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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA; SAN FRANCISCO BAY GUARDIAN, Plaintiffs, v. FEDERAL BUREAU OF INVESTIGATION, Defendant.	Case No. 12-cv-3728-SI NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT Date: March 15, 2013 Time: 9:00 a.m. Place: San Francisco U.S. Courthouse Judge: Hon. Susan Illston

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NOTICE OF MOTION

PLEASE TAKE NOTICE that on March 15, 2013, at 9:00 a.m. in the United States Courthouse at San Francisco, California, defendant Federal Bureau of Investigation, by and through undersigned counsel, will move this Court for summary judgment on all of plaintiffs' claims in their Complaint.

MOTION FOR SUMMARY JUDGMENT

Defendant Federal Bureau of Investigation hereby moves for summary judgment on all of the claims in plaintiffs' Complaint pursuant to Federal Rule of Civil Procedure 56 and the Freedom of Information Act, 5 U.S.C. § 552, for the reasons more fully set forth in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

Plaintiffs the American Civil Liberties Union of Northern California and the San Francisco Bay Guardian ("plaintiffs") brought this lawsuit to compel defendant the Federal Bureau of Investigation ("FBI") to process their Freedom of Information Act ("FOIA") request seeking records relating to the so-called "Occupy movement." Shortly after plaintiffs filed their lawsuit, however, the FBI responded to plaintiffs request by releasing responsive documents, some of which were withheld in part or in full pursuant to various FOIA exemptions. The FBI's search for responsive materials exceeded all applicable legal requirements for a reasonable search under FOIA, as the FBI construed plaintiffs' request broadly and conducted detailed searches beyond those that it typically employs when responding to a FOIA request. And in processing plaintiffs' FOIA request, the FBI properly withheld records exempt from disclosure under FOIA. For these reasons, as set forth in more detail below, defendant's Motion for Summary Judgment should be granted.

BACKGROUND

1. Procedural History.

In March 2012, plaintiffs submitted to the FBI a FOIA request for various records relating to the Occupy movement. *See* Decl. of David M. Hardy ("Hardy Decl.") ¶ 7 & Ex. A attached thereto. Specifically, plaintiffs' FOIA request sought the following materials:

1) Records created, received, gathered or maintained by the FBI (including but not limited to sub-entities within the FBI such as the Joint Terrorism Task Force, the Campus Liaison Initiative, and the Academic Alliance Program) since June 1, 2011 pertaining to persons, planning, assemblies, marches, demonstrations, or any other activity associated with movements referring to themselves as Occupy Oakland, Occupy San Francisco, Occupy Cal, or Occupy UC Davis.

2) Intelligence Bulletins referring to the "Occupy" movement generally or any geographically specific Occupy movement.

3) Training for FBI agents regarding the Occupy movement generally or any geographically specific Occupy movement.

4) Written materials related or referring to the Occupy movement generally of any geographically specific Occupy movement and setting forth or referring to legal reasoning or authority relied upon by the FBI with respect to its investigatory and enforcement activities.

Id. & Ex. A. In their request, plaintiffs sought expedited processing, as well as a waiver of duplication fees. *Id.* & Ex. A.

By letter dated March 13, 2012, the FBI acknowledged receipt of the FOIA request, informed plaintiffs that their request to the San Francisco Field Office had been forwarded to FBI Headquarters for processing, and that their request for a fee waiver was being considered. Hardy Decl. ¶ 8 & Ex. B attached thereto. On March 26, 2012, the FBI granted plaintiffs' request for expedited processing, informed plaintiffs that a search for potentially responsive records had begun, and indicated that plaintiffs would be advised of the FBI's decision regarding their fee waiver once the search was complete. Hardy Decl. ¶ 9 & Ex. C attached thereto.

Plaintiffs inquired as to the status of their request by letter dated May 17, 2012, and filed a Complaint in this Court seeking relief on July 17, 2012. *See* Hardy Decl. ¶¶ 10-11 & Ex. D attached thereto; ECF 1.

The FBI subsequently released responsive materials to plaintiffs on August 24, 2012. At that time, the FBI stated that it had processed 37 pages responsive to plaintiffs' request, of which 13 pages were released. The FBI indicated that it had withheld the remaining 24 pages (and had made redactions on the released pages) pursuant to FOIA Exemptions (b)(1), (b)(6), (b)(7)(A), (b)(7)(C), (b)(7)(D), and (b)(7)(E). Additionally, and as part of its search, the FBI identified materials in its files from the United States Coast Guard ("Coast Guard"). The Coast Guard requested the FBI to withhold information on their behalf pursuant to FOIA Exemptions (b)(3), (b)(6), and (b)(7)(E). See Hardy Decl. ¶ 12 & Ex. E attached thereto.

