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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff,

v.

DEPARTMENT OF JUSTICE,

Defendant.

Case No. CV 10-4982-RS

**DEFENDANT'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

**Judge: Hon. Richard Seeborg**
**Date: May 10, 2012**
**Place: Courtroom 3, 17th Floor**

TO PLAINTIFF AND ITS COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on May 10, 2012, or as soon thereafter as counsel may be heard by the Court, Defendant will, and hereby does, move the Court to grant Defendant's Motion for Summary Judgment. In this case under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, Defendant Department of Justice, and its components Criminal Division, Drug Enforcement Administration and Federal Bureau of Investigation, have adequately searched for and produced records in response to Plaintiff's FOIA requests that were not otherwise protected from disclosure under the FOIA. Accordingly, Defendant moves for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure. Attached in support of this motion are a Memorandum of Points and Authorities, the Declarations of Kristin L. Ellis of the Criminal Division, Katherine L. Myrick of the Drug Enforcement Administration, and David M. Hardy of the Federal Bureau of Investigation, as well as supporting exhibits, Vaughn indexes, and a Proposed Order.

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**
**SAN FRANCISCO DIVISION**

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| ELECTRONIC FRONTIER FOUNDATION,<br><br>Plaintiff,<br><br>vs.<br><br>DEPARTMENT OF JUSTICE,<br><br>Defendant. | Case No. 10-CV-4892-RS<br><br>**DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**<br><br>**Judge: Hon. Richard Seeborg**<br>**Date: May 10, 2012**<br>**Place: Courtroom 3, 17th Floor** |

## INTRODUCTION

Plaintiff Electronic Frontier Foundation ("EFF") has sued the Department of Justice's Criminal Division ("CRM"), Drug Enforcement Administration ("DEA"), and the Federal Bureau of Investigation ("FBI") under the Freedom of Information Act, 5 U.S.C. § 552, seeking the release of agency records relating to two separate FOIA requests. The first request was directed solely to the FBI and sought the production of records regarding the agency's "Going Dark" program. The second request was submitted to all three components and sought, *inter alia*, records concerning problems experienced by the components conducting electronic surveillance of communication systems such as Blackberry, Facebook, and peer-to-peer messaging services like Skype. Plaintiff brought suit seeking the release and expedited processing of these records. The components have now produced all responsive, non-exempt records. In total, the components identified approximately 3,700 pages of responsive materials to Plaintiff's FOIA requests, and released, in full or with redactions, 956 pages to Plaintiff.

Given the nature of Plaintiff's request seeking documents identifying problems and obstacles faced by Defendant in conducting lawful electronic surveillance, as well as the sensitive internal deliberations addressing these problems, many of the responsive records are, unsurprisingly, exempt from release under the FOIA. Specifically, the components have invoked Exemptions 1, 2, 3, 4, 5, 6, 7(A), 7(C), 7(D), and 7(E) to withhold materials either in full or part. As the component's declarations and Vaughn indices attached to this memorandum, as well as those declarations previously submitted in support of Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment, demonstrate, the components conducted an adequate search of agency records and produced all reasonably segregable, non-exempt records that were responsive to Plaintiff's FOIA requests. Accordingly, this Court should grant Defendant's Motion for Summary Judgment.

## BACKGROUND

### I. PLAINTIFF'S MAY 21, 2009 AND SEPTEMBER 28, 2010 FOIA REQUESTS.

There are two separate FOIA requests that are at issue in this case. The first was submitted to FBI on May 21, 2009 concerning the Bureau's Going Dark Program. *See* Exhibit A to Declaration of David M. Hardy ("First Hardy Decl.") (ECF No. 19-1). Specifically, Plaintiff requested documents from 2007 to the present concerning: (1) "[A]ll records that describe the Going Dark Program"; (2) "[A]ll Privacy Impact Assessments prepared for the Going Dark Program"; and (3) "[A]ll System of Records Notices ('SORNs') that discuss or describe the Going Dark Program." *Id.* at 2-3.

Plaintiff's second request, dated September 28, 2010, was directed to CRM, DEA and FBI seeking "all agency records created on or after January 1, 2006 (including, but not limited to, electronic records) discussing, concerning, or reflecting":

1. any problems, obstacles or limitations that hamper the DOJ's current ability to conduct surveillance on communications systems or networks including, but not limited to, encrypted services like Blackberry (RIM), social networking sites like Facebook, peer-to-peer messaging services like Skype, etc.;

2. any communications or discussions with the operators of communications systems or networks (including, but not limited to, those providing encrypted communications, social networking, and peer-to-peer messaging services), or with equipment manufacturers and vendors, concerning technical difficulties the DOJ has encountered in conducting authorized electronic surveillance;

3. any communications or discussions concerning technical difficulties the DOJ has encountered in obtaining assistance from non-U.S.-based operators of communications systems or networks, or with equipment manufacturers and vendors in the conduct of authorized electronic surveillance;

4. any communications or discussions with the operators of communications systems or networks, or with equipment manufacturers and vendors, concerning development and needs related to electronic communications surveillance-enabling technology;

5. any communications or discussions with foreign government representatives or trade groups about trade restrictions or import or export controls related to electronic communications surveillance-enabling technology;

6. any briefings, discussions, or other exchanges between DOJ officials and members of the Senate or House of Representatives concerning implementing a requirement for electronic communications surveillance-enabling technology, including, but not limited to, proposed amendments to the Communications Assistance for Law Enforcement Act (CALEA).

*See, e.g.*, Ex. 1 to Declaration of Kristin L. Ellis ("First Ellis Decl.") at 2 (ECF No. 19-2). Plaintiff sought expedited processing of this request, which was granted by FBI but denied by CRM and DEA. *See generally* Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment (ECF No. 19).

On October 28, 2010, Plaintiff brought suit against CRM, DEA and FBI, alleging that the components had wrongfully withheld agency records and seeking expedited processing of the materials. Comp. (ECF No. 1). On January 6, 2011, Plaintiff moved for partial summary judgment (ECF No. 16) seeking the expedited processing of these records. Defendant opposed the motion (ECF No. 19), and a hearing was held on February 17, 2011 (ECF No. 21). Following the hearing, the Court adopted the parties' proposed processing schedule and, as a result, denied Plaintiff's motion without prejudice. (ECF No. 27).

