning applicants and employees under federal personnel security programs. To accomplish its law enforcement, national security, and intelligence missions effectively, the FBI must ensure the appropriate character of FBI employees, applicants, and at times, other government agency personnel when required by statute or otherwise by conducting suitability investigations (i.e. background/personnel checks).

(57) Thus, these records were compiled for a law enforcement purpose; they squarely fall within the law enforcement duties of the FBI; therefore, the information readily meets the threshold requirement of Exemption (b)(7).

**EXEMPTIONS 6 AND 7(C) –INVASIONS OF PERSONAL PRIVACY**

(58) Exemption 6 exempts from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). All information that applies to a particular person falls within the scope of Exemption 6.

(59) Exemption 7(C) similarly exempts from disclosure “records or information compiled for law enforcement purposes [when disclosure] could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C).<sup>20</sup>

(60) When withholding information pursuant to these two exemptions, the FBI is required to balance the privacy interests of the individuals mentioned in these records against any public interest in disclosure. In asserting these exemptions, each piece of information was scrutinized to determine the nature and strength of the privacy interest of every individual whose name and/or identifying information appears in the documents at issue. When withholding the information, the individual's privacy interest was balanced against the public's interest in disclosure. For purposes of these exemptions, a public interest exists only when information about an individual would shed light on the FBI's performance of its mission to protect and defend the United States against terrorist and foreign intelligence threats, to uphold and enforce the criminal laws of the United States, and to provide leadership and criminal justice services to federal, state, municipal, and international agencies and partners. In each instance where information was withheld pursuant to Exemptions 6 and 7(C), the FBI determined that the

---

<sup>20</sup> The practice of the FBI is to assert Exemption 6 in conjunction with Exemption 7(C). Although the balancing test for Exemption 6 uses a “would constitute a clearly unwarranted invasion of personal privacy” standard and the test for Exemption 7(C) uses the lower standard of “could reasonably be expected to constitute an unwarranted invasion of personal privacy,” the analysis and balancing required by both exemptions is sufficiently similar to warrant a consolidated discussion. The privacy interests are balanced against the public's interest in disclosure under both exemptions.

individuals' privacy interests outweighed any public interest in disclosure.

**(b)(6)-1 and (b)(7)(C)-1**      **Names and/or Identifying Information of Third Parties Merely Mentioned**

(61) In Category (b)(6)-1 and (b)(7)(C)-1, the FBI protected the names and identifying information of third-parties who were merely mentioned in the responsive documents. The FBI has information about these third-parties in its files because these individuals were related either directly or indirectly with the subjects of suitability investigations for sensitive positions within the government pursuant to Executive Order 10450. These individuals were not of investigative interest to the FBI. Despite the age of the documents, these third-parties maintain substantial and legitimate privacy interests in avoiding disclosure of this information and thereby being connected with a criminal investigation. Disclosure of these third-parties' names and/or identifying information in connection with an FBI investigation carries an extremely negative connotation. Disclosure of their identities would subject these individuals to possible harassment or criticism and focus derogatory inferences and suspicion on them. The FBI also considered whether there was any public interest that would override these privacy interests, and concluded that disclosing information about individuals merely mentioned in an FBI file would not significantly increase the public's understanding of the operations and activities of the FBI. Accordingly, the FBI properly protected these individuals' privacy interests pursuant to FOIA Exemptions (b)(6)-1 and (b)(7)(C)-1.<sup>21</sup>

**(b)(6)-2 and (b)(7)(C)-2**      **Names of Non-FBI Federal Government Personnel**

(62) In Category (b)(6)-2 and (b)(7)(C)-2, the FBI protected the names and identifying

---

<sup>21</sup> Category (b)(6)-1 and (b)(7)(C)-1 is located on the following Bates pages: FBI-940, 952, 962, 972, 975-976, 980, 988, 991, 994-995, 998-999, 1003, 1007-1008, 1019, 1026, 1029-1030, 1032, 1041-1042, 1051, 1054, 1214.

information of non-FBI federal government personnel mentioned in records responsive to Plaintiff's request. Specifically, the FBI protected the names of Departments of the Air Force, Army, Navy, General Services Administration, Government Printing Office, and Veterans Administration personnel. The relevant inquiry here is whether public access to this information would violate a viable privacy interest of these individuals, and whether there is a public interest in releasing their identities. Despite the age of the documents, disclosure of their identities and identifying information could subject these personnel, to unauthorized inquiries and harassment and would constitute a clearly unwarranted invasion of their personal privacy. The rationale for protecting non-FBI federal employees is the same as that for FBI employees, *infra*.

In balancing the legitimate privacy interest of these individuals against any public interest in disclosure, the FBI determined that there is a complete lack of bona fide public interest in this information because its disclosure will not shed light on the operations and activities of the federal government. Accordingly, the FBI has concluded that the disclosure of this information would "constitute a clearly unwarranted" and "unwarranted invasion of their personal privacy." The FBI properly protected the names and identifying information of non-FBI federal government personnel pursuant to FOIA Exemptions (b)(6)-2 and (b)(7)(C)-2.<sup>22</sup>

**(b)(6)-3 and (b)(7)(C)-3      Names and/or Identifying Information of Third Parties Who Provided Information**

(63) In Category (b)(6)-3 and (b)(7)(C)-3, the FBI protected the names and identifying information of individuals who were interviewed and provided information to the FBI during the course of its investigations of others for suitability for sensitive government positions in

<sup>22</sup> Category (b)(6)-2 and (b)(7)(C)-2 is located on the following Bates pages: FBI-941, 943-945, 962-963, 972-976, 978, 980-982, 986-991, 995-1000, 1002-1003, 1007-1008, 1014, 1017-1020, 1026, 1028-1033, 1038-1044, 1048, 1051, 1053, 1056, 1058-1061 1151-1152, 1361.

accordance with Executive Order 10450.

(64) The FBI has found that information provided by individuals during an interview is one of the most productive investigative tools used by law enforcement agencies. The largest roadblock to successfully obtaining the desired information through an interview is fear by the interviewee that his/her identity will be exposed and consequently, that he/she could be harassed, intimidated, or threatened with legal or economic reprisal, possible physical harm, or even death. In order to surmount these obstacles, persons interviewed by the FBI or other law enforcement agencies must be assured that their names and personally-identifying information will be held in the strictest confidence. The continued access by the FBI or other law enforcement agencies to persons willing to honestly relate pertinent facts bearing upon a particular investigation far outweighs any benefit the public might derive from disclosure of the names of those who cooperated with the FBI or other law enforcement agencies. Thus, the FBI has determined that these individuals maintain substantial privacy interests in not having their identity disclosed. In contrast, the FBI could identify no public interest in the disclosure of this information because disclosure of this third party name and/or identifying information would not shed light on or significantly increase the public's understanding of the operations and activities of the FBI or other law enforcement agencies. Accordingly, the FBI properly protected these individuals' privacy interests pursuant to FOIA Exemptions (b)(6)-3 and (b)(7)(C)-3<sup>23</sup>. At times, the FBI also cited FOIA Exemption (b)(7)(D)-2 in conjunction with FOIA Exemptions (b)(6)-3 and (b)(7)(C)-3 to protect the names of individuals under an implied assurance of confidentiality.<sup>24</sup>

---

<sup>23</sup> Category (b)(6)-3 and (b)(7)(C)-3 is located on the following Bates pages: FBI-1025, 1048, 1058, 1227.

<sup>24</sup> Category (b)(6)-3 and (b)(7)(C)-3 is cited in conjunction with (b)(7)(D)-2 on the following Bates pages: FBI-1025, 1048.

**(b)(6)-4 and (b)(7)(C)-4      Names of FBI Special Agents**

(65) In Category (b)(6)-4 and (b)(7)(C)-4, the FBI protected the names FBI Special Agents (“SAs”) who were responsible for conducting, supervising, and/or maintaining the suitability investigative activities reflected in the documents responsive to Plaintiff’s FOIA request. These responsibilities included conducting interviews and compiling information, as well as reporting on the status of the investigation. Assignments of SAs to any particular investigation are not by choice. Publicity (adverse or otherwise) regarding any particular investigation to which they have been assigned may seriously prejudice their effectiveness in conducting other investigations. The privacy consideration is also to protect FBI SAs, as individuals, from unnecessary, unofficial questioning as to the conduct of this or other investigations, whether or not they are currently employed by the FBI. FBI SAs conduct official inquiries into various criminal and national security violation cases. They come into contact with all strata of society, conducting searches and making arrests, both of which result in reasonable but nonetheless serious disturbances to people and their lives. It is possible for an individual targeted by such law enforcement actions to carry a grudge which may last for years. These individuals may seek revenge on the agents and other federal employees involved in a particular investigation. The publicity associated with the release of an agent’s identity in connection with a particular investigation could trigger hostility toward a particular agent. Thus, SAs maintain substantial privacy interests in information about them in criminal investigative files. In contrast, there is no public interest to be served by disclosing the identities of the SAs to the public because their identities would not, themselves, significantly increase the public’s understanding of the FBI’s operations and activities. Accordingly, after balancing these SAs’ substantial privacy interests against the non-existent public interest, the FBI properly protected the names of SAs pursuant to

Exemptions 6 and 7(C).<sup>25</sup>

**Exemption 7(D) – Confidential Source Information**

(66) Exemption 7(D) protects “records or information compiled for law enforcement purposes” when disclosure:

could reasonably be expected to disclose the identity of a confidential source, including a State, local or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement agency conducting a lawful national security intelligence investigation, information furnished by a confidential source.

5 U.S.C. § 552(b)(7)(D). Exemption 7(D) provides categorical protection for the identities of confidential sources, as well as the information provided by such sources in a criminal or national security investigation. No balancing of interests is required and the public’s interest in the information is not a factor.

(67) As background, confidential sources report to the FBI on a regular basis in furtherance of the FBI’s criminal law enforcement and national security mission. Some provide information under express assurances of confidentiality and are “informants” within the common meaning of the term. Others are interviewed and/or provide information under circumstances from which assurances of confidentiality may be inferred. In either situation, these sources are considered to be confidential because they furnish information only with the understanding that their identities and the information they provided will not be divulged outside the FBI.

(68) Information provided by confidential sources is singular in nature, and if released, could reveal their identities. The FBI has learned through experience that sources assisting,

---

<sup>25</sup> Category (b)(6)-4 and (b)(7)(C)-4 is located on the following Bates pages: FBI-1162, 1168, 1170, 1172, 1182, 1189, 1191, 1193, 1198, 1214, 1216, 1236, 1242, 1283-1284, 1288, 1300.

cooperating with, and providing information to the FBI must be free to do so without fear of reprisal. The FBI has also learned that sources must be free to furnish information to the FBI with complete candor and without the understandable tendency to hedge or withhold information because of fear that their cooperation with the FBI will later be made public. Sources providing information to the FBI must be secure in the knowledge that their assistance and their identities will be held in confidence. Given this need for confidentiality, the release of a source's identity would forever eliminate that source as a future means of obtaining information. In addition, when the identity of one source is revealed, that revelation has a chilling effect on the activities and cooperation of other sources. Such a result would eliminate one of the FBI's most important means of collecting information and thereby severely hamper law enforcement efforts to detect and apprehend individuals engaged in the violation of federal criminal laws.

**(b)(7)(D)-1**                    **Foreign Government Agency Information Under Express Confidentiality**

(69) FOIA Exemption (b)(7)(D)-1 has been asserted to withhold information provided to the FBI by a foreign government and/or foreign law enforcement entity under an express assurance of confidentiality. During the course of the FBI's intelligence investigations it received information from a foreign government regarding the on-going investigations. The FBI has many agreements with foreign governments under which security and/or criminal law enforcement information is exchanged. The agreements specify the extent of confidentiality requested by the respective foreign government entity. In some circumstances, a foreign government or entity may request confidentiality for its identity and information provided, while in other circumstances, a foreign government or entity might request classification for both its identity and information provided, and yet a third foreign government or entity may request that its information be

protected while it does not object to the disclosure of its relationship and interaction with the FBI.

(70) In this case, the FBI has express confidentiality agreements with these foreign governments and/or foreign law enforcement entities which provided information to the FBI during the conduct of suitability investigations. The FBI's agreements with these law enforcement entities provide assurance that the FBI will not disclose their identities, as well as the information that they provided to the FBI. If the FBI were to disclose the identities and the information provided by these foreign law enforcement entities under an express assurances of confidentiality, such a disclosure would have a chilling effect on the FBI's relationship with these entities. Furthermore, the disclosure would have a chilling effect on the FBI's relationship with other foreign law enforcement agencies which have entered into similar agreements with the FBI. The FBI has properly withheld this information pursuant to FOIA Exemption (b)(7)(D)-1.<sup>26</sup>

**(b)(7)(D)-2 Names, Identifying Information Data and/or Information Provided By Individuals Under an Implied Assurance of Confidentiality**

(71) In Category (b)(7)(D)-2, the FBI protected the names, identifying information about, and information provided by third parties under circumstances in which confidentiality can be inferred. These third parties provided information concerning the Communist Party activities of subjects who were of investigative interest to the FBI or other law enforcement agencies. Specifically, within the responsive documents, the FBI inferred that individuals provided information to the FBI only because they believed their cooperation with, and the information they provided, would remain confidential under the following circumstances:

(a) The FBI protected identifying information about and information provided by individuals who had provided information over a period of time that had proven to be reliable.

---

<sup>26</sup> Category (b)(7)(D)-1 is located on the following Bates pages: FBI-75, 458-460.

These individuals were in a position to have ready access to and/or knowledge about individuals involved in Communist Party activities. Such access exposed them to potential significant harms should their association and cooperation with the FBI be publicly disclosed. These third party sources provided specific detailed information that is singular in nature concerning the activities of certain subjects regarding the FBI's investigation of Communist Party activities. The disclosure of the identities of these sources and the information they provided could have dire consequences because disclosure could subject these third parties, as well as their families, to embarrassment, humiliation, and/or physical or mental harm.

(72) These third parties provided information of value to the FBI concerning its investigations, and in doing so, placed themselves in harm's way should their identity and cooperation with the FBI become known. Under these circumstances, it is reasonable to infer that these third parties cooperated with the FBI only with the expectation of confidentiality. Thus, the FBI properly protected the sources' identities and the information they provided pursuant to FOIA Exemption (b)(7)(D).<sup>27</sup> At times, the FBI also cited FOIA Exemptions (b)(6)-3 and (b)(7)(C)-3 in conjunction with FOIA Exemption (b)(7)(D)-2 to protect the names and/or identifying information of third parties who provided information.<sup>28</sup>

**DOCUMENTS REFERRED TO OTHER GOVERNMENT AGENCIES ("OGAs")**  
**FOR DIRECT RESPONSE TO PLAINTIFF**

(73) As part of its search for and processing of records responsive to Plaintiff's request, the FBI identified a number of pages containing information and/or equities originating with

---

<sup>27</sup> Category (b)(7)(D)-2 is located on the following Bates pages: FBI-973, 1025, 1048.

<sup>28</sup> See fn. 23, *supra*.

numerous Other Government Agencies (“OGAs”). In accordance with DOJ regulations, 28 C.F.R. § 16.4, the FBI referred the documents to those agencies for direct response to plaintiff.

***Department of Justice – National Security Division (“NSD”)***

(74) On April 17, 2015 and June 22, 2015, the FBI referred 141 pages to NSD for a direct response to Plaintiff. These pages are identifiable as FBI-19-37, 107-118, 120-122, 188, 202-211, 218-240, 257-259, 270, 833-885, 919-929, 935-938, 1072-1084, 1148-1150, 1165-1167, 1171, 1175-1180, 1220-1221, 1226, 1228-1232, 1239-1241, 1256-1258, 1260, 1290-1296, and 1358-1359. NSD determined that 42 pages were under the purview of another agency – the Office of Legal Counsel (“OLC”) - and sent them to that agency for direct referral to Plaintiff. These pages are identifiable as FBI-107-118, 202-208, 218-237, and 257-259. NSD advised FBI that it partially denied 4 pages containing NSD equities pursuant to Exemptions 6 and 7(C). These pages are identifiable as FBI-935-938. NSD’s accounting of the referral results will be described in NSD’s *Vaughn* submission in this case. (See Exhibit R.)

***OLC***

(75) By letter dated September 29, 2015, OLC advised Plaintiff that it received 42 pages of documents initially referred by NSD. OLC notified Plaintiff that it referred 8 pages to OIP for their direct response to Plaintiff. These pages are identifiable as FBI-233-237 and 257-259. OLC also stated that although the remaining 34 pages were protected by the deliberative process and attorney client privileges of FOIA Exemption 5 and exempt from disclosure, it was releasing the remaining pages to Plaintiff as a matter of discretion. These pages are identifiable as FBI-107-118, 202-208, and 218-232.

**OIP**

(76) On April 17, 2015, May 11, 2015, and June 22, 2015, the FBI referred 184 pages to OIP for a direct response to Plaintiff. These pages are identifiable as FBI-260-265, 376-381, 385-386, 397-409, 416-419, 570-590, 1181, 1243-1244, 1262-1267, 1310-1321, 1322-1350, 1353-1357, 1362-1409, and 1415-1443.

**April 17, 2015 OIP Referral (“OIP2”)**

(77) By letter dated September 2, 2015, the OIP advised Plaintiff the FBI referred one document consisting of six pages for direct response to Plaintiff. Initially, OIP advised it had withheld these documents pursuant to the deliberative process privilege of FOIA Exemption 5. These pages are identifiable as FBI-260-265.

**May 11, 2015 OIP Referral (“OIP3”)**

(78) By letter dated September 28, 2015, OIP advised Plaintiff the FBI referred 75 pages of material to them for direct response to Plaintiff. These pages are identifiable as FBI-376-381, 385-386, 397-409, 416-419, 570-590, and 1415-1443. Initially, OIP advised that 32 pages should be withheld in full pursuant to the deliberative process privilege of FOIA Exemption 5. These pages are identifiable as FBI-376-381, 385-386, 397-409, and 570-580. OIP also advised that two documents, totaling five pages were referred to the National Security Division. These pages are identifiable as FBI-416-419, and 590.<sup>29</sup> Lastly, OIP advised that 38 pages of the referred material were not responsive to Plaintiff’s request because it did not pertain to Executive Order 10450. These pages are identifiable as FBI-581-589, and 1415-1443.

---

<sup>29</sup> On October 4, 2016, NSD advised the FBI that it released these pages to Plaintiff in full on September 25, 2015.

