

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

| | | |
|--------------------------------|---|--------------------------------|
| AMERICAN CIVIL LIBERTIES UNION |) | |
| FOUNDATION OF MASSACHUSETTS, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civil Action No.: 14-11759-ADB |
| |) | |
| DEPARTMENT OF JUSTICE, |) | |
| |) | |
| Defendant. |) | |
| |) | |

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT’S
MOTION FOR PARTIAL SUMMARY JUDGMENT
(AS TO THE FEDERAL BUREAU OF INVESTIGATION)**

Pursuant to Fed. R. Civ. P. 56, Defendant, the Department of Justice, moves for partial summary judgment as to the documents reviewed and released by the Federal Bureau of Investigation (“FBI”) in this Freedom of Information Act (“FOIA”) case. Plaintiff, the American Civil Liberties Union Foundation of Massachusetts (“ACLU”), brought this action under the FOIA, 5 U.S.C. §552, seeking the release of three categories of records: (1) the structure of the Massachusetts Joint Terrorism Task Force; (2) FBI Boston Field Office investigations; and (3) Ibragim Todashev. The FBI released hundreds of documents to the ACLU, and withheld information pursuant to FOIA Exemptions 5 U.S.C. §552(b)(1), (b)(6), (b)(7)(C), and (b)(7)(E). Defendant now moves for summary judgment.

LOCAL 56.1 STATEMENT OF UNDISPUTED FACTS

By letter dated December 9, 2013, the ACLU submitted a FOIA request to the FBI seeking access to records related to the structure of the Massachusetts Joint Terrorism Task Force (“JTTF”), records concerning FBI Boston Field Office Investigations, and records pertaining to Ibragim Todashev.¹ See Declaration of David M. Hardy (“Hardy Decl.”) attached as Exhibit 1 ¶ 5. Additionally, the ACLU requested expedited processing and a fee waiver. Id. In letters dated January 2, 2014, the FBI acknowledged receipt of the ACLU’s requests and assigned it FOIA Request Numbers 1246012 and 1246014. Hardy Decl. ¶¶ 7, 13. The FBI advised the ACLU it was searching the indices to the Central Records System for information responsive to its request. Hardy Decl. ¶¶ 7, 13. The FBI further advised that the ACLU’s request for a fee waiver was being considered and that it would be advised of the decision at a later date. Hardy Decl. ¶¶ 7, 13. By letter dated January 16, 2014, the FBI advised the ACLU it was granting its request for expedited processing. Hardy Decl. ¶¶ 8, 14. On April 10, 2014, the ACLU filed its complaint in this instant action. Hardy Decl. ¶ 9.

For FOIA Request 12460012 regarding the Structure of the Massachusetts JTTF, the FBI made its first interim release of records to the ACLU by letter dated August 29, 2014. Hardy Decl. ¶ 10. The FBI advised that two pages of records were reviewed and zero pages of records were being released, with all information withheld pursuant to FOIA Exemption (b)(7)(E). Hardy Decl. ¶ 10. The FBI also advised the ACLU that it could appeal the FBI’s determination by filing an administrative appeal with the DOJ’s Office of Information Policy (“OIP”) within sixty days. Hardy Decl. ¶ 10. The FBI further advised the ACLU that it had completed its

¹ This memorandum addresses the FBI’s response to the ACLU’s Requests A and B. As the Hardy Declaration states, the FBI’s response to the ACLU’s Request C regarding Ibragim Todashev will be addressed at a later date.

searches in response to this part of the request, and was reviewing the records located for responsiveness and was processing them for release in accordance with the schedule established in this litigation. Hardy Decl. ¶ 10.