By this time, counsel for plaintiffs and undersigned counsel for defendant were engaged in discussions regarding the scope of plaintiffs' FOIA request and the FBI's response thereto. Based on those conversations, and by letter dated October 2, 2012, plaintiffs clarified the scope of materials that they were seeking regarding "Intelligence Bulletins." *See* Hardy Decl. ¶ 13. Based upon that clarification, and by letter dated October 16, 2012, the FBI informed plaintiffs

that three additional pages had been located that were responsive to their request. All three pages, however, were withheld in full pursuant to FOIA Exemptions (b)(6), (b)(7)(A), (b)(7)(C), and (b)(7)(D). Additionally, the FBI attached new, Bates-stamped copies of the thirteen pages previously released on August 24, 2012. *See* Hardy Decl. ¶ 13 & Ex. F attached thereto.

2. The FBI's Searches for Responsive Materials.

The Central Records System ("CRS") enables the FBI to maintain the information which it has acquired in the course of fulfilling its mandated law enforcement responsibilities. The records maintained in the CRS consist of administrative, applicant, criminal, personnel, and other files compiled for law enforcement purposes. This system consists of a numerical sequence of files broken down according to subject matter. The subject matter of a file may relate to an individual, organization, company, publication, activity, or foreign intelligence matter (or program). Certain records in the CRS are maintained at FBI Headquarters; others are maintained in field offices. Although the CRS is primarily designed to serve as an investigative tool, the FBI regularly uses the CRS to conduct searches for documents responsive to FOIA and Privacy Act requests. The mechanism that the FBI uses to search the CRS is the Automated Case Support System ("ACS"). *See* Hardy Decl. ¶ 14.

Access to the CRS is typically obtained through the General Indices, which are arranged in alphabetical order.[1] The General Indices consist of index cards on various subject matters that are searched either manually (for older, pre-1973 materials) or through the automated indices. Hardy Decl. ¶ 15 & n.4. The entries in the General Indices fall into two categories:

> (a) A "main" entry – A "main" entry, or "main" file, carries the name corresponding with a subject of a file contained in the CRS.

[1] The decision to index names other than subjects, suspects, and victims is a discretionary decision made by the FBI Special Agent ("SA") assigned to work on the investigation, the Supervisory SA ("SSA") in the field office conducting the investigation, and the SSA at FBI Headquarters. The FBI does not index every name in its files; rather, it indexes only that information considered to be pertinent, relevant, or essential for future retrieval. Without a "key" (index) to this enormous amount of data, information essential to ongoing investigations could not be readily retrieved. The FBI files would thus be merely archival in nature and could not be effectively used to serve the mandated mission of the FBI, which is to investigate violations of federal criminal statutes. Therefore, the General Indices to the CRS files are the means by which the FBI can determine, at the outset, what retrievable information, if any, the FBI may have in its CRS files on a particular subject matter or individual. Hardy Decl. ¶ 19.

> (b) A "reference" entry – A "reference" entry, sometimes called a "cross-reference," is generally only a mere mention or reference to an individual, organization, or other subject matter, contained in a document located in another "main" file on a different subject matter.

Hardy Decl. ¶ 15.

Access to CRS files in FBI field offices is also obtained through the General Indices, which are likewise arranged in alphabetical order, and consist of an index on various subjects, including the names of individuals and organizations. Searches made in the General Indices to locate records concerning a particular subject, such as Occupy movement, are made by searching the subject requested in the index. FBI field offices have automated indexing functions. *See* Hardy Decl. ¶ 16.

On or about October 16, 1995, the ACS system was implemented for all field offices, Legal Attaches, and FBI Headquarters in order to consolidate portions of the CRS that had previously been automated. Prior to the ACS, there was no way to electronically query the case filed for data, such as an individual's name or social security number. With the implementation of ACS, the required information was duplicated and moved to the ACS so that it could be searched. More than 105 million records from the CRS were converted from automated systems previously utilized by the FBI. Automation did not change the CRS; instead, automation has facilitated more economic and expeditious access to records maintained in the CRS. *See* Hardy Decl. ¶ 17.

ACS consists of three integrated, yet separately functional, automated applications that support case management functions for all FBI investigative and administrative cases. Among the applications is Electronic Case File ("ECF"), which serves as the central electronic repository for the FBI's official text-based documents. Hardy Decl. ¶ 18.

The FBI used an exhaustive, multi-step process to identify materials responsive to plaintiffs' FOIA request. As an initial matter, the FBI conducted a search of the CRS to identify all potentially responsive main and cross-reference files indexed under the following terms: "Occupy Movement/Northern California," "Occupy Oakland," "Occupy San Francisco," "Occupy Cal," "Occupy UC Davis," "OWS," "Occupy Wall," "Occupy Movement," "Occupy Encampments," "Occupy Encampment," "Occupy McPherson," "Occupy Zuccotti Park,"

"Occupy New York City," "Occupy DC," "Occupy Oakland" "Occupy Portland," "Occupy San Francisco," "Occupy Sacramento," "Occupy Salt Lake City," "Occupy Seattle," "Occupy Atlanta," "Occupy San Jose," "Occupy Boston," "Occupy Los Angeles," "Occupy Indianapolis," "Occupy Baltimore," "Occupy St. Louis," "Occupy Cincinnati," "Occupy Providence," "Occupy Austin," "Occupy Denver," "Occupy Eugene," "Occupy Philadelphia," "Occupy Buffalo," "Occupy Las Vegas," "Occupy Charlotte," "Occupy Pittsburgh," "Occupy Dallas," "Occupy Houston," "Occupy Chicago," "Occupy Washington," "Occupy Washington DC," and "Occupy K." No records were located as a result of this search. *See* Hardy Decl. ¶ 20.