## II. STATUTORY OVERVIEW OF FOIA AND STANDARD OF REVIEW.

The FOIA represents a balance struck by Congress "'between the right of the public to know and the need of the Government to keep information in confidence.'" *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. 1497, 89th Cong., 2d Sess., 6 (1966)). While the FOIA generally requires agencies to search for and release documents responsive to a properly submitted request, the statute also recognizes "that public disclosure is not always in the public interest." *Baldrige v. Shapiro*, 455 U.S. 345, 352 (1982). Accordingly, the Act provides nine statutory exemptions to its general disclosure obligation. *See* 5 U.S.C. §§

552(a)(3), (b)(1)-(9). Although the nine exemptions should be "narrowly construed," *FBI v. Abramson*, 456 U.S. 615, 630 (1982), the Supreme Court has made clear that courts must give them "meaningful reach and application." *John Doe Agency*, 493 U.S. at 152.

Summary judgment is appropriate where 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(a). "As a general rule, all FOIA determinations should be resolved on summary judgment." *Lawyers' Comm. for Civil Rights of San Francisco Bay Area v. U.S. Dep't. of the Treasury*, 534 F. Supp. 2d 1126, 1131 (N.D. Cal. 2008). A court reviews an agency's response to a FOIA request *de novo*. 5 U.S.C. § 552(a)(4)(B).

## ARGUMENT

Defendant moves for summary judgment on the adequacy of the components' searches and because the components have released all reasonably segregable, non-exempt records that are responsive to Plaintiff's request.

### I. DEFENDANT CONDUCTED AN ADEQUATE SEARCH FOR RESPONSIVE RECORDS.

To prevail on summary judgment regarding the adequacy of its search, an agency must demonstrate that "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) (internal quotation marks omitted). "This showing may be made by 'reasonably detailed, nonconclusory affidavits submitted in good faith.'" *Id.* The affidavits "must describe what records were searched, by whom, and through what processes." *Lawyers' Comm.*, 534 F. Supp. 2d at 1131 (internal 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." *Id.* (internal quotation marks omitted). As discussed below, the searches

conducted in response to Plaintiff's FOIA requests were reasonably calculated to uncover all responsive documents and should be upheld.

**A. CRM's Search Was Adequate.**

As explained in the Second Declaration of Kristin L. Ellis ("Second Ellis Decl.") of CRM's Freedom of Information Act/Privacy Act ("FOIA/PA") Unit, (Ex. 1) CRM conducted systematic searches for information responsive to Plaintiff's September 28, 2011 FOIA request. Second Ellis Decl. ¶ 12. Beginning on October 6, 2010, agency personnel in CRM's FOIA/PA Unit familiar with the request identified the four offices within the Criminal Division most likely to possess responsive information and sent each office a search request that included a copy of Plaintiff's request. *Id*. ¶¶ 12-13.

Based on discussions with these four offices, CRM subsequently determined that other areas within the Criminal Division might possess potentially responsive information. *Id*. ¶ 16. As a result, all CRM employees were asked to search for responsive documents and were also instructed to report to CRM's FOIA/PA Unit if they believed they might have potentially responsive information in electronic form (i.e., in their email accounts or on their personal network drives). *Id*. ¶¶ 16-17. With the exception of several employees who conducted searches of their own electronic documents, CRM's Information Technology Management ("ITM") office conducted a search of employees' unsecured (i.e., non-classified) e-mail accounts and network drives using "key words" derived from Plaintiff's request in conjunction with the term "Going Dark."[1] *Id*. ¶¶ 18-19. CRM-ITM also used key words to search a shared network used by CRM's Computer Crime and Intellectual Property Section. *Id*. ¶ 19. In order to conduct these searches,

[1] Two employees who reported they likely possessed responsive information on their secured (i.e., classified) e-mail accounts were tasked with searching these classified accounts. *Id*. ¶ 18.

CRM-ITM restored the last full backup from three servers. *Id*. ¶ 18.

Limiting its search for records from January 1, 2006 to the day it began its search on October 16, 2010, *id*. ¶ 19, CRM initially located approximately 8,425 pages of potentially responsive information. *Id*. ¶ 20. Ultimately, however, after the materials were reviewed, very few of the pages turned out to be responsive. In five interim responses from April 2011 to August 2011, CRM completed processing of these records, releasing one page in full and 6 pages in part and withholding 51 pages in full. *Id*. ¶¶ 20-21; 24-29. According to Ms. Ellis of CRM's FOIA/PA Unit, because CRM "cast such a wide net in searching for information (by asking all CRM employees to search) and because the terms pertinent to this request commonly appear in CRM records relating to routine issues involving electronic surveillance [ ] unrelated to problems conducting such surveillance or to any other topic responsive to plaintiff's FOIA request, much of the information we located was either duplicative (*i.e.*, several employees had the same documents or were senders/recipients of the same e-mails) or not responsive." *Id*. ¶ 20.

CRM also located approximately 500 pages of potentially responsive information originating from, or of primary interest to other Federal agencies, and consistent with DOJ regulation, *see* 28 C.F.R. § 16.4(c), referred those records to the originating agencies for processing and a direct response to Plaintiff. *Id.* ¶¶ 68-71.

**B. DEA's Search Was Adequate.**

In response to Plaintiff's September 28, 2010, FOIA request, DEA's Freedom of Information/Records Management Section ("SARF") consulted with agency personnel with expertise and knowledge about the issues raised in Plaintiff's request to identify DEA offices and employees likely to possess responsive information. *See* Second Declaration of Katherine L. Myrick Drug Enforcement Administration ("Second Myrick Decl.") (Ex. 3) ¶ 5a. As a result of

this process, six DEA offices were identified, and on November 18, 2010,[2] these offices began searching for responsive records in both hard copy and electronic form. *Id*. ¶ 5a-b.

As part of an overlapping and complimentary search effort, three DEA employees who had worked on issues related to DEA's electronic surveillance capabilities were also tasked with searching for responsive records. *Id*. ¶ 6. In addition, DEA conducted key word searches of its "WebCims database," a document management and tracking system used to locate Congressional inquiries or correspondence, as well as its "CONG database," an internal electronic log of inquiries and tasks received from Congressional liaisons. *Id*. ¶ 5b.

