

**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.)	
_____)	

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

As detailed in its opening motion papers (*see* Dkt. No. 37), Defendant United States Department of Justice (“Defendant”) has conducted a thorough search for records responsive to Plaintiff Mattachine Society of Washington, D.C.’s (“Plaintiff”) Freedom of Information Act (“FOIA”) request submitted to the Federal Bureau of Investigation (“FBI”) seeking “copies of all communications, personnel or investigative files created in association with Executive Order 10450. . .” (“Plaintiff’s FOIA Request”). All reasonably segregable material has been released to Plaintiff.

In its opposition to Defendant’s summary judgment motion and in support of its cross-motion, Plaintiff acknowledges that the FBI searched all of the appropriate databases for records responsive to Plaintiff’s FOIA Request. *See* Dkt. No. 41, Opposition of the Mattachine Society to the Government’s Motion for Summary Judgment and Cross-Motion for Summary Judgment (“Pl. Mem.”), at pp. 14, 17. Plaintiff has also conceded that the overwhelming majority of the

withholdings of exempt documents are appropriate, with the exception of just 11 pages that Plaintiff challenges. *Id.* at pp. 7-8.

Although Plaintiff notes the well-established principle that the agency has discretion to craft the list of terms it deems most appropriate to search for documents responsive to Plaintiff's FOIA Request, Plaintiff contends that the FBI's search was inadequate because it did not use a laundry list of generic search terms that were not included in Plaintiff's FOIA Request. *Id.* at pp. 10, 17. Plaintiff also incorrectly asserts that the FBI improperly withheld 11 pages, in whole or in part, pursuant to Exemptions 1, 3, 6, 7(C), and 7(D). Plaintiff challenges these properly made withholdings based solely upon speculative and conclusory statements that are devoid of any support in the record. There is, therefore, no need for the Court to review the withheld records as Plaintiff urges because there are no material facts in dispute that would prevent entry of summary judgment for Defendant at this time.

For the reasons set forth in Defendant's opening motion papers, the declarations submitted in support of Defendant's motion,¹ and below, Defendant respectfully submits that the Court should grant summary judgment in its favor and deny Plaintiff's cross-motion for summary judgment.

¹ On December 6, 2016, along with Defendant's Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment (*see* Dkt. No. 37) ("Def. Mem."), Defendant filed the declarations of David M. Hardy, Section Chief of the FBI's Record/Information Dissemination Section, Record Management Division (*see* Dkt. No. 37-1, Exh. 1) (the "First Hardy Decl."); Susan L. Kim, Attorney Advisor in the FOIA and Declassification Unit of the Office of Law and Policy in the National Security Division of DOJ (*see* Dkt. No. 37-1, Exh. 3) (the "First Kim Decl."); and Fernando Pineiro, Deputy FOIA Officer for the FOIA Office at United States Immigration and Customs Enforcement (*see* Dkt. No. 37-1, Exh. 2). These declarations are wholly incorporated into this reply and opposition. Supplemental declarations of David M. Hardy (the "Second Hardy Decl.") and Susan L. Kim (the "Second Kim Decl.") further detailing the search for and processing of documents responsive to Plaintiff's FOIA Request are being submitted herewith.

ARGUMENT

I. THE FBI CONDUCTED A THOROUGH SEARCH REASONABLY CALCULATED TO UNCOVER ALL RECORDS RESPONSIVE TO PLAINTIFF'S FOIA REQUEST

Under the FOIA, an agency must undertake a search that is “reasonably calculated to uncover all relevant documents.” *Weisberg v. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (internal quotation marks omitted); *Oglesby v. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (“[T]he 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.”); *Media Research Center v. United States Dep’t of Justice*, 818 F. Supp. 2d 131, 137 (D.D.C. 2011).

The focus on the adequacy inquiry is not on the results. *Bigwood v. United States Dep’t of Defense*, 132 F. Supp. 3d 124, 135 (D.D.C. 2015) (explaining that the adequacy of the search is judged by appropriateness of the methods used to carry out the search rather than by fruits of the search); *Boggs v. United States*, 987 F. Supp. 11, 20 (D.D.C. 1997) (noting that the court’s role is to determine the reasonableness of the search, “not whether the fruits of the search met plaintiff’s aspirations”). A search is not inadequate merely because it failed to “uncover[] every document extant.” *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1201 (D.C. Cir. 1991); *Bigwood*, 132 F. Supp. 3d at 135 (“[T]he agency’s search for records need not be exhaustive, but merely reasonable. The proper inquiry is not whether there might exist additional documents possibly responsive to a request, but whether the agency conducted a search reasonably calculated to uncover relevant documents.”); *Judicial Watch v. Rossotti*, 285 F. Supp. 2d 17, 26 (D.D.C. 2003) (“Perfection is not the standard by which the reasonableness of a FOIA search is measured.”). Rather, a search is inadequate only if the agency fails to “show, with reasonable detail, that the search method . . .

was reasonably calculated to uncover all relevant documents.” *Oglesby*, 920 F.2d at 68. Hypothetical assertions are insufficient to raise a material question of fact with respect to the adequacy of an agency’s search. *Id.* at 67 n.13.

An agency shows the reasonableness of its search method through its declaration or affidavit. *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982) (“[A]ffidavits 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.”); *Bigwood*, 132 F. Supp. 3d at 135.

“Agency affidavits enjoy a presumption of good faith that withstands purely speculative claims about the existence and discoverability of other documents.” *Chamberlain v. U.S. Dep’t of Justice*, 957 F. Supp. 292, 294 (D.D.C. 1997), *aff’d*, 124 F.3d 1309 (D.C. Cir. 1997); *SafeCard Servs.*, 926 F.2d at 1200; *Physicians for Human Rights v. United States Dep’t of Defense*, 675 F. Supp. 2d 149, 158 (D.D.C. 2009). Once an agency demonstrates the adequacy of its search, the plaintiff can only rebut the agency’s position “by showing that the agency’s search was not made in good faith.” *Maynard v. C.I.A.*, 986 F.2d 547, 560 (1st Cir. 1993). Thus, once the agency has met its burden regarding the adequacy of its search, the burden shifts to the requester to rebut the evidence by a showing of bad faith on the part of the agency. *Miller v. United States Dep’t of State*, 779 F.2d 1378, 1383 (8th Cir. 1985).

As the First Hardy Decl. and Second Hardy Decl. (collectively, the “Hardy Declarations”) establish, the FBI’s search method was reasonably calculated to uncover responsive records. The Hardy Declarations provide sufficient evidence to warrant summary judgment. In particular, they provide a detailed description of the procedures the FBI uses to process FOIA requests generally,

the specific steps taken to respond to Plaintiff's FOIA Request, the search terms used to accomplish the search for documents responsive to Plaintiff's FOIA Request, and the justification for nondisclosure of documents pursuant to the relevant FOIA exemptions. Thus, the Hardy Declarations offer adequate detail regarding the search and, therefore, the Court should accord them substantial weight.