In responding to FOIA requests, it is not the current policy of the FBI to conduct text searches of the ECF. Instead, the FBI typically relies upon its searches of the CRS indices. Out of an abundance of caution, however, the FBI took an additional step in this case of conducting a text search of the ECF to identify all potentially responsive main and cross-reference files. This extra step yielded responsive cross-reference records relating to the FBI's support of state and local law enforcement agencies. *See* Hardy Decl. ¶¶ 21-22 & n.5.

LEGAL STANDARD

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "Because facts in FOIA cases are rarely in dispute, most such cases are decided on motions for summary judgment." *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 688 (9th Cir. 2012); *see also Lawyers' Comm. for Civil Rights v. U.S. Dep't of the Treasury*, 534 F. Supp. 2d 1126, 1131 (N.D. Cal. 2008) ("As a general rule, all FOIA determinations should be resolved on summary judgment."). Discovery is seldom necessary or appropriate. *See Shannahan v. IRS*, 672 F.3d 1142, 1151 (9th Cir. 2012) (holding that district court "properly denied [plaintiff's] discovery requests for information concerning the nature and origins of the documents he requested" because FOIA cases "revolve[] around the propriety of revealing certain documents"). A court reviews an agency's response to a FOIA request *de novo*. 5 U.S.C. § 552(a)(4)(B).

ARGUMENT

I. The FBI Conducted A Search Reasonably Calculated to Uncover All Relevant Documents.

On summary judgment in a FOIA case, the agency must demonstrate "it has conducted a search reasonably calculated to uncover all relevant documents." *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 986 (9th Cir. 2009) (quotation marks omitted). "This showing may be made by reasonably detailed, nonconclusory affidavits submitted in good faith." *Id.* (quotation marks omitted). Such affidavits or declarations are accorded "a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *Lawyers' Comm.*, 534 F. Supp. 2d at 1131. Indeed, the agency "need not set forth with meticulous documentation the details of an epic search for the requested records." *Id.* (quotation marks omitted).

To that end, the agency does not have to search "every record system" to locate documents or "engage in a vain search where it believes responsive documents are unlikely to be located." *Rosenfeld v. U.S. Dep't. of Justice*, No. C 07-3240, 2010 WL 3448517, at *6 (N.D. Cal. Sept. 1, 2010) (quoting *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). "[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*." *Citizens Comm'n on Human Rights v. FDA.*, 45 F.3d 1325, 1328 (9th Cir. 1995) (citation and quotation marks omitted). In general, the sufficiency of a search is determined by the "appropriateness of the methods" used to carry it out, "not by the fruits of the search." *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). Accordingly, the failure of an agency "to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for the requested records." *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004).

As explained in the declaration of David Hardy, the FBI's search exceeds this standard. As noted above, the FBI's policy is to search the CRS General Indices in response to FOIA requests. *See* Hardy Decl. ¶¶ 14-15, 19, 21 & n.5. Significantly, however, the CRS was not

created merely to respond to FOIA requests; it "is primarily designed to serve as an investigative tool" as part of the FBI's mission "to investigate violations of federal criminal statutes." Hardy Decl. ¶¶ 14, 19. In that sense, the General Indices are the means by which the FBI can identify what retrievable information, if any, the FBI may have in its CRS files on a particular subject matter. Hardy Decl. ¶ 19.

In response to plaintiffs' FOIA request, the FBI searched the CRS indices using 43 separate terms relating to the Occupy movement. *See* Hardy Decl. ¶ 20. That search, by itself, was adequate. *See, e.g.*, *Brunetti v. FBI*, 357 F. Supp. 2d 97, 103 (D.D.C. 2004) (finding adequate search where FBI conducted a CRS search that produced one responsive file and noting that FBI declaration "describes in great detail the structure of the FOIA unit of the FBI and the various processes involved in implementing a search," including the CRS indices). In this case, however, the FBI went above and beyond its standard CRS search. "In an abundance of caution, the FBI took an additional step to conduct a text search of the ECF to identify all potentially responsive main and cross-reference files" indexed to the search terms that the FBI used to search the CRS indices. Hardy Decl. ¶ 21. Such a text search is more comprehensive than an index search of the CRS. Hardy Decl. ¶ 21 n.5. The FBI does not normally conduct text searches of the ECF, but did so here because of the nature of the case and the publicity surrounding the Occupy movement. Hardy Decl. ¶ 21 n.5.[2]

In sum, the FBI has more than satisfied FOIA's reasonable search requirement, and its declaration demonstrates that the standard is met. The Court should grant summary judgment to the FBI on this issue. *See Lane v. Dep't of Interior*, 523 F.3d 1128, 1139-40 (9th Cir. 2008) (granting summary judgment where the "government's actions were reasonably calculated to uncover all relevant documents, and it demonstrated the adequacy of its searches by producing two separate affidavits" (internal citation and quotation marks omitted)).