**June 22, 2015 OIP Referral (“OIP4”)**

(79) By letter dated September 9, 2016, OIP advised Plaintiff the FBI and OLC referred a combined total of 111 pages of material to their office for direct response to Plaintiff. This referral included the 8 pages from OLC identifiable as FBI-233-237 and 257-259. The remaining 103 pages of FBI material are identifiable as FBI-1181, 1243-1244, 1262-1267, 1310-1321, 1322-1350, 1353-1357, and 1362-1409. OIP advised that this material was appropriate for release without excision. Additionally, OIP advised that the material in its two previous referrals, OIP2 and OIP3, were re-reviewed and OIP determined that all the information previously withheld, totaling 38 pages, was being released as a matter of agency discretion. These pages are identifiable as FBI-260-265, 376-381, 385-386, 397-409, and 570-580. OIP also identified three additional pages for release from those it previously deemed not responsive to Plaintiff’s request. These pages are identifiable as FBI-584-586.

**DOCUMENTS REFERRED TO OGAs FOR COORDINATION WITH THE FBI**

(80) The FBI also identified pages, some in their entireties and some in part, containing information and/or equities originating with OGAs. In accordance with DOJ regulations, 28 C.F.R. § 16.4(c), the FBI coordinated with these OGAs with equities in these documents to determine how the OGAs wanted the FBI to treat their information contained within the responsive FBI documents.

***NSD Coordination (“NSDI”)***

(81) On April 17, 2015, the FBI sent 138 pages to NSD for coordination. These pages are identifiable as FBI-38-94, 127-173, 251-256, 271-291, and 912-918. On May 5, 2015, the FBI

was notified that NSD had no objection to the documents' release in full. The FBI processed and released its own equities on these pages in full or in part. See ¶¶ 69-70, *supra*.

***NSD Coordination ("NSD2")***

(82) On June 22, 2015, the FBI sent 44 pages to NSD for coordination. These pages are identifiable as FBI-1087-1088, 1123-1125, 1168-1170, 1172-1174, 1182-1188, 1193-1213, 1214-1217, and 1227. On July 2, 2015, the FBI was notified that NSD had no further recommendations. The FBI processed and released its own equities on these pages in full or in part. See ¶¶ 61, 63-65, *supra*.

***Department of State ("DOS")***

(83) On June 22, 2015 the FBI sent 31 pages to DOS for coordination. These pages are identifiable as FBI-1165-1167, 1182-1188, and 1193-1213. On March 7, 2016, the FBI was notified that DOS had no objection to the release of these documents to Plaintiff. The FBI processed and released its own equities on these pages in full or in part. See ¶ 65, *supra*.

***OIP Coordination ("OIP-C1")***

(84) On May 11, 2015, the FBI sent 235 pages to OIP for coordination. These pages are identifiable as FBI-424-451, 458-460, 462-501, 536-557, 630-723, 726-751, and 753-774. On September 23, 2015, the FBI was notified that OIP held no equities and deferred to the FBI and any other equity holders on the release of this material. The FBI processed and released its own equities on these pages in full or in part. See ¶¶ 69-70, *supra*.

***OIP Coordination ("OIP-C2")***

(85) On June 22, 2015, the FBI sent 2 pages to OIP for coordination. These pages are

identifiable as FBI-1189-1190. On September 8, 2016, the FBI was notified that OIP had no objections to release as proposed, i.e. with the FBI's listed redactions for its own equities. The FBI processed and released its own equities on these pages in full or in part. *See* ¶ 65, *supra*.

***Department of Homeland Security - Federal Emergency Management Agency ("FEMA")***

(86) On June 22, 2015, the FBI sent 2 pages to FEMA for coordination. These pages are identifiable as FBI-1360-1361. On August 18, 2015, the FBI was notified that after carefully reviewing the documents, FEMA determined that the information was appropriate for release. The FBI processed and released its own equities on these pages in full or in part. *See* ¶ 62, *supra*.

***Department of Homeland Security – United States Immigration and Customs Enforcement ("ICE")***

(87) On June 22, 2015, the FBI sent 2 pages to ICE for coordination. These pages are identifiable as FBI-1136-1137. On July 8, 2015, the FBI was notified to withhold ICE-originated information pursuant to FOIA exemptions (b)(6) and (b)(7)(C). The justification for these withholdings will be addressed in ICE's *Vaughn* submission in this case. (***See Exhibit S.***)

***National Security Agency ("NSA")***

(88) On June 22, 2015, the FBI sent 2 pages to NSA for coordination. These pages are identifiable as FBI-1062-1063. On July 6, 2016, the FBI was notified that NSA had reviewed the document and determined that all NSA information was fully releasable. The FBI released these pages in full.

***White House/National Security Council ("NSC")***

(89) On June 22, 2015, the FBI sent 3 pages to the White House for coordination. These pages are identifiable as FBI-1233-1235. On July 8, 2016, the FBI was notified by NSC to release

these pages in full as the White House did not have equity interest in the document. The FBI released these pages in full.

***Department of Defense (“DOD”)***

(90) On June 22, 2015, the FBI sent 34 pages to DOD for coordination. These pages are identifiable as FBI-1162-1164, 1172-1174, 1182-1188, and 1193-1213. On December 3, 2015, the FBI was notified that DOD completed their review of the documents and determined that DOD equities were minimal. DOD advised no objection to disclosure and deferred to FBI for release. The FBI processed and released its own equities on these pages in full or in part. *See* ¶ 65, *supra*.

***Central Intelligence Agency (“CIA”)***

(91) On June 15, 2016, the FBI sent 35 pages to CIA for coordination. These pages are identifiable as FBI-1568-1602. On September 6, 2016, the FBI was notified by CIA to release the document in full. The FBI released these pages in full.

**SEGREGABILITY**

(92) As discussed in ¶ 4 *supra*, there were 1,602 responsive pages identified: 1,110 Released in Full (“RIF”), 93 Released in Part (“RIP”), and 399 Withheld in Full (“WIF”). Each of these categories is discussed below to further address segregability.

- A. Pages RIF. Following the segregability review, RIDS determined that 1,110 pages could be released in full without redaction as there was no foreseeable harm to an interest protected by a FOIA exemption.
- B. Pages RIP. Following the segregability review, RIDS determined that 93 pages could be released in part with redactions per the identified FOIA exemptions herein.

These pages comprise a mixture of material that could be segregated for release and material that was withheld as release would trigger foreseeable harm to one or more interests protected by the cited FOIA exemptions on these pages.

C. Pages WIF. Following the segregability review, RIDS determined that 399 pages were required to be withheld in their entirety. Of these, 324 pages were withheld in their entirety because they were referred to other government agencies for direct response to Plaintiff, 72 pages were withheld in their entirety because they were duplicative of other pages, and 3 pages (FBI-458-460) were withheld in their entirety because RIDS determined that all information on these pages was fully covered by FOIA Exemption (b)(7)(D)-1. See ¶¶ 69-70 & fn 25, supra. RIDS determined that any non-exempt information on these pages was so intertwined with exempt material, that no information could be reasonably segregated for release. Any further segregation of this intertwined material would employ finite resources only to produce disjointed words, phrases, or sentences, that taken separately or together, would have minimal or no informational content.

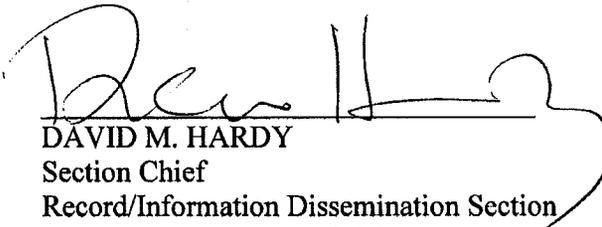
### CONCLUSION

(93) The FBI performed adequate and reasonable searches for responsive records; processed all such records and released all reasonably segregable non-exempt information from documents responsive to Plaintiff's FOIA requests that are subject to FOIA. The FBI processed the records under the access provisions of the FOIA to achieve maximum disclosure. Information was properly withheld pursuant to FOIA Exemptions (b)(1), (b)(3), (b)(6), (b)(7)(C), and (b)(7)(D).

The FBI carefully examined the documents and determined that the information withheld from Plaintiff in this case, if disclosed: would reveal classified and statutorily protected information; would cause a clearly unwarranted invasion of the personal privacy, or could reasonably be expected to constitute an unwarranted invasion of personal privacy; could reasonably be expected to disclose the identities of confidential sources and the information they provided. After extensive review of the documents at issue, I have determined that there is no further non-exempt information that can be reasonably segregated and released without revealing exempt information.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that Exhibits A through S attached hereto are true and correct copies.

Executed this <sup>17</sup>~~6~~ day of December, 2016.

  
DAVID M. HARDY  
Section Chief  
Record/Information Dissemination Section  
Records Management Division  
Federal Bureau of Investigation  
Winchester, Virginia



# McDermott Will & Emery

Boston Brussels Chicago Düsseldorf Frankfurt Houston London Los Angeles Miami  
Milan Munich New York Orange County Paris Rome Seoul Silicon Valley Washington, D.C.  
Strategic alliance with MWE China Law Offices (Shanghai)

Lisa A. Linsky  
Attorney at Law  
llinsky@mwe.com  
+1 212 547 6667

January 25, 2013

VIA FIRST CLASS MAIL

Federal Bureau of Investigation  
Record/Information Dissemination Section  
Attn: FOIPA Request  
170 Marcel Drive  
Winchester, VA 22602-4843

Dear FOIA Officer:

This is a new request pursuant to the Freedom of Information Act, 5 U.S.C. § 552.

In connection with this request, please provide copies of all communications, personnel or investigative files created in association with Executive Order 10450, which was signed by President Dwight Eisenhower in April 1953 and made effective on May 27, 1953. This request includes any and all internal FBI correspondence or communications regarding Executive Order 10450 and also specifically includes, but is not limited to, all files created by and communications to or from Warren E. Burger. The date range for this request is 1950-1990.

To assist you in locating the documents and information related to this request, Executive Order 10450 authorized federal agencies, including the U.S. Civil Service Commission and the Federal Bureau of Investigation, to investigate current and potential federal employees for security risks. Notably, the order expanded criteria for determining a security risk to include "Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, sexual perversion." In this regard, Executive Order 10450 authorized the FBI to expand its "Sex Deviate program," which systematically collected information on suspected homosexuals employed in the federal government, law enforcement agencies, and institutions of higher learning. In addition, Warren E. Burger was in charge of enforcing Executive Order 10450 as an Assistant Attorney General in charge of the Civil Division at the Department of Justice, for the approximate period 1952-1957. Information collected in the course of the program was forwarded to designated officials in the executive, legislative, and judicial branches of government.

Please advise if the administrative fees associated with this request will exceed \$500.00.

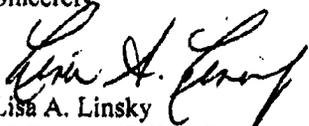
January 25, 2013  
Page 2

The information sought pursuant to this request is not for commercial use but rather in connection with the work of the Mattachine Society, a non-profit education and research organization.

Please feel free to contact me or my colleague, Lisa Gerson, via phone or email with any questions. Our contact information is listed below.

Your prompt attention to this request is appreciated.

Sincerely,

  
Lisa A. Linsky  
McDermott Will & Emery LLP  
340 Madison Avenue  
New York, New York 10172  
llinsky@mwe.com  
(212) 547-5587

Lisa Gerson  
lgerson@mwe.com  
(212) 547-5769

  
Jason Raymond  
2122 P Street NW  
Washington, D.C. 20037  
248.767.4740  
jasonmraymond@gmail.com

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

MATTACHINE SOCIETY OF  
WASHINGTON, D.C.

Plaintiff,

v.

UNITED STATES DEPARTMENT  
OF JUSTICE,

Defendant.

---

Civil Action No. 1:16-CV-00773-RCL

**Exhibit B**

U.S. Department of Justice



Federal Bureau of Investigation  
Washington, D.C. 20535

February 5, 2013

MS. LISA A. LINSKY  
MCDERMOTT, WILL & EMERY LLP  
340 MADISON AVENUE  
NEW YORK, NY 10172

FOIPA Request No.: 1207786-000  
Subject: EXECUTIVE ORDER 10450  
(1950-1990)

Dear Ms. Linsky:

This acknowledges receipt of your Freedom of Information/Privacy Acts (FOIPA) request to the FBI.

- This FOIPA request has been received at FBI Headquarters for processing.
- This FOIPA request has been received at the [ \_\_\_\_\_ Resident Agency / \_\_\_\_\_ Field Office] and forwarded to FBI Headquarters for processing.
- We are searching the indices to our Central Records System for the information responsive to this request. You will be informed of the results in future correspondence.
- Your request for a fee waiver is being considered and you will be advised of the decision at a later date.
- Please check for the status of your FOIPA request at [www.fbi.gov/foia](http://www.fbi.gov/foia)

The FOIPA Request number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Hardy".

David M. Hardy  
Section Chief,  
Record/Information  
Dissemination Section  
Records Management Division

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

MATTACHINE SOCIETY OF  
WASHINGTON, D.C.

Plaintiff,

v.

UNITED STATES DEPARTMENT  
OF JUSTICE,

Defendant.

---

Civil Action No. 1:16-CV-00773-RCL

**Exhibit C**

U.S. Department of Justice



Federal Bureau of Investigation  
Washington, D.C. 20535

March 13, 2013

MS. LISA A. LINSKY  
MCDERMOTT, WILL & EMERY LLP  
340 MADISON AVENUE  
NEW YORK, NY 10172

FOIPA Request No.: 1207786-000  
Subject: EXECUTIVE ORDER 10450  
(1950-1990)

Dear Ms. Linsky:

This is in reference to your Freedom of Information/Privacy Act (FOIPA) request.

By letter dated January 25, 2013, you indicated your willingness to pay \$500.00. We have located approximately 1,585 pages of records potentially responsive to your request. There is a duplication fee of ten cents per page if you receive a paper copy (See 28 C.F.R. §16.11 and 16.49). Releases are also available on CD upon request. Each CD contains approximately 500 pages per release. The 500 page estimate is based on our business practice of processing medium and large track cases through interim releases of approximately 500 pages. The first 100 pages, or the cost equivalent (\$10.00) for releases on CD, will be provided to you at no charge. By DOJ regulation, the FBI notifies requesters when anticipated fees exceed \$25.00. If all of the pages that are potentially responsive to your request are released, you will owe \$148.50 in duplication fees to receive a paper copy or \$35.00 (3CD's at \$15.00 less \$10.00) to receive the release on CD if an alternative address is provided. Please remember this is only an estimate, and if some of the pages are withheld in full pursuant to FOIA/Privacy Act exemption(s) or are determined to not be responsive to your request, the actual charges could be less.

To speed processing your request, please consider reducing its scope to place it in a smaller processing queue. This may reduce your search and duplication costs and hasten the receipt of your information. The FBI uses a three-queue processing system to fairly assign and process new requests. Requests track into one of the three queues depending on the number of responsive pages - 500 pages or less (small queue), 501 pages to 2500 pages (medium queue), or more than 2500 pages (large queue). Small queue cases usually require the least time to process. Please let us know in writing if you would like to discuss reducing the scope of your request and your willingness to pay the estimated search and duplication costs indicated above. Please provide a telephone number, if one is available, where we can reach you between 8:00 a.m. and 5:00 p.m., Eastern Time. Mail your response to: Initial Processing, Record Information/Dissemination Section, Records Management Division, Federal Bureau of Investigation, 170 Marcel Drive, Winchester, VA 22602. You may also fax your response to: 540-868-4997, Attention: Initial Processing.

**No payment is required at this time.** However, you must notify us in writing within thirty (30) days from the date of this letter of your format decision (paper or CD) and your commitment to pay the estimated fee. Please include the FOIPA Request Number listed above in any communication regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Hardy".

David M. Hardy  
Section Chief,  
Record/Information  
Dissemination Section  
Records Management Division

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

MATTACHINE SOCIETY OF  
WASHINGTON, D.C.

Plaintiff,

v.

UNITED STATES DEPARTMENT  
OF JUSTICE,

Defendant.

---

Civil Action No. 1:16-CV-00773-RCL

**Exhibit D**

# McDermott Will & Emery

Boston Brussels Chicago Düsseldorf Frankfurt Houston London Los Angeles Miami  
Milan Munich New York Orange County Paris Rome Seoul Silicon Valley Washington, D.C.  
Strategic alliance with MWE China Law Offices (Shanghai)

Lisa A. Linsky  
Attorney at Law  
llinsky@mwe.com  
+1 212 547 5587

March 25, 2013

Initial Processing  
Record Information/Dissemination Section  
Records Management Division  
Federal Bureau of Investigation  
170 Marcel Drive  
Winchester, VA 22602

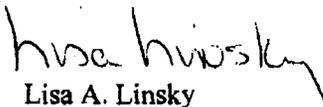
Re: FOIPA Request No.: 1207786-000

Dear Mr. Hardy:

This is in response to a letter dated March 13, 2013, in which you addressed the dissemination of approximately 1,585 pages of records in response to a Freedom of Information/Privacy Act (FOIPA) request. As indicated in the initial FOIPA request, we are willing to pay the estimated search and duplication costs. We also request that the records be provided on CD and on a rolling basis as they become available for release.

Regarding your question about a potential reduction in scope of this FOIPA request, please be advised that we do not wish to reduce the scope of the FOIPA request in any manner.

Very truly yours,



Lisa A. Linsky

**McDermott  
Will & Emery**

McDermott Will & Emery LLP  
340 Madison Avenue  
New York, New York 10173-1822

INITIAL PROCESSING  
RECORD INFORMATION/DISSEMINATION  
SECTION  
RECORDS MANAGEMENT DIVISION  
FEDERAL BUREAU OF INVESTIGATION  
170 MARCEL DRIVE  
WINCHESTER, VA 22602

2280234843 R001



U.S. FEDERAL ENERGY STORES  
\$ 000.46  
RECORDED & INDEXED  
MAY 17 2013

ECILE



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

MATTACHINE SOCIETY OF  
WASHINGTON, D.C.

Plaintiff,

v.

UNITED STATES DEPARTMENT  
OF JUSTICE,

Defendant.

---

Civil Action No. 1:16-CV-00773-RCL

**Exhibit E**

# McDermott Will & Emery

Boston Brussels Chicago Düsseldorf Frankfurt Houston London Los Angeles Miami  
Milan Munich New York Orange County Paris Rome Seoul Silicon Valley Washington, D.C.  
Strategic alliance with MWE China Law Offices (Shanghai)

Lisa A. Linsky  
Attorney at Law  
llinsky@mwe.com  
+1 212 547 5587

May 16, 2013

Initial Processing  
Record Information/Dissemination Section  
Records Management Division  
Federal Bureau of Investigation  
170 Marcel Drive  
Winchester, VA 22602

Re: FOIPA Request No.: 1207786-000

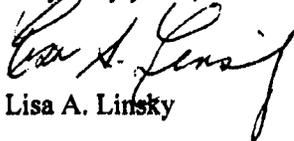
Dear Mr. Hardy:

This is in follow-up to our response regarding the above-mentioned Freedom of Information/Privacy Act (FOIPA) Request. On March 25, 2013, we responded to a letter dated March 13, 2013, in which you addressed the dissemination of approximately 1,585 pages of records in response to a FOIPA request. Our March 25, 2013, response is attached to this letter. As indicated in our response, as well as in the initial FOIPA request, we are willing to pay the estimated search and duplication costs. In our response we also requested that the records be provided on CD and on a rolling basis as they become available for release.