The FBI Properly Exercised Its Discretion in Identifying the Appropriate Search Terms

A FOIA requester "cannot dictate the search terms for his or her FOIA request." *Bigwood*, 132 F. Supp. 3d at 140. Rather, the agency can exercise its "discretion in crafting lists of search terms that [it] believe[s] to be reasonably tailored to uncover documents responsive to the FOIA request." *Physicians for Human Rights*, 675 F. Supp. 2d at 164; *Bigwood*, 132 F. Supp. 3d at 140; *Liberation Newspaper v. United States Dep't of State*, 80 F. Supp. 3d 137, 146 (D.D.C. 2015); *Media Research Center*, 818 F. Supp. 2d at 139. When those "search terms are reasonable, the Court will not second guess the agency regarding whether other search terms might have been superior." *Liberation Newspaper*, 80 F. Supp. 3d at 146-47; *Bigwood*, 132 F. Supp. 3d at 140 ("Where the search terms are reasonably calculated to lead to responsive documents, a court should neither 'micromanage' nor second guess the agency's search."); *Agility Public Warehousing Co. K.S.C. v. National Security Agency*, 113 F. Supp. 3d 313, 339 (D.D.C. 2015).

Here, Plaintiff claims that the FBI's use of the search terms "Executive Order 10450," "Sex Deviate," and "Sex Deviate Program" was inadequate. Plaintiff contends that the FBI should have looked beyond the language of the request itself and determined its search terms based upon a myriad of other sources, including: (1) "the purpose of the request," (2) "the facts and circumstances underlying Executive Order 10450," (3) "the objective of Executive Order 10450,"

and (4) “the labels applied to people affected by Executive Order 10450.” *See* Pl. Mem. at pp. 14-16. However, Plaintiff itself is apparently unable to determine what terms it believes should have been used. Plaintiff first contends that the search should have included the terms “sexual perversion,” “pervert,” “homosexual,” and “Warren Burger.” *Id.* at p. 7. Plaintiff then alleges that “[a]n actual reasonable search would also use search terms such as ‘homo,’ ‘gay,’ ‘lesbian,’ ‘queer,’ and ‘sodomy.’” *Id.* Plaintiff later claims that “a full search” would include “other related terms” like “morals charges,” “immoral,” “deviant,” and “abomination.” *Id.* at p. 15, fn. 5.

As David Hardy explains in the Second Hardy Decl., the FBI agrees that “Warren Burger” is an appropriate search term that the FBI inadvertently excluded from its initial search. *See* Second Hardy Decl. ¶ 10. Therefore, the FBI searched for multiple variations of Warren Burger’s name, but did not locate any additional records responsive to Plaintiff’s FOIA Request. *Id.* However, as the Second Hardy Decl. makes clear, the numerous additional search terms proposed by Plaintiff are far too broad and generic to result in an effective search. Mr. Hardy explains that searches using those terms would result in thousands of hits for documents that are wholly irrelevant to Plaintiff’s FOIA Request. The FBI would then have to undertake an unduly burdensome review of documents that contain those broad terms but in no way pertain to Executive Order 10450, the subject of Plaintiff’s FOIA Request. *Id.* at 7-9. Such a search far exceeds the requirements of the FOIA. *See, e.g., Looks Filmproduktionen GMBH v. Central Intelligence Agency*, 199 F. Supp. 3d 153, 168 (D.D.C. 2016) (“In fulfilling the statutory mandate of the FOIA, federal agencies properly use search terms that are designed to return responsive documents as a means of targeting their resources in the most efficient manner.”).

Plaintiff's speculation that the use of its proposed search terms would result in the location of additional responsive records is insufficient to establish that the FBI's search was unreasonable and, thus, is insufficient to defeat summary judgment. *See, e.g., Agility Public Warehousing*, 113 F. Supp. 3d at 339 ("The plaintiff's insistence on its own preferred search terms does not undermine the *reasonableness* of the [agency's] search terms.") (emphasis in original); *Liberation Newspaper*, 80 F. Supp. 3d at 146 ("[S]peculation as to the potential results of a different search does not necessarily undermine the adequacy of the agency's actual search.").

II. THE WITHHOLDINGS ARE APPROPRIATE AND *IN CAMERA* REVIEW IS UNNECESSARY

In response to Plaintiff's FOIA Request, the FBI reviewed 1,602 pages and released 1,201 pages in full and part, with certain information withheld pursuant to FOIA Exemptions 1, 3, 6, 7(C), and 7(D). *See* First Hardy Decl. ¶¶ 21, 92. All documents responsive to Plaintiff's FOIA request were processed to achieve maximum disclosure. *Id.* at ¶¶ 36, 92. Plaintiff does not dispute the majority of the withholdings and offers nothing more than conjecture that the withholdings on 11 pages were overbroad. For the reasons detailed in Defendant's opening motion papers, declarations, and below, Defendant's withholdings were appropriate and the *in camera* review that Plaintiff requests is unnecessary.

a. The FBI Properly Withheld Pages FBI 458 – FBI 460 Pursuant to Exemption 7(D)

As detailed in the Second Hardy Decl. (*see* ¶ 12), pages FBI 458 through FBI 460 are a document that consists of information that a foreign government entity provided to the FBI regarding civil service suitability matters. The foreign government entity provided the information under an express assurance that it would be kept confidential. As Mr. Hardy explained in his first declaration (*see* ¶ 70), disclosure of the information would have a chilling

effect on the FBI's relationship both with the specific foreign government entity that provided the information contained in this document as well as on the FBI's relationship with other foreign government entities with similar agreements with the FBI. Thus, the FBI properly withheld this document in full pursuant to Exemption 7(D). *See also* Def. Mem. at pp. 34-37.

Plaintiff speculates that the information contained within pages FBI 458-460 “*may* no longer be sensitive, the informant *may* be deceased, or the agreements as to an assurance of confidentiality *may* be obsolete.” Pl. Mem. at p. 20 (emphasis added). However, Plaintiff offers no evidence substantiating these claims or demonstrating that the FBI has acted in bad faith in withholding the document. Plaintiff's conjecture is insufficient to defeat summary judgment. *See, e.g., Physicians for Human Rights*, 675 F. Supp. 2d at 166.