By letter dated October 30, 2014, the FBI made its second release of records to the ACLU. Hardy Decl. ¶ 11. The FBI advised that 706 pages of records were reviewed and 441 pages of records were being released in full or part, with certain information withheld pursuant to FOIA Exemption (b)(7)(E). Hardy Decl. ¶ 11. Additionally, the FBI advised the ACLU that it located other government agencies (“OGAs”) information within the responsive records and was consulting with those agencies. Hardy Decl. ¶ 11. The FBI advised the ACLU that it would correspond with it regarding this information once the consultation was finished. Hardy Decl. ¶ 11. Finally, the FBI advised the ACLU that it could appeal the FBI’s determination by filing an administrative appeal with OIP within sixty days. Hardy Decl. ¶ 11.

By letter dated January 6, 2015, the FBI made its third release of records to the ACLU. Hardy Decl. ¶ 12. The FBI advised that 547 pages of records were reviewed and 534 pages of records were being released in full or part, with certain information withheld pursuant to FOIA Exemptions (b)(1), (b)(6), (b)(7)(C), and (b)(7)(E). Hardy Decl. ¶ 12. Additionally, the FBI advised it located other government agencies (“OGAs”) information within the responsive records and was consulting with those agencies. Hardy Decl. ¶ 12. The FBI advised the ACLU that it would correspond with it regarding this information once the consultations were finished. Hardy Decl. ¶ 12. Finally, the FBI advised the ACLU that it could appeal the FBI’s determination by filing an administrative appeal with the OIP within sixty days. Hardy Decl. ¶ 12.

For FOIA Request 12460014 regarding FBI Boston Field Office Investigations, the FBI, by letter dated August 29, 2014, advised that two pages of records were reviewed and two pages of records were being released in part, with certain information withheld pursuant to FOIA Exemptions (b)(6), (b)(7)(C), and (b)(7)(E). Hardy Decl. ¶ 15. Further, the FBI advised the ACLU that it had completed its searches in response to this part of the request, was reviewing the records located for responsiveness, and was processing them for release in accordance with the schedule established in this litigation. Hardy Decl. ¶ 15. Finally, the FBI advised the ACLU that it could appeal the FBI's determination by filing an administrative appeal with the OIP within sixty days. Hardy Decl. ¶ 15. By letter dated March 3, 2015, the FBI made its second release of records to the ACLU. Hardy Decl. ¶ 16. The FBI advised that 592 pages of records were reviewed and 53 pages of records were being released in full or part, with certain information withheld pursuant to FOIA Exemptions (b)(6), (b)(7)(C), and (b)(7)(E). Hardy Decl. ¶ 16. Further, the FBI advised the ACLU that numerous pages were removed as "duplicates" in the enclosed release since they were processed and released to them in response to FOIA Number 1246012. Hardy Decl. ¶ 16. Finally, the FBI notified that ACLU that it could appeal the FBI's determination by filing an administrative appeal with the OIP within sixty days. Hardy Decl. ¶ 16.

In sum, the FBI processed a total of 1,849 responsive pages. Hardy Decl. ¶ 4. Of these pages, 903 pages were released in full, 162 pages released in part, and 784 pages were withheld in full. Hardy Decl. ¶ 4.

STANDARD OF REVIEW

A. Summary Judgment Standard.

Where no genuine dispute exists as to any material fact, summary judgment is required. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Borges v. Serrano-Isern, 605 F.3d 1, 4 (1st Cir. 2010) (citing Fed. R. Civ. P. 56(c)(2)). A genuine issue of material fact is one that would change the outcome of the litigation. Anderson, 477 U.S. at 247. “The burden on the moving party may be discharged by ‘showing’ -- that is, pointing out to the [Court] -- that there is an absence of evidence to support the non-moving party’s case.” Sweats Fashions, Inc. v. Pannill Knitting Co., Inc., 833 F.2d 1560, 1563 (Fed. Cir. 1987). Once the moving party has met its burden, the non-movant may not rest on mere allegations, but must instead proffer specific facts showing that a genuine issue exists for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