As of the date of this letter, we have not received any of the aforementioned records. We write now in an effort to determine the estimated time of delivery of these requested records which you have in your possession.

For the sake of completeness, we reiterate that we do not wish to reduce the scope of the FOIPA request in any manner.

Very truly yours,



Lisa A. Linsky

U.S. practice conducted through McDermott Will & Emery LLP.

340 Madison Avenue New York, New York 10173-1922 Telephone: +1 212 547 5400 Facsimile: +1 212 547 5444 www.mwe.com

# McDermott Will & Emery

Boston Brussels Chicago Düsseldorf Frankfurt Houston London Los Angeles Miami  
Milan Munich New York Orange County Paris Rome Seoul Silicon Valley Washington, D.C.  
Strategic alliance with MWE China Law Offices (Shanghai)

Lisa A. Linsky  
Attorney at Law  
llinsky@mwe.com  
+1 212 547 5567

March 25, 2013

Initial Processing  
Record Information/Dissemination Section  
Records Management Division  
Federal Bureau of Investigation  
170 Marcel Drive  
Winchester, VA 22602

Re: FOIPA Request No.: 1207786-000

Dear Mr. Hardy:

This is in response to a letter dated March 13, 2013, in which you addressed the dissemination of approximately 1,585 pages of records in response to a Freedom of Information/Privacy Act (FOIPA) request. As indicated in the initial FOIPA request, we are willing to pay the estimated search and duplication costs. We also request that the records be provided on CD and on a rolling basis as they become available for release.

Regarding your question about a potential reduction in scope of this FOIPA request, please be advised that we do not wish to reduce the scope of the FOIPA request in any manner.

Very truly yours,



Lisa A. Linsky

**McDermott  
Will & Emery**

McDermott Will & Emery  
640, Marcel Drive  
New York, New York 10118-1902



**Initial Processing  
Records Information/Dissemination Section  
Records Management Division  
Federal Bureau of Investigation  
170 Marcel Drive  
Winchester, VA 22602**

2260234843 R001



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

MATTACHINE SOCIETY OF  
WASHINGTON, D.C.

Plaintiff,

v.

UNITED STATES DEPARTMENT  
OF JUSTICE,

Defendant.

---

Civil Action No. 1:16-CV-00773-RCL

**Exhibit F**

# McDermott Will & Emery

Boston Brussels Chicago Düsseldorf Frankfurt Houston London Los Angeles Miami  
Milan Munich New York Orange County Paris Rome Seoul Silicon Valley Washington, D.C.  
Strategic alliance with MWE China Law Offices (Shanghai)

Lisa A. Linsky  
Attorney at Law  
llinsky@mwe.com  
+1 212 547 5587

December 13, 2013

Mr. David M. Hardy  
Section Chief  
Record Information/Dissemination Section  
Records Management Division  
Federal Bureau of Investigation  
170 Marcel Drive  
Winchester, VA 22602

*admin*  
*\* in back*

Re: FOIPA Request No.: 1207786-000

Dear Mr. Hardy:

This is our second follow-up letter regarding the above-referenced Freedom of Information/Privacy Act (FOIPA) Request.

On March 25, 2013, we responded to your letter dated March 13, 2013, in which you addressed the dissemination of approximately 1,585 pages of records in response to our original FOIPA request. For your convenience, copies of our March 25, 2013 letter and your March 13, 2013 letter are enclosed. As indicated in our response, as well as in the initial FOIPA request, we are willing to pay the estimated search and duplication costs associated with providing these 1,585 pages of responsive documents to us. In our response dated March 25, 2013, we also requested that the records be provided on CD and on a rolling basis as they become available for release. Because we did not receive a response to our March 25, 2013, letter, we sent a second letter to you on May 16, 2013. A copy of our May 16, 2013 letter is also enclosed.

As of the date of this letter, we have not received any of the aforementioned responsive records, nor have we received any response to our March 25, 2013 or May 16, 2013 letters from you. Please promptly provide the documents in response to our repeated FOIPA request.

For the sake of completeness, we reiterate that we do not wish to reduce the scope of our FOIPA request in any manner.

Very truly yours,

*lisalinsky*  
Lisa A. Linsky

Enclosures

U.S. practice conducted through McDermott Will & Emery LLP.

340 Madison Avenue New York, New York 10173-1922 Telephone: +1 212 547 5400 Facsimile: +1 212 547 5444 www.mwe.com

# McDermott Will & Emery

Boston Brussels Chicago Düsseldorf Frankfurt Houston London Los Angeles Miami  
Milan Munich New York Orange County Paris Rome Seoul Silicon Valley Washington, D.C.  
Strategic alliance with MWE China Law Offices (Shanghai)

Lisa A. Linsky  
Attorney at Law  
llinsky@mwe.com  
+1 212 547 5587

March 25, 2013

Initial Processing  
Record Information/Dissemination Section  
Records Management Division  
Federal Bureau of Investigation  
170 Marcel Drive  
Winchester, VA 22602

Re: FOIPA Request No.: 1207786-000

Dear Mr. Hardy:

This is in response to a letter dated March 13, 2013, in which you addressed the dissemination of approximately 1,585 pages of records in response to a Freedom of Information/Privacy Act (FOIPA) request. As indicated in the initial FOIPA request, we are willing to pay the estimated search and duplication costs. We also request that the records be provided on CD and on a rolling basis as they become available for release.

Regarding your question about a potential reduction in scope of this FOIPA request, please be advised that we do not wish to reduce the scope of the FOIPA request in any manner.

Very truly yours,

/s/

Lisa A. Linsky

U.S. Department of Justice



Federal Bureau of Investigation  
Washington, D.C. 20535

March 13, 2013

MS. LISA A. LINSKY  
MCDERMOTT, WILL & EMERY LLP  
340 MADISON AVENUE  
NEW YORK, NY 10172

FOIPA Request No.: 1207786-000  
Subject: EXECUTIVE ORDER 10450  
(1950-1990)

Dear Ms. Linsky:

This is in reference to your Freedom of Information/Privacy Act (FOIPA) request.

By letter dated January 25, 2013, you indicated your willingness to pay \$500.00. We have located approximately 1,585 pages of records potentially responsive to your request. There is a duplication fee of ten cents per page if you receive a paper copy (See 28 C.F.R. §16.11 and 16.49). Releases are also available on CD upon request. Each CD contains approximately 500 pages per release. The 500 page estimate is based on our business practice of processing medium and large track cases through interim releases of approximately 500 pages. The first 100 pages, or the cost equivalent (\$10.00) for releases on CD, will be provided to you at no charge. By DOJ regulation, the FBI notifies requesters when anticipated fees exceed \$25.00. If all of the pages that are potentially responsive to your request are released, you will owe \$148.50 in duplication fees to receive a paper copy or \$35.00 (3CD's at \$15.00 less \$10.00) to receive the release on CD if an alternative address is provided. Please remember this is only an estimate, and if some of the pages are withheld in full pursuant to FOIA/Privacy Act exemption(s) or are determined to not be responsive to your request, the actual charges could be less.

To speed processing your request, please consider reducing its scope to place it in a smaller processing queue. This may reduce your search and duplication costs and hasten the receipt of your information. The FBI uses a three-queue processing system to fairly assign and process new requests. Requests track into one of the three queues depending on the number of responsive pages - 500 pages or less (small queue), 501 pages to 2500 pages (medium queue), or more than 2500 pages (large queue). Small queue cases usually require the least time to process. Please let us know in writing if you would like to discuss reducing the scope of your request and your willingness to pay the estimated search and duplication costs indicated above. Please provide a telephone number, if one is available, where we can reach you between 8:00 a.m. and 5:00 p.m., Eastern Time. Mail your response to: Initial Processing, Record Information/Dissemination Section, Records Management Division, Federal Bureau of Investigation, 170 Marcel Drive, Winchester, VA 22602. You may also fax your response to: 540-868-4997, Attention: Initial Processing.

**No payment is required at this time.** However, you must notify us in writing within thirty (30) days from the date of this letter of your format decision (paper or CD) and your commitment to pay the estimated fee. Please include the FOIPA Request Number listed above in any communication regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Hardy", is written over the typed name.

David M. Hardy  
Section Chief,  
Record/Information  
Dissemination Section  
Records Management Division



FO

McDermott Will & Emery LLP  
340 Madison Avenue  
New York, New York 10173-1922

**McDermott  
Will & Emery**

Mr. David M. Hardy  
Section Chief  
Record Information/Dissemination Section  
Records Management Division  
Federal Bureau of Investigation  
170 Marcel Drive  
Winchester, VA 22602

OPENED & INSPECTED  
DEC 18 2013

22602484370



ET



U.S. Department of Justice



Federal Bureau of Investigation  
Washington, D.C. 20535

April 17, 2015

LISA A LINSKY  
MCDERMOTT, WILL & EMERY LLP  
340 MADISON AVENUE  
NEW YORK, NY 10173

FOIPA Request No.: 1207786-000  
Subject: EXECUTIVE ORDER 10450 (1950-1990)

Dear Lisa Linsky:

The enclosed documents were reviewed under the Freedom of Information/Privacy Acts (FOIPA), Title 5, United States Code, Section 552/552a. Deletions have been made to protect information which is exempt from disclosure, with the appropriate exemptions noted on the page next to the excision. In addition, a deleted page information sheet was inserted in the file to indicate where pages were withheld entirely. The exemptions used to withhold information are marked below and explained on the enclosed Explanation of Exemptions:

Section 552		Section 552a
<input type="checkbox"/> (b)(1)	<input type="checkbox"/> (b)(7)(A)	<input type="checkbox"/> (d)(5)
<input type="checkbox"/> (b)(2)	<input type="checkbox"/> (b)(7)(B)	<input type="checkbox"/> (j)(2)
<input checked="" type="checkbox"/> (b)(3)	<input type="checkbox"/> (b)(7)(C)	<input type="checkbox"/> (k)(1)
<u>Rule 6(e), FRCP</u>	<input checked="" type="checkbox"/> (b)(7)(D)	<input type="checkbox"/> (k)(2)
_____	<input type="checkbox"/> (b)(7)(E)	<input type="checkbox"/> (k)(3)
_____	<input type="checkbox"/> (b)(7)(F)	<input type="checkbox"/> (k)(4)
<input type="checkbox"/> (b)(4)	<input type="checkbox"/> (b)(8)	<input type="checkbox"/> (k)(5)
<input type="checkbox"/> (b)(5)	<input type="checkbox"/> (b)(9)	<input type="checkbox"/> (k)(6)
<input type="checkbox"/> (b)(6)		<input type="checkbox"/> (k)(7)

539 pages were reviewed and 253 pages are being released.

Documents were located which originated with, or contained information concerning, other Government agencies) [OGA].

This information has been referred to the OGA(s) for review and direct response to you.

We are consulting with OGA(s). The FBI will correspond with you regarding this information when the consultation is finished.

In accordance with standard FBI practice and pursuant to FOIA exemption (b)(7)(E) and Privacy Act exemption (j)(2) [5 U.S.C. § 552/552a (b)(7)(E)/(j)(2)], this response neither confirms nor denies the existence of your subject's name on any watch lists.

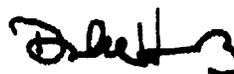
For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist. Enclosed for your information is a copy of the Explanation of Exemptions.

You have the right to appeal any denials in this release. Appeals should be directed in writing to the Director, Office of Information Policy (OIP), U.S. Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's eFOIA portal at <http://www.justice.gov/oip/efoia-portal.html>. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be easily identified.

The enclosed material is from the main investigative file(s) in which the subject(s) of your request was the focus of the investigation. Our search located additional references, in files relating to other individuals, or matters, which may or may not be about your subject(s). Our experience has shown when ident, references usually contain information similar to the information processed in the main file(s). Because of our significant backlog, we have given priority to processing only the main investigative file(s). If you want the references, you must submit a separate request for them in writing, and they will be reviewed at a later date, as time and resources permit.

See additional information which follows.

Sincerely,



David M. Hardy  
Section Chief  
Record/Information  
Dissemination Section  
Records Management Division

Enclosure(s)

In response to your Freedom of Information Act (FOIA) request submitted to the Records Management Division at Winchester, VA, enclosed is a processed copy of FBI Headquarters file 66-HQ-A19000, sections 1, 2, and 4. This release represents the first interim release of information responsive to your request.

Per your request the release has been placed on a CD-ROM.

No fee is being assessed at this time. When the second interim release is made in this case, you will be billed for the \$5.00 fee associated with this first release as well as the \$15.00 duplication fee for the second release for a total of \$20.00. Each subsequent release will be made at a cost of \$15.00.

Inquiries regarding your OGA referrals designated within the release as "Referral/Direct" may be directed to the following agencies at:

Teresa Crosland  
National Security Division  
Department of Justice  
Room 6150  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001

Carmen L. Mallon  
Chief of Staff  
Office of Information Policy  
Department of Justice Suite 11050  
1425 New York Ave, NW  
Washington, DC 20530-0001

**EXPLANATION OF EXEMPTIONS****SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552**

- (b)(1) (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 to such Executive order;
- (b)(2) related solely to the internal personnel rules and practices of an agency;
- (b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ( A ) could reasonably be expected to interfere with enforcement proceedings, ( B ) would deprive a person of a right to a fair trial or an impartial adjudication, ( C ) could reasonably be expected to constitute an unwarranted invasion of personal privacy, ( D ) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, ( E ) 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, or ( F ) could reasonably be expected to endanger the life or physical safety of any individual;
- (b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (b)(9) geological and geophysical information and data, including maps, concerning wells.

**SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a**

- (d)(5) information compiled in reasonable anticipation of a civil action proceeding;
- (j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;
- (k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;
- (k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;
- (k)(4) required by statute to be maintained and used solely as statistical records;
- (k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;
- (k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

MATTACHINE SOCIETY OF  
WASHINGTON, D.C.

Plaintiff,

v.

UNITED STATES DEPARTMENT  
OF JUSTICE,

Defendant.

---

Civil Action No. 1:16-CV-00773-RCL

**Exhibit H**



U.S. Department of Justice

Federal Bureau of Investigation  
Washington, D.C. 20535

May 12, 2015

LISA A LINSKY  
MCDERMOTT, WILL & EMERY LLP  
340 MADISON AVENUE  
NEW YORK, NY 10172

FOIPA Request No.: 1207786-000  
Subject: EXECUTIVE ORDER 10450 (1950-1990)

Dear Lisa Linsky:

The enclosed documents were reviewed under the Freedom of Information/Privacy Acts (FOIPA), Title 5, United States Code, Section 552/552a. Deletions have been made to protect information which is exempt from disclosure, with the appropriate exemptions noted on the page next to the excision. In addition, a deleted page information sheet was inserted in the file to indicate where pages were withheld entirely. The exemptions used to withhold information are marked below and explained on the enclosed Explanation of Exemptions:

Section 552		Section 552a	
<input type="checkbox"/> (b)(1)	<input type="checkbox"/> (b)(7)(A)	<input checked="" type="checkbox"/> (d)(5)	
<input type="checkbox"/> (b)(2)	<input type="checkbox"/> (b)(7)(B)	<input type="checkbox"/> (j)(2)	
<input type="checkbox"/> (b)(3)	<input checked="" type="checkbox"/> (b)(7)(C)	<input type="checkbox"/> (k)(1)	
_____	<input type="checkbox"/> (b)(7)(D)	<input type="checkbox"/> (k)(2)	
_____	<input type="checkbox"/> (b)(7)(E)	<input type="checkbox"/> (k)(3)	
_____	<input type="checkbox"/> (b)(7)(F)	<input type="checkbox"/> (k)(4)	
<input type="checkbox"/> (b)(4)	<input type="checkbox"/> (b)(8)	<input type="checkbox"/> (k)(5)	
<input type="checkbox"/> (b)(5)	<input type="checkbox"/> (b)(9)	<input type="checkbox"/> (k)(6)	
<input checked="" type="checkbox"/> (b)(6)		<input type="checkbox"/> (k)(7)	

552 pages were reviewed and 169 pages are being released.

Documents were located which originated with, or contained information concerning, other Government Agency (OGA).

This information has been referred to the OGA for review and direct response to you.

We are consulting with another agency. The FBI will correspond with you regarding this information when the consultation is completed.

In accordance with standard FBI practice and pursuant to FOIA exemption (b)(7)(E) and Privacy Act exemption (j)(2) [5 U.S.C. § 552/552a (b)(7)(E)/(j)(2)], this response neither confirms nor denies the existence of your subject's name on any watch lists.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist. Enclosed for your information is a copy of the Explanation of Exemptions.

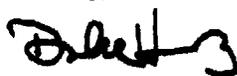
For questions regarding our determinations, visit the [www.fbi.gov/foia](http://www.fbi.gov/foia) website under "Contact Us." The FOIPA Request Number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

You have the right to appeal any denials in this release. Appeals should be directed in writing to the Director, Office Information Policy (OIP), U.S. Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's eFOIA portal at <http://www.justice.gov/oip/efoia-portal.html>. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be easily identified.

The enclosed material is from the main investigative file(s) in which the subject(s) of your request was the focus of the investigation. Our search located additional references, in files relating to other individuals, or matters, which may or may not be about your subject(s). Our experience has shown when ident, references usually contain information similar to the information processed in the main file(s). Because of our significant backlog, we have given priority to processing only the main investigative file(s). If you want the references, you must submit a separate request for them in writing, and they will be reviewed at a later date, as time and resources permit.

See additional information which follows.

Sincerely,



David M. Hardy  
Section Chief  
Record/Information  
Dissemination Section  
Records Management Division

Enclosure(s)

In response to your Freedom of Information Act (FOIA) request submitted to the Records Management Division at Winchester, VA, enclosed is a processed copy of FBI Headquarters file 66-HQ-A19000, section 3, 66-HQ-A19000 EBF 50, section 1, and 66-HQ-A19000 EBF 89, section 1. This release represents the second interim release of information responsive to your request.

Per your request the release has been placed on a CD-ROM.

By letter dated April 17, 2015, we sent you a CD containing the first interim release for this case. At that time, we explained the \$5.00 balance associated with that release would be billed with this release. Accordingly, upon receipt of the enclosed CD-ROM, please go to [www.pay.gov](http://www.pay.gov) to make an electronic payment\* in the amount of \$20.00, or make a check or money order payable to the Federal Bureau of Investigation and remit it to the Work Process Unit, Record Information/Dissemination Section, Records Management Division, Federal Bureau of Investigation, 170 Marcel Drive, Winchester, VA 22602. Please include the FOIPA Request Number with your payment. Failure to pay for this release within thirty (30) days from the date of this letter will close any pending FBI FOIPA requests from you. Nonpayment will also cause an automatic denial of any future FOIPA requests.