In total, DEA identified 1036 pages of potentially responsive records, *id*. ¶ 8b, and 570 pages of potentially responsive materials originating from other agencies, which were referred out to those agencies for a direct response to Plaintiff. *Id*. ¶ 8b. DEA made its first interim release on or about April 1, 2011 and made its sixth and final release on or about September 1, 2011. *Id*. ¶ 8. In total, 179 pages were released in full, 63 pages were released in part with redactions, and 794 pages were withheld in full. *Id*. ¶ 9j.

**C. FBI's Searches Were Adequate.**

*Plaintiff's May 21, 2009 Going Dark Request.* After receiving this request for all Bureau records from 2007 to the present concerning the "Going Dark Program," the FBI conducted a search of its Central Records System ("CRS"). *See* First Hardy Decl. (ECF No. 19-1) ¶¶ 5, 7. The FBI maintains indices of subject matters that are held within its CRS, and entries on those indices generally fall into two categories: (1) "main" entries that describe a subject matter or the name of a file contained within the CRS; and (2) "reference" entries that reflect a reference to an individual, organization, or subject matter in another "main" file. *Id*. ¶ 7.

[2] Because DEA initiated its search on November 18, 2010, it used this date as the administrative "cut-off" for the search. Second Myrick Decl. ¶ 5 (citing 28 C.F.R. § 16.4(a)).

On May 26, 2009, FBI conducted a search of its CRS to identify information responsive to Plaintiff's request. *Id.* ¶ 33. The FBI subsequently determined that it was necessary to conduct a more individualized inquiry (outside of the CRS system) of certain FBI divisions and offices reasonably likely to have potentially responsive records. *Id.* ¶ 34. Accordingly, FBI's FOIA office sent an Electronic Communication ("EC") to personnel in these designated divisions who were requested to search for responsive records from January 1, 2007 through the administrative cut-off date of June 1, 2009, when FBI began its search. *Id.*

*Plaintiff's September 28, 2011 Request.* Given the breadth of the September 28, 2011 request, which as noted above was also directed to CRM and DEA, FBI determined that the request did not lend itself to a search of the CRS. First Hardy Decl. ¶ 38. Instead, as with Plaintiff's other request, FBI's FOIA unit identified divisions and offices likely to have responsive records and circulated an EC to those offices on November 8, 2010. *Id.* When additional FBI offices were subsequently identified as having potentially responsive material, a second EC was circulated on January 10, 2011. *Id.* Both EC's requested that personnel in the relevant divisions conduct a search for responsive documents in their possession from January 1, 2006 through the administrative cut-off date of November 8, 2010. *Id.*

Based on all the searches performed in response to Plaintiff's two FOIA requests, FBI identified a total of 2,662 responsive pages and produced 707 pages in full or part to Plaintiff. Second Hardy Decl. ¶ 258.

As seen above, the components conducted comprehensive searches for documents in both hard copy and electronic form that were potentially responsive to Plaintiff's FOIA requests. As set forth in further detail in the components' declarations, these searches met the components' obligations under the FOIA and should be upheld. *Lahr*, 569 F.3d at 986 (to prevail on summary judgment, agency must show "it has conducted a search reasonably calculated to uncover all

relevant documents") (internal quotation marks omitted); *Lawyers' Comm.*, 534 F. Supp. 2d at 1131 (agency demonstrates adequacy of its search by "'describ[ing] what records were searched, by whom, and through what processes.'").

## II. DEFENDANT'S WITHHOLDINGS ARE APPROPRIATE.

Under the FOIA, a document may be withheld or redacted "only if it falls within one of nine statutory exemptions to the [FOIA] disclosure requirement." *Kamman v. IRS*, 56 F.3d 46, 48 (9th Cir. 1995). Ordinarily, government agencies submit affidavits or declarations, commonly referred to as "Vaughn indexes," that identify the materials withheld and that contain a particularized explanation of the reasons for the withholdings. *See 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)). The declaration must offer "'reasonably detailed descriptions of the documents and [] facts sufficient to establish an exemption.'" *Kamman*, 56 F.3d at 48 (internal quotation marks omitted).

In this case, the components have provided declarations and Vaughn indexes detailing the records withheld, the FOIA exemptions claimed, and the reasons for the withholdings. *See* United States Department of Justice, Criminal Division Vaughn Index ("CRM's Vaughn Index") (Exhibit 2); DEA Vaughn Index (Ex. J to Second Myrick Decl.); FBI's Vaughn Index for Cardozo FOIA Releases ("FBI's Vaughn Index for Plaintiff's May 21, 2009 Request") (Ex. O to Second Hardy Decl.); FBI's Vaughn Index for Lynch FOIA Releases ("FBI's Vaughn Index for Plaintiff's September 28, 2010 Request") (Ex. P to Second Hardy Decl.) Because the number of responsive records ultimately identified by CRM was far smaller than the number of responsive records located by the other components, CRM's declaration and Vaughn index are organized by individual documents. Given the voluminous nature of the responsive materials identified by DEA and FBI, these components have grouped similar documents into like categories for ease of

analysis. DEA's and FBI's declarations and *Vaughn* indexes describe the pages that make up each category in detail and demonstrate that the exemptions at issue have been properly applied to the materials.

**A. Defendant Properly Withheld Documents Pursuant to Exemption 1.**

FBI and DEA have both withheld classified information pursuant to Exemption 1, which protects from disclosure matters that are "(1)(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order."[3] *Id*. (citing 5 U.S.C. § 552(b)(1)). In this case, the classified information was withheld pursuant to Executive Order 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009) (amended at 75 Fed. Reg. 1013). Information may be classified pursuant to this Executive Order if:

> (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 § 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.

Exec. Order No. 13,526 § 1.1(a). Several procedural requirements must also be met. *See id*. §§ 1.5, 1.7, 3.1, 3.3.[4]

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[3] FBI invoked Exemption 1 to withhold pages in the following categories: Category 1E (13 pages); 1F (6 pages); 2A (1 page); 2B (2 pages); 2D (13 pages); 2E (55 pages); 2F (9 pages); 2H (26 pages); and 2J (8 pages). *See* Second Hardy Decl. ¶¶ 113-116; 129-131; 137-140; 153-155; 172-175; 187-189; 204-206; 223-226; 249-251. DEA invoked Exemption 1 to withhold portions of an internal DEA summary of an interagency working group. DEA's Vaughn Index at 18 (61-62).