Thus, to avoid summary judgment here, the ACLU (as the non-moving party) must present some objective evidence that would enable the Court to find that it is entitled to relief. In Celotex Corp. v. Catrett, the Supreme Court held that, in responding to a proper motion for summary judgment, the party who bears the burden of proof on an issue at trial must “make a sufficient showing on an essential element of [his] case” to establish a genuine dispute. 477 U.S. 317, 322-23 (1986). In Anderson, the Supreme Court further explained that “the mere existence of a scintilla of evidence in support of the Plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the Plaintiff.” 477 U.S. at 252. In Celotex, the Supreme Court further instructed that the “[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal

Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’” 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

B. FOIA Cases are Generally Decided on Summary Judgment.

The FOIA “was enacted to facilitate public access to Government documents and designed to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” Union Leader Corp. v. U.S. Dept. of Homeland Security, 749 F.3d 45, 49 (1st Cir. 2014) (internal quotations omitted). This right of access is not absolute. Id. at 50.

“In a FOIA case, summary judgment may be granted to the government if ‘the agency proves that it has fully discharged its obligations under the FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester.’” Fischer v. DOJ, 596 F.Supp.2d 34, 42 (D.D.C.2009) (quoting Greenberg v. U.S. Dep't of Treasury, 10 F.Supp.2d 3, 11 (D.D.C.1998)). In a FOIA suit, an agency is entitled to summary judgment once it demonstrates that no material facts are in dispute and, if applicable, that each document that falls within the class requested either has been produced, is unidentifiable, or is exempt from disclosure. Students Against Genocide v. Dept. of State, 257 F.3d 828, 833 (D.C. Cir. 2001); Weisberg v. U.S. Dept. of Justice, 627 F.2d 365, 368 (D.C. Cir. 1980). An agency satisfies the summary judgment requirements in a FOIA case by providing the Court and plaintiff with affidavits or declarations and other evidence which show that the documents in question were produced or are exempt from disclosure. Hayden v. NSA, 608 F.2d 1381, 1384, 1386 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980); Church of Scientology v. U.S. Dept. of Army, 611 F.2d 738, 742 (9th Cir. 1980); Trans Union LLC v. FTC, 141 F. Supp. 2d 62, 67 (D.D.C. 2001) (summary judgment in FOIA cases may be awarded solely on the basis of agency affidavits “when the affidavits describe ‘the documents and the justifications for non-

disclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.”) (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)); see also *Public Citizen Inc. v. Dept. of State*, 100 F. Supp. 2d 10, 16 (D.D.C. 2000), aff’d in part, rev’d in part, 276 F.3d 634 (D.C. Cir. 2002). The requester may challenge such a showing by “set[ting] forth specific facts showing that there is a genuine issue for trial,” Fed. R. Civ. P. 56(e), that would permit a reasonable jury to find in his favor. *Laningham v. U.S. Navy*, 813 F.2d 1236, 1241 (D.C. Cir. 1987). Agency declarations “are afforded a presumption of good faith” an adequate affidavit “can be rebutted only ‘with evidence that the agency’s search was not made in good faith.’” *Defenders of Wildlife v. U.S. Dep’t. of Interior*, 314 F. Supp. 2d 1, 8 (D.D.C.2004).

ARGUMENT

A. FBI IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW

1. The FBI Conducted an Adequate, Reasonable Search.

To demonstrate the adequacy of a search, an agency must “show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Oglesby v. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Stalcup v. CIA*, 768 F.3d 65, 74 (1st Cir. 2014). An adequate search does not mean that every conceivable responsive document will be discovered. See id. (“There is no requirement that an agency search every record system.”); *Allen v. United States Secret Serv.*, 335 F. Supp. 2d 95, 99 (D.D.C. 2004) (“While the agency’s search must be reasonably calculated to produce the requested information, FOIA does not impose a requirement that every record be found.”); *Weisberg v. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (“[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.”).

In evaluating the adequacy of a search, courts accord agency declarations “a presumption of good faith, which cannot be rebutted by ‘purely speculative claims about the existence and discoverability of other documents.’” Safecard Serv., Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991). “Mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them.” Id. at 1201. The statute does not require “meticulous documentation [of] the details of an epic search.” Perry v. Block, 684 F.2d 121, 127 (D.C. Cir. 1982). Instead, declarations 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.” Id.