For questions regarding our determinations, visit the [www.fbi.gov/foia](http://www.fbi.gov/foia) website under "Contact Us."

The FOIPA Request Number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

\*Pay.gov is a secure web-based application that accepts credit card and ACH payments online, and is hosted by the United States Department of Treasury, Financial Management Service. For frequent FOIPA requesters, it is recommended to create a Pay.gov account to retain an online history of payments made through Pay.gov and to retain specific information for future payments. To make an electronic payment, complete the FBI Freedom of Information Act and Privacy Act Form located on Pay.gov. Please note: if a refund is necessary, there is less processing time to refund a credit card payment than an ACH payment.

Inquiries regarding your OGA referrals designated within the release as "Referral/Direct" may be directed to the following agencies at:

Vanessa Brinkman  
Department of Justice  
Office of Information Policy (OIP)  
1425 New York Ave, NW  
Washington, DC 20530-0001

**EXPLANATION OF EXEMPTIONS****SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552**

- (b)(1) (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 to such Executive order;
- (b)(2) related solely to the internal personnel rules and practices of an agency;
- (b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ( A ) could reasonably be expected to interfere with enforcement proceedings, ( B ) would deprive a person of a right to a fair trial or an impartial adjudication., ( C ) could reasonably be expected to constitute an unwarranted invasion of personal privacy, ( D ) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, ( E ) 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, or ( F ) could reasonably be expected to endanger the life or physical safety of any individual;
- (b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (b)(9) geological and geophysical information and data, including maps, concerning wells.

**SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a**

- (d)(5) information compiled in reasonable anticipation of a civil action proceeding;
- (j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;
- (k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;
- (k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;
- (k)(4) required by statute to be maintained and used solely as statistical records;
- (k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;
- (k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.



MATTACHINE SOCIETY OF WASHINGTON, D. C. (THE)  
 1527 18TH ST NW APT 7  
 WASHINGTON, DC 20036-1462

1176  
 15-122/540 7727  
 5561840512

DATE 5/22/15

PAY TO THE ORDER OF FBI \$ 20.00

Twenty and 00/100 DOLLARS

WELLS FARGO Bank, N.A.  
 Member FDIC  
 Wells Fargo Bank, N.A.  
 District of Columbia  
 wells Fargo.com

FOR FOIPA Request # 1207786-000

⑈0000001176⑈ ⑆054001220⑆ 5561840512⑈

Received  
5/27/2015

Pate Felts  
1338 Q St NW  
Washington, DC 20009

CAPITAL DISTRICT

22 MAY 2015 PM 2 L

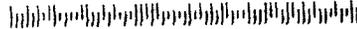


# 1207786-0  
DB

INSPEC  
23 2015

Work Process Unit  
Record Information/Dissemination Section  
Records Management Division  
FBI  
170 Marcel Drive  
Winchester, VA 22602

22602484370



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

MATTACHINE SOCIETY OF  
WASHINGTON, D.C.

Plaintiff,

v.

UNITED STATES DEPARTMENT  
OF JUSTICE,

Defendant.

---

Civil Action No. 1:16-CV-00773-RCL

**Exhibit J**

# McDermott Will & Emery

FOIA (SMB)  
FBI

Boston Brussels Chicago Dallas Düsseldorf Frankfurt Houston London Los Angeles Miami  
Milan Munich New York Orange County Paris Rome Seoul Silicon Valley Washington, D.C.  
Strategic alliance with MWE China Law Offices (Shanghai)

Lisa A. Linsky  
Attorney at Law  
llinsky@mwe.com  
+1 212 547 5587

June 12, 2015

**VIA UNITED STATES MAIL**

RECEIVED  
JUN 23 2015  
Office of Information Policy

Director  
Office of Information Policy  
United States Department of Justice  
1425 New York Ave., Suite 1050  
Washington D.C. 2530-0001

Re: Appeal of Agency Determination of FOIA Request No. 1207786-000

Dear Director:

We represent the Mattachine Society of Washington D.C. ("MSDC") in the above referenced request for documents pursuant to the Freedom of Information Act ("FOIA"). The MSDC is a non-profit, non-partisan research and educational society that conducts original archival research at The National Archives, U.S. presidential libraries, the Library of Congress, the FOIA Library of the Federal Bureau of Investigation, the Stonewall National Museum and Archives, and other private and public repositories across the country. The mission of the MSDC is to uncover the often deleted political histories of lesbian, gay, bisexual and transgender ("LGBT") Americans who faced persecution and discrimination at the hands of federal and state governments for over sixty-five years. The MSDC is dedicated to achieving full civil equality for LGBT Americans.

We, on behalf of the MSDC, hereby appeal the determinations of the Federal Bureau of Investigation ("FBI") and Department of Justice ("DOJ") with respect to the above referenced matter for the reasons detailed herein.

### **Background**

Under the pretext of protecting national security, President Dwight D. Eisenhower issued Executive Order 10450 ("EO 10450"), declaring that the federal government could deny a citizen employment in "each department or agency of the Government" solely because that person was homosexual. Exec. Order No. 10,450 § 2, 18 Fed. Reg. 2,489 (Apr. 29, 1953). We understand that then Assistant Attorney General Warren E. Burger (and later Chief Justice of the Supreme Court) was tasked with the responsibility of defending any action under EO 10450.

On or about January 25, 2014, the MSDC submitted a FOIA request (the "Request") to the Federal Bureau of Investigation (the "FBI") seeking the production of documents concerning

U.S. practice conducted through McDermott Will & Emery LLP.

340 Madison Avenue New York, New York 10173-1922 Telephone: +1 212 547 5400 Facsimile: +1 212 547 5444 www.mwe.com

Federal Bureau of Investigation  
June 12, 2015  
Page 2

EO 10450 dated from January 1, 1950 through December 31, 1990. The Request specifically sought all files in the FBI's possession created by and communications to or from Warren Burger concerning EO 10450.

More than two years later, on April 17, 2015, the FBI responded to the Request stating that "539 pages were reviewed and 253 pages are being released." (Ltr. from D. Hardy to L. Linsky, dated Apr. 17, 2015 (the "FBI Letter").) The FBI claims that the following exemptions, pursuant to 5 U.S.C. § 552, justified the withholding of documents responsive to the Request: 552(b)(3) (citing Federal Rule of Criminal Procedure 6(e)) and 552(b)(7)(D). Additional documents were sent to other Government agencies for review.

On May 5, 2015, we received a letter from the Department of Justice, National Security Division ("DOJ") which released an additional number of pages. However, the DOJ stated that it had "reviewed these records and are releasing them in part." (Ltr. from K. Tiernan to L. Linsky, dated May 5, 2015 (the "DOJ Letter").) The DOJ claims that the following exemptions, pursuant to 5 U.S.C. § 552, justified the withholding of documents responsive to the Request: 552(b)(6) and 552(b)(7)(C).

We hereby appeal the FBI's and the DOJ's determinations and respectfully request that the FBI (i) reconsider the scope of its search for documents and (ii) reconsider its application of the claimed exemptions.

#### **Reasons for Appeal**

"Congress enacted the FOIA in order to 'pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'" *Morley v. C.I.A.*, 508 F.3d 1108, 114 (D.C. Cir. 2007) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976); *Rose v. Dep't of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)). FOIA "adopts as its most basic premise a policy strongly favoring public disclosure of information of federal agencies." *Halpern v. F.B.I.*, 181 F.3d 279, 286 (2d Cir. 1999).

Based upon the information we have received in response to the Request, we believe that the FBI and DOJ have not met these standards. More specifically, we assert that (i) the scope of the FBI's search for documents was inadequate and (ii) the FBI has failed to meet its burden to demonstrate that the claimed exemptions apply. For the reasons stated below, the FBI should reconsider its initial response, expand its search, and produce more documents pursuant to the Request.

#### ***The FBI's Search for Documents Was Inadequate***

At the time the FBI received the Request, it had a responsibility "to do a reasonably thorough search of its records and to turn over all responsive materials except those for which it could prove an exemption from disclosure." *Church of Scientology Int'l v. DOJ*, 30 F.3d 224,

Federal Bureau of Investigation  
June 12, 2015  
Page 3

229-30 (1st Cir. 1994). In judging whether an agency has conducted an adequate search, “the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Oglesby v. United States Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

Here, the FBI has not provided any basis upon which the adequacy of its search can be reasonably evaluated. It has not disclosed what method it used to search for records, where it searched for records or what other possible search parameters it used to locate potentially responsive documents. At a minimum, we request that the FBI disclose this basic information so that the adequacy of the FBI’s search methodology can be scrutinized.

But, at a more fundamental level, it is apparent from the released documents themselves that the FBI’s search was inadequate. As noted above, the time period for the request was from 1950 through 1990. The FBI released documents from the approximate period of 1956 through 1959. There is no indication whatsoever that the FBI searched for documents outside of this time period. This is especially troubling given that EO 10450 was issued in April of 1953 and the documents produced by the FBI predominantly concern the amendment of EO 10450 in light of the Supreme Court’s decision in *Cole v. Young* which invalidated large portions of EO 10450.

Moreover, the FOIA request specifically requests all files in the FBI’s possession created by and communications to or from Warren E. Burger concerning EO 10450. There is not one record that was produced by the FBI upon which Mr. Burger was copied or authored.

We believe that the FBI’s search is patently inadequate and respectfully request that the FBI reevaluate whatever its search criteria is or may be and make an effort to locate additional responsive documents.

#### *The FBI’s and DOJ’s Claimed Exemptions Are Inadequate*

As the FBI and DOJ are undoubtedly aware, the court “‘impose[s] a substantial burden on an agency seeking to avoid disclosure’ through the FOIA exemptions.” *Morley*, 508 F.3d at 1114-15 (quoting *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973)). “As such, exemptions from disclosure must be narrowly construed and ‘conclusory and generalized allegations of exemptions’ are unacceptable.” *Id.* (quoting *Founding Church of Scientology of Wash., D.C., Inc. v. Nat’l Sec. Agency*, 610 F.2d 824, 830 (D.C. Cir. 1979)).

The FBI Letter and the DOJ Letter state that certain documents are being withheld pursuant to the following exemptions: (i) 5 U.S.C. § 552(b)(3) (citing Federal Rule of Criminal Procedure 6(e)); (ii) 5 U.S.C. § 552(b)(6); (iii) 5 U.S.C. § 552(b)(7)(C); and (iv) 5 U.S.C. § 552(b)(7)(D).

Other than identifying the claimed exemptions, neither the FBI Letter nor the DOJ Letter provide any further explanation or justification for withholding these documents. We respectfully request that the FBI and the DOJ provide an explanation for withholding these

Federal Bureau of Investigation  
June 12, 2015  
Page 4

documents other than with "conclusory and generalized allegations of exemptions." *Morley*, 508 F.3d at 1115.

Because the FBI and DOJ have failed to provide their reasons for the claimed exemptions, we reserve all rights to challenge the claimed exemptions on their merits when those reasons are provided.

**Conclusion**

We look forward to your response to this appeal and the production of further documents in response to the Request. Please advise if the further production of documents associated with the Request requires administrative fees that will exceed \$500.00.

The information sought pursuant to this appeal and the Request is not for commercial use but rather in connection with the work of the Mattachine Society, a non-profit education and research organization.

Please feel free to contact me via phone or email with any questions.

Respectfully submitted,

  
Lisa A. Linsky / MLH  
on behalf of the Mattachine Society  
of Washington D.C.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

MATTACHINE SOCIETY OF  
WASHINGTON, D.C.

Plaintiff,

v.

UNITED STATES DEPARTMENT  
OF JUSTICE,

Defendant.

---

Civil Action No. 1:16-CV-00773-RCL

**Exhibit K**



U.S. Department of Justice

Federal Bureau of Investigation  
Washington, D.C. 20535

June 23, 2015

LISA A LINSKY  
MCDERMOTT, WILL & EMERY LLP  
340 MADISON AVENUE  
NEW YORK, NY 10172

FOIPA Request No.: 1207786-000  
Subject: EXECUTIVE ORDER 10450 (1950-1990)

Dear Lisa Linsky:

The enclosed documents were reviewed under the Freedom of Information/Privacy Acts (FOIPA), Title 5, United States Code, Section 552/552a. Deletions have been made to protect information which is exempt from disclosure, with the appropriate exemptions noted on the page next to the excision. In addition, a deleted page information sheet was inserted in the file to indicate where pages were withheld entirely. The exemptions used to withhold information are marked below and explained on the enclosed Explanation of Exemptions:

Section 552		Section 552a
<input checked="" type="checkbox"/> (b)(1)	<input type="checkbox"/> (b)(7)(A)	<input type="checkbox"/> (d)(5)
<input type="checkbox"/> (b)(2)	<input type="checkbox"/> (b)(7)(B)	<input type="checkbox"/> (j)(2)
<input checked="" type="checkbox"/> (b)(3)	<input checked="" type="checkbox"/> (b)(7)(C)	<input type="checkbox"/> (k)(1)
<u>50 U.S.C. § 3024 (j)(1)</u>	<input checked="" type="checkbox"/> (b)(7)(D)	<input type="checkbox"/> (k)(2)
<hr/>	<input type="checkbox"/> (b)(7)(E)	<input type="checkbox"/> (k)(3)
<hr/>	<input type="checkbox"/> (b)(7)(F)	<input type="checkbox"/> (k)(4)
<input type="checkbox"/> (b)(4)	<input type="checkbox"/> (b)(8)	<input type="checkbox"/> (k)(5)
<input type="checkbox"/> (b)(5)	<input type="checkbox"/> (b)(9)	<input type="checkbox"/> (k)(6)
<input checked="" type="checkbox"/> (b)(6)		<input type="checkbox"/> (k)(7)

476 pages were reviewed and 254 pages are being released.

- Documents were located which originated with, or contained information concerning, other Government Agencies [OGA].
- This information has been referred to the OGA(s) for review and direct response to you.
- We are consulting with another agency. The FBI will correspond with you regarding this information when the consultation is completed.
- In accordance with standard FBI practice and pursuant to FOIA exemption (b)(7)(E) and Privacy Act exemption (j)(2) [5 U.S.C. § 552/552a (b)(7)(E)/(j)(2)], this response neither confirms nor denies the existence of your subject's name on any watch lists.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist. Enclosed for your information is a copy of the Explanation of Exemptions.

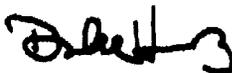
For questions regarding our determinations, visit the [www.fbi.gov/foia](http://www.fbi.gov/foia) website under "Contact Us." The FOIPA Request Number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

You have the right to appeal any denials in this release. Appeals should be directed in writing to the Director, Office Information Policy (OIP), U.S. Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's eFOIA portal at <http://www.justice.gov/oip/efoia-portal.html>. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be easily identified.

☐ The enclosed material is from the main investigative file(s) in which the subject(s) of your request was the focus of the investigation. Our search located additional references, in files relating to other individuals, or matters, which may or may not be about your subject(s). Our experience has shown when ident, references usually contain information similar to the information processed in the main file(s). Because of our significant backlog, we have given priority to processing only the main investigative file(s). If you want the references, you must submit a separate request for them in writing, and they will be reviewed at a later date, as time and resources permit.

☑ See additional information which follows.

Sincerely,



David M. Hardy  
Section Chief  
Record/Information  
Dissemination Section  
Records Management Division

Enclosure(s)

In response to your Freedom of Information Act (FOIA) request submitted to the Records Management Division at Winchester, VA, enclosed is a processed copy of FBI Headquarters file 66-HQ-A19000, sections 5, and 6. This release represents the third interim release of information responsive to your request.

Per your request the release has been placed on a CD-ROM.

Upon receipt of the enclosed CD, please go to [www.pay.gov](http://www.pay.gov) to make an electronic payment\*, or make a check or money order payable to the Federal Bureau of Investigation in the amount of \$15.00 and remit payment to the Work Process Unit, Record/Information Dissemination Section, Records Management Division, Federal Bureau of Investigation, 170 Marcel Drive, Winchester, VA 22602. Please include the FOIPA Request Number with your payment. Failure to pay for this release within thirty (30) days from the date of this letter will close any pending FBI FOIPA requests from you. Nonpayment will also cause an automatic denial of any future FOIPA requests.

For questions regarding our determinations, visit the [www.fbi.gov/foia](http://www.fbi.gov/foia) website under "Contact Us."

The FOIPA Request Number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

\*Pay.gov is a secure web-based application that accepts credit card and ACH payments online, and is hosted by the United States Department of Treasury, Financial Management Service. For frequent FOIPA requesters, it is recommended to create a Pay.gov account to retain an online history of payments made through Pay.gov and to retain specific information for future payments. To make an electronic payment, complete the FBI Freedom of Information

Act and Privacy Act Form located on Pay.gov. Please note: if a refund is necessary, there is less processing time to refund a credit card payment than an ACH payment.

As previously indicated, documents were located which originated with, or contained information concerning another agencies. We are consulting with the other agencies and are awaiting their response. Due to the fact that our office has processed all other information currently in our possession, your request is being administratively closed at this time, pending the completion of the outstanding consultation by our office. The FBI will correspond with you regarding those documents when the consultation is completed.

Inquiries regarding your OGA referrals designated within the release as "Referral/Direct" may be directed to the following agencies at:

Teresa Crosland  
National Security Division  
Department of Justice  
Room 6150  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001

Vanessa Brinkman  
Office of Information Policy (OIP)  
1425 New York Avenue, NW  
Washington, DC 20530

Attn: Arnetta James, FOIA Initiative Coordinator  
Office of Intelligence Policy and Review  
Department of Justice, National Security Division  
950 Pennsylvania Avenue, NW Suite 6150  
Washington, DC 20530

**EXPLANATION OF EXEMPTIONS**

**SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552**

- (b)(1) (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 to such Executive order;
- (b)(2) related solely to the internal personnel rules and practices of an agency;
- (b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ( A ) could reasonably be expected to interfere with enforcement proceedings, ( B ) would deprive a person of a right to a fair trial or an impartial adjudication, ( C ) could reasonably be expected to constitute an unwarranted invasion of personal privacy, ( D ) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, ( E ) 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, or ( F ) could reasonably be expected to endanger the life or physical safety of any individual;
- (b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (b)(9) geological and geophysical information and data, including maps, concerning wells.

**SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a**

- (d)(5) information compiled in reasonable anticipation of a civil action proceeding;
- (j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;
- (k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;
- (k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;
- (k)(4) required by statute to be maintained and used solely as statistical records;
- (k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;
- (k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

MATTACHINE SOCIETY OF  
WASHINGTON, D.C.