Plaintiff further incorrectly claims that this Court has a “duty to review FBI 458 through FBI 460 *in camera* to determine whether these documents were properly withheld in full and whether they can be partially released.” Pl. Mem. at p. 20. However, the Court has no such duty and *in camera* review is unnecessary. Although the FOIA permits district courts to conduct *in camera* review, it does not compel the Court to do so. *See, e.g., Larson v. Dep't of State*, 565 F.3d 857, 869-70 (D.C. Cir. 2009); *Juarez v. Dep't of Justice*, 518 F.3d 54, 59-60 (D.C. Cir. 2008) (“It is true that FOIA provides district courts the option to conduct *in camera* review . . . but it by no means compels the exercise of that option.”). “Indeed, an *in camera* review is a last resort. . . .” *See, e.g., Bigwood*, 132 F. Supp. 3d at 153. The D.C. Circuit has made clear that where, as here, “the agency's affidavits ‘provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith, then summary judgment is appropriate without *in*

camera review of the documents.” *Larson*, 565 F.3d at 870 (quoting *Hayden v. United States*, 608 F.2d 1381, 1387 (D.C. Cir. 1979)); *Juarez*, 518 F.3d at 60 (“When a district court finds that a law enforcement agency’s affidavits sufficiently describe the documents and set forth proper reasons for invoking an exemption, *in camera* inspection of those documents is unnecessary.”).

b. The FBI Properly Redacted Pages FBI 1151 – FBI 1152 Pursuant to Exemptions 6 and 7(C)

Pages FBI 1151-1152 are a November 1973 memorandum concerning the “Federal Employee Security Program” that contains limited redactions protecting the names and identifying information for non-FBI federal government personnel. *See* Second Hardy Decl. ¶ 13; Exh. A. As explained in the Second Hardy Decl., the FBI determined that based upon the identifying information of the individuals contained in the document and the 1973 date of the document, the individuals whose names were protected could conceivably still be alive. *Id.* The FBI carefully weighed these individuals’ privacy interests against the public interest to be served by disclosing their names and concluded that the disclosure of these individuals’ identities would not significantly increase the public’s understanding of the FBI’s operations and activities related to Executive Order 10450. *Id.* at ¶ 14. Therefore, the FBI properly protected their names and identifying information pursuant to Exemptions 6 and 7(C). *See also* Def. Mem. at pp. 28-29.

Again, without presenting any evidence, Plaintiff speculates that this document, which has been produced with minimal redactions, “*may have been overly redacted,*” and, although again lacking any reasonable basis, requests that the Court also review this document *in camera*. *See* Pl. Mem. at p. 21 (emphasis added). However, here, too, for the reasons set forth above, *in camera* review is unwarranted.²

² Plaintiff also apparently requests that the FBI disclose the protected information now based upon

c. Pages FBI 935 – FBI 938 Have Not Been Withheld in Their Entirety

Plaintiff next contends that pages FBI 935-938 were withheld in their entirety and should be reviewed *in camera* to determine whether they can be released in redacted form. *See* Pl. Mem. at pp. 21-22. These pages are an April 1959 memorandum to the Director of the FBI from the Acting Assistant Attorney General regarding “Survey of Non-Sensitive Position Cases by the Civil Service Commission.” *See* Second Kim Decl., Exh. B. The FBI referred this memorandum to DOJ’s National Security Division (“NSD”) for direct response to Plaintiff. *See* Second Hardy Decl. fn 9; First Kim Decl. ¶ 4; Second Kim Decl. ¶¶ 3-4.

Although the FBI provided Plaintiff with a “Deleted Page Information Sheet” mistakenly indicating this document was withheld in full, it was, in fact, released in part with the names and identifying information of government employees redacted pursuant to Exemptions 6 and 7(C). *See* First Kim Decl. ¶¶ 4-7; Second Kim Decl. ¶¶ 3-5. Thus, there is no need for further review of the document to determine whether it can be released in redacted form.

d. Pages FBI 1268 – FBI 1269 Were Properly Redacted Pursuant to Exemption 3

As demonstrated by the Hardy Declarations, the FBI properly redacted pages FBI 1268-1269 to protect classified information and relationships, methods, and activities related to matters of national security. *See* First Hardy Decl. ¶¶ 40-54; Second Hardy Decl. ¶ 15; *see also* Def. Mem. at pp. 17-24. However, upon further review, the FBI declassified the withheld information on these pages. *See* Second Hardy Decl. ¶ 15. Therefore, although Exemption 1 no longer

Plaintiff’s agreement to keep it “confidential” while it attempts to obtain evidence that the individuals whose names and identifying information has been protected are either deceased or consent, after the fact, to the FBI’s release of their personal information to Plaintiff. *See* Pl. Mem. at p. 21. In light of the privacy interests involved, such an approach is unquestionably inappropriate.

applies, the document continues to warrant protection pursuant to Exemption 3. *Id.*

Plaintiff has neither identified anything improper about the FBI's redaction of this sensitive document, provided any evidence rebutting the Hardy Declarations demonstrating that the redacted information is subject to FOIA exemptions, nor established bad faith on the part of the FBI. Yet, Plaintiff claims that because the document is "heavily redacted," the Court should review it *in camera* "to determine whether the partial withholding was proper and whether the redactions can be limited." Pl. Mem. at pp. 22-23.

In circumstances such as this involving matters concerning national security, where "an agency's statements supporting exemption contain reasonable specificity of detail as to demonstrate that the withheld information logically falls within the claimed exemption and evidence in the record does not suggest otherwise," it is well-settled that "the court should not conduct a more detailed inquiry to test the agency's judgment and expertise or to evaluate whether the court agrees with the agency's opinions." *Larson*, 565 F.3d at 865, 870 (affirming grant of summary judgment notwithstanding denial of plaintiff's request for *in camera* review and explaining that in cases involving national security, *in camera* review is "particularly a last resort"); *see also Looks Filmproduktionen*, 199 F. Supp. 3d at 177 ("[W]here an agency's withholdings implicate national security concerns [*in camera*] review is 'particularly a last resort[, and] a court should not resort to it routinely on the theory that 'it can't hurt.'" (quoting *American Civil Liberties Union v. United States Dep't of Justice*, 640 Fed.Appx. 9, 10 (D.C. Cir. 2016))).

CONCLUSION

For the reasons set forth in Defendant's opening motion papers, declarations submitted in support of its summary judgment motion and in opposition to Plaintiff's cross-motion, and as

discussed above, Defendant respectfully requests that the Court grant its motion for summary judgment and deny Plaintiff's cross-motion for summary judgment.

Dated: March 27, 2017

Respectfully Submitted,

CHANNING D. PHILLIPS, D.C. Bar # 415793
United States Attorney

DANIEL F. VAN HORN, D.C. Bar # 924092
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SECOND 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 251 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 13526,¹ 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 January 25, 2013 FOIA request to FBIHQ, seeking access to records concerning Executive Order 10450 ("Plaintiff's FOIA Request").