As outlined in the Declaration of David M. Hardy, in this case, the FBI conducted an adequate, reasonable search for responsive records. Hardy Decl. ¶¶ 17-20. Specifically, RIDS enlisted the assistance of Boston Field Office Personnel and personnel at FBI Headquarters involved in the FBI’s National Joint Terrorism Task Force (“NJTTTF”) program, as these were the FBI personnel most familiar with this material and most likely to possess records responsive to these FOIA requests. Hardy Decl. ¶ 18. By internal electronic communication, RIDS requested that these FBI personnel search for any records responsive to categories I.A. and I.B. of the ACLU’s FOIA request. Hardy Decl. ¶ 18. RIDS specifically asked that these individuals search for the following:

- All records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, faxes, guidance, evaluations, instructions, analysis, memoranda, agreements, notes rules, technical manuals, technical specifications, training manuals, or studies;
- Electronic records maintained on computers, or audio or video tapes;
- E-mails;

- Any other portable media (CD-ROMS, Diskette, etc.); and,
- Other stand alone databases created for the purpose of any particular investigation.

In response to RIDS' internal electronic communication, these personnel at the FBI Boston Field Office and NJTTF located documents and information concerning the structure of the NJTTF and Boston JTTF, the budget of the Boston JTTF, statistical information concerning JTTF investigations, membership of the Boston JTTF, and Memoranda of Understanding ("MOUs") between the FBI and its JTTF partners. Hardy Decl. ¶ 19. Additionally, as part of its standard procedures when responding to FOIA requests, RIDS searched its FOIA Document Processing System ("FDPS") for any material responsive to these requests. Hardy Decl. ¶ 20. Through this search, RIDS located several JTTF MOUs that were previously processed in response to other FOIA requests. Hardy Decl. ¶ 20. Those records were reviewed and redacted or withheld pursuant to FOIA. The redacted documents were and then turned over to the ACLU. Accordingly, because the FBI employed measures that can be expected to produce the information requested, it conducted an adequate and reasonable search and summary judgment is appropriate.

2. The FBI Properly Withheld Information Pursuant to the FOIA.

In accordance with the statutory requirements of the FOIA, the Hardy Declaration contains a complete description of, and justification for, the information exempt pursuant to FOIA Exemptions 1, 6, 7(C), and 7(E) of the FOIA, 5 U.S.C. §§ 552(b)(1), 552(b)(6), (b)(7)(C), (b)(7)(E). Hardy Decl. ¶¶ 21-55. The DOJ has adequately justified its assertion of these exemptions and has demonstrated that it did not improperly withhold information from the ACLU. Accordingly, the DOJ is entitled to partial summary judgment as to the ACLU's Requests A and B, directed to the FBI.

a. The FBI Properly Withheld Records Pursuant to Exemption 1.

Exemption 1 of the FOIA protects from disclosure information that has been deemed classified “under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy” and is “in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1). The executive order that currently applies to the protection of national security information is Executive Order (“E.O.”) 13526, which was signed by President Barack Obama on December 29, 2009. See Exec. Order. No 13526, 75 Fed. Reg. 707 (December 29, 2009). In applying this exemption, agencies must determine whether the records at issue meet the requirements set forth in E.O. 13526 § 1.1(a):

- (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.