[2] It is also worth noting that the FBI conducted an additional search for materials relating to "Intelligence Bulletins" after plaintiffs' counsel clarified the scope of materials that plaintiffs were seeking pursuant to that aspect of plaintiffs' FOIA request. *See* Hardy Decl. ¶ 13.

II. The FBI Properly Withheld Records That Are Exempt From Disclosure Under FOIA.

The Freedom of Information Act was enacted to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (internal quotation omitted). However, the public's interest in government information under FOIA is not absolute, as "Congress recognized . . . that public disclosure is not always in the public interest." *CIA v. Sims*, 471 U.S. 159, 166-67 (1985). FOIA's "basic purpose" reflects a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151 (1989) (quotation omitted). Thus, FOIA is designed to achieve a "workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." *Id.* at 152 (citation omitted).

To that end, FOIA incorporates "nine exemptions . . . which a government agency may invoke to protect certain documents from public disclosure." *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996). Ordinarily, government agencies submit "detailed public affidavits identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption" that are "commonly referred to as [] 'Vaughn' ind[ices]." *Lion Raisins v. U.S. Dep't. of Agric.*, 354 F.3d 1072, 1082 (9th Cir. 2004) (citing *Vaughn v. Rosen*, 484 F.2d 820, 823-25 (D.C. Cir.1973)). These statutory exemptions must be given "meaningful reach and application." *John Doe Agency*, 493 U.S. at 152. "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). And courts "accord substantial weight to an agency's declarations regarding the application of a FOIA exemption." *Shannahan*, 672 F.3d at 1148. For the reasons discussed below, the FBI's withholdings in this case are appropriate.

A. The FBI Properly Withheld Records Pursuant to FOIA Exemption 1.

FOIA 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." 5 U.S.C. § 552 (b)(1). For information to be properly classified pursuant to Exemption 1, it must meet the requirements of Executive Order ("E.O.") 13,526, "Classified National Security Information," 75 Fed. Reg. 707 (Dec. 29, 2009):

> (1) an original classification authority is classifying the information;
>
> (2) the information is owned by, produced by or for, or is under the control of the United States Government;
>
> (3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and
>
> (4) the original classification authority determines 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 is able to identify or describe the damage.

Id. § 1.1, 75 Fed. Reg. at 707. The Executive Order lists three classification levels for national security information: Top Secret, Secret, and Confidential. *Id.* § 1.2, 75 Fed. Reg. at 707-08. The declarant for the FBI, David M. Hardy, is an original classification authority. *See* Hardy Decl. ¶ 2.

"The function of determining whether secrecy is required in the national interest is expressly assigned to the executive." *Epstein v. Ressor*, 421 F.2d 930, 933 (9th Cir. 1970). Thus, and for exemptions related to national security, "the district court [is] required to accord 'substantial weight' to [the agency's] affidavits" as long as they are not "controverted by contrary evidence in the record or by evidence of [agency] bad faith." *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992); *see also Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) ("Mindful that courts have little expertise in either international diplomacy or counterintelligence operations, we are in no position to dismiss the CIA's facially reasonable concerns."); *Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982) ("'[T]he Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse [effects]

might occur as a result of public disclosure of a particular classified record.'") (quoting S. Rep. No. 1200, 93rd Cong., 2d Sess. 12 (1974)).

The Hardy declaration and *Vaughn* index[3] submitted herewith fully supports application of Exemption 1, as they describe "the justifications for nondisclosure with reasonably specific detail," *Hunt*, 981 F.2d at 1119, and demonstrate "that the information withheld logically falls within the claimed exemption[]." *Id.*; *see also Berman v. CIA*, 501 F.3d 1136, 1140 (9th Cir. 2007) (same). *See* Hardy Decl. ¶¶ 28-50. All of the information being withheld pursuant to Exemption 1 has been marked at the "Secret" level, as the unauthorized disclosure of that information reasonably could be expected to cause serious damage to national security. Hardy Decl. ¶ 31; E.O. 13526 § 1.2(a)(2). Moreover, all of the procedural requirements associated with E.O. 13526 were followed with respect to these materials. Hardy Decl. ¶ 31.

Here, the FBI has withheld classified information relating to intelligence activities, sources, and methods that, if disclosed, could be expected to cause serious damage to the national security. Hardy Decl. ¶¶ 33-47. Specifically, the FBI has withheld FBI file numbers assigned to specific intelligence activities, the release of which would lead to the exposure of the particular intelligence activities and methods at issue. *See* Hardy Decl. ¶¶ 37-38. Those file numbers contain a geographical prefix or the originating office and case number, which includes a numerical characterization of the type of investigation followed by a chronological number assigned to a specific investigation or activity. Hardy Decl. ¶ 37. Disclosure of an intelligence file number in the aggregate will enable hostile analysts to attribute any information released from the documents containing such a file number to that particular file. Hardy Decl. ¶ 38. As additional information is supplied, "a partial mosaic of the activity begins to appear as more information is identified with the file leading to the exposure of actual current activities or methods." Hardy Decl. ¶ 38; *CIA v. Sims*, 471 U.S. at 178 ("[W]hat may seem trivial to the uninformed may appear of great moment to one who has a broad view of the scope and may put the questioned item of information in its proper context.") (internal quotation marks and citation omitted). In the end, "[t]he identification of these intelligence methods, which continue to