[4] Agency decisions to withhold classified information under the FOIA are reviewed *de novo* by the district court, and the agency bears the burden of proving its claim for exemption. *See* 5

In support of the application of Exemption 1 to the records withheld from FBI's production, FBI submits the Second Declaration of David M. Hardy, Section Chief of FBI's Record/Information Dissemination Section ("RIDS"), Records Management Division ("RMD") (Ex. 4). Because the document withheld by DEA pursuant to Exemption 1 was done to protect the Bureau's own information, DEA supports this withholding by submitting the Third Declaration of David M. Hardy ("Third Hardy Decl.") (Ex. K to Second Myrick Decl.).

For the Exemption 1 materials withheld from FBI's and DEA's productions, Mr. Hardy found that the records were classified in accordance with the mandated procedures set forth in Executive Order 13,526. Mr. Hardy — an original classification authority — personally reviewed the withheld information and determined that it was under the control of the United States Government, was classified, and required the classification marking of "Secret." Second Hardy Decl. ¶¶ 2, 28; Third Hardy Decl. ¶¶ 2, 9. Mr. Hardy made certain that all of the procedural and administrative requirements of the Executive Order were followed, including proper identification and marking of documents. Second Hardy Decl. ¶ 28; Third Hardy Decl. ¶ 9. Substantively, Mr. Hardy determined that the information was exempt from disclosure pursuant to Executive Order 13,526 because it falls within one or more of the categories in § 1.4 of the Order and that disclosure could cause serious harm to national security. Second Hardy Decl. ¶¶ 29-32; Third Hardy Decl. ¶¶ 10-11.

Specifically, Mr. Hardy determined that the information involves intelligence activities, sources, or methods, and/or relates to foreign relations or foreign activities of the United States, including confidential sources. *Id.*; *see* Exec. Order No. 13,526 § 1.4(c) (authorizing withholding

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U.S.C. § 552(a)(4)(B). Nevertheless, because classification authorities have "unique insights" into the adverse effects that might result from public disclosure of classified information, courts must accord "substantial weight" to an agency's affidavits justifying classification. *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).

of information that could reasonably be expected to cause identifiable or describable damage to national security that pertains to "intelligence activities (including covert action), intelligence sources or methods, or cryptology"); *id.* § 1.4(d) (authorizing withholding of information that could reasonably be expected to cause identifiable or describable damage to national security that pertains to "foreign relations or foreign activities of the United States, including confidential sources").

With respect to section 1.4(c) of Executive Order 13,526, the information withheld by FBI and DEA pursuant to Exemption 1 "consists of classified procedures and methods of intelligence-gathering utilized by the FBI to gather intelligence information." Second Hardy Decl. ¶¶ 115, 131, 139, 155, 174, 189, 206, 225; Third Hardy Decl. ¶ 10. Disclosure of this information would reveal these methods of intelligence gathering are currently used by the FBI to gather intelligence information, and could reasonably be expected to cause serious damage to the national security for the following reasons: (1) "disclosure would allow hostile entities to discover the current intelligence activities used; (2) disclosure would reveal or determine the criteria used — and priorities assigned to — current intelligence or counterintelligence investigations; (3) disclosure would reveal the Intelligence Community's (IC's) continual sensitive work creating a decentralized communication medium which would aid in facilitating the sharing of information and enhance collaboration efforts across the IC; and (4) disclosure will highlight the exact data collection and [electronic surveillance] capabilities shortfalls that the IC are encountering during National Security Investigations due to technology advancements in communication system platforms, and encryption applications." Second Hardy Decl. ¶¶ 115, 131, 139, 155, 174, 206, 225; Third Hardy Decl. ¶ 11. According to Mr. Hardy, the release of this information would allow hostile entities to "develop countermeasures which could severely disrupt the FBI's intelligence-gathering capabilities." *Id.*

In addition, pursuant to section 1.4(d) of Executive Order 13,526, some of the information withheld from FBI's production has been found by Mr. Hardy to "affect the foreign relations of the United States." *Id*. ¶¶ 116, 140, 175, 226. As Mr. Hardy explains, "[t]he delicate liaisons established between and among the United States and foreign governments could be severely damaged should the United States disclose such information from [foreign counterintelligence] investigations." *Id*.

For the reasons explained above, and as set forth more fully in the components' declarations and Vaughn indexes, Exemption 1 was properly asserted in this case. Exec. Order No. 13,526 § 1.4(c)-(d).

**B. Defendant Properly Withheld Records Pursuant to Exemption 3.**

DEA and FBI each withheld materials pursuant to Exemption 3, which applies to records that are "specifically exempted from disclosure by statute" provided the statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue," or alternatively, if the statute "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). In promulgating the 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 Baldrige*, 455 U.S. at 352-53; *Essential Info., Inc. v. U.S. Info. Agency*, 134 F.3d 1165, 1166 (D.C. Cir. 1998).

As FBI's and DEA's declarations and Vaughn indices make clear, these components properly withheld material in accordance with the "two-part inquiry [that] determines whether Exemption 3 applies to a given case." *Minier v. CIA*, 88 F.3d 796, 801 (9th Cir. 1996). Under this two-step process: "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*.

***1. DEA Properly Invoked Exemption 3.***

Pursuant to Exemption 3, DEA withheld portions of 10 pages containing information obtained from a Title III intercept. *See* DEA's Vaughn Index at 9 ("DEA Case Example Summaries, 2006 to Feb. 2010"); *id.* at 10 ("DEA Case Example Related Emails, May-Aug., 2010"); *id.* at 13 ("Information-Internal Briefing Material"); *id.* at 18 ("Case Examples Referred from DOJ-Criminal Division"); *id.* at 19 ("Coordination E-mails Referred by FBI"). Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510 *et seq.*, prohibits the release of information pertaining to the interception of wire, oral, or electronic communications except in circumstances that do not apply here. Because DEA is barred from disclosing this information to Plaintiff by statute, DEA properly invoked Exemption 3 to withhold the information. *See, e.g., Cottone v. Reno,* 193 F.3d 550, 554 (D.C. Cir. 1999) (holding that wiretapped recordings obtained pursuant to Title III are ordinarily exempt from disclosure under Exemption 3).