(4) This declaration incorporates my previous declaration dated December 6, 2016 (see Dkt. No. 37-1, pp. 1-103) (hereinafter "First Hardy Declaration"), and responds to the claims advanced by Plaintiff in its January 30, 2017 Opposition of the Mattachine Society to the Government's Motion for Summary Judgment and Cross-Motion for Summary Judgment (see

¹ 75 Fed. Reg. 707 (2010).

Dkt. No. 41).²

I. ADEQUACY OF THE FBI'S SEARCH FOR RECORDS RESPONSIVE TO PLAINTIFF'S FOIA REQUEST

(5) Plaintiff makes numerous allegations that the FBI did not properly search for records responsive to Plaintiff's FOIA request. First, Plaintiff claims that the FBI's use of the terms: "Executive Order 10450," "Sex Deviate," and "Sex Deviate Program" was inadequate. Plaintiff further argues that the FBI should also have searched: "sexual perversion," "pervert," "homosexual," "homo," "gay," "lesbian," "queer," "sodomy," "moral charges," "immoral," "deviant," and "abomination" (hereinafter "Supplemental Terms"). Lastly, Plaintiff alleges that the FBI failed to search for documents relevant to Warren E. Burger in relation to Executive Order 10450 at all.

A. Search Terms

(6) The FBI utilized the terms "Executive Order 10450," "Sex Deviate," and "Sex Deviate Program" during its searches since these are the terms Plaintiff emphasized in Plaintiff's FOIA request letter. Plaintiff specifically requested "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." Additionally, Plaintiff's request letter provides a background paragraph

² One of the claims Plaintiff advances is its request for the FBI to produce the 67 duplicative pages to Plaintiff so they can confirm that the pages are in fact duplicative. Additionally, Plaintiff concedes that they have not remitted payment referenced by the Defendant in footnote 1 of its Memorandum and states that it will make the \$15.00 outstanding payment. See Plaintiff's Cross-MSJ at footnotes 3-4, p. 8. In fact, the FBI actually identified 72 pages withheld in their entirety because they were duplicative of other pages (FBI 324-368, 370-375, 387-396, 452-457, & 1410-1414). See generally First Hardy Decl. at ¶ 92c. The FBI will produce the duplicative pages upon receipt of the outstanding \$15.00 amount Plaintiff acknowledges it owes.

concerning Executive Order 10450 and specifically referenced the “Sex Deviate program” “to assist [the FBI] in locating documents and information related to this request...” See First Hardy Decl. ¶ 5 at Exhibit A. In this case, the FBI based its search terms on the information provided by Plaintiff, and determined that any responsive information, should it exist, would logically be located within the CRS using the three search terms above. Thus, the FBI conducted CRS searches using ACS/the UNI application, a Sentinel index search,³ and Manual Indices search for FBIHQ using these terms. As a result, the FBI located and retrieved files indexed under these terms. See First Hardy Decl. at ¶¶ 31-32.

(7) With respect to the Supplemental Terms, Plaintiff contends the FBI should have searched for them as an initial matter; however, since Plaintiff did not include these terms in its FOIA request, any request that the FBI perform a search using these terms constitutes a new FOIA request. Secondly, the Supplemental Terms are overly broad and, therefore, using them to search the FBI’s records for a 40-year period would constitute an unduly burdensome search that is unlikely to result in locating documents responsive to Plaintiff’s FOIA Request.

(8) The CRS is structured in a way that information important to an investigation, or that may be important to the FBI in the future, is indexed so that it can be easily retrieved. Considering the FBI’s indexing is conducted in such a manner (oriented towards fulfilling the FBI’s investigative missions), it is unlikely that a search of FBI indices using the Supplemental Terms would provide results that are relevant to Plaintiff’s request. Most records within the FBI’s indices are indexed under subjects of investigations, the titles of investigations, and/or

³ Generally, if a request seeks records that may have been generated on or after July 1, 2012, the FBI conducts a Sentinel index search to ensure adequacy of the CRS index search. In this case, however, the FBI conducted a good faith Sentinel index search despite the fact that Plaintiff’s request included only the date range of 1950-1990.

various administrative/investigative subject matters. RIDS, in most cases, relies on index searches when conducting reasonable FOIPA searches because all subjects of import to the FBI can reasonably be expected to be located through an index search. Generally, names/subjects that are not indexed in the CRS via ACS and/or Sentinel are those deemed to have no long-lasting significance to the FBI. As such, these names/subjects are usually incomplete and are unaccompanied by any other identifying information. The generic terms provided by Plaintiff are not likely indexed in ACS or Sentinel in a manner where a search of these terms in the FBI's indices would locate records sought by Plaintiff. A fruitful search of the CRS using such generic search terms requires the FBI to go beyond a search of its indices, and conduct unduly burdensome full-text searches of the Electronic Case File ("ECF")⁴ application of ACS and Sentinel. Full-text searches, sometimes even when filtered, generally return a significant number of hits that are random and incomplete references. This would be the case when searching ECF using the Supplemental Terms. For instance, the search term "pervert" alone returned over 5,500 Sentinel ECF hits. RIDS would then have to spend an inordinate amount of time reviewing each hit to determine whether it pertains to the specific subject of Plaintiff's request. The problem with conducting full-text searches in response to FOIA and Privacy Act requests lies in the time and resources necessary to sift through and analyze all the resultant "hits" to determine which are responsive. Therefore, the net result of a full-text search is typically a significant use of time and resources that may yield no additional responsive information. Thus, such a search is

⁴ The Electronic Case File ("ECF") is another of ACS's automated applications. ECF serves as the central electronic repository for the FBI's official text-based electronically uploaded documents. Thus, any search of the ECF constitutes a full-text search of the CRS. An ECF text search is not reasonably calculated to locate all responsive records because not all files are searchable through a full-text search since not all file serials have been converted to a searchable electronic format. While the FBI's indices are electronically searchable, a large portion of the FBI records they correspond to remain in paper format.

unduly burdensome, and RIDS posits its original search was reasonably calculated to locate all responsive records described in Plaintiff's request. *See generally* First Hardy Decl. at ¶¶ 23-26, 30-35.

(9) In summation, Plaintiff's request for the FBI to search the Supplemental Terms (which were not clearly enumerated in Plaintiff's original request) constitutes a new FOIA request; indexing within the CRS is not conducted in a way which makes the Supplemental Terms searchable to produce responsive records in this case; conducting a fruitful search of such vague terms requires unduly burdensome text searches of the CRS; and upon reviewing its original search efforts, the FBI believes its original search meets the reasonable search standard required by the FOIA.⁵

B. Warren E. Burger Search

(10) After reviewing Plaintiff's Cross-MSJ, the FBI determined that it had inadvertently failed to utilize Mr. Burger's name to search for responsive records related to Executive Order 10450 as was explicitly stated in Plaintiff's FOIA request letter. *See* First Hardy Decl. ¶ 5 at Exhibit A. Therefore, the FBI conducted a CRS index search for responsive records employing the UNI application of ACS, and Sentinel⁶ by using the following search terms: "Warren Earl Burger," "Warren E. Burger," and "Warren Burger." The FBI's search included a three-way phonetic⁷ breakdown of Mr. Burger's first, middle, and last name. Furthermore, the FBI also

⁵ The FBI judged its original search to be reasonable except for its inadvertent omission of Warren E. Burger as a search subject. The FBI rectified this omission upon receiving Plaintiff's Cross-MSJ. *See* ¶ 10, *supra*.