Plaintiff,

v.

UNITED STATES DEPARTMENT  
OF JUSTICE,

Defendant.

---

Civil Action No. 1:16-CV-00773-RCL

**Exhibit L**



**U.S. Department of Justice**

Office of Information Policy

---

Telephone: (202) 514-3642

Washington, D.C. 20530

July 14, 2015

Lisa A. Linsky, Esq.  
McDermott Will & Emery LLP  
340 Madison Avenue  
New York, NY 10173-1922  
llinsky@mwe.com

Re: Request No. 1207786

Dear Ms. Linsky:

This is to advise you that your administrative appeal from the action of the Federal Bureau of Investigation was received by this Office on June 23, 2015.

The Office of Information Policy has the responsibility of adjudicating such appeals. In an attempt to afford each appellant equal and impartial treatment, we have adopted a general practice of assigning appeals in the approximate order of receipt. Your appeal has been assigned number **AP-2015-04578**. Please mention this number in any future correspondence to this Office regarding this matter. Please note that if you provide an e-mail address or another electronic means of communication with your request or appeal, this Office may respond to your appeal electronically even if you submitted your appeal to this Office via regular U.S. Mail.

We will notify you of the decision on your appeal as soon as we can. If you have any questions about the status of your appeal, you may contact me at the number above. If you have submitted your appeal through this Office's online electronic appeal portal, you may also obtain an update on the status of your appeal by logging into your portal account.

Sincerely,

A handwritten signature in black ink, appearing to read "Priscilla Jones", written over a horizontal line.

Priscilla Jones  
Supervisory Administrative Specialist

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MATTACHINE SOCIETY OF  
WASHINGTON, D.C.

Plaintiff,

v.

UNITED STATES DEPARTMENT  
OF JUSTICE,

Defendant.

Civil Action No. 1:16-CV-00773-RCL

**Exhibit M**

McDermott  
Will & Emery

JMB ~~\_\_\_\_\_~~

Expands AP-2015-04578

FOIA - June 22 Release

Boston Brussels Chicago Dallas Düsseldorf Frankfurt Houston London Los Angeles Miami  
Milan Munich New York Orange County Paris Rome Seoul Silicon Valley Washington, D.C.  
Strategic alliance with MWE China Law Offices (Shanghai)

Lisa A. Linsky  
Attorney at Law  
llinsky@mwe.com  
+1 212 647 6587

August 13, 2015

RECEIVED

VIA UNITED STATES MAIL

AUG 20 2015

Director  
Office of Information Policy  
United States Department of Justice  
1425 New York Ave., Suite 1050  
Washington D.C. 2530-0001

Office of Information Policy

Re: Appeal of Agency Determination of FOIA Request No. 1207786-000  
Appeal Number AP-2015-04578

Dear Director:

We represent the Mattachine Society of Washington D.C. ("MSDC") in the above referenced request for documents pursuant to the Freedom of Information Act ("FOIA") as well as the associated appeal.<sup>1</sup> We are in receipt of a letter dated June 22, 2015 from the Federal Bureau of Investigation ("FBI") providing an additional partial response to the above referenced request for documents.

After having reviewed the materials provided with the June 22 letter, on behalf of the MSDC, we hereby appeal the determinations of the FBI with respect to the above referenced matter. This appeal is related to the same appeal listed above as it all stems from the same FOIA request. As a result, we respectfully request that this appeal be consolidated with Appeal Number AP-2015-04578.

Background

Under the pretext of protecting national security, President Dwight D. Eisenhower issued Executive Order 10450 ("EO 10450"), declaring that the federal government could deny a citizen employment in "each department or agency of the Government" solely because that person was homosexual. Exec. Order No. 10,450 § 2, 18 Fed. Reg. 2,489 (Apr. 29, 1953). We understand that then Assistant Attorney General Warren E. Burger (and later Chief Justice of the Supreme

<sup>1</sup> The MSDC is a non-profit, non-partisan research and educational society that conducts original archival research at The National Archives, U.S. presidential libraries, the Library of Congress, the FOIA Library of the Federal Bureau of Investigation, the Stonewall National Museum and Archives, and other private and public repositories across the country. The mission of the MSDC is to uncover the often deleted political histories of lesbian, gay, bisexual and transgender ("LGBT") Americans who faced persecution and discrimination at the hands of federal and state governments for over sixty-five years. The MSDC is dedicated to achieving full civil equality for LGBT Americans.

Federal Bureau of Investigation  
August 13, 2015  
Page 2

Court) was tasked with the responsibility of defending any action actions taken pursuant to the authority found in EO 10450.

On or about January 25, 2014, the MSDC submitted a FOIA request (the "Request") to the FBI seeking the production of documents concerning EO 10450 dated from January 1, 1950 through December 31, 1990. The Request specifically sought all files in the FBI's possession created by and communications to or from Warren Burger concerning EO 10450.

More than two years later, on April 17, 2015, the FBI responded to the Request stating that "539 pages were reviewed and 253 pages are being released." (Ltr. from D. Hardy, dated Apr. 17, 2015 (the "FBI Letter").) The FBI claimed that the following exemptions, pursuant to 5 U.S.C. § 552, justified the withholding of documents responsive to the Request: 552(b)(3) (citing Federal Rule of Criminal Procedure 6(e)) and 552(b)(7)(D). Additional documents were sent to other Government agencies for review.

On May 5, 2015, we received a letter from the Department of Justice, National Security Division ("DOJ") which released an additional number of pages. However, the DOJ stated that it had "reviewed these records and are releasing them in part." (Ltr. from K. Tiernan, dated May 5, 2015 (the "DOJ Letter").) The DOJ claimed that the following exemptions, pursuant to 5 U.S.C. § 552, justified the withholding of documents responsive to the Request: 552(b)(6) and 552(b)(7)(C).

On June 12, 2015, the MSDC appealed the determinations of the FBI and the DOJ and requested that additional information be released pursuant to the Request (the "Appeal").

On June 22, 2015, we received a letter from the FBI responding to the Request stating that "476 pages were reviewed and 254 pages are being released." (Ltr. from D. Hardy to L. Linsky, dated June 22, 2015 (the "Second FBI Letter").) The FBI claims that the following exemptions, pursuant to 5 U.S.C. § 552, justified the withholding of documents responsive to the Request: 552 (b)(1); 552(b)(3) (citing 50 U.S.C. § 403g); 552(b)(7)(C); and 552(b)(7)(D). The FBI indicated that additional documents were sent to other Government agencies for review. In addition, the FBI indicated that it is consulting with another agency concerning the Request.

On July 14, 2015, the Office of Information Policy for the DOJ sent a letter to undersigned counsel acknowledging receipt of the Appeal on June 23, 2015. The Appeal was assigned appeal number AP-2015-04578.

In addition to the above referenced Appeal, we hereby appeal the FBI's determinations with respect to the Second FBI Letter and respectfully request that the FBI (i) reconsider the scope of its search for documents and (ii) reconsider its application of the claimed exemptions. Moreover, we respectfully request that this appeal be consolidated with the prior Appeal to streamline the administrative process.

Federal Bureau of Investigation  
August 13, 2015  
Page 3

### Reasons for Appeal

“Congress enacted the FOIA in order to ‘pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.’ *Morley v. C.I.A.*, 508 F.3d 1108, 114 (D.C. Cir. 2007) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976); *Rose v. Dep’t of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)). FOIA “adopts as its most basic premise a policy strongly favoring public disclosure of information of federal agencies.” *Halpern v. F.B.I.*, 181 F.3d 279, 286 (2d Cir. 1999).

Based upon the information we have received in response to the Request, we believe that the FBI has not met these standards. More specifically, we assert that (i) the scope of the FBI’s search for documents was inadequate and (ii) the FBI has failed to meet its burden to demonstrate that the claimed exemptions apply. For the reasons stated below, the FBI should reconsider its initial response, expand its search, and produce more documents pursuant to the Request.

#### *The FBI’s Search for Documents Was Inadequate*

At the time the FBI received the Request, it had a responsibility “to do a reasonably thorough search of its records and to turn over all responsive materials except those for which it could prove an exemption from disclosure.” *Church of Scientology Int’l v. DOJ*, 30 F.3d 224, 229-30 (1st Cir. 1994). In judging whether an agency has conducted an adequate search, “the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Oglesby v. United States Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

Here, the FBI has not provided any basis upon which the adequacy of its search can be reasonably evaluated. It has not disclosed what method it used to search for records, where it searched for records or what other possible search parameters it used to locate potentially responsive documents. At a minimum, we request that the FBI disclose this basic information so that the adequacy of the FBI’s search methodology can be scrutinized.

But, at a more fundamental level, it is apparent from the released documents themselves that the FBI’s search was inadequate. As noted above, the time period for the request was from 1950 through 1990. It appears, however, that the FBI only produced documents created after 1959. This is troubling because EO 10450 was issued in April of 1953 and the documents produced by the FBI predominantly concern the amendment of EO 10450 in light of the Supreme Court’s decision in *Cole v. Young* in 1959 which invalidated large portions of EO 10450. The MSDC has a good faith basis to believe that there are responsive documents concerning actions and activities by government officials and agencies which occurred in the immediate aftermath of the issuance of EO 10450, and in the years prior to the *Cole v. Young* decision.

Federal Bureau of Investigation  
August 13, 2015  
Page 4

Moreover, the FOIA request specifically requests all files in the FBI's possession created by and communications to or from Warren E. Burger concerning EO 10450. There is not one record that was produced by the FBI upon which Mr. Burger was copied or authored.

We believe that the FBI's search is patently inadequate and respectfully request that the FBI reevaluate whatever its search criteria is or may be and make an effort to locate additional responsive documents.

*The FBI's and DOJ's Claimed Exemptions Are Inadequate*

As the FBI and DOJ are undoubtedly aware, the court "impose[s] a substantial burden on an agency seeking to avoid disclosure' through the FOIA exemptions." *Morley*, 508 F.3d at 1114-15 (quoting *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973)). "As such, exemptions from disclosure must be narrowly construed and 'conclusory and generalized allegations of exemptions' are unacceptable." *Id.* (quoting *Founding Church of Scientology of Wash., D.C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 830 (D.C. Cir. 1979)).

The Second FBI Letter states that certain documents are being withheld pursuant to the following exemptions: (i) 5 U.S.C. § 552 (b)(1); (ii) 5 U.S.C. § 552(b)(3) (citing 50 U.S.C. § 403g); (iii) 5 U.S.C. § 552(b)(7)(C); and (iv) 5 U.S.C. § 552(b)(7)(D).

Other than identifying the claimed exemptions, the Second FBI Letter does not provide any further explanation or justification for withholding these documents. We respectfully request that the FBI provide an explanation for withholding these documents other than with "conclusory and generalized allegations of exemptions." *Morley*, 508 F.3d at 1115.

Because the FBI and DOJ have failed to provide their reasons for the claimed exemptions, we reserve all rights to challenge the claimed exemptions on their merits when those reasons are provided.

**Conclusion**

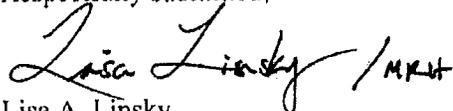
We look forward to your response to this appeal (which should be consolidated with the above referenced appeal) and the production of further documents in response to the Request. Please advise if the further production of documents associated with the Request requires administrative fees that will exceed \$500.00.

The information sought pursuant to this appeal and the Request is not for commercial use but rather in connection with the work of the Mattachine Society, a non-profit education and research organization.

Federal Bureau of Investigation  
August 13, 2015  
Page 5

Please feel free to contact me via phone or email with any questions.

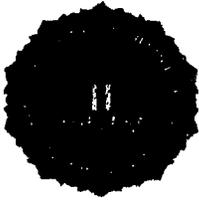
Respectfully submitted,



Lisa A. Linsky  
on behalf of the Mattachine Society  
of Washington D.C.

DM\_US 63156145-1.099749.0589





U.S. Department of Justice

Federal Bureau of Investigation  
Washington, D.C. 20535

October 30, 2015

LISA A LINSKY  
MCDERMOTT, WILL & EMERY LLP  
340 MADISON AVENUE  
NEW YORK, NY 10172

FOIPA Request No.: 1207786-001  
Subject: EXECUTIVE ORDER 10450 (1950-1990)

Dear Lisa Linsky:

You were previously advised we were consulting with another agency concerning information located as a result of your Freedom of Information/Privacy Acts (FOIPA) request.

This consultation is complete and the enclosed material is being released to you with deletions made pursuant to Title 5, United States Code, Section(s) 552/552a as noted below. See the enclosed form for an explanation of these exemptions.

Section 552		Section 552a	
<input type="checkbox"/> (b)(1)	<input type="checkbox"/> (b)(7)(A)	<input type="checkbox"/> (d)(5)	
<input type="checkbox"/> (b)(2)	<input type="checkbox"/> (b)(7)(B)	<input type="checkbox"/> (j)(2)	
<input type="checkbox"/> (b)(3)	<input checked="" type="checkbox"/> (b)(7)(C)	<input type="checkbox"/> (k)(1)	
_____	<input checked="" type="checkbox"/> (b)(7)(D)	<input type="checkbox"/> (k)(2)	
_____	<input type="checkbox"/> (b)(7)(E)	<input type="checkbox"/> (k)(3)	
_____	<input type="checkbox"/> (b)(7)(F)	<input type="checkbox"/> (k)(4)	
<input type="checkbox"/> (b)(4)	<input type="checkbox"/> (b)(8)	<input type="checkbox"/> (k)(5)	
<input type="checkbox"/> (b)(5)	<input type="checkbox"/> (b)(9)	<input type="checkbox"/> (k)(6)	
<input checked="" type="checkbox"/> (b)(6)		<input type="checkbox"/> (k)(7)	

140 pages were reviewed and 140 pages are being released.

Deletions were made by NAME OF AGENCY (USE ONLY FOR AGENCIES ALLOWING ATTRIBUTION). To appeal those denials, please write directly to that agency.

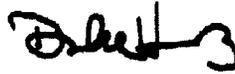
For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S. C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

For questions regarding our determinations, visit the [www.fbi.gov/foia](http://www.fbi.gov/foia) website under "Contact Us.". The FOIPA Request Number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

You may file an appeal by writing to the Director, Office of Information Policy (OIP), U.S. Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's eFOIA portal at <http://www.justice.gov/oip/efoia-portal.html>. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number in any correspondence to us for proper identification of your request.

┌ See additional information which follows.

Sincerely,



David M. Hardy  
Section Chief,  
Record/Information  
Dissemination Section  
Records Management Division

Enclosure(s)

**EXPLANATION OF EXEMPTIONS**

**SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552**

- (b)(1) (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 to such Executive order;
- (b)(2) related solely to the internal personnel rules and practices of an agency;
- (b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ( A ) could reasonably be expected to interfere with enforcement proceedings, ( B ) would deprive a person of a right to a fair trial or an impartial adjudication, ( C ) could reasonably be expected to constitute an unwarranted invasion of personal privacy, ( D ) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, ( E ) 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, or ( F ) could reasonably be expected to endanger the life or physical safety of any individual;
- (b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (b)(9) geological and geophysical information and data, including maps, concerning wells.

**SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a**

- (d)(5) information compiled in reasonable anticipation of a civil action proceeding;
- (j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;
- (k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;
- (k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;
- (k)(4) required by statute to be maintained and used solely as statistical records;
- (k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;
- (k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

MATTACHINE SOCIETY OF  
WASHINGTON, D.C.

Plaintiff,

v.

UNITED STATES DEPARTMENT  
OF JUSTICE,

Defendant.

---

Civil Action No. 1:16-CV-00773-RCL

**Exhibit O**



**U.S. Department of Justice**  
Office of Information Policy  
Suite 11050  
1425 New York Avenue, NW  
Washington, DC 20530-0001

Telephone: (202) 514-3642

Lisa A. Linsky, Esq.  
McDermott Will & Emery LLP  
340 Madison Avenue  
New York, NY 10173-1922  
[llinsky@mwe.com](mailto:llinsky@mwe.com)

Re: Appeal No. AP-2015-04578  
Request No. 1207786  
CDT:JMB

**VIA: Email**

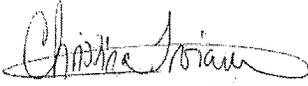
Dear Ms. Linsky:

You appealed on behalf of your client, Mattachine Society of Washington, D.C., from the action of the Federal Bureau of Investigation on its Freedom of Information Act request for access to records concerning Executive Order 10450 for the period from 1950 to 1990.

I have been informed that your client filed a lawsuit concerning the FBI's action in the United States District Court for the District of Columbia. As indicated in the Department of Justice's regulations located at 28 C.F.R. § 16.8(b)(2) (2015), an appeal should not normally be acted upon by this Office if the FOIA request becomes the subject of litigation. For this reason, I am closing your appeal file in this Office.

Sincerely,

5/10/2016

X 

Christina D. Troiani, Associate Chief, for  
Sean O'Neill, Chief, Administrative Appeals Staff  
Signed by: CHRISTINA TROIANI

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

MATTACHINE SOCIETY OF  
WASHINGTON, D.C.

Plaintiff,

v.

UNITED STATES DEPARTMENT  
OF JUSTICE,

Defendant.

---

Civil Action No. 1:16-CV-00773-RCL

**Exhibit P**



U.S. Department of Justice

Federal Bureau of Investigation  
Washington, D.C. 20535

September 6, 2016

MS. LISA A. LINSKY  
MCDERMOTT, WILL & EMERY LLP  
340 MADISON AVENUE  
NEW YORK, NY 10172

FOIPA Request Number: 1207786-0  
Subject: EXECUTIVE ORDER 10450 (1950-1990)

Dear Ms. Linsky:

The enclosed documents were reviewed under the Freedom of Information Act (FOIA), Title 5, United States Code, Section 552. Deletions have been made to protect information which is exempt from disclosure, with the appropriate exemptions noted on the page next to the excision. In addition, a deleted page information sheet was inserted in the file to indicate where pages were withheld entirely. The exemptions used to withhold information are marked below and explained on the enclosed Explanation of Exemptions:

Section 552		Section 552a
<input checked="" type="checkbox"/> (b)(1)	<input type="checkbox"/> (b)(7)(A)	<input type="checkbox"/> (d)(5)
<input type="checkbox"/> (b)(2)	<input type="checkbox"/> (b)(7)(B)	<input type="checkbox"/> (j)(2)
<input checked="" type="checkbox"/> (b)(3)	<input checked="" type="checkbox"/> (b)(7)(C)	<input type="checkbox"/> (k)(1)
Federal Rules of Criminal Procedure	<input checked="" type="checkbox"/> (b)(7)(D)	<input type="checkbox"/> (k)(2)
<hr/> Rule 6(e), 50 U.S.C., § 3024 (j)(1)	<input type="checkbox"/> (b)(7)(E)	<input type="checkbox"/> (k)(3)
	<input type="checkbox"/> (b)(7)(F)	<input type="checkbox"/> (k)(4)
<input type="checkbox"/> (b)(4)	<input type="checkbox"/> (b)(8)	<input type="checkbox"/> (k)(5)
<input type="checkbox"/> (b)(5)	<input type="checkbox"/> (b)(9)	<input type="checkbox"/> (k)(6)
<input checked="" type="checkbox"/> (b)(6)		<input type="checkbox"/> (k)(7)

1602 pages were reviewed and 1201 pages are being released.