[3] The *Vaughn* index is attached to the Hardy Declaration as Exhibit H.

furnish positive intelligence information to this day, will severely limit their application" and "will inform hostile intelligence of the possible range of our intelligence capabilities, as well as the probable intelligence that the FBI has gathered, or can collect, concerning them." Hardy Decl. ¶ 38. Accordingly, "the release of the file numbers can lead to the exposure of the actual intelligence activity or method utilized in FBI investigations, and can reasonably be expected to cause serious damage to national security." Hardy Decl. ¶ 38. Courts have routinely upheld the exemption of such file numbers pursuant to Exemption 1. *See, e.g.*, *Council on Am.-Islamic Relations v. FBI*, 749 F. Supp. 2d 1104, 1110-1113 (S.D. Cal. 2010); *ACLU v. FBI*, 429 F. Supp. 2d 179, 188 (D.D.C. 2006).

The FBI also withheld information reflecting detailed intelligence activities relating to a specific individual or organization of national security interest on two pages of documents. Hardy Decl. ¶ 39. The disclosure of this information would cause serious damage to the national security, as it would reveal actual intelligence activities or methods used by the FBI against a specific target, would disclose the intelligence-gathering capabilities of the method, and would provide an assessment of the intelligence source penetration of a specific target during a specific period of time. Hardy Decl. ¶ 39. Moreover, those two pages of documents also contain classified intelligence source information. Hardy Decl. ¶¶ 40-47. Release of intelligence-source information "could reasonably be expected to cause damage to the national security by causing current intelligence sources to cease providing information, and discourage potential sources from cooperating with the FBI for fear their identities would be publicly revealed at some point." Hardy Decl. ¶ 43. To that end, the FBI withheld detailed and specific information provided by human intelligence sources, Hardy Decl. ¶ 45, and a numerical designator for an intelligence source that acts as a singular identifier for a source that provided information of value on individuals and/or organizations or national security interest, Hardy Decl. ¶¶ 46-47. Again, courts have upheld the withholding of such information pursuant to Exemption 1. *See Council on Am.-Islamic Relations*, 749 F. Supp. 2d at 111-13 (intelligence sources); *Singh v. FBI*, 574 F. Supp. 2d 32, 42-43 (D.D.C. 2008) (numerical designation).

B. The FBI Properly Withheld Records Pursuant to FOIA Exemptions 6 and 7.

FOIA protects from mandatory disclosure "records or information compiled for law enforcement purposes" when, among other issues, production of the documents "(A) could reasonably be expected to interfere with enforcement proceedings" (Exemption 7(A)), "(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy" (Exemption 7(C)), "(D) could reasonably be expected to disclose the identity of a confidential source" or "information furnished by a confidential source" (Exemption 7(D)), and "(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," (Exemption 7(E)). 5 U.S.C. § 552(b)(7). In addition to Exemption 7(C), there is a separate FOIA exemption for "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) (Exemption 6).

As a threshold issue when analyzing Exemption 7, the Court must make a determination as to whether the documents have a law enforcement purpose, which, in turn, requires examination of whether the agency serves a "law enforcement function." *Church of Scientology Int'l v. I.R.S.*, 995 F.2d 916, 919 (9th Cir. 1993) (internal quotation marks and citation omitted). The FBI has such a law enforcement function, as it "has a clear law enforcement mandate." *Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 808 (9th Cir. 1995); Hardy Decl. ¶ 52. In this Circuit, and in order to satisfy Exemption 7's threshold requirement, a government agency with a clear law enforcement mandate—such as the FBI—"'need only establish a rational nexus between enforcement of a federal law and the document for which [a law enforcement] exemption is claimed.'" *Rosenfeld*, 57 F.3d at 808 (citation omitted). Moreover, Exemption 7 applies with equal force to records compiled in order to enforce state law. *See Hopkinson v. Shillinger*, 866 F.2d 1185, 1222 n.27 (10th Cir. 1989) (Exemption 7 applies "to FBI laboratory tests conducted at the request of local law enforcement authorities")[4]; *Leadership Conf. on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 257-58 (D.D.C. 2005) (determining that "local police

[4] The Tenth Circuit subsequently granted re-hearing *en banc*, but did not disturb its analysis regarding FOIA. *See Hopkinson v. Shillinger*, 888 F.2d 1286 (10th Cir. 1989).

arrest reports [and] bail bond information" met threshold), *motion to amend denied*, 421 F. Supp. 2d 104 (D.D.C. 2006); *Code v. FBI*, No. 95-1892, 1997 WL 150070, at *5 (D.D.C. Mar. 26, 1997) (finding that documents compiled in connection with FBI's efforts to assist local police in homicide investigations met threshold). As the documents responsive to plaintiffs' FOIA request relate to the FBI's assistance to local law enforcement agencies regarding the Occupy movement, the information being withheld clearly meets Exemption 7's threshold requirement. Hardy Decl. ¶ 52.