⁶ *See* fn. 3, *supra*.

⁷ The FBI used the phonetic search capabilities of ACS to conduct a three-way phonetic search of Warren Burger's name. This means that first, the computer automatically broke his name down and searched the index for three different name breakdowns of the name entered: "Warren Earl Burger," "Warren E. Burger," and "Warren Burger." Then, the computer broke the names down based on their phonetic characteristics. The computer returns results

conducted a search of its manual indices using the same terms: “Warren Earl Burger,” “Warren E. Burger,” and “Warren Burger.”⁸ The FBI’s search efforts located records broadly responsive to Mr. Burger; however, after reviewing these results, the FBI has determined that none of these records were responsive to Plaintiff’s specific FOIA request for Mr. Burger’s involvement with Executive Order 10450.

II. FOIA EXEMPTIONS

(11) Plaintiff objects to withholdings in part on pages FBI-1151-1152, 1268-1269 and in full on pages FBI-458-460, 935-938.⁹ Specifically on FBI-1151-1152, the FBI cited exemptions (b)(6)-2 & (b)(7)(C)-2 to protect the names of non-FBI Federal Government Personnel. *See* First Hardy Decl. at ¶ 62. Additionally on FBI 1268-1269, the FBI cited exemptions (b)(1)-1¹⁰ & (b)(3)-2 to protect classified information concerning intelligence activities, sources, and methods (E.O. 13526 § 1.4(c)), and information specifically exempted by 50 U.S.C. § 3024(i)(1) (National Security Act of 1947). *See* First Hardy Decl. at ¶¶ 40-48, 51-54. Lastly, the FBI withheld pages FBI-458-460 in full citing exemption (b)(7)(D)-1 to protect

based on whether or not they phonetically match a certain percentage of the first and last names searched.

⁸ 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.

⁹ The FBI referred these pages to the Department of Justice National Security Division (“NSD”) for direct response to Plaintiff. In litigation, the FBI labeled these pages as FBI-935-938 for tracking purposes. NSD addressed these pages in declarations of Susan L. Kim, Attorney Advisor in the Freedom of Information Act and Declassification Unit of the Office of Law and Policy in the NSD.

¹⁰ Upon further review, the FBI has declassified the withheld information on these pages; however, FOIA exemption (b)(3) still applies. *See* ¶ 15, *infra*.

Foreign Government Agency Information under Express Confidentiality. *See* First Hardy Decl. at ¶¶ 69-70. The FBI will further address these withholdings herein.

A. FBI-458-460

(12) Although Plaintiff claims that the FBI withheld pages FBI 458 through 460 in their entirety pursuant to FOIA exemptions (b)(7)(D)-1 and (b)(7)(D)-2, in fact, the FBI only cited FOIA exemption (b)(7)(D)-1 to withhold pages FBI-458-460 in full to protect information provided to the FBI by a foreign government entity under an express assurance of confidentiality. The document at issue here consists of information from a foreign government entity provided to the FBI under an express assurance of confidentiality regarding civil service or suitability matters. Notwithstanding Plaintiff's claims that the age or sensitivity of the document may somehow impact the applicability of the exemption, the chilling effect I described in the First Hardy Decl. at ¶ 70 refers to the impediment of cooperation between foreign government entities with express confidentiality agreements and the FBI if the relationship were exposed. In this instance, the foreign government entity only requested express assurance of confidentiality, but regardless, exposure of such relationships would hinder the FBI's ability to gather information internationally in the scope of its investigations. Lastly, these cooperative relationships can span decades; therefore, these entities will be much less likely to readily cooperate with the FBI in future investigations if the FBI does not properly protect their requested confidential collaboration.

FBI-1151-1152¹¹

(13) On these pages, the FBI protected the names and identifying information for non-FBI Federal Government personnel of the Department of Agriculture. The FBI determined that

¹¹ Copies of the pages, as produced to Plaintiff, are attached hereto as Exhibit A.

based on the identifying information of the individuals on these pages and the date of the document itself (circa November 1973) these individuals could conceivably still be alive. In balancing the legitimate privacy interest of these individuals against any public interest in disclosure, the FBI carefully examined relevant parts of the FOIA request and weighed them against these individuals' personal privacy interests.

(14) As a result of these efforts, the FBI determined there is no public interest to be served by disclosing the identities of these individuals to the public because their identities would not, themselves, significantly increase the public's understanding of the FBI's operations and activities related to EO 10450. Accordingly, after balancing these individuals' substantial privacy interests against the minimal, if any, public interest, the FBI properly protected the names and identifying information of the non-FBI Federal Government personnel on pages FBI-1151-1152 under exemptions (b)(6)-2 & (b)(7)(C)-2.

B. FBI-1268-1269¹²

(15) On these pages, the FBI initially cited exemption (b)(1)-1 to protect classified information at the "Confidential" level. However, upon further review, the FBI has declassified the withheld information on these pages; therefore FOIA exemption (b)(1) no longer applies. Nevertheless, the withheld information continues to warrant protection pursuant to FOIA exemption (b)(3) under the National Security Act of 1947. The FBI cited exemption (b)(3)-2 to protect information related to the National Foreign Intelligence Program ("NFIP"). The NFIP is now known as the National Intelligence Program ("NIP").¹³ The NIP consists of all programs,

¹² Copies of the pages, as produced to Plaintiff, are attached hereto as Exhibit B.

¹³ See Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA") Title 1, Subtitle G, Section 1074 of Public Law 108-458, where the National Foreign Intelligence Program was re-designated as the National Intelligence

projects, and activities of the Intelligence Community, as well as any other programs of the Intelligence Community designated jointly by the Director and the head of a United States department or agency or by the President.¹⁴ The activities of the Intelligence Community include the strategic use of various sources to obtain intelligence related information and are conducted through a myriad of available methods of intelligence gathering, not all of which are known to the public. As a federal agency within the Intelligence Community and a federal law enforcement agency, some of the FBI's programs and/or activities relate to the NIP. With regard to the pages at issue here, the FBI protected intelligence-gathering methods, activities, and a specific relationship with an intelligence or security service of a foreign government or international organization related to the NIP pursuant to (b)(3)-2 (50 U.S.C. § 3024(i)(1)), because release would reveal these very intelligence methods and the sources therein requiring protection under the National Security Act of 1947.