The Supreme Court recognized that a great amount of deference should be accorded to the agency’s decision to protect national security information from disclosure, an accepted doctrine that continues to this day. See EPA v. Mink, 410 U.S. 73, 84, 94 (1973); James Madison Project v. CIA, 605 F. Supp. 2d 99, 109 (D.D.C. 2009) (reiterating that court grants deference to agency national security decisions and noting balance required between openness and national security); Miller v. DOJ, 562 F. Supp. 2d 82, 101 (D.D.C. 2008) (noting that courts “generally defer to agency expertise in national security matters”). Thus, summary judgment is appropriate if an agency’s affidavits are reasonably specific and there is no evidence of bad faith. See Larson v. Dep’t of State, 565 F. 3d 857, 865 (D.C. Cir. 2009) (holding that if agency affidavit contains “reasonable specificity” and “information logically falls within claimed

exemption,” then “court should not conduct a more detailed inquiry to test the agency’s judgment”); Maynard v. CIA, 986 F. 3d 547, 555-56 & n. 7 (1st Cir. 1993) (recognizing that courts must accord “substantial deference to agency withhold determinations and “uphold the agency’s decision so long as withheld information logically falls into the exemption category cited and there exists no evidence of agency “bad faith”).

In this case, the FBI determined that the responsive records it located are classified and marked at the “Secret” level since the unauthorized disclosure of this information reasonably could be expected to cause serious damage to national security. See E.O. 13526 § 1.2 (a)(2). In addition to this substantive requirement, certain procedural and administrative requirements of E.O. 13526, were followed before information can be considered to be properly classified, such as proper identification and marking of documents. RIDS made certain that:

- (a) each document was marked as required and stamped with the proper classification designation;
- (b) each document was marked to indicate clearly which portions are classified and which portions are exempt from declassification as set forth in E.O. 13526 § 1.5 (b);
- (c) the prohibitions and limitations on classification specified in E.O. 13526 § 1.7, were adhered to;
- (d) the declassification policies set forth in E.O. 13526 §§ 3.1 and 3.3 were followed; and
- (e) any reasonably segregable portion of these classified documents that did not meet the standards for classification under E.O. 13526, were declassified and marked for release, unless withholding was otherwise warranted under applicable law.

Specifically, the information pertains to “intelligence activities (including covert action), intelligence sources or methods, or cryptology.” See E.O. 13526, § 1.4(c). E.O. 13526, § 1.4(c), exempts intelligence activities (including covert action), intelligence sources or methods, or cryptology from disclosure. The information withheld in these documents pursuant to Exemption (b)(1) was withheld to protect detailed intelligence activity information compiled regarding a specific individual or organization of national security interest. Hardy Decl. ¶ 30; see Leopold v. CIA, 2015 WL 2255957, at *8 (D.D.C. May 14, 2015) (determining that the

asserted information concerning expenditures pertained to intelligence activities, sources, and methods). The classification redactions were made to protect from disclosure information that would reveal the actual intelligence activities and methods used by the FBI against specific targets of foreign counterintelligence investigations or operations; identify a target of a foreign counterintelligence investigation; or disclose the intelligence gathering capabilities of the activities or methods directed at specific targets. Hardy Decl. ¶ 31. The classified information withheld contains detailed intelligence activities information gathered or compiled by the FBI on specific individuals or organizations of national security interest. Hardy Decl. ¶ 34. The disclosure of this information could reasonably be expected to cause serious damage to the national security, as it would: (a) reveal the actual intelligence activity or method utilized by the FBI against a specific target; (b) disclose the intelligence-gathering capabilities of the method; and (c) provide an assessment of the intelligence source penetration of a specific target during a specific period of time. *Id.* This information is properly classified at the “Secret” level, withheld pursuant to E.O. 13526, § 1.4(c), and is exempt from disclosure pursuant to Exemption 1.

b. The FBI Properly Withheld Records Pursuant to Exemption 6.

Exemption 6 of the FOIA permits agencies to withhold records that are contained within “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). In applying this exemption, agencies must determine as a threshold matter whether the records at issue fall into the categories of “personnel and medical files and similar files.” The term “similar files” has been construed broadly to include “any records on an individual who can be identified as applying to that individual.” *See Dep’t of State v. Wash. Post. Co.*, 456 U.S. 595, 601 (1982) (quoting the legislative history of the exemption in order to define the term). Although Exemptions 6 and

7(C) have different thresholds, they employ the same type of analysis, which requires an agency to identify and balance the relevant privacy and public interests at stake. See Favish, 541 U.S. at 165-6 (describing the differences between the two exemptions). Disclosures in accordance with Exemption 6 are evaluated in light of whether they “would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).