- Document(s) were located which originated with, or contained information concerning, other Government Agency (ies) [OGA].
- This information has been referred to the OGA(s) for review and direct response to you.
- We are consulting with another agency. The FBI will correspond with you regarding this information when the consultation is completed.
- In accordance with standard FBI practice and pursuant to FOIA exemption (b)(7)(E) and Privacy Act exemption (j)(2) [5 U.S.C. § 552/552a (b)(7)(E)/(j)(2)], this response neither confirms nor denies the existence of your subject's name on any watch lists.

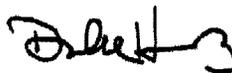
For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist. Enclosed for your information is a copy of the Explanation of Exemptions.

Although your request is in litigation, we are required by 5 § USC 552 (a)(6)(A) to provide you the following information concerning your right to appeal. You may file an appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically transmitted within ninety (90) days from the date of this letter in order to be considered timely. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be easily identified.

The enclosed material is from the main investigative file(s) in which the subject(s) of your request was the focus of the investigation. Our search located additional references, in files relating to other individuals, or matters, which may or may not be about your subject(s). Our experience has shown when ident, references usually contain information similar to the information processed in the main file(s). Because of our significant backlog, we have given priority to processing only the main investigative file(s). If you want the references, you must submit a separate request for them in writing, and they will be reviewed at a later date, as time and resources permit.

See additional information which follows.

Sincerely,



David M. Hardy  
Section Chief  
Record/Information  
Dissemination Section  
Records Management Division

Enclosure(s)

In response to your Freedom of Information/Privacy Act (FOIPA) request, submitted to FBI Headquarters, Records Management Division, Winchester, Virginia, enclosed is one (1) compact disc (CD) containing a coded and Bates Stamped version of the material already released to you on April 17, 2015, May 12, 2015, June 23, 2015, and October 30, 2015. The enclosed documents are Bates Stamped FBI-1 through FBI-1602.

Additionally, you were previously advised we were consulting with agencies concerning information located as a result of your FOIA request. These consultations are complete and parts of the enclosed material are being released to you with deletions made pursuant to Title 5, United States Code, Section(s) 552 as noted below. See the enclosed form for an explanation of these exemptions.

You have the right to appeal ICE's withholding determination. Should you wish to do so, send your appeal and a copy of this letter to: U.S. Immigration Customs Enforcement, Office of Principal Advisor, U.S. Department of Homeland Security, Freedom of Information Office, 500 12<sup>th</sup> Street, S.W., Stop 5009 Washington D.C., following the the procedures outlined in the DHS regulations at 6 C.F.R. § 5.9. Your appeal must be received within 60 days of the date of this letter. Your envelope should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at: [www.dhs.gov/foia](http://www.dhs.gov/foia).

Inquiries regarding your OGA referrals designated within the release as "Referral/Direct" may be directed to the following agencies at:

Teresa Crosland  
National Security Division  
Department of Justice  
Room 6150  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001

Carmen L. Mallon  
Chief of Staff  
Office of Information Policy  
Department of Justice Suite 11050  
1425 New York Ave, NW  
Washington, DC 20530-0001

Vanessa Brinkman  
Office of Information Policy (OIP)  
1425 New York Avenue, NW  
Washington, DC 20530

Attn: Arnetta James, FOIA Initiative Coordinator  
Office of Intelligence Policy and Review  
Department of Justice, National Security Division  
950 Pennsylvania Avenue, NW Suite 6150  
Washington, DC 20530

**EXPLANATION OF EXEMPTIONS****SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552**

- (b)(1) (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 to such Executive order;
- (b)(2) related solely to the internal personnel rules and practices of an agency;
- (b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ( A ) could reasonably be expected to interfere with enforcement proceedings, ( B ) would deprive a person of a right to a fair trial or an impartial adjudication, ( C ) could reasonably be expected to constitute an unwarranted invasion of personal privacy, ( D ) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, ( E ) 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, or ( F ) could reasonably be expected to endanger the life or physical safety of any individual;
- (b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (b)(9) geological and geophysical information and data, including maps, concerning wells.

**SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a**

- (d)(5) information compiled in reasonable anticipation of a civil action proceeding;
- (j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;
- (k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;
- (k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;
- (k)(4) required by statute to be maintained and used solely as statistical records;
- (k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;
- (k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.





U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

October 6, 2016

MS. LISA LINSKY  
MCDERMOTT, WILL & EMERY LLP  
340 MADISON AVENUE  
NEW YORK, NY 10172

FOIPA Request No.: 1207786-0  
Subject: EXECUTIVE ORDER 10450 (1950-1990)

Dear Ms. Linsky:

This is in response to your Freedom of Information Act (FOIA) request.

Files 105-HQ-12189 and 140-HQ-1397 serial 3 were destroyed on July 10, 1998 and July 16, 2009 respectively. Since this material could not be reviewed, it is not known if it was responsive to your request. Record retention and disposal is carried out under supervision of the National Archives and Records Administration (NARA), Title 44, United States Code, Section 3301 and Title 36, Code of Federal Regulations, Chapter 12, Sub-chapter B, Part 1228. The FBI Records Retention Plan and Disposition Schedules have been approved by the United States District Court for the District of Columbia and are monitored by NARA.

Additionally, a search of the Central Records System maintained at FBI Headquarters indicated that potentially responsive records have been sent to NARA. If you wish to review these potentially responsive records, send your request to NARA at the following address using file numbers 100-HQ-468120 serial 12, 140-HQ-00 serials 921, 889, 904, 884, 878, 745, 879, 886, 725, 901, 893, 919, 738x, and 100-HQ-7254 serial 1582 as a reference:

National Archives and Records Administration  
8601 Adelphi Road  
College Park, MD 20740-6001

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

Although your request is in litigation, you may file an appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically transmitted within ninety (90) days from the date of this letter in order to be considered timely. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be easily identified.

Enclosed for your information is a copy of the FBI Fact Sheet and Explanation of Exemptions.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Hardy", is written over the word "Sincerely,".

David M. Hardy  
Section Chief,  
Record/Information  
Dissemination Section  
Records Management Division

Enclosure(s)



## FBI FACT SHEET

- **The primary functions of the FBI are national security and law enforcement.**
- **The FBI does not keep a file on every citizen of the United States.**
- **The FBI was not established until 1908 and we have very few records prior to the 1920s.**
- **FBI files generally contain reports** of FBI investigations of a wide range of matters, including counterterrorism, counter-intelligence, cyber crime, public corruption, civil rights, organized crime, white collar crime, major thefts, violent crime, and applicants.
- **The FBI does not issue clearances or non-clearances for anyone other than its own personnel or persons having access to FBI facilities.** Background investigations for security clearances are conducted by many different Government agencies. Persons who received a clearance while in the military or employed with some other government agency should contact that entity. Most government agencies have websites which are accessible on the internet which have their contact information.
- **An identity history summary check or “rap sheet” is NOT the same as an “FBI file.”** It is a listing of information taken from fingerprint cards and related documents submitted to the FBI in connection with arrests, federal employment, naturalization or military service. The subject of a “rap sheet” may obtain a copy by submitting a written request to FBI CJIS Division – Summary Request, 1000 Custer Hollow Road, Clarksburg, WV 26306. Along with a specific written request, the individual must submit a new full set of his/her fingerprints in order to locate the record, establish positive identification, and ensure that an individual’s records are not disseminated to an unauthorized person. The fingerprint submission must include the subject’s name, date and place of birth. There is a required fee of \$18 for this service, which must be submitted by money order or certified check made payable to the Treasury of the United States. A credit card payment option is also available. Forms for this option and additional directions may be obtained by accessing the FBI Web site at [www.fbi.gov/about-us/cjis/identity-history-summary-checks](http://www.fbi.gov/about-us/cjis/identity-history-summary-checks).
- **The National Name Check Program (NNCP)** conducts a search of the FBI’s Universal Index (UNI) to identify any information contained in FBI records that may be associated with an individual and provides the results of that search to a requesting federal, state or local agency. Names are searched in a multitude of combinations and phonetic spellings to ensure all records are located. The NNCP also searches for both “main” and “cross reference” files. A main file is an entry that carries the name corresponding to the subject of a file, while a cross reference is merely a mention of an individual contained in a file. The results from a search of this magnitude can result in several “hits” and “idents” on an individual. In each instance where UNI has identified a name variation or reference, information must be reviewed to determine if it is applicable to the individual in question.
- **The Record/Information Dissemination Section (RIDS)** searches for records and provides copies of FBI files responsive to Freedom of Information or Privacy Act (FOIPA) requests for information. RIDS provides responsive documents to requesters seeking “reasonably described information.” For a FOIPA search, the subject’s name, event, activity, or business is searched to determine whether there is an associated investigative file. This is called a “main file search” and differs from the **NNCP** search.

**FOR GENERAL INFORMATION ABOUT THE FBI, VISIT OUR WEBSITE AT**  
**[www.fbi.gov](http://www.fbi.gov)**

**EXPLANATION OF EXEMPTIONS****SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552**

- (b)(1) (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 to such Executive order;
- (b)(2) related solely to the internal personnel rules and practices of an agency;
- (b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ( A ) could reasonably be expected to interfere with enforcement proceedings, ( B ) would deprive a person of a right to a fair trial or an impartial adjudication, ( C ) could reasonably be expected to constitute an unwarranted invasion of personal privacy, ( D ) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, ( E ) 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, or ( F ) could reasonably be expected to endanger the life or physical safety of any individual;
- (b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (b)(9) geological and geophysical information and data, including maps, concerning wells.

**SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a**

- (d)(5) information compiled in reasonable anticipation of a civil action proceeding;
- (j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;
- (k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;
- (k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;
- (k)(4) required by statute to be maintained and used solely as statistical records;
- (k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;
- (k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.



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

MATTACHINE SOCIETY	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:16-cv-00773 (RCL)
	)	
U.S. DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	

**DECLARATION OF SUSAN L. KIM**

I, Susan L. Kim, declare as follows:

1. I am an Attorney Advisor in the Freedom of Information Act (“FOIA”) and Declassification Unit of the Office of Law and Policy in the National Security Division (“NSD”) of the United States Department of Justice (“DOJ” or “Department”). NSD is a component of the Department which formally began operations on October 2, 2006, by inter alia, consolidating the resources of the Office of Intelligence Policy and Review (“OIPR”) and the Criminal Division’s Counterterrorism Section (“CTS”) and Counterespionage Section (“CES”).

2. In my capacity as an Attorney Advisor in the FOIA and Declassification Unit, I work on litigation matters for the unit that responds to requests for access to NSD records and information pursuant to the FOIA, 5 U.S.C. § 552 and the Privacy Act of 1974. The statements contained in this declaration are based upon my personal knowledge, information provided to me in the course of my official duties, and determinations I have made following a review of NSD’s potentially responsive documents.

3. In a letter dated January 23, 2013, plaintiff submitted a Freedom of Information Act (“FOIA”) request to the Federal Bureau of Investigation (“FBI”) for “copies of all

communications, personnel or investigative files created in association with Executive Order 10450, which was signed by President Dwight Eisenhower in April 1953 and effective on May 27, 1953." This includes "any and all internal FBI correspondence or communication regarding Executive Order 10450 and also specifically includes, but is not limited to, all files created by and communications to or from Warren E. Burger." The date range for the request was 1950-1990.

4. In a letter dated, April 17, 2015, the FBI referred responsive records to NSD for direct response to the requester. In a letter dated, May 5, 2015, NSD FOIA informed the requester that it was releasing these records in part and that the withheld portions of these records were exempt from disclosure pursuant to FOIA Exemptions (b)(6) and (b)(7)(C). Since NSD's partial release, the FBI labeled these records FBI 935-938.

5. Exemption (b)(6) permits withholding of "personnel and medical files and similar files when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Similarly, Exemption (b)(7)(C) protects "records or information compiled for law enforcement purposes, ... to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7). When withholding information pursuant to these exemptions, the Government must balance the privacy interests of the individuals against any public interest in disclosure. The public interest in disclosure is determined by whether the information would inform the general public about how the Government fulfills its responsibilities.

6. Here, NSD asserts Exemptions (b)(6) and (b)(7)(C) to protect the names and

identifying information of government employees. These exemptions have been applied in conjunction, such that information withheld under one exemption is also withheld under the other. Specifically, the responsive records contain names of Federal Government personnel. The Department of Justice gathered the names of these employees because they are employees against whom the Department would have considered termination proceedings. For each withholding under Exemption (b)(6) and (b)(7)(C), NSD determined that the privacy rights of the individuals outweighed the public interest, if any, in the disclosure of the information.

7. These individuals and their families have privacy interests in avoiding publicity in connection with having been considered for employment termination because such an association could subject these individuals and their families to both harassment and embarrassment. At the same time, there is no discernible public interest in identifying these individuals because providing the names and/or identifying information of particular employees would not shed light on the government's operations. As a result, releasing this information would constitute a clearly unwarranted invasion of their privacy which outweighs the public interest in disclosure.

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

Executed this 6<sup>th</sup> day of December, 2016.

  
\_\_\_\_\_  
SUSAN L. KIM

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

MATTACHINE SOCIETY OF  
WASHINGTON, D.C.

Plaintiff,

v.

UNITED STATES DEPARTMENT  
OF JUSTICE,

Defendant.

---

Civil Action No. 1:16-CV-00773-RCL

**Exhibit S**

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

**MATTACHINE SOCIETY OF  
WASHINGTON, D.C.**

**Plaintiff,**

**v.**

**UNITED STATES DEPARTMENT  
OF JUSTICE,**

**Defendant.**

**Civil Action No. 16-0773 (RCL)**

**DECLARATION OF FERNANDO PINEIRO  
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS,  
OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT**

I, Fernando Pineiro, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am the Deputy Freedom of Information Act ("FOIA") Officer of the Freedom of Information Act Office ("ICE FOIA Office") at U.S. Immigration and Customs Enforcement ("ICE"). I have held this position since December 29, 2013. Prior to this position, I was the FOIA Officer for the office for three years at the Office for Civil Rights and Civil Liberties ("CRCL") at the U.S. Department of Homeland Security ("DHS").

2. The ICE FOIA Office is responsible for processing and responding to all FOIA, 5 U.S.C. § 552, and Privacy Act, 5 U.S.C. § 552a, requests received at ICE. The ICE FOIA office mailing address is 500 12<sup>th</sup> Street, S.W., STOP 5009, Washington, D.C. 20536-5009.

3. As the Deputy FOIA Officer of the ICE FOIA Office, my official duties and responsibilities include the general management, oversight, and supervision of the ICE FOIA Office. I manage and supervise a staff of ICE FOIA Paralegal Specialists, who report to me regarding the processing of FOIA and Privacy Act requests received by ICE. In connection with

my official duties and responsibilities, I am familiar with ICE's procedures for responding to requests for information pursuant to provisions of the FOIA and the Privacy Act. In that respect, I am familiar with ICE's processing of the FOIA consultation request dated June 22, 2015 that Defendant U.S. Department of Justice ("DOJ"), Federal Bureau of Investigation ("FBI") was sent to ICE and is a portion of the subject of this litigation.

4. I make this declaration in support of FBI's Motion to Dismiss, and in the Alternative for Summary Judgment in the above-captioned action. The statements I make in this declaration are based on my personal knowledge, which includes knowledge acquired through agency files reviewed, and information provided to me by other ICE employees in the course of my official duties. The documents attached hereto are kept by ICE in the ordinary course of its business activities.

**I. ADMINISTRATIVE PROCEDURAL HISTORY OF PLAINTIFF'S FOIA REQUEST AND REFERRAL OF DOCUMENTS TO ICE**

5. In a letter dated January 25, 2013, Plaintiff submitted a FOIA request to the FBI FOIA (the "Request"). *Exhibit A.*

6. In a letter dated June 22, 2015, the FBI forwarded the Request along with a referral of a two page document to ICE and asked that ICE review the document, make any deletions it deemed appropriate, and return the document to the FBI. *Exhibit B.* The FBI referred the document to ICE because it had located the document, deemed the document responsive to the Request, and found that the document "concern[ed]" ICE. *Id.*

7. In a letter dated July 8, 2015, the ICE FOIA Office responded to the FBI, and indicated that "[a]fter review of the information referred by the FBI, ICE has determined that portions of the bracketed information will be withheld pursuant to Exemptions of the FOIA...." *Exhibit C.* To the letter the ICE FOIA Office attached a redacted version of the two-page

document supplied by the FBI, which withheld information pursuant to FOIA Exemptions 6 & 7(C). *Exhibit D*. The ICE FOIA Office's letter also instructed the FBI as to how to explain to the requester that it has the right to appeal ICE's withholding determination and how to do so. *Exh. C*.

## II. THE VAUGHN INDEX

8. Pursuant to the requirements set forth in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), a *Vaughn* index accompanies this declaration; the *Vaughn* Index provides a description of each redaction and the corresponding FOIA exemption being applied. *See Exhibit E – ICE's Vaughn Index*.

9. The *Vaughn* index is in a table format and contains six headings: "Entry Number," "Bates Number," "Withholding: Full/Partial," "Description of Records and Redactions, and Reasons for Redactions," and "Exemptions Applied", which contain the following information:

- Entry Number refers to the specific entry number on the *Vaughn* index.
- Bates Number refers to the specific bates numbers stamped on each of the responsive documents.
- Withholding: Full/Partial refers to the level of withholdings taken on the documents.
- "Description of Records and Redactions, and Reasons for Redactions" describes the redacted information and the justification for the redactions.
- Exemptions Applied describes the exemptions applied to the redactions in the documents.

### III. DESCRIPTION OF FREEDOM OF INFORMATION ACT WITHHOLDINGS

#### FOIA Exemption 6 and 7(C) (codified at 5 U.S.C. § 552(b)(6) and (b)(7)(C))

10. FOIA Exemption 6 provides that the FOIA does not apply to matters that are “personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”

11. FOIA Exemption 7(C) protects from disclosure records or information “compiled for law enforcement purposes” if a release of the records or information “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”

12. 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 USC §§ 533, 534, and Executive Order 12333 as implemented by the Attorney General’s Guidelines for Domestic FBI Operations (“AGG-DOM”) and 28 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 national security, and further the foreign intelligence objectives of the United States, and to conduct personnel investigations requisite to the work of the Department of Justice and whenever required by statute or otherwise. Under this investigative authority, the responsive records herein were compiled for the following specific law enforcement purpose.