CONCLUSION

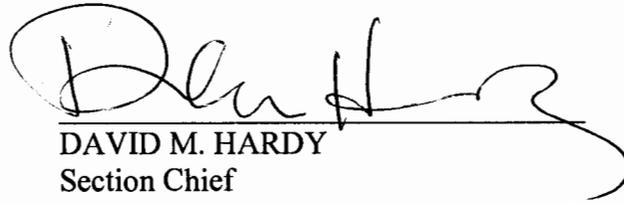
(16) The FBI has explained how its search for responsive records is adequate and why certain information should remain exempt pursuant to FOIA Exemptions (b)(3), (b)(6), (b)(7)(C), and (b)(7)(D).

Program.

¹⁴ See Executive Order 12333, paragraph 3.5(j).

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

Executed this 27th day of March 2017.

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

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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

<hr/>)	
MATTACHINE SOCIETY OF)	
WASHINGTON, D.C.)	
)	
Plaintiff,)	
)	
v.)	Civ. A. No. 1:16-cv-00773-RCL
)	
UNITED STATES DEPARTMENT)	
OF JUSTICE,)	
)	
Defendant.)	
<hr/>)	

Exhibit A

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA GEN. REG. NO. 27

5010-106

UNITED STATES GOVERNMENT

Memorandum

TO : Mr. Cleveland *WKC*

DATE: 11/26/73

FROM : O. E. Coleman *O.E.C.*

SUBJECT: FEDERAL EMPLOYEE SECURITY PROGRAM

- Assoc. Dir. _____
- Asst. Dir.: _____
- Admin.
- Comp. Syst. _____
- Ext. Affairs _____
- Files & Com. _____
- Gen. Inv. _____
- Ident. _____
- Inspection _____
- Intell.
- Laboratory _____
- Plan. & Eval. _____
- Spec. Inv. _____
- Training _____
- Legal Coun. _____
- Telephone Rm. _____
- Director Sec'y _____

Handwritten notes and signatures:
WKC
Waldrop
AMB
WKC

On 11/16/73 Walter I. Waldrop, Deputy Director, Bureau of Personnel Investigations, Civil Service Commission (CSC), advised Standard Form 85 (Data for Nonsensitive or Noncritical Sensitive Position) (copy attached) is being revised by CSC and Office of General Counsel at CSC believes following question should be deleted from this form:

"Question 13, Organizations with which affiliated (past and present) other than religious or political organizations or those which show religious or political affiliations (if none, so state)."

The reason for position taken by Office of General Counsel, according to Mr. Waldrop, is court decisions in field of Federal personnel. He stated copy of Standard Form 85 as revised will be submitted to FBI for any comment we care to make.

Mr. Waldrop continued that a decision by U. S. District Court for Northern District of California, filed 10/31/73, as an order granting plaintiffs' motion for summary judgment in the case of Society for Individual Rights, Inc., et al., v. Robert Hampton, et al., is another very disturbing decision as far as CSC is concerned. He stated Society for Individual Rights, an organization of homosexual persons, and [redacted] brought this action to challenge policy of CSC as stated in Federal Personnel Manual Supplement (Internal) 731-71, of excluding from Government employment all persons who have engaged in or solicited others to engage in homosexual acts. [redacted] was discharged on the basis of this policy from his position as [redacted]

REC-45 66-19000-69

Handwritten notes:
 12-114520
 140-40306
 145-12189

UNRECORDED COPY FILED IN 145-12189

[redacted] which employment
 [redacted] Investigation showed that [redacted]

During an interview by CSC investigator, [redacted] confirmed accuracy of [redacted]

Enc. *2* (CONTINUED OVER)

- 1 - Mr. Mintz
- 1 - Mr. Walsh
- 1 - Mr. Cleveland

- 1 - Mr. Coleman
- 1 - Mr. Egan

RHE:cjh
 (6)

XEROX
 1973

Handwritten notes and signatures:
 9
 [Signatures]

Handwritten notes:
 126
 66-19000-1013

Memorandum to Mr. Cleveland
Re: Federal Employee Security Program

Army report. Based on this information, CSC ordered [redacted] discharged. b6 -2
b7C -2

Court held [redacted] improperly discharged by CSC based solely on fact [redacted] and employment of such a person will bring Government service into "public contempt." Court stated CSC can discharge a person for immoral behavior only if that behavior impairs the efficiency of the service. b6 -2
b7C -2

Court ordered [redacted] reinstated and reimbursed for any net wage loss. Court ordered CSC to cease excluding or discharging from Government service any homosexual whom CSC would deem unfit for Government employment solely because employment of such a person in Government service might bring that service into the type of public contempt which might reduce the Government's ability to perform public business with the essential respect and confidence of the citizens which it serves. b6 -2
b7C -2

[redacted] Office of Security, Department of Agriculture, advised that [redacted] was born [redacted] and was last known to reside at [redacted] b6 -2
b7C -2

[redacted] Bureau file 140-40306 on [redacted] born [redacted] in [redacted] shows that in 1971 his mother, [redacted] volunteered information that [redacted] and [redacted] had made statements to her concerning U. S. foreign policy not being in the best interest of the people of the United States. It was determined that [redacted] was no longer employed by the [redacted] Available information concerning him disseminated to CSC 10/5/71. b6 -2
b7C -2

ACTION:

For information.



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

<hr/>)	
MATTACHINE SOCIETY OF)	
WASHINGTON, D.C.)	
)	
Plaintiff,)	
)	
v.)	Civ. A. No. 1:16-cv-00773-RCL
)	
UNITED STATES DEPARTMENT)	
OF JUSTICE,)	
)	
Defendant.)	
<hr/>)	

Exhibit B

~~CONFIDENTIAL~~

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED EXCEPT
WHERE SHOWN OTHERWISE

EXEMPTED FROM AUTOMATIC
DECLASSIFICATION
AUTHORITY DERIVED FROM:
FBI AUTOMATIC DECLASSIFICATION GUIDE
EXEMPTION CODE: 25X(1,6)
DATE 06-17-2015 BY: ADG/J86J43T30

- 1 - Mr. F. C. Fehl
(Attn: A. E. Splendore)
- 1 - Mr. E. W. Walsh
(Attn: S.R. Burns, Personnel Officer)

4
AV

To: Legat, Bonn

7/9/76

From: Director, FBI

- 1 - Mr. T. W. Leavitt
- 1 - Mr. A. B. Fulton
- 1 - Mr. T. E. Burns

FEDERAL EMPLOYEE SECURITY PROGRAM

[Redacted]

b1 -1
b3 -2

[Redacted]

b1 -1
b3 -2

Legat, Bonn should arrange for delivery of the original and one copy to Dr. Meier. A third copy of the enclosed material is being furnished for the record of Legat, Bonn.