***2. FBI Properly Invoked Exemption 3.***

FBI also withheld information pursuant to Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510, *et seq*, pertaining to the interception of wire, oral, or electronic communications. Second Hardy Decl. ¶¶ 142, 191, 229 (Categories 2A, 2E, and 2H). In addition, as required by 18 U.S.C. § 3123(d), FBI properly withheld information that would reveal the existence or use of a pen register or trap and trace device, or that would reveal the existence of an investigation involving a pen register or trap and trace device. Second Hardy Decl. ¶¶ 143, 157, 177, 227 (Categories 2A, 2B, 2D, and 2H); *see also Manna v. U.S. Dep't of Justice*, 815 F. Supp. 798, 812 (D.N.J. 1993) (pen register materials protected pursuant to 18 U.S.C. § 3123(d) and Exemption 3).

As explained above, and for the additional reasons set forth in the components' declarations

and Vaughn indices, DEA and FBI properly withheld materials pursuant to Exemption 3.

**C. Defendant Properly Withheld Documents Pursuant to Exemption 4.**

FOIA authorizes withholding "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4) ("Exemption 4"). To withhold information under Exemption 4, the government agency must demonstrate that the materials in question contain "(1) commercial and financial information, (2) obtained from a person or by the government, (3) that is privileged or confidential." *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1112 (9th Cir.1994). Commercial or financial matters are "confidential" for purposes of this exemption if disclosure of the information is likely to have either of the following effects: "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.*

***1. DEA Properly Invoked Exemption 4.***

DEA withheld ten pages pursuant to Exemption 4 that were contained in communications between DEA and companies regarding specific problems experienced by DEA during intercept operations. Second Myrick Decl. ¶ 21b(2). As made clear by Ms. Myrick of DEA, these companies voluntarily provided information to DEA regarding their "internal operations" and "technical and product capabilities" that is not customarily released to the public. *Id*. Furthermore, each company articulated "the competitive harm that would result from the release of such internal, commercial information shared with DEA and made clear that release would adversely impact DEA's ability to obtain any such information in the future."[5] *Id*.

DEA also withheld 4 pages pursuant to Exemption 4 contained in summaries of meetings in

[5] Four of these pages are also exempt under Exemption 7D as they contain information supplied to DEA under an express, confidentiality agreement. *See infra.*

2008 and 2009 between DEA and specific carriers, service providers, and industry consultants. *Id.* ¶ 21c(2). The withheld pages include "detailed, technical information" from two companies concerning their "communication system capabilities" and contain information about the companies' "levels of investment in certain technologies, and corporate operational and budget constraints associated with implementing certain capabilities." *Id.* One company articulated the competitive harm that would result if the information was released and that doing so would prevent the company from voluntarily providing information to law enforcement in the future. *Id.* One company also expressed concern that the information it shared with DEA could be used by terrorists or criminal elements to the detriment of the company and DEA's operations. *Id.*

As the Second Myrick Declaration and DEA's Vaughn index demonstrate, the information withheld by DEA pursuant to Exemption 4 was confidential commercial information voluntarily provided by various companies. The release of this information would cause competitive harm to the companies and impair DEA's ability to receive such information in the future. Thus, the information was properly withheld under Exemption 4. *GC Micro Corp.*, 33 F.3d at 1112.

***2. FBI Properly Invoked Exemption 4.***

FBI withheld 39 pages pursuant to Exemption 4 to protect proprietary contractual information provided by an FBI contractor. Second Hardy Decl. ¶ 118; FBI's Cardozo Vaughn Index at 4. Specifically, the FBI applied Exemption 4 to a draft proposal describing the scope of work a company would perform on behalf of the "FBI Going Dark Initiative Electronic Surveillance Analyst Project." Second Hardy Decl. ¶ 118. The contractual documents contained cost projections associated with implementing the project and, as Mr. Hardy explains, the release of this information "would impair the FBI's ability to obtain similar products or services from this, and other contractors in the future." *Id.* Accordingly, the information was properly withheld under Exemption 4. *GC Micro Corp.*, 33 F.3d at 1112.

**D. Defendant Properly Withheld Documents Pursuant to Exemption 5.**

FOIA exempts from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) ("Exemption 5"). In short, Exemption 5 permits agencies to withhold privileged information, including materials protected by the deliberative process, attorney client and attorney work product privileges. *See, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997).

The deliberative process privilege applies to "decisionmaking of executive officials generally," and protects documents containing deliberations that are part of the process by which governmental decisions are formulated. *In re Sealed Case*, 121 F.3d 729, 737, 745 (D.C. Cir. 1997). As the Supreme Court has explained:

> The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government.

*Dep't of the Interior v. Klamath Water Users Protective. Ass'n*, 532 U.S. 1, 8-9 (2001) (internal quotation marks and citations omitted). The privilege "rests on the policy of protecting the decision making processes of government agencies . . . with the ultimate purpose being to prevent injury to the quality of agency decisions." *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1113 (D.C. Cir. 2004) (internal quotation marks, alteration and citation omitted).

A document may be withheld on the basis of the deliberative process privilege if it is both pre-decisional and deliberative. *Nat'l Wildlife Federation v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988). A document is "predecisional" if it is "generated before the adoption of an agency policy," and "deliberative" if it "reflects the give-and-take of the consultative process."

*Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The privilege "thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Id.*

The attorney-client privilege exists to "protect a client's confidences to her attorney so that the client may have uninhibited confidence in the inviolability of her relationship with her attorney." *Nat'l Res. Def. Council v. U.S. Dept. of Def.*, 388 F. Supp. 2d 1086, 1099 (C.D. Cal. 2005) (internal quotation marks omitted). To withhold a document under Exemption 5 pursuant to the attorney-client privilege, "an agency must demonstrate that the document it seeks to withhold (1) involves confidential communications between an attorney and his client and (2) relates to a legal matter for which the client has sought professional advice." *Id.* (internal quotation marks omitted).