1. Exemption 7(A) (Pending Law Enforcement Proceedings)

Exemption 7(A) permits the withholding of: (1) "records or information"; (2) "compiled for law enforcement purposes"; (3) the disclosure of which "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7). Congress enacted Exemption 7(A) because it "'recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their cases'" in court. *John Doe Agency*, 493 U.S. at 156 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978)). To satisfy its burden justifying the applicability of this Exemption, the FBI need only demonstrate that (1) a law enforcement proceeding is pending or prospective, and (2) release of the information could reasonably be expected to cause some articulable harm to the proceeding. *Robbins Tire & Rubber Co.,* 437 U.S. at 224.

Here, the FBI has asserted Exemption 7(A) in a limited fashion to protect the file numbers of pending FBI investigations. Hardy Decl. ¶ 54. In addition to meeting Section 7's threshold requirement, these materials meet the requirements of Exemption 7(A), as "[t]he release of the control file number of an on-going FBI investigation under development could result not only in the acknowledgement of the existence of the investigation but also in the identification of suspects," thus potentially "compromis[ing] the investigation." Hardy Decl. ¶ 54. Accordingly, the withholding of these file numbers relating to open investigations is appropriate pursuant to Exemption 7(A). *See Judicial Watch, Inc. v. FBI*, No. 00-745 (TFH),

2001 WL 35612541, at *5 (D.D.C. Apr. 20, 2001) (upholding withholding of FBI investigative file numbers per Exemption 7(A)).[5]

2. Exemptions 6 and 7(C) (Clearly Unwarranted and Unwarranted Invasion of Personal Privacy)

As noted above, Exemption 6 provides that an agency may withhold "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). Its more expansive law-enforcement counterpart, Exemption 7(C), permits withholding of "records or information compiled for law enforcement purposes" to the extent that "production of such law enforcement records . . . *could reasonably be expected* to constitute an *unwarranted* invasion of personal privacy." *Id.* § 552(b)(7)(C) (emphasis added); *see Yonemoto*, 686 F.3d at 693 n.7 (describing Exemption 7(C)'s broader protections). Both exceptions are often considered together. *See Yonemoto*, 686 F.3d at 693 n.7; *see also* Hardy Decl. ¶ 55 n.10 (noting that "[t]he practice of the FBI is to assert Exemption (b)(6) in conjunction with (b)(7)(C)").

Here, Exemptions 6 and 7(C) have been asserted to protect the names and/or identifying information of FBI Special Agents and support personnel, as publicity regarding any particular investigation "may seriously prejudice their effectiveness in conducting other investigations" and subject them to "unnecessary, unofficial questioning as to the course of an investigation." Hardy Decl. ¶ 57. The FBI also applied Exemptions 6 and 7(C), in conjunction with Exemption 7(D), to protect the names and/or identifying information of third parties who provided information to the FBI. Hardy Decl. ¶ 60-61. Moreover, the FBI applied Exemptions 6 and 7(C) to withhold the names and/or identifying information concerning third parties merely mentioned in records responsive to plaintiffs' request, Hardy Decl. ¶ 62, and the names and/or identifying information of state and local law enforcement personnel acting in their official capacities, Hardy Decl. ¶ 63.

In addition to satisfying Exemption 7's threshold requirement of being compiled for law

[5] During the initial FOIA processing, Exemption (b)(7)(A) alone was asserted for the sensitive case file numbers. However, the FBI has determined that Exemption (b)(7)(E) is also appropriate for protecting the same sensitive, pending case control file numbers as an investigative technique. *See* Hardy Decl. ¶54 n.9.

enforcement purposes,[6] these records all reflect a cognizable privacy interest protected by both Exemptions 6 and 7(C). Such an interest "'encompass[es] the individual's control of information concerning his or her person, but it is not limited to just that type of information.'" *Yonemoto*, 686 F.3d at 693 (quoting *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989)). Because of the nature of their work, "[t]he publicity associated with the release of an agent's identity in connection with a particular investigation could trigger hostility toward a particular agent." Hardy Decl. ¶ 58. Similarly, FBI support personnel "could become targets of harassing inquiries for unauthorized access to investigations if their identities were released." Hardy Decl. ¶ 59. Individuals who provide information to the FBI often "fear that their identity may be exposed and, consequently, that they could be harassed, intimidated, or threatened with legal consequences, economic reprisal, or possible physical harm." Hardy Decl. ¶ 61. The disclosure of identifying information for third parties merely mentioned "in connection with the FBI carries an extremely negative connotation" that "would subject these individuals to possible harassment or criticism and focus derogatory inferences and suspicion on them." Hardy Decl. ¶ 62. And the disclosure of the identities of state and/or local law enforcement officers "could subject them, as individuals, to unofficial inquiries not anticipated in connection with their assistance to the FBI." Hardy Decl. ¶ 63.