Enclosures - ~~3~~ **ENCLOSURE**

1 - Foreign Liaison Unit (Route through for review)

TEB: vb
(9)

EX-112

SEE NOTE PAGE TWO

REC-45

66-19000-84

14 JUL 13 1976

- Asst. Dir. _____
- Dep. AD Adm. _____
- Dep. AD Inv. _____
- Asst. Dir.:
- Adm. Serv. _____
- Ext. Affairs _____
- Fin. & Pers. _____
- Gen. Inv. _____
- Ident. _____
- Inspection _____
- Intell. _____
- Laboratory _____
- Legal Coun. _____
- Plan. & Eval. _____
- Rec. Mgnt. _____
- Spec. Inv. _____
- Training _____
- Telephone Rm. _____
- Director Sec'y _____

FBI

MAILED 15
JUL 12 1976
FBI

NB

~~CONFIDENTIAL~~ MATERIAL ATTACHED

204

MAIL ROOM TELETYPE UNIT

FBI-1268

0 JUL 23 1976

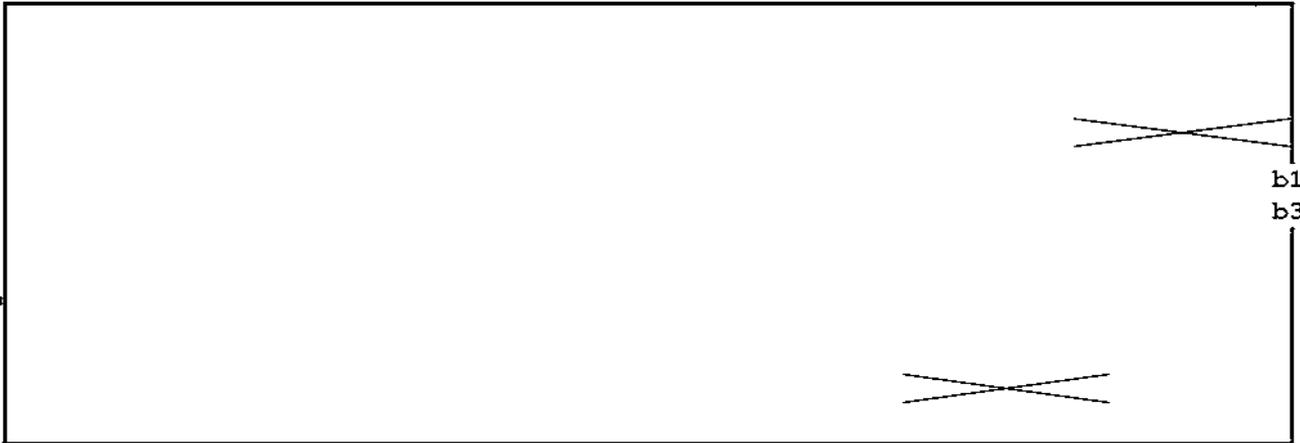
~~CONFIDENTIAL~~

~~CONFIDENTIAL~~

Airtel to Legat, Bonn
Re: Federal Employee Security Program

(C)

NOTE:



b1 -1
b3 -2



APPROVED: _____	Ext. Affairs.....	Laboratory.....
Assoc. Dir.	Fin. & Pers.....	Legal Coun.....
Dep. AD Adm.....	Gen. Inv.....	Plan. & Eval.....
Dep. AD Inv.....	Ident.....	Rec. Mgmt.....
Asst. Dir.:	Inspection.....	Spec. Inv.....
Adm. Serv.....	Intell.....	Training.....

~~CONFIDENTIAL~~

(U)

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

<hr/>)	
MATTACHINE SOCIETY OF)		
WASHINGTON, D.C.,)		
)		
Plaintiff,)		
)	Civil Action No. 16-0773 (RCL)	
v.)		
)		
UNITED STATES DEPARTMENT)		
OF JUSTICE,)		
)		
Defendant.)		
<hr/>)	

SECOND 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. This declaration incorporates my previous declaration dated

December 6, 2016 (*see* Dkt. No 37-1, pp. 105-108) and responds to the claims advanced by plaintiff in its January 30, 2017 Opposition of the Mattachine Society to the Government's Motion for Summary Judgment and Cross-Motion for Summary Judgment (*see* Dkt. No. 41).

3. In paragraph 4 of my December 6, 2016 declaration, I stated that, “[i]n 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.”

4. I have since been informed that the FBI provided a “Deleted Page Information Sheet” (attached hereto as Exhibit A) to plaintiff which stated that pages FBI 935-938 were withheld in full because they originated with “another Government agency.” That other Government agency is the Department, and, as noted above, the FBI referred those documents to DOJ NSD on April 17, 2015. However, the version that was referred to NSD was a clean copy which did not have any FBI page numbers stamped on them. Representatives of the FBI's FOIA unit provided me with the stamped version of FBI 935-938, and I can confirm that these are the exact same pages which were referred to NSD.

5. For the reasons I detailed in my December 6, 2016 declaration, NSD withheld FBI 935-938 in part under FOIA Exemptions (b)(6) and (b)(7)(C). A copy of the document, as it was released to plaintiff by NSD, is attached hereto as Exhibit B.

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

Executed this 27th day of March 2017.



SUSAN L. KIM

Exhibit A

OPCA-20 (12-3-96)

XXXXXX
XXXXXX
XXXXXX

**FEDERAL BUREAU OF INVESTIGATION
FOIA/PA DELETED PAGE INFORMATION SHEET**

4 Page(s) withheld entirely at this location in the file. One or more of the following statements, where indicated, explain this deletion.

Deletions were made pursuant to the exemptions indicated below with no segregable material available for release to you.

Section 552

Section 552a

- (b)(1) _____
- (b)(2) _____
- (b)(3) _____
- _____
- _____
- (b)(4) _____
- (b)(5) _____
- (b)(6) _____

- (b)(7)(A) _____
- (b)(7)(B) _____
- (b)(7)(C) _____
- (b)(7)(D) _____
- (b)(7)(E) _____
- (b)(7)(F) _____
- (b)(8) _____
- (b)(9) _____

- (d)(5) _____
- (j)(2) _____
- (k)(1) _____
- (k)(2) _____
- (k)(3) _____
- (k)(4) _____
- (k)(5) _____
- (k)(6) _____
- (k)(7) _____

Information pertained only to a third party with no reference to the subject of your request or the subject of your request is listed in the title only.

Document(s) originated with another Government agency(ies). These documents were referred to that agency(ies) for review and direct response to you.

_____ Page(s) contain information furnished by another Government agency(ies). You will be advised by the FBI as to the releasability of this information following our consultation with the other agency(ies).