With respect to the FBI special agents and support personnel and other non-FBI federal law enforcement employees (Exemption (b)(6)-1), state and local law enforcement personnel (Exemption (b)(6)-2), and third parties of investigative interest mentioned in the records (Exemption (b)(6)-3), the FBI identified substantial privacy interests and, accordingly, concluded that disclosure of their identities likely would expose them to some form of harassment or unwanted attention. Hardy Decl. ¶¶ 43-46. Courts, even in the context of non law enforcement records, have recognized that these types of harm constitute a clearly unwarranted invasion of an individual’s personal privacy. See NARFE v. Horner, 879 F.2d at 878 (determining that the release of names and/or addresses of federal annuitants to a special interest association would subject them to harassment and constitute a significant invasion of their privacy).

In this case, the dangers of disclosure are magnified because of the sensitivity of the records at issue, which pertain to the names and/or identifying information of personnel from federal agencies including the FBI, the U.S. Coast Guard, and the U.S. Immigration and Customs Enforcement, state and local law enforcement personnel in and around the Boston area, and third-party individuals of investigative interest. See Hardy Decl. ¶ 43-46. The FBI protected the names and/or identifying information of its Special Agents (“SAs”) and support personnel who were responsible for conducting, supervising, and/or maintaining the investigative and intelligence activities reported in the documents. These responsibilities included conducting

interviews and compiling the resulting information, as well as reporting on the status of investigations. The FBI also protected the names and identifying information of non-FBI federal personnel from the agencies listed above for the same reasons. Hardy Decl. ¶ 44-46; see, e.g., Balderrama v. Dep't of Homeland Security, No. 04-1617, 2006 W.L. 889778, at *9 (D.D.C. Mar. 30, 2006) (permitting an agency to withhold identities of witnesses, undercover officers, informants pursuant to Exemptions 6 in recognition of the fact that they had “substantial privacy interest in not being identified with law enforcement proceedings”).

Accordingly, in recognition of the substantial privacy interest at stake and the complete lack of any countering public interest, the balance properly weighs on the side of nondisclosure. See Beck, 997 F.2d at 1494. As such, the FBI's withholdings pursuant to Exemption 6 are appropriate.

c. The Requested Records Satisfied the Threshold of Exemption 7.

Exemption 7 protects “records or information compiled for law enforcement purposes” to the extent that disclosure could “reasonably be expected to” cause one of the harms enumerated under the subsection of the exemption. 5 U.S.C. § 552(b)(7). Agencies that have a criminal law enforcement function, like the FBI, can satisfy the threshold of Exemption 7 by establishing that the records at issue relate to the enforcement of federal laws and that the enforcement activity involves one of the law enforcement duties of that agency. See Campbell v. DOJ, 164 F.3d 20, 24 (D.C. Cir.1998) (affirming that where an agency specializes in law enforcement it “must establish a rational ‘nexus between the investigation and one of the agency's law enforcement duties,’ and a connection between an ‘individual or incident and possible security risk or violation of federal law’” to meet the Exemption 7 threshold).

Here, the records at issue meet the threshold of Exemption 7 because they deal with the FBI's law enforcement, national security, and intelligence missions (Hardy Decl. ¶ 38) and were compiled in accordance with the FBI's mandate to enforce criminal violations of the law. Hardy Decl. ¶¶ 37-39. After an agency has shown that the threshold of Exemption 7 is satisfied, it must further demonstrate that disclosure of the information at issue could reasonably be expected to cause one of the harms enumerated in the subparts of the exemption. In this case, the FBI determined that two different provisions of Exemption 7 applied to portions of the requested records namely, Exemptions 7(C) and 7(E). See 5 U.S.C. § 552(b)(7)(C), (b)(7)(E).

d. The FBI Properly Withheld Records Pursuant to Exemption 7(C).