Once a non-trivial, non-speculative privacy interest is present, then the exemptions shield the information from disclosure unless "the public interests in disclosing the *particular* information requested outweigh those privacy interests." *Yonemoto*, 686 F.3d at 694. This balances the privacy interest against the asserted public interest. Yet the "*only* relevant public interest in the FOIA balancing analysis is the extent to which disclosure of the information sought would she[d] light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Id.* at 694 (quoting *Bibles v. Or. Natural Desert Ass'n*, 519 U.S. 355, 355-56, 117 S. Ct. 795, 136 L. Ed. 2d 825 (1997)). Here, there is no public interest served by revealing the information protected by Exemptions 6 and 7(C). Identifying particular FBI employees sheds no light on the FBI's activities and operations regarding the

[6] This threshold requirement does not apply to the extent these records are being analyzed pursuant to the narrower provisions of Exemption 6.

Occupy movement. That is even more true with respect to third parties—be they informants, individuals merely mentioned, or local law enforcement officials—as their identity has nothing whatsoever to do with the FBI's activities or operations. *See Council on Am.-Islamic Relations*, 749 F. Supp. 2d at 1119-21 (upholding application of Exemption 7(C) to FBI Special Agents and support personnel, local law enforcement employees, and third parties who provided information or who were merely mentioned).

3. Exemption 7(D) (Information from Confidential Sources)

The FBI has withheld material under Exemption 7(D), which permits the withholding or redacting of law enforcement records, the release of which "could reasonably be expected to disclose the identity of a confidential source . . . and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation . . . information furnished by a confidential source." 5 U.S.C. § 552(b)(7)(D). A confidential source is one who "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 172 (1993) (internal quotation and citation omitted). An implied assurance of confidentiality could be found "when circumstances such as the nature of the crime investigated and the witness' relation to it support an inference of confidentiality." *Landano*, 508 U.S. at 179, 181. In such circumstances, the government is entitled to a presumption of inferred confidentiality. *Id.* Exemption 7(D) requires no balancing of public and private interests. *See Dow Jones & Co. v. U.S. Dep't of Justice*, 917 F.2d 571, 575-76 (D.C. Cir. 1990).

Specifically, the FBI asserted Exemption 7(D) to protect the names, identifying information, and/or information provided by third parties under both express and implied assurances of confidentiality. *See* Hardy Decl. ¶¶ 66-69. As to the latter, "[t]he sensitivity of the information, and the position of the sources, are such that it may be inferred that the information was provided with the expectation of confidentiality." Hardy Decl. ¶ 67. Regardless of whether the assurances of confidentiality was express or implied, the information provided was detailed and singular in nature, and revealing the identity of—and information provided by—these

sources "would have a chilling effect on the activities and cooperation of this and other future FBI confidential sources." Hardy Decl. ¶ 67; *see also id.* ¶ 69. Accordingly, application of Exemption 7(D) was justified. *See Span v. U.S. Dep't of Justice*, 696 F. Supp. 2d 113 (D.D.C. 2010) (applying Exemption 7(D) to confidential source-related information).

4. Exemption 7(E) (Investigative Techniques and Procedures)

Exemption 7(E) protects from disclosure information compiled for law enforcement purposes where release of the information "would disclose techniques and procedures for law enforcement investigations or prosecutions," or where it would "disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). Congress intended that Exemption 7(E) protect from disclosure techniques and procedures used to prevent and protect against crimes as well as techniques and procedures used to investigate crimes after they have been committed. *See, e.g., PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 250-51 (D.C. Cir. 1993) (holding that portions of FBI manual describing patterns of violations, investigative techniques, and sources of information available to investigators were protected by Exemption 7(E)).

Here, Exemption 7(E) has been asserted to protect procedures and techniques used by FBI agents to conduct national security investigations, as well as methods and techniques involving the identity of FBI units, the disclosure of which would reveal targets and physical areas of interest of the investigation. Hardy Decl. ¶¶ 71, 72. As noted in the Hardy Declaration, release of information relating to procedures and techniques would enable criminals to educate themselves about the techniques and procedures being used, and information about the units conducting investigations would tip-off those being investigated to the FBI's areas of interest. Hardy Decl. ¶¶ 71, 72 (noting, for example, that "knowing that a unit whose focus is on financial crimes is involved is quite different information than knowing that the unit has a focus on crimes of violence"). Accordingly, this information was properly withheld pursuant to Exemption 7(E).[7]

[7] As noted above, the FBI has determined that Exemption (b)(7)(E) also applies to sensitive case file numbers as disclosure of these pending file numbers could reveal a law enforcement investigative technique. *See* Hardy Decl. ¶54 n.9. The release of the control file numbering convention identifies not only the stage of the FBI investigative process but it would

III. The Coast Guard Properly Withheld Records That Are Exempt From Disclosure Under FOIA.

When processing plaintiffs' FOIA request, the FBI identified two documents, totaling thirteen pages, which originated with the United States Coast Guard. Hardy Decl. ¶ 84. Pursuant to Department of Justice regulations, the FBI contacted the Coast Guard, which instructed the FBI to release responsive information in the first document (consisting of seven pages). Hardy Decl. ¶ 84; Declaration of Peter J. Hatch ("Hatch Decl.") ¶ 8. The Coast Guard instructed the FBI to withhold information in the second document (consisting of six pages) pursuant to Exemptions (b)(3), (b)(6), and (b)(7)(E); Hatch Decl. ¶ 8.[8] For the reasons discussed below, the Coast Guard's withholdings in this case (as exerted by the FBI) are appropriate.