_____ Page(s) withheld inasmuch as a final release determination has not been made. You will be advised as to the disposition at a later date.

_____ Page(s) were not considered for release as they are duplicative of _____.

_____ Page(s) withheld for the following reason(s): _____

The following number(s) is (are) to be used for reference regarding these pages:

FBI-935 through 938

XXXXXXXXXXXXXXXXX
X Deleted Page(s) X
X No Duplication Fee X
X for this page X
XXXXXXXXXXXXXXXXX

Exhibit B

TAPER Doc

STANDARD FORM NO. 64

CONFIDENTIAL

Office Memorandum • UNITED STATES GOVERNMENT

TO : Director, Federal Bureau of Investigation
ATTN: Mr. Alan H. Belmont, Assistant Director

DATE: April 1 1959

Declassified by: *MAR*

FROM : *Jay* J. Walter Yeagley, Acting Assistant Attorney General
Internal Security Division

CLASSIFICATION: UNCLASSIFIED
DATE: 5-2-15

SUBJECT: Survey of Non-Sensitive Position Cases by the
Civil Service Commission

Revision of Executive Order 10450

This confirms the list of names given verbally by Mr. Joseph C. Weixel of this Division to Mr. George Lake of the Federal Bureau of Investigation on March 27, 1959. This list is taken from a survey conducted by the Civil Service Commission at the request of the Department of Justice and concerns occupants of non-sensitive positions.

The first group comprising nine (9) employees are those restored as a result of the Cole v. Young decision, June 11, 1956 against whom agencies would consider termination proceedings, if they had security authority. In the survey the Department of Health, Education and Welfare noted that it had five (5) employees restored and three (3) remain on the rolls. The Department of Interior noted that it had five (5) employees restored and has five (5) still on the rolls. Security officials at the Departments of Health, Education and Welfare and Interior advised the Civil Service Commission that they could not at this time express a position on the number of employees against whom they would bring security proceedings, if such were available. The Post Office Department advised the Civil Service Commission that fifty-six (56) employees were restored as a result of the Cole decision. However, the Department did not indicate the number of individuals still on the rolls nor the number of restoration cases against whom security proceedings might be brought. The Civil Service Commission stated in the survey that it had two (2) individuals restored as a result of the Cole decision and had two (2) still on the rolls. The Commission indicated that it could not make a definite statement that it would proceed against these two (2) individuals under a security authority, however, it did list their names and they are noted below in parentheses.

Department of the Air Force - []

Department of the Army - []

Civil Service Commission - []

EX-136

REC-8

66-19000-56

10 APR 9 1959

UNRECORDED COPY FILED IN 140-00-1

C

*Memo Stanley to Row 4/7/59
JFC: RHE: LHL: [unclear]*

*66-19000
6- [unclear]*

66 APR 15 1959

CONFIDENTIAL

~~CONFIDENTIAL~~

Declassified by:

PKR

DATE

5-7-15

DATE

Government Printing Office - []

Department of the Treasury - []

Veterans Administration - []

all (S)(7)(C)

The second group comprises eighty-four (84) individuals in non-sensitive positions, not subject to Civil Service Commission jurisdiction, on whom there appears some loyalty-type information and against whom agencies would consider termination proceedings, if they had security authority. Eighty-two (82) names are listed below. The Department of Agriculture has advised that it has two (2) such cases and that the names of these individuals are available in the security office of that agency. The Federal Communications Commission, the Departments of Health, Education and Welfare, Interior, Post Office and the Renegotiation Board advised the Civil Service Commission that they could not at this time express a position on the number of individuals in this group against whom they might consider security proceedings.

Department of the Air Force

[]

all (S)(7)(C)

Department of the Army

[]

General Services Administration

[]

~~CONFIDENTIAL~~

~~CONFIDENTIAL~~

Government Printing Office

Declassified by: MAB
USDOJ/NSD
Date: 5-4-15

- []

Department of the Navy

- []

Securities & Exchange Commission

- []

Department of the Treasury

- []

Veterans Administration

- []

*all
(b)(7)(C)*

~~CONFIDENTIAL~~

~~CONFIDENTIAL~~

Veterans Administration (cont'd)



Declassified by: MA B
USDOJ/NSD
Date: 5-24-15

all
(6/17/16)

~~CONFIDENTIAL~~

5. Not disputed that by letter dated April 17, 2015, the FBI further responded to Plaintiff's FOIA request by advising Plaintiff that 539 pages had been reviewed and 253 pages were being released. *See* Declaration of David M. Hardy, dated December 6, 2016, Dkt. No. 37-1 ("Hardy Decl."), Exh. G.

6. Defendant does not dispute that by letter dated May 5, 2015, the National Security Division advised Plaintiff that it had reviewed and was releasing, in part, documents responsive to Plaintiff's FOIA request, and released, in full and in part, approximately 49 pages. *See* Amended Complaint, Dkt. No. 26, Exh. 20. Defendant does not have sufficient information to respond to Plaintiff's claim concerning the date it received the letter, however, that is not material to the resolution of Plaintiff's cross-motion.

7. Defendant does not dispute that by letter dated May 12, 2015, the FBI advised Plaintiff that 552 pages had been reviewed and 169 pages were being released. *See* Hardy Decl., Exh. H. Defendant does not have sufficient information to respond to Plaintiff's claim concerning the date it received the letter, however, that is not material to the resolution of Plaintiff's cross-motion.

8. Defendant does not dispute that by letter dated June 23, 2015, the FBI advised Plaintiff that 476 pages had been reviewed and 254 pages were being released. *See* Hardy Decl., Exh. K. Defendant does not have sufficient information to respond to Plaintiff's claim concerning the date it received the letter, however, that is not material to the resolution of Plaintiff's cross-motion.

9. Not disputed.

10. Defendant does not dispute that it withheld, in whole and in part, certain records pursuant to the relevant FOIA exemptions but does dispute the accuracy of the purported summary

of those exemptions prepared by Plaintiff. *See Hardy Decl.*, ¶¶ 40-72, 92.

11. Not disputed.

12. Not disputed.

13. Defendant does not dispute that the FBI's search included a string breakdown of the search term variations. *See Hardy Decl.*, ¶ 31.

14. Disputed. The date range for the search was 1950 through 1990, as specified by Plaintiff in its FOIA request. *See Hardy Decl.*, Exh. A.

Dated: March 27, 2017

Respectfully Submitted,

CHANNING D. PHILLIPS, D.C. Bar # 415793
United States Attorney

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

By: /s/ *Melanie D. Hendry*

Melanie D. Hendry
Assistant United States Attorney
555 Fourth Street, N.W.
Washington, D.C. 20530
(202) 252-2510
melanie.hendry2@usdoj.gov