The attorney work product doctrine protects materials prepared by an attorney in anticipation of litigation, including the materials of government attorneys generated in litigation and pre-litigation counseling. *See* Fed. R. Civ. P. 26(b)(3); *In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management)*, 357 F.3d 900, 907 (9th Cir. 2004).

***1. CRM Properly Invoked Exemption 5.***

CRM relied on the attorney work product privilege to withhold e-mails containing discussions among Department attorneys in relation to on-going cases that are still under investigation or have proceeded to prosecution. Second Ellis Decl. ¶ 42. CRM concluded that these messages were sent in anticipation and/or in furtherance of litigation, *id.*, and therefore properly invoked the attorney work product privilege as a basis to withhold these materials.

With respect to the remaining materials to which Exemption 5 applies, CRM invoked the deliberative process privilege. CRM found that the following materials were both pre-decisional

and deliberative:

***Development of Proposed Legislation to Fix the "Going Dark" Problem.*** CRM applied the deliberative process privilege to draft documents created during deliberations within the Criminal Division about how to address the "Going Dark" problem, and, in particular, whether the problem could be fixed through legislation. Second Ellis Decl. ¶ 46.

***Preliminary and Draft Resource Requests to Address the "Going Dark" Problem.*** CRM relied on the deliberative process privilege to withhold a preliminary request for resources by the Child Exploitation and Obscenity Section (CEOS) to combat the "Going Dark" problem, as well as subsequent draft requests prepared by CRM-CEOS to request additional resources. *Id.* ¶ 47. All of these requests for resources are predecisional because they were compiled to be submitted to CRM's Office of Administration (ADMIN), which would then make the decision about additional resources. *Id.* These requests are also deliberative. The drafts represent the views of the employees about what additional resources would be needed by CRM-CEOS to combat the "Going Dark" problem. *Id.*

***Draft Responses to a Proposed Digital Due Process Initiative***. CRM relied on the deliberative process privilege to withhold draft responses prepared by an office in CRM reflecting its views about how the Division should respond to an initiative proposed by the Digital Due Process (DDP) organization to limit law enforcement access to electronic evidence. *Id.* ¶ *48.*

***Draft Chapter of "Transnational Crime Threats" Document.*** CRM withheld a portion of a draft chapter from a document entitled "Transnational Crime Threats" pursuant to the deliberative process privilege. *Id.* ¶ 49. This draft was circulated by the author for comments, and as such, it reflected the preliminary views of the employee who authored it. *Id.*

***E-mails Related to Preparing Attorney General Briefing Materials.*** CRM withheld portions of two e-mails in which an Assistant Deputy Chief provided her input about the "Going

Dark" issue for inclusion in briefing materials being prepared for the Attorney General in connection with a ministerial meeting between the United States and the European Union. *Id.* ¶ *50.* This information reflected the over-arching policy debate within the U.S. Government about the "Going Dark" issue, as well as Ms. Shave's deliberative process of selecting and suggesting information for briefing to the Attorney General. *Id.*

***Internal Briefing Document.*** CRM withheld an e-mail in which a Deputy Chief briefed his Chief about a variety of issues, expressing his opinions about a briefing for an ambassador on the subject of accessing electronic communications on a particular carrier's system. *Id.* ¶ *51.* CRM concluded this information was predecisional because it reflected the views and opinions of a lower-level official about briefing an ambassador, and deliberative because the Deputy Chief was not the final decision-maker and his views and opinions were merely part of the process by which the final decision would be made. *Id.*

As seen above, and for the additional reasons provided in CRM's declaration and *Vaughn* index, all of the documents withheld by CRM pursuant to the deliberative process privilege were predecisional and deliberative. Furthermore, "[r]eleasing these documents would expose employees' candid views and opinions, which do not represent agency policy, to public scrutiny. Such disclosure would have a chilling effect on those employees' participation in the deliberations." *See, e.g., id*. ¶ 46. For these reaons, CRM properly withheld these materials pursuant to Exemption 5.

***2. DEA Properly Invoked Exemption 5.***

DEA applied Exemption 5 to 461 pages of draft documents and emails that either forward draft material or provide additional comments, recommendations, or suggested edits to the draft documents to which they pertain. Second Myrick Decl. ¶ 9.b. Many of the draft documents within the processing categories are replete with edits, strikethroughs, comments and questions. *Id. See,*

*e.g.*, *Coastal States*, 617 F.2d at 866 (explaining that deliberative process privilege "covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Id.* As Ms. Myrick explains, "[d]isclosure [of these materials] would have a profound chilling effect across all DEA decision-making processes as agency personnel would be less inclined to produce and circulate drafts for consideration and comment." *Id.*

DEA also invoked the deliberative process privilege throughout the processing categories to records identified as "Talking Points" or "Discussion or Issue Papers." *Id.* ¶ 9c. Talking points or discussion papers are routinely used within DEA to prepare agency personnel for interaction with Congress, other agencies, and private individuals or companies. *Id.* These papers are inherently predecisional as they are preparatory in nature and do not reflect final agency actions as the officials or working groups relying on the papers may disregard or modify these advisory papers in full or in part. *Id.* They are also deliberative and provide the opinions, suggestions, recommendations, and analysis of the subordinate employees or working group participants who draft them. *Id.*

Given the large number of documents to which DEA invoked Exemption 5, Defendant respectfully refers the Court to the extensive category-by-category discussion in the Second Declaration of Ms. Myrick and DEA's *Vaughn* Index, which further demonstrate that DEA properly applied Exemption 5 to these materials.

***3. FBI Properly Invoked Exemption 5.***

The FBI's Exemption 5, deliberative process withholdings were applied throughout the categories to materials containing "an internal, on-going dialogue among and between FBI and DOJ personnel with regard to the FBI's development of the 'Going Dark Initiative.'" Second Hardy Decl. ¶ 47. "This dialogue is both (a) 'predecisional' — antecedent to the adoption of

agency policy, and (b) 'deliberative' — the numerous talking points, discussion papers, presentations, and/or e-mail trails and exchanges reflect a continuous set of deliberations, including the give and take of the consultative process, with regard to the shaping and evaluation of the FBI's policies and program development." *Id*. In addition, the "release of the redacted information is likely to chill full, frank, and open internal discussions — a chilling effect which is all the more dangerous given the important national security interest at stake — the prevention of the FBI from 'Going Dark' on its lawful use of intercept capabilities in both counterterrorism and counterintelligence investigations." *Id.* ¶ 48.