13. As prescribed by AGG-DOM, paragraph I.D.4., the pertinent records were compiled and/or created in furtherance of FBI’s authority to conduct personnel background checks concerning applicants and employees under federal personnel security programs. To

accomplish its law enforcement, national security, and intelligence missions effectively, the FBI must ensure the appropriate character of FBI employees, applicants, and at times, other government agency personnel when required by statute or otherwise by conducting suitability investigations (i.e. background/personnel checks).

14. Thus, these records were compiled for a law enforcement purpose; they squarely fall within the law enforcement duties of the FBI; therefore, the information readily meets the threshold requirement of Exemption (b)(7).

15. On June 10, 1933, the Immigration and Naturalization Service (INS) was created by Executive Order 6166, which granted it the authority to administer and enforce laws relating to admission, exclusion, deportation, and naturalization of aliens, and investigate alleged violations of those laws. Pursuant to the Homeland Security Act of 2002, the INS was dismantled and the DHS was vested with the authority to carry “out the immigration enforcement functions vested by statute in, or performed by, the Commissioner of Immigration and Naturalization (or any officer, employee, or component of the Immigration and Naturalization Service)...” 6 U.S.C. § 202(3). The DHS now has the authority to administer and enforce the immigration laws of the United States. 8 USC § 1103(a)(1); 8 CFR § 2.1. ICE is a component of DHS. ICE is the largest investigative arm of DHS, and is responsible for identifying and eliminating vulnerabilities within the nation’s borders. ICE is tasked with preventing any activities that threaten national security and public safety by investigating the people, money, and materials that support illegal enterprises. Under this enforcement authority, the responsive records herein were compiled for the following specific law enforcement purpose.

16. Executive Order 10450, at Section 3(a) requires that the “appointment of each civilian officer or employee in any department or agency of the Government shall be made

subject to investigation [, which] in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation....” 18 Fed. Reg. 2489 (Apr. 27, 1953). Executive Order 10577 amended the Civil Service Rules to confer the Civil Service Commission [now known as the Office of Personnel Management] with the authority to “make appropriate investigations to secure enforcement of the Civil Service Act, Rules, and Regulations, including investigation of the qualifications and suitability of applicants for positions in the competitive service.” 19 Fed. Reg. 7521 (Nov. 22, 1954). Executive Order 10577 was subsequently amended by Executive Order 12107, which to, “secure effective implementation of the civil service laws, rules, and regulations,” enables the Director of the Office of Personnel Management to investigate “the qualifications and suitability of applicants for positions in the competitive service.” 44 Fed. Reg. 1055 (Dec. 28, 1978).

17. The record was compiled for a law enforcement purpose: to vet an individual for employment with legacy-INS, in furtherance of its law enforcement efforts. Accordingly, it falls squarely within the law enforcement duties of the legacy INS as well as the DHS and ICE; therefore, the information readily meets the threshold requirement of Exemption (b)(7).

18. When asserting FOIA Exemptions 6 and 7(C), ICE balances an individual’s personal privacy interest against the public’s interest in shedding light on ICE’s performance of its statutory duties.

19. ICE has withheld information on both pages of documents containing information protected by FOIA Exemptions 6 and 7(C). (*See* bates page numbers FBI-1136-1137.)

Specifically, ICE applied FOIA Exemption 6 in conjunction with Exemption 7(C) to protect from disclosure the name of a Federal government employee.

20. By virtue of the positions held by the Federal government employee referenced in the responsive record, he is permitted access to official government information. ICE gave consideration to the privacy interests of this Federal employee in not becoming a target of harassment – including, but not limited to, harassment in the form of requests for authorized access to government information – and their interest in remaining free from interference with the performance of his duties.

21. With respect to information specific to Federal government employees, the privacy consideration at issue includes the interest of this individual in remaining free from harassment and annoyance in conducting his official duties in the future, his interest in remaining free from harassment and annoyance in his private life, and his interest in not being targeted by individuals who may seek to do him harm.

22. Disclosure of the information about the Federal government employee referenced in the responsive record would also constitute an unwarranted invasion of personal privacy and subject the individual to embarrassment, harassment, and undue public attention. Such information, if disclosed to the public or to a third party requester without the permission of the individual, could expose the individual to identity theft and may reasonably lead to unwanted contact from persons that might seek to harm the individual.

23. The individual's privacy interest in the information contained in the record outweighs any minimal public interest in the disclosure of the information. Plaintiff has not articulated a sufficient public interest or public need to justify release of this information. The disclosure of this Personally Identifiable Information ("PII") serves no public benefit and would

not assist the public in understanding how ICE is carrying out its statutory responsibilities.

Finally, the third party mentioned in the law enforcement record did not consent to the disclosure of his PII.

24. ICE determined that the disclosure of the information described in Paragraphs 13 through 17 above would constitute a clearly unwarranted invasion of personal privacy. Moreover, ICE determined that disclosure of the records and information described in Paragraphs 13 through 17, which were compiled for law enforcement purposes, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

25. Having determined that the individual identified in the responsive records has a cognizable privacy interest in not having his information released, ICE FOIA then balanced the interest in safeguarding the individual's privacy from unnecessary public scrutiny against the public's interest in shedding light on the operations and activities of ICE (or the legacy Immigration and Naturalization Service ("INS")) in the performance of its statutory duties. In each instance where Exemptions 6 and 7(C) were applied, the redaction was limited to the name of the individual, which if released, would not shed light any further light as to the operations or activities of ICE or INS. All of the information surrounding the redactions was released and the limited extent of the redaction is readily apparent from the context of the records.

26. Additionally, Plaintiff has not articulated any public interest that could be advanced by releasing the personally identifiable information of the individual in question. As such, releasing the information withheld per FOIA Exemptions 6 and 7(C) would not shed light on the operations of ICE or the government.

27. Based upon the traditional recognition of strong privacy interests in law enforcement records, the categorical withholding of third party information identified in law

enforcement records is appropriate. Moreover, the third party identified in this record has not provided consent to the release of his personally identifying information as required by 6 C.F.R. §§ 5.3(a) & 5.21(d).

**IV. SEGREGABILITY**

28. 5 U.S.C. § 552(b) requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.”

29. A line-by-line review was conducted to identify information exempt from disclosure or for which a discretionary waiver of exemption could be applied.

30. With respect to the records that were released in part, all information not exempted from disclosure pursuant to the FOIA exemptions specified above was correctly segregated and non-exempt portions were released.

**V. JURAT CLAUSE**

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge and belief. Signed this 21st day of November, 2016.



---

Fernando Pineiro, Deputy FOIA Officer  
Freedom of Information Act Office  
U.S. Department of Homeland Security  
U.S. Immigration and Customs Enforcement  
500 12th Street, S.W., Stop 5009  
Washington, D.C. 20536-5009

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

**MATTACHINE SOCIETY OF  
WASHINGTON, D.C.  
Plaintiff,**

**Civil Action No. 16-0773 (RCL)**

**v.**

**UNITED STATES DEPARTMENT  
OF JUSTICE,  
  
Defendant.**

**DECLARATION OF FERNANDO PINEIRO  
IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS,  
OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT**

I, Fernando Pineiro, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am the Deputy Freedom of Information Act (“FOIA”) Officer of the Freedom of Information Act Office (“ICE FOIA Office”) at U.S. Immigration and Customs Enforcement (“ICE”). I have held this position since December 29, 2013. Prior to this position, I was the FOIA Officer for the office for three years at the Office for Civil Rights and Civil Liberties (“CRCL”) at the U.S. Department of Homeland Security (“DHS”).

2. The ICE FOIA Office is responsible for processing and responding to all FOIA, 5 U.S.C. § 552, and Privacy Act, 5 U.S.C. § 552a, requests received at ICE. The ICE FOIA office mailing address is 500 12<sup>th</sup> Street, S.W., STOP 5009, Washington, D.C. 20536-5009.

3. As the Deputy FOIA Officer of the ICE FOIA Office, my official duties and responsibilities include the general management, oversight, and supervision of the ICE FOIA Office. I manage and supervise a staff of ICE FOIA Paralegal Specialists, who report to me regarding the processing of FOIA and Privacy Act requests received by ICE. In connection with

my official duties and responsibilities, I am familiar with ICE's procedures for responding to requests for information pursuant to provisions of the FOIA and the Privacy Act. In that respect, I am familiar with ICE's processing of the FOIA consultation request dated June 22, 2015 that Defendant U.S. Department of Justice ("DOJ"), Federal Bureau of Investigation ("FBI") was sent to ICE and is a portion of the subject of this litigation.

4. I make this declaration in support of FBI's Motion to Dismiss, and in the Alternative for Summary Judgment in the above-captioned action. The statements I make in this declaration are based on my personal knowledge, which includes knowledge acquired through agency files reviewed, and information provided to me by other ICE employees in the course of my official duties. The documents attached hereto are kept by ICE in the ordinary course of its business activities.

**I. ADMINISTRATIVE PROCEDURAL HISTORY OF PLAINTIFF'S FOIA REQUEST AND REFERRAL OF DOCUMENTS TO ICE**

5. In a letter dated January 25, 2013, Plaintiff submitted a FOIA request to the FBI FOIA (the "Request"). *Exhibit A.*

6. In a letter dated June 22, 2015, the FBI forwarded the Request along with a referral of a two page document to ICE and asked that ICE review the document, make any deletions it deemed appropriate, and return the document to the FBI. *Exhibit B.* The FBI referred the document to ICE because it had located the document, deemed the document responsive to the Request, and found that the document "concern[ed]" ICE. *Id.*

7. In a letter dated July 8, 2015, the ICE FOIA Office responded to the FBI, and indicated that "[a]fter review of the information referred by the FBI, ICE has determined that portions of the bracketed information will be withheld pursuant to Exemptions of the FOIA...." *Exhibit C.* To the letter the ICE FOIA Office attached a redacted version of the two-page

document supplied by the FBI, which withheld information pursuant to FOIA Exemptions 6 & 7(C). *Exhibit D*. The ICE FOIA Office's letter also instructed the FBI as to how to explain to the requester that it has the right to appeal ICE's withholding determination and how to do so. *Exh. C*.

## II. THE VAUGHN INDEX

8. Pursuant to the requirements set forth in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), a *Vaughn* index accompanies this declaration; the *Vaughn* Index provides a description of each redaction and the corresponding FOIA exemption being applied. *See Exhibit E – ICE's Vaughn Index*.

9. The *Vaughn* index is in a table format and contains six headings: "Entry Number," "Bates Number," "Withholding: Full/Partial," "Description of Records and Redactions, and Reasons for Redactions," and "Exemptions Applied", which contain the following information:

- Entry Number refers to the specific entry number on the *Vaughn* index.
- Bates Number refers to the specific bates numbers stamped on each of the responsive documents.
- Withholding: Full/Partial refers to the level of withholdings taken on the documents.
- "Description of Records and Redactions, and Reasons for Redactions" describes the redacted information and the justification for the redactions.
- Exemptions Applied describes the exemptions applied to the redactions in the documents.

**III. DESCRIPTION OF FREEDOM OF INFORMATION ACT WITHHOLDINGS**

**FOIA Exemption 6 and 7(C)  
(codified at 5 U.S.C. § 552(b)(6) and (b)(7)(C))**

10. FOIA Exemption 6 provides that the FOIA does not apply to matters that are “personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”

11. FOIA Exemption 7(C) protects from disclosure records or information “compiled for law enforcement purposes” if a release of the records or information “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”

12. 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 USC §§ 533, 534, and Executive Order 12333 as implemented by the Attorney General’s Guidelines for Domestic FBI Operations (“AGG-DOM”) and 28 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 national security, and further the foreign intelligence objectives of the United States, and to conduct personnel investigations requisite to the work of the Department of Justice and whenever required by statute or otherwise. Under this investigative authority, the responsive records herein were compiled for the following specific law enforcement purpose.

13. As prescribed by AGG-DOM, paragraph I.D.4., the pertinent records were compiled and/or created in furtherance of FBI’s authority to conduct personnel background checks concerning applicants and employees under federal personnel security programs. To

accomplish its law enforcement, national security, and intelligence missions effectively, the FBI must ensure the appropriate character of FBI employees, applicants, and at times, other government agency personnel when required by statute or otherwise by conducting suitability investigations (i.e. background/personnel checks).

14. Thus, these records were compiled for a law enforcement purpose; they squarely fall within the law enforcement duties of the FBI; therefore, the information readily meets the threshold requirement of Exemption (b)(7).

15. On June 10, 1933, the Immigration and Naturalization Service (INS) was created by Executive Order 6166, which granted it the authority to administer and enforce laws relating to admission, exclusion, deportation, and naturalization of aliens, and investigate alleged violations of those laws. Pursuant to the Homeland Security Act of 2002, the INS was dismantled and the DHS was vested with the authority to carry “out the immigration enforcement functions vested by statute in, or performed by, the Commissioner of Immigration and Naturalization (or any officer, employee, or component of the Immigration and Naturalization Service)...” 6 U.S.C. § 202(3). The DHS now has the authority to administer and enforce the immigration laws of the United States. 8 USC § 1103(a)(1); 8 CFR § 2.1. ICE is a component of DHS. ICE is the largest investigative arm of DHS, and is responsible for identifying and eliminating vulnerabilities within the nation’s borders. ICE is tasked with preventing any activities that threaten national security and public safety by investigating the people, money, and materials that support illegal enterprises. Under this enforcement authority, the responsive records herein were compiled for the following specific law enforcement purpose.

16. Executive Order 10450, at Section 3(a) requires that the “appointment of each civilian officer or employee in any department or agency of the Government shall be made

subject to investigation [, which] in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation....” 18 Fed. Reg. 2489 (Apr. 27, 1953). Executive Order 10577 amended the Civil Service Rules to confer the Civil Service Commission [now known as the Office of Personnel Management] with the authority to “make appropriate investigations to secure enforcement of the Civil Service Act, Rules, and Regulations, including investigation of the qualifications and suitability of applicants for positions in the competitive service.” 19 Fed. Reg. 7521 (Nov. 22, 1954). Executive Order 10577 was subsequently amended by Executive Order 12107, which to, “secure effective implementation of the civil service laws, rules, and regulations,” enables the Director of the Office of Personnel Management to investigate “the qualifications and suitability of applicants for positions in the competitive service.” 44 Fed. Reg. 1055 (Dec. 28, 1978).

17. The record was compiled for a law enforcement purpose: to vet an individual for employment with legacy-INS, in furtherance of its law enforcement efforts. Accordingly, it falls squarely within the law enforcement duties of the legacy INS as well as the DHS and ICE; therefore, the information readily meets the threshold requirement of Exemption (b)(7).

18. When asserting FOIA Exemptions 6 and 7(C), ICE balances an individual’s personal privacy interest against the public’s interest in shedding light on ICE’s performance of its statutory duties.

19. ICE has withheld information on both pages of documents containing information protected by FOIA Exemptions 6 and 7(C). (*See* bates page numbers FBI-1136-1137.)

Specifically, ICE applied FOIA Exemption 6 in conjunction with Exemption 7(C) to protect from disclosure the name of a Federal government employee.

20. By virtue of the positions held by the Federal government employee referenced in the responsive record, he is permitted access to official government information. ICE gave consideration to the privacy interests of this Federal employee in not becoming a target of harassment – including, but not limited to, harassment in the form of requests for authorized access to government information – and their interest in remaining free from interference with the performance of his duties.

21. With respect to information specific to Federal government employees, the privacy consideration at issue includes the interest of this individual in remaining free from harassment and annoyance in conducting his official duties in the future, his interest in remaining free from harassment and annoyance in his private life, and his interest in not being targeted by individuals who may seek to do him harm.

22. Disclosure of the information about the Federal government employee referenced in the responsive record would also constitute an unwarranted invasion of personal privacy and subject the individual to embarrassment, harassment, and undue public attention. Such information, if disclosed to the public or to a third party requester without the permission of the individual, could expose the individual to identity theft and may reasonably lead to unwanted contact from persons that might seek to harm the individual.

23. The individual's privacy interest in the information contained in the record outweighs any minimal public interest in the disclosure of the information. Plaintiff has not articulated a sufficient public interest or public need to justify release of this information. The disclosure of this Personally Identifiable Information ("PII") serves no public benefit and would

not assist the public in understanding how ICE is carrying out its statutory responsibilities.

Finally, the third party mentioned in the law enforcement record did not consent to the disclosure of his PII.

24. ICE determined that the disclosure of the information described in Paragraphs 13 through 17 above would constitute a clearly unwarranted invasion of personal privacy. Moreover, ICE determined that disclosure of the records and information described in Paragraphs 13 through 17, which were compiled for law enforcement purposes, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

25. Having determined that the individual identified in the responsive records has a cognizable privacy interest in not having his information released, ICE FOIA then balanced the interest in safeguarding the individual's privacy from unnecessary public scrutiny against the public's interest in shedding light on the operations and activities of ICE (or the legacy Immigration and Naturalization Service ("INS")) in the performance of its statutory duties. In each instance where Exemptions 6 and 7(C) were applied, the redaction was limited to the name of the individual, which if released, would not shed light any further light as to the operations or activities of ICE or INS. All of the information surrounding the redactions was released and the limited extent of the redaction is readily apparent from the context of the records.

26. Additionally, Plaintiff has not articulated any public interest that could be advanced by releasing the personally identifiable information of the individual in question. As such, releasing the information withheld per FOIA Exemptions 6 and 7(C) would not shed light on the operations of ICE or the government.

27. Based upon the traditional recognition of strong privacy interests in law enforcement records, the categorical withholding of third party information identified in law

enforcement records is appropriate. Moreover, the third party identified in this record has not provided consent to the release of his personally identifying information as required by 6 C.F.R. §§ 5.3(a) & 5.21(d).

**IV. SEGREGABILITY**

28. 5 U.S.C. § 552(b) requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.”

29. A line-by-line review was conducted to identify information exempt from disclosure or for which a discretionary waiver of exemption could be applied.

30. With respect to the records that were released in part, all information not exempted from disclosure pursuant to the FOIA exemptions specified above was correctly segregated and non-exempt portions were released.

**V. JURAT CLAUSE**

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Signed this \_\_21st\_\_ day of November, 2016.