Exemption 7(C) “shields information compiled for law enforcement purposes when the release of such records ‘could reasonably be expected to constitute an unwarranted invasion of personal privacy.’” Stalcup v. CIA, 768 F.3d 65, 73 (1st Cir. 2014); Moffat v. United States DOJ, 716 F.3d 244, 251 (1st Cir. 2013). The FOIA’s “central purpose is to ensure that the Government’s activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed.” Union Leader Corp. v. U.S. Dept. of Homeland Security, 749 F.3d at 50. Accordingly, this exemption requires the Court “to balance these privacy interests against the public interest in disclosure.” Moffat, 716 F.3d at 251; Maynard v. CIA, 986 F.2d 547, 566 (1st Cir. 1993). The United States Supreme Court defined these competing interests in DOJ v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989). A privacy interest, the Court found, is generally understood as an “individual’s control of information concerning his or her person.” Id. at 763. Conversely, a qualifying public interest must reveal information that sheds light on the operations or activities

of the government. Id. at 797 (noting that the “FOIA’s central purpose is to ensure that the Government’s activities be opened to the sharp eye of public scrutiny”).

Here, the FBI found that the privacy interests of the individuals mentioned in the records outweighed any public interests and, accordingly, correctly determined that the information was exempt from disclosure under Exemption 7(C). Hardy Decl. ¶¶ 41-46. A number of third parties were named in the records including FBI Special Agents, state and local law enforcement officers, and non-FBI Federal Law Enforcement employees; also named were individuals who provided assistance to the government; individuals incidentally mentioned in connection with the investigation, a third-party victim, and subjects or suspects of investigative interest. Hardy Decl. ¶¶ 43-46. With respect to each of these individuals, the FBI identified substantial privacy interests. Hardy Decl. ¶¶ 43-46.

The FBI determined that, due to the sensitive nature of their jobs, the release of the identities of FBI agents, state and local law enforcement officials, and non-FBI federal law enforcement employees could compromise their effectiveness or expose them to acts of hostility or revenge. Hardy Decl. ¶¶ 43, 44. Similarly, the identities of the state and local law enforcement officials were protected because there is a possibility that these individuals would be subject to harassment by those who seek unauthorized access to details of a criminal investigation and because they could become a prime target for compromise if their identities were known. Hardy Decl. ¶ 45. With respect to individuals who provided information to the government, the FBI found that disclosure of these individual’s identities would create the risk of harassment, intimidation, retaliation, threat of legal or economic reprisal, or even possible physical harm. Hardy Decl. ¶ 51. The FBI also determined that those who were merely mentioned in the files as third parties of investigative interest also have strong privacy interests,

because their association with a criminal law enforcement investigation could cast them in an unfavorable or negative light if released to the public because it “carries a strong negative connotation” and could cause unsolicited and unnecessary attention to be focused on them and/or their family members and subject them to “possible harassment, criticism and focus derogatory inferences and suspicion on them.” Hardy Decl. ¶ 51.

Due to the inherently sensitive nature of law enforcement records in general, and these records in particular, the privacy interests identified by the FBI provide sufficient justifications for withholding all of the third party information mentioned in these records. Hardy Decl. ¶¶ 46. It is well established that absent some compelling public interest, the names and identifying information of law enforcement officers, agency employees, witnesses, informants and suspects are properly withheld under Exemption 7(C). See Nation Magazine v. U.S. Customs Serv., 71 F.3d. 885, 896 (D.C. Cir. 1995) (holding that in the absence of an overriding public interest “to the extent any information contained in 7(C) investigatory files would reveal the identities of individuals who are subjects, witnesses or informants in law enforcement investigations, those portions of records are categorically exempt from disclosure”); Miller v. DOJ, 562 F. Supp. 2d. 82, 119-22 (D.D.C. 2008) (concluding that multiple agencies correctly withheld information under Exemption 7(C) that would identify law enforcement agents, government employees, and persons associated with the plaintiff because disclosure would compromise their effectiveness or subject them to harassment).