FBI also properly invoked Exemption 5 to protect communications between FBI attorneys and their clients covered by the attorney-client privilege. *See id.* ¶ 49.

As with DEA, given the large number of documents to which FBI invoked Exemption 5, Defendant respectfully refers the Court to the category-by-category discussion of these materials in the Second Hardy Declaration and FBI's *Vaughn* indexes to further demonstrate that FBI has properly invoked Exemption 5 in this case.

**E. Defendant Properly Withheld Documents Pursuant to 7.**

FOIA protects from mandatory disclosure "records or information compiled for law enforcement purposes" where it can reasonably be expected to result in one of the enumerated harms listed in the statute. 5 U.S.C. § 552(b)(7). As a threshold matter, an agency must show that the materials in question have been "compiled for law enforcement purposes." *Id.* Where, as here, the agency has a "clear law enforcement mandate," it "need only establish a rational nexus between enforcement of a federal law and the document for which [a law enforcement] exemption is claimed." *Rosenfeld v. U.S. Dept. of Justice*, 57 F.3d 803, 808 (9th Cir. 1995) (internal quotation marks omitted).

There is no doubt that CRM, DEA and FBI each have a clear law enforcement mandate. *Id.*

("The releasing agency in this case, the Federal Bureau of Investigation, has a clear law enforcement mandate."); *see also United States v. Harris*, 165 F.3d 1277, 1281 (9th Cir. 1999) (discussing the Criminal Division's law enforcement efforts related to firearms violations); *In re Persico*, 522 F.2d 41, 50 (2d Cir. 1975) (recognizing the Criminal Division's law enforcement purpose as it relates to prosecuting organized criminal activity); *Manna v. Dep't of Justice*, 832 F. Supp. 866, 875 (D.N.J. 1993) (noting that "DEA, as the federal agency charged with the primary responsibility for enforcing federal drug laws, clearly has the requisite criminal law enforcement mandate").

Furthermore, the records at issue here were compiled for law enforcement purposes. In the case of CRM, the e-mails and documents withheld pursuant to Exemption 7 reflected problems conducting lawful electronic surveillance and were either collected during criminal investigations, or were re-compilations of information originally compiled during such investigations. Second Ellis Decl. ¶¶ 35, 39. *Abramson*, 456 U.S. at 631-32 (law enforcement information retains Exemption 7 protection even if re-compiled for other purposes.)

Similarly, all the records to which DEA applied Exemption 7 were compiled for law enforcement purposes. These records either "(1) relate to, discuss, or summarize actual DEA criminal cases, or (2) they relate to or discuss . . . the substantive issue of DEA's ability or inability to conduct criminal investigations by electronic intercept." Second Myrick Decl. ¶ 9.d.

The records withheld by FBI pursuant to Exemption 7 were also compiled for law enforcement purposes. Second Hardy Decl. ¶ 51. These materials involve "identifying, analyzing, and reviewing technical, legal, policy, and resource impediments to the FBI's electronic intercept operations, and its development of a five-prong strategic approach to address an identified lawful intercept capability gap." *Id.* ¶ 54. FBI concluded that "[t]he intelligence information discussed in these documents, as well as the investigation of potential violations of federal law, fall squarely

within the law enforcement duties of the FBI." *Id*.

With the threshold requirement of Exemption 7 met, Defendant next addresses the specific uses of Exemption 7 that were applied to the records in this case.

***1. Defendant Properly Withheld Materials Under Exemption 7(A).***

Exemption 7(A) authorizes the withholding of information "compiled for law enforcement purposes" where release "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). For Exemption 7(A) withholdings, the government must show that the records (1) relate to "a law enforcement proceeding [that] is pending or prospective[,]" and that (2) "release of the information could reasonably be expected to cause some articulable harm." *Manna*, 51 F.3d at 1164. Exemption 7(A) "does not require a presently pending 'enforcement proceeding.' Rather, . . . it is sufficient that the government's ongoing [] investigation is likely to lead to such proceedings." *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 926 (D.C. Cir. 2003). As courts have recognized, "[t]he principal purpose of Exemption 7(A) is to prevent disclosures which might prematurely reveal the government's . . . focus of its investigations, and thereby enable suspects to establish defenses or fraudulent alibis or to destroy or alter evidence." *Maydak v. U.S. Dep't of Justice*, 218 F.3d 760, 762 (D.C. Cir. 2000). As seen below, the information withheld by Defendant pursuant to Exemption 7(A) is precisely that type of information.

***a. CRM Properly Invoked Exemption 7(A).***

CRM relied on Exemption 7(A) to withhold information from an internal document prepared by CRM's Narcotics and Dangerous Drugs Section providing investigative and operational examples of how drug cartels were using technology to circumvent law enforcement efforts to conduct electronic surveillance. *See* Second Ellis Decl. ¶ 61 (discussing CRM-000015 to CRM-000019); CRM Vaughn Index at 3. According to Ms. Ellis of the Criminal Division, release

of this document, which contains "information about surveillance and undercover activities and about witnesses/cooperators, targets, and other individuals mentioned in relation to those investigations could adversely impact on-going and prospective enforcement proceedings." *Id.* ¶ 65. For instance, among other things, the release of such information could prejudice the testimony of witnesses in "the pending investigation and resulting prosecutions." *Id.* Accordingly, this information was properly withheld under Exemption 7A.

***b. DEA Properly Invoked Exemption 7(A).***

DEA applied Exemption 7A to withhold 112 pages of information that "either summarizes, discusses, or relates to DEA criminal cases which remain in an open or active status." Second Myrick Decl. ¶ 9e; *see also* DEA's Vaughn Index at 3, 9-10, 12-19. DEA confirmed that these cases were "under active investigation" or "remained open pending completion of ongoing or pending prosecutions" by either querying DEA's case database or by directly contacting DEA field agents. Second Myrick Decl. ¶ 9e. According to Ms. Myrick, the release of this information would interfere with enforcement proceedings because it "would reveal the scope, direction, and nature of the investigations as well as reveal information that could harm prospective and/or ongoing government prosecutions in these matters." *Id.* "If the information is released, the individuals and/or entities, who are of investigative interest in the cases could use the information to develop alibis or intimidate, harass or harm potential witnesses." *Id.* Consequently, this information was properly withheld under Exemption 7A.