---

Fernando Pineiro, Deputy FOIA Officer  
Freedom of Information Act Office  
U.S. Department of Homeland Security  
U.S. Immigration and Customs Enforcement  
500 12th Street, S.W., Stop 5009  
Washington, D.C. 20536-5009

# Exhibit A

# McDermott Will & Emery

Boston Brussels Chicago Düsseldorf Frankfurt Houston London Los Angeles Miami  
Milan Munich New York Orange County Paris Rome Seoul Silicon Valley Washington, D.C.  
Strategic alliance with MWE China Law Offices (Shanghai)

Lisa A. Linsky  
Attorney at Law  
llinsky@mwe.com  
+1 212 547 5587

January 25, 2013

VIA FIRST CLASS MAIL

Federal Bureau of Investigation  
Record/Information Dissemination Section  
Attn: FOIPA Request  
170 Marcel Drive  
Winchester, VA 22602-4843

Dear FOIA Officer:

This is a new request pursuant to the Freedom of Information Act, 5 U.S.C. § 552.

In connection with this request, please provide copies of all communications, personnel or investigative files created in association with **Executive Order 10450**, which was signed by President Dwight Eisenhower in April 1953 and made effective on May 27, 1953. This request includes any and all internal FBI correspondence or communications regarding Executive Order 10450 and also specifically includes, but is not limited to, all files created by and communications to or from Warren E. Burger. The date range for this request is **1950-1990**.

To assist you in locating the documents and information related to this request, Executive Order 10450 authorized federal agencies, including the U.S. Civil Service Commission and the Federal Bureau of Investigation, to investigate current and potential federal employees for security risks. Notably, the order expanded criteria for determining a security risk to include "Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, sexual perversion." In this regard, Executive Order 10450 authorized the FBI to expand its "Sex Deviate program," which systematically collected information on suspected homosexuals employed in the federal government, law enforcement agencies, and institutions of higher learning. In addition, Warren E. Burger was in charge of enforcing Executive Order 10450 as an Assistant Attorney General in charge of the Civil Division at the Department of Justice, for the approximate period **1952-1957**. Information collected in the course of the program was forwarded to designated officials in the executive, legislative, and judicial branches of government.

Please advise if the administrative fees associated with this request will exceed \$500.00.

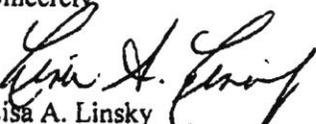
January 25, 2013  
Page 2

The information sought pursuant to this request is not for commercial use but rather in connection with the work of the Mattachine Society, a non-profit education and research organization.

Please feel free to contact me or my colleague, Lisa Gerson, via phone or email with any questions. Our contact information is listed below.

Your prompt attention to this request is appreciated.

Sincerely,

  
Lisa A. Linsky  
McDermott Will & Emery LLP  
340 Madison Avenue  
New York, New York 10172  
llinsky@mwe.com  
(212) 547-5587

Lisa Gerson  
lgerson@mwe.com  
(212) 547-5769

  
Jason Raymond  
2122 P Street NW  
Washington, D.C. 20037  
248.767.4740  
jasonmraymond@gmail.com

# Exhibit B



U.S. Department of Justice

Federal Bureau of Investigation  
Washington, D.C. 20535

Date: June 22, 2015

To: Catrina Pavlik-Keenan  
Freedom of Information Act Office  
U.S. Immigration and Customs Enforcement  
500 12th Street S.W.  
Mailstop 5009  
Washington, DC 20536

From: David M. Hardy  
Section Chief  
Record/Information Dissemination Section  
Records Management Division

Subject: FOI/PA Request of LISA LINSKY  
FBI FOI/PA # 1207786-000  
Re: EXECUTIVE ORDER 10450 (1950-1990)

In connection with review of FBI files responsive to the above request, the following were located:

- \_\_\_ unclassified document(s) which originated with your agency is/are being referred to you for direct response to the requester. The requester has/has not been advised of this referral. Please furnish us with a copy of your disclosure letter to the requester. (See *index A*)
- 1 FBI document containing information (bracketed) concerning your agency.
  - We will advise the requester to expect a direct response from your agency regarding this matter.
  - Please review this information and return the document to us, making any deletions you deem appropriate. (See *index B*)
- \_\_\_ classified document(s) which originated with your agency is/are being referred to you for direct response to the requester. The requester has/has not been advised of this referral. Please furnish us with a copy of your disclosure letter to the requester, and advise us if the classification of the document(s) changed so that we may amend our files. (See *index C*)
- \_\_\_ classified FBI document(s) containing information (bracketed) concerning your agency.
  - We will advise the requester to expect a direct response from your agency regarding this matter.
  - Please review this information and return the document(s) to us, making any deletions you deem appropriate, citing the exemption(s) claimed. Please advise this Bureau if the document(s) still warrant classification. (See *index D*)

Please note that some of the enclosed documents contain deletions made by the FBI. The appropriate exemption appears next to the redacted information. The requester may file an appeal by writing to the Director, Office of Information Policy (OIP), U.S. Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's eFOIA portal <http://www.justice.gov/oip/efoia-portal.html>. Their appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number in any correspondence to us for proper identification of the request.

A copy of the requester's initial letter and other significant correspondence is enclosed for your convenience. If you have any questions concerning this referral, please contact GIS *Graber*, at (540) 868-4538. The FOIPA number as well as the FBI file number(s) on the Index Listing (see next page) should be utilized during any consultation with the FBI concerning this referral.

(INDEX LISTING NEXT PAGE)

---

Index A:

---

Index B:

66-HQ-A19000, SECTION 5, SERIAL 68 (2 PAGE DOCUMENT)

---

Index C:

---

Index D:

Enclosure(s)

# **“Correspondence”**

# McDermott Will & Emery

Boston Brussels Chicago Düsseldorf Frankfurt Houston London Los Angeles Miami  
Milan Munich New York Orange County Paris Rome Seoul Silicon Valley Washington, D.C.  
Strategic alliance with MWE China Law Offices (Shanghai)

Lisa A. Linsky  
Attorney at Law  
llinsky@mwe.com  
+1 212 547 5587

January 25, 2013

VIA FIRST CLASS MAIL

Federal Bureau of Investigation  
Record/Information Dissemination Section  
Attn: FOIPA Request  
170 Marcel Drive  
Winchester, VA 22602-4843

Dear FOIA Officer:

This is a new request pursuant to the Freedom of Information Act, 5 U.S.C. § 552.

In connection with this request, please provide copies of all communications, personnel or investigative files created in association with **Executive Order 10450**, which was signed by President Dwight Eisenhower in April 1953 and made effective on May 27, 1953. This request includes any and all internal FBI correspondence or communications regarding Executive Order 10450 and also specifically includes, but is not limited to, all files created by and communications to or from Warren E. Burger. The date range for this request is **1950-1990**.

To assist you in locating the documents and information related to this request, Executive Order 10450 authorized federal agencies, including the U.S. Civil Service Commission and the Federal Bureau of Investigation, to investigate current and potential federal employees for security risks. Notably, the order expanded criteria for determining a security risk to include "Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, sexual perversion." In this regard, Executive Order 10450 authorized the FBI to expand its "Sex Deviate program," which systematically collected information on suspected homosexuals employed in the federal government, law enforcement agencies, and institutions of higher learning. In addition, Warren E. Burger was in charge of enforcing Executive Order 10450 as an Assistant Attorney General in charge of the Civil Division at the Department of Justice, for the approximate period **1952-1957**. Information collected in the course of the program was forwarded to designated officials in the executive, legislative, and judicial branches of government.

Please advise if the administrative fees associated with this request will exceed \$500.00.

U.S. practice conducted through McDermott Will & Emery LLP.

340 Madison Avenue New York, New York 10173-1922 Telephone: +1 212 547 5400 Facsimile: +1 212 547 5444 [www.mwe.com](http://www.mwe.com)

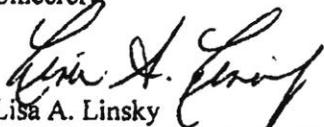
January 25, 2013  
Page 2

The information sought pursuant to this request is not for commercial use but rather in connection with the work of the Mattachine Society, a non-profit education and research organization.

Please feel free to contact me or my colleague, Lisa Gerson, via phone or email with any questions. Our contact information is listed below.

Your prompt attention to this request is appreciated.

Sincerely



Lisa A. Linsky  
McDermott Will & Emery LLP  
340 Madison Avenue  
New York, New York 10172  
llinsky@mwe.com  
(212) 547-5587

Lisa Gerson  
lgerson@mwe.com  
(212) 547-5769



Jason Raymond  
2122 P Street NW  
Washington, D.C. 20037  
248.767.4740  
jasonmraymond@gmail.com

# Exhibit C

U.S. Department of Homeland Security  
500 12<sup>th</sup> Street, S.W., Stop 5009  
Washington, DC 20536-5009



**U.S. Immigration  
and Customs  
Enforcement**

July 08, 2015

David M. Hardy, Chief  
Record/Information Dissemination Section  
Records Management Division  
Federal Bureau of Investigation  
Department of Justice  
170 Marcel Drive  
Winchester, VA 22602-4843

**SUBJECT: FBI FOIA Case Number FOI/PA# 1207786-000  
ICE FOIA Case Number 2015-ICCO-00218**

In a letter dated June 22, 2015, the Federal Bureau of Investigation (FBI) requested the U.S. Immigration and Customs Enforcement (ICE) review the information in a 2 page record that the FBI had located in response to a Freedom of Information Act request for all communications, personnel or investigative files created in association with Executive Order 10450

After review of the information referred by the FBI, ICE has determined that portions of the bracketed information will be withheld pursuant to Exemptions of the FOIA as described below.

**FOIA Exemption 6** exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right to privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

**FOIA Exemption 7(C)** protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators, in not being unwarrantably associated with alleged criminal activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate. As such, ICE has determined that the privacy interest in the identities of individuals in the records you have requested clearly outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into this determination.

The denial statement and appeal information in your response to the requester should read:

“You have the right to appeal ICE’s withholding determination. Should you wish to do so, send your appeal and a copy of this letter to: U.S. Immigration Customs Enforcement, Office of Principal Legal Advisor, U.S. Department of Homeland Security, Freedom of Information Office, 500 12<sup>th</sup> Street, S.W., Stop 5009 Washington, D.C. 20536-5009, following the procedures outlined in the DHS regulations at 6 C.F.R. § 5.9. Your appeal must be received within 60 days of the date of this letter. Your envelope and letter should be marked “FOIA Appeal.” Copies of the FOIA and DHS regulations are available at [www.dhs.gov/foia](http://www.dhs.gov/foia).

If you need to contact our office about this matter, please refer to case number **2015-ICCO-00218**. This office can be reached at (866) 633-1182.

Sincerely,

Handwritten signature of Bradley E. White in cursive script.

Catrina M. Pavlik-Keenan  
FOIA Officer

Enclosure(s): 2 Pages

# Exhibit D



Memorandum to Mr. Cleveland  
Re: Federal Employees Security Program

of the Communist Party and that (b) (6), (b) (7) (c) had attended party functions although he denied having been a member. Because of this information Immigration and Naturalization Service rejected (b) (6), (b) (7) (c) for employment. In addition, in 1954 (b) (6), (b) (7) (c) was denied merchant seaman's papers by the United States Coast Guard based upon the same information. A check of Bureau files disclosed (b) (6), (b) (7) (c) brother-in-law was known to have been active in communist affairs through 1959. In view of this information concerning (b) (6), (b) (7) (c) and all the members of his family and the fact he had previously been denied Federal employment and merchant seaman's papers, a full field investigation was conducted. This investigation disclosed that (b) (6), (b) (7) (c) had broken with his family on the subject of communism as a young man and the investigation concerning him since that time was entirely favorable. This was furnished to the Civil Service Commission which later reported it had reached a favorable determination regarding employment of (b) (6), (b) (7) (c). Since it is the responsibility of this Bureau to resolve these matters by developing favorable as well as unfavorable data, there is no question but what this investigation was fully justified.

RECOMMENDATION:

In view of the fact that it is the policy of the Bureau not to open full field investigations on basis of insignificant information it is recommended no action be taken with respect to the suggestion of the Philadelphia office.

Approved.  
Jill  
7-27  
9:49P

WVC  
SEC  
WGL  
DCK  
WOL

# Exhibit E

**Mattachine Society of Washington, D.C. v. U.S. Department of Justice,  
No. 16-0773 (D.D.C., filed April 27, 2016)**

U.S. Immigration and Customs Enforcement's Vaughn Index Regarding Withholdings Pursuant to FOIA Exemptions (b)(6) and (b)(7)(C)

Entry Number	Bates Number	Withholding: Full/Partial	Description of Records and Redactions, and Reasons for Redactions	Exemptions Applied
1	FBI-1136	Partial	<p><b>Document Title:</b> United States Government Memorandum re: Federal Employees Security Program Executive Order 10450 (Page 1 of 2)</p> <p><b>Description of Document and Redaction(s):</b> The information redacted under (b)(6), (b)(7)(C), located after "that" contains the name of a Federal government employee.</p> <p><b>Reasons for Redaction(s):</b> FOIA Exemptions (b)(6) &amp; (b)(7)(C): The disclosure of the name of a Federal employee could reasonably be expected to constitute an unwarranted invasion of personal privacy by conceivably subjecting him to harassment and annoyance in conducting his official duties and in his private life; could place him in danger as individuals opposed to Federal government employees may begrudge him for an indefinite time period and seek revenge; and disclosure could minimize his effectiveness in performing his duties. The disclosure of this PII serves no public benefit and would not assist the public in understanding how the agency is carrying out its statutory responsibilities. Furthermore, the privacy interest in this PII outweighs any minimal public interest that could possibly exist in the disclosure of this information.</p>	<p style="text-align: center;">The Freedom of Information Act 5 U.S.C. § 552 (b) (6), (b)(7)(C)</p>
2	FBI-1137	Partial	<p><b>Document Title:</b> United States Government Memorandum re: Federal Employees Security Program Executive Order 10450 (Page 2 of 2)</p> <p><b>Description of Document and Redaction(s):</b> The information redacted under (b)(6), (b)(7)(C), located after "that", "rejected", "1954", "disclosed", "concerning", and "of" contains the name of a Federal government employee.</p> <p><b>Reasons for Redaction(s):</b> FOIA Exemptions (b)(6) &amp; (b)(7)(C): The disclosure of the name of a Federal employee could reasonably be expected to constitute an unwarranted invasion of personal privacy by conceivably subjecting him to harassment and annoyance in conducting his official duties and in his private life; could place him in danger as individuals opposed to Federal government employees may begrudge him for an indefinite time period and seek revenge; and disclosure could minimize his effectiveness in performing his duties. The disclosure of this PII serves no public benefit and would not assist the public in understanding how the agency is carrying out its statutory responsibilities. Furthermore, the privacy interest in this PII outweighs any minimal public interest that could possibly exist in the disclosure of this information.</p>	<p style="text-align: center;">The Freedom of Information Act 5 U.S.C. § 552 (b)(6), (b)(7)(C)</p>

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

MATTACHINE SOCIETY	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:16-cv-00773 (RCL)
	)	
U.S. DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	

**DECLARATION OF SUSAN L. KIM**

I, Susan L. Kim, declare as follows:

1. I am an Attorney Advisor in the Freedom of Information Act (“FOIA”) and Declassification Unit of the Office of Law and Policy in the National Security Division (“NSD”) of the United States Department of Justice (“DOJ” or “Department”). NSD is a component of the Department which formally began operations on October 2, 2006, by inter alia, consolidating the resources of the Office of Intelligence Policy and Review (“OIPR”) and the Criminal Division’s Counterterrorism Section (“CTS”) and Counterespionage Section (“CES”).

2. In my capacity as an Attorney Advisor in the FOIA and Declassification Unit, I work on litigation matters for the unit that responds to requests for access to NSD records and information pursuant to the FOIA, 5 U.S.C. § 552 and the Privacy Act of 1974. The statements contained in this declaration are based upon my personal knowledge, information provided to me in the course of my official duties, and determinations I have made following a review of NSD’s potentially responsive documents.

3. In a letter dated January 23, 2013, plaintiff submitted a Freedom of Information Act (“FOIA”) request to the Federal Bureau of Investigation (“FBI”) for “copies of all

communications, personnel or investigative files created in association with Executive Order 10450, which was signed by President Dwight Eisenhower in April 1953 and effective on May 27, 1953.” This includes “any and all internal FBI correspondence or communication regarding Executive Order 10450 and also specifically includes, but is not limited to, all files created by and communications to or from Warren E. Burger.” The date range for the request was 1950-1990.

4. In a letter dated, April 17, 2015, the FBI referred responsive records to NSD for direct response to the requester. In a letter dated, May 5, 2015, NSD FOIA informed the requester that it was releasing these records in part and that the withheld portions of these records were exempt from disclosure pursuant to FOIA Exemptions (b)(6) and (b)(7)(C). Since NSD’s partial release, the FBI labeled these records FBI 935-938.

5. Exemption (b)(6) permits withholding of “personnel and medical files and similar files when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). Similarly, Exemption (b)(7)(C) protects “records or information compiled for law enforcement purposes, ... to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7). When withholding information pursuant to these exemptions, the Government must balance the privacy interests of the individuals against any public interest in disclosure. The public interest in disclosure is determined by whether the information would inform the general public about how the Government fulfills its responsibilities.

6. Here, NSD asserts Exemptions (b)(6) and (b)(7)(C) to protect the names and

identifying information of government employees. These exemptions have been applied in conjunction, such that information withheld under one exemption is also withheld under the other. Specifically, the responsive records contain names of Federal Government personnel. The Department of Justice gathered the names of these employees because they are employees against whom the Department would have considered termination proceedings. For each withholding under Exemption (b)(6) and (b)(7)(C), NSD determined that the privacy rights of the individuals outweighed the public interest, if any, in the disclosure of the information.

7. These individuals and their families have privacy interests in avoiding publicity in connection with having been considered for employment termination because such an association could subject these individuals and their families to both harassment and embarrassment. At the same time, there is no discernible public interest in identifying these individuals because providing the names and/or identifying information of particular employees would not shed light on the government's operations. As a result, releasing this information would constitute a clearly unwarranted invasion of their privacy which outweighs the public interest in disclosure.

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

Executed this 6<sup>th</sup> day of December, 2016.



---

SUSAN L. KIM

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

_____	)	
MATTACHINE SOCIETY OF	)	
WASHINGTON D.C.	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 16-0773 (RCL)
v.	)	
	)	
UNITED STATES DEPARTEMENT	)	
OF JUSTICE,	)	
	)	
Defendant.	)	
_____		

**PROPOSED ORDER**

THIS CAUSE comes before the Court upon Defendant United States Department of Justice's Motion for Summary Judgment.

UPON CONSIDERATION of the motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that, for the reasons stated in the motion, the motion is GRANTED. Any pending motions are hereby DENIED AS MOOT.

DONE AND ORDERED in Chambers in Washington, District of Columbia, this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
ROYCE C. LAMBERTH  
UNITED STATES DISTRICT JUDGE