A. Exemptions 3 (Records Exempt from Disclosure Per Statute) and 6 (Clearly Unwarranted Invasion of Personal Privacy).

Exemption 3 applies to records that are "specifically exempted from disclosure" by other federal statutes "if that statute – establishes particular criteria for withholding it or refers to the particular types of material to be withheld." 5 U.S.C. § 552(b)(3). In promulgating FOIA, Congress included Exemption 3 to recognize the existence of collateral statutes that limit the disclosure of information held by the government, and to incorporate such statutes within FOIA's exemptions. *See Balridge v. Shapiro*, 455 U.S. 345, 352-53 (1982); *Essential Info., Inc. v. U.S. Info. Agency*, 134 F.3d 1165, 1166 (D.C. Cir. 1998). Under Exemption 3, "the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage."" *Fitzgibbon v. CIA*, 911 F.2d 755, 761-62 (D.C. Cir. 1990).

Here, the Coast Guard withheld information relating to the identity of and contact information for a member of the Coast Guard pursuant to Exemptions 3 and 6. Hatch Decl. ¶ 9.

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also disclose the investigative interest or priority given to such matters or subjects of investigation. In applying a mosaic analysis, suspects could use the numbers in conjunction with other known information to decipher who or what is of investigative interest to the FBI. If this information were released, it would enable violators to potentially change their pattern of activity to avoid detection, apprehension, or create alibis for suspected activities. *Id.* As such, it is appropriate to withhold such information pursuant to Exemption (b)(7)(E).

[8] Some information was withheld from disclosure in both documents because it was outside the scope of plaintiffs' FOIA request. *See* Hatch Decl. ¶¶ 7-9.

The Coast Guard's declaration supports the "two-part inquiry [that] determines whether Exemption 3 applies to a given case." *Minier*, 88 F.3d at 800-01 (citing *Sims*, 471 U.S. at 167). "First, a court must determine whether there is a statute within the scope of Exemption 3. Then, it must determine whether the requested information falls within the scope of the statute." *Id.*at 801. In asserting Exemption 3, the Coast Guard relied upon 10 U.S.C. § 130b, which permits "personally identifying information" for members of armed services assigned to a "sensitive unit" to be withheld from disclosure. 10 U.S.C. § 130b(a). This Court has upheld the withholding of information pursuant to Exemption 3 and Section 130b. *See Hiken v. Dep't of Defense*, 521 F. Supp. 2d 1047, 1062 (N.D. Cal. 2007) ("The court, therefore, concludes that the non-disclosure of the names and personally identifying information of military personnel pursuant to 10 U.S.C. section 130b is valid under Exemption 3."). And the identity and contact information being withheld fall within the scope of Section 130b, as they relate to a member of the Coast Guard's Intelligence Coordination Center, which is a "sensitive unit." Hatch Decl. ¶ 9. This same information also falls within the scope of Exemption 6, which provides that an agency may withhold "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). *See* Part II.B.2, *supra* (discussing application of Exemption 6 by FBI).

B. Exemption 7(E) (Investigative Techniques and Procedures)

The Coast Guard also withheld information pursuant to Exemption 7(E), which exempts investigative techniques and procedures. *See* Part II.B.4, *supra* (discussing application of Exemption 7(E) by FBI). Specifically, the Coast Guard withheld information that tracks law enforcement and national intelligence requirements established by agencies and reported on by agencies. *See* Hatch Decl. ¶ 9. While the Coast Guard released substantive information, it withheld "the reporting identification of sources (here, agencies) and the specific requirement identifier that defined maritime port security requirements." Hatch Decl. ¶ 9. These details, if released, "could jeopardize how both law enforcement and national intelligence agencies established and organized law enforcement intelligence reporting criteria and what information,

when reported, met that criteria." Hatch Decl. ¶ 9. Accordingly, this information was properly withheld pursuant to Exemption 7(E).

IV. Defendant Has Produced All Reasonably Segregable Portions of Responsive Records

FOIA 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 under this subsection." 5 U.S.C. § 552(b). This provision does not require disclosure of records in which the non-exempt information that remains is meaningless. *See Nat'l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 220-21 (D.D.C. 2005) (concluding that no reasonably segregable information exists because "the non-exempt information would produce only incomplete, fragmented, unintelligible sentences composed of isolated, meaningless words."). The FBI and Coast Guard have reviewed the withheld material and have disclosed all non-exempt information that reasonably could be disclosed. *See* Hardy Decl. ¶¶ 23-24, 85; Hatch Decl. ¶ 10. Accordingly, the FBI has produced all "reasonably segregable portion[s]" of the responsive records. 5 U.S.C. § 552(b).

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment should be granted.

DATED: December 21, 2012

Respectfully submitted,

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