Similarly, courts have found that even individuals who are merely mentioned in law enforcement records possess significant privacy rights. See Branch v. FBI, 658 F. Supp. 204, 209 (D.C. Cir. 1987) (observing that “the mention of an individual’s name in a law enforcement file will engender speculation and carries a stigmatizing connotation” and, accordingly,

concluding that disclosure of the identities of persons who “were merely mentioned incidentally or as suppliers of information in connection with the investigation, would result in an unwarranted invasion of personal privacy”); Mack v. Navy, 259 F. Supp. 2d 99, 109 (D.D.C. 2003) (protecting identities of law enforcement agents, victims, witnesses, subjects of investigative interest, and third parties mentioned in investigative records categorically).

After establishing the privacy interests at stake, the FBI attempted to identify, but ultimately was unable to ascertain, any qualifying public interest that would be advanced by the release of the records at issue. Hardy Decl. ¶¶ 44-46. Notably, the ACLU also neglected to assert any public interest as required by the Supreme Court in NARA v. Favish, 541 U.S. 157, 172 (2004). The Supreme Court held that in instances “where the privacy concerns addressed by Exemption 7(C) are present, the exemption requires the person requesting the information to establish a sufficient reason for the disclosure.” See id. It is the requester’s burden to demonstrate that the “public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake” and that “the information is likely to advance that interest.” See id. Here, the ACLU has made no such showing; accordingly, as the FBI identified significant privacy interests and no qualifying public interest, it properly withheld the information pursuant to Exemption 7(C).

e. The FBI Properly Withheld Records Pursuant to Exemption 7(E).

Exemption 7(E) protects records or information compiled for law enforcement purposes when release “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.” 5 U.S.C. § 552(b)(7)(E). See James v. U.S. Customs and Border Prot., 549 F. Supp. 2d 1, 10 (D.D.C. 2008)

(stating that agency properly invoked Exemption 7(E) for investigative techniques where agency had demonstrated that release “could enable [others] to employ measures to neutralize these techniques”) (quoting agency’s declaration)).

Within the responsive documents, Exemption (7)(E) has been applied to non-public investigative techniques and procedures utilized by the FBI to pursue its law enforcement and intelligence gathering missions, and also to non-public details about techniques and procedures that are otherwise known to the public. Hardy Decl. ¶ 48. Specifically, the FBI asserted Exemption (7)(E) to protect the allocation of resources and structure of the Massachusetts JTTF, statistical data regarding categories and types of investigations, internal FBI web addresses, sensitive FBI squads and/or units, and sensitive FBI file numbers. Hardy Decl. ¶ 48; see Durrani v. DOJ, 607 F. Supp. 2d 77, 91 (D.D.C. 2009) (“Exemption 7(E) afford categorical protection for techniques and procedures used in law enforcement investigations and prosecutions.”). Armed with this information, criminals would have an idea as to where the FBI is focusing its limited resources. Hardy Decl. ¶¶ 47-53. Criminals could then plan and structure their activities to that avoid the FBI’s investigative strengths, exploit its weaknesses, and circumvent the law. Id. Therefore, this information is exempt from disclosure pursuant to Exemption 7(E).

CONCLUSION

For all of these reasons, the DOJ is entitled to judgment as a matter of law as to Requests A and B that the ACLU submitted to the FBI.

Respectfully submitted,

CARMEN M. ORTIZ
United States Attorney

By: /s/ Jennifer A. Serafyn
Jennifer A. Serafyn
Assistant United States Attorney
United States Attorney's Office
John Joseph Moakley U.S. Courthouse
1 Courthouse Way, Suite 9200
Boston, MA 02210
(617) 748-3188
Jennifer.Serafyn@usdoj.gov

Dated: July 24, 2015

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants.

/s/ Jennifer A. Serafyn
Jennifer Serafyn
Assistant United States Attorney

Dated: July 24, 2015