***c. FBI Properly Invoked Exemption 7(A).***

The FBI applied Exemption 7A "to protect information that either summarize[s], discuss[es], or relate[s] to FBI criminal cases which remain in an open or active status." Second Hardy Decl. ¶ 149; FBI's Lynch Vaughn Index at 3-4, 7. According to the FBI, the release of this information "could harm prospective and/or ongoing government prosecutions in these matters."

*Id*. Therefore, FBI properly withheld this information pursuant to Exemption 7A.

***2. Defendant Properly Withheld Materials Pursuant to Exemption 7(C), In Conjunction With Exemption 6.***

The components relied upon Exemption 7(C), as well as Exemption 6, to withhold names and other identifying information of various individuals contained in the responsive records. Exemption 7(C) shields "records or information compiled for law enforcement purposes" that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(c). Similarly, Exemption 6 permits the government to withhold information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); *see also U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599–600 (1982) ("[T]he primary concern of Congress in drafting Exemption 6 was to provide for the confidentiality of personal matters.").

For either exemption, after the agency has demonstrated that a personal privacy interest is threatened by a requested disclosure, the burden shifts to the plaintiff to show there is a public interest in disclosure of the information. *See Lahr*, 569 F.3d at 973. The Supreme Court has made clear that "the only relevant public interest in the FOIA balancing analysis" under Exemptions 6 and 7(C) 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.'" *U.S. Dep't of Def. v. FLRA*, 510 U.S. 487, 497 (1994) (quoting *Reporters Comm.*, 489 U.S. at 773). If such an interest is established, the court then balances this public interest against the harm that would result to the individual's privacy interests if the information were disclosed. [2]

[2] The balancing analyses required by Exemption 6 and Exemption 7(c) are similar but not identical:

> Exemption 7(C)'s privacy language is broader than the comparable language in Exemption 6 in two respects. First, whereas Exemption 6 requires that the invasion of privacy be

*Id*.

***a. CRM Properly Invoked Exemption 6 and 7(C).***

CRM invoked Exemptions 6 and Exemption 7(C) to withhold "the names, contact information, and/or other personally-identifying information of non-senior level CRM employees, as well as FBI, DEA, ATF, and State Department employees and foreign law enforcement officers from the Netherlands." Second Ellis Decl. ¶ 55. In addition, CRM withheld "the name and/or contact information of other third-parties mentioned in the responsive records, including a technical representative of a telecommunications company, the victim of a death threat, and targets, witnesses, and confidential sources in several criminal investigations of drug cartels." *Id*.

CRM determined that the individuals whose information was withheld have cognizable privacy interests in protecting such information. *Id*. ¶ 59. According to Ms. Ellis, "public disclosure of this information could subject these individuals to unwarranted attention or harassment in the performance of their duties." *Id*. In addition, "employees involved in criminal law enforcement investigations, especially law enforcement agents, could also face physical harm if their identities are disclosed." *Id*. CRM further concluded that there is no significant public interest in this information and that, as a result, disclosure would be unwarranted. *Id*. ¶ 60.

***b. DEA Properly Invoked Exemption 6 and 7(C).***

DEA invoked Exemptions 6 and Exemption 7(C) to withhold four different groups of names. The first group contained "the names or identities, e-mail addresses, and phone numbers of

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> 'clearly unwarranted,' the adverb 'clearly' is omitted from Exemption 7(c). . . . Second, whereas Exemption 6 refers to disclosures that 'would constitute' an invasion of privacy, Exemption 7(c) encompasses any disclosure that 'could reasonably be expected to constitute' such an invasion. . . . Thus, the standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files.

*DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989).

DEA Special Agents and other DEA, DOJ, and federal agency personnel." Second Myrick Decl. ¶ 9e. The names of DEA Executive-level or publicly known personnel, however, were released. *Id.* ¶ 9e n.8. The second group contained "the names, alias identities, and other personally identifying information (phone numbers, email addresses, user account information, images) of investigative targets, co-conspirators, criminal associates, and other third parties identified in the investigative context." *Id.* ¶ 9e. The third category contained "individual confidential source identities," and the fourth contained "the names, contact, or other identifying information of individuals (primarily personnel of third-party companies)" who cooperated with DEA regarding intercept issues or were otherwise identified in investigative records. *Id.*

Employing the balancing test of Exemption 6 and 7, DEA found that the individuals identified in each of the four groups have cognizable privacy interests. *Id.* ¶ 9e(2). Next, DEA determined that there is no public interest in the disclosure of this information because it does not provide "insight into DEA's performance of its statutory duties." *Id.* *FLRA*, 510 U.S. at 497. Accordingly, DEA correctly found that the individual privacy interests in question outweighed any discernible public interest in the disclosure of this information. *Id.*

***c. FBI Properly Invoked Exemption 6 and 7(C).***

FBI invoked Exemption 6 and 7(C) to withhold the names and identifying information of FBI employees, other Federal Government personnel, local and state law enforcement officers, FBI contractors, and officers of a Foreign Intelligence Agency. Second Hardy Decl. ¶ 56. FBI also invoked these exemptions to withhold the names and identifying information of various third parties, including persons of investigative interest to the FBI, individuals who provided information to FBI, and employees in the communication industry. *Id.* FBI determined that these individuals have cognizable privacy interests in protecting their information and then balanced these interests against what it found was no discernible public interest in the release of the information given that

the information does not shed light on the activities of the FBI.[6] *Id.* ¶¶ 56-72.

As seen above, and for the additional reasons set forth in the components' declarations and Vaughn indexes, the components properly concluded that disclosure of the names and other identifying information discussed above would constitute an unwarranted invasion of personal privacy under Exemption 6, or, in the alternative, could reasonably be expected to constitute an unwarranted invasion of personal privacy under Exemption 7(C). As a result, the information was properly withheld.

***3. Defendant Properly Withheld Materials Pursuant to Exemption 7(D).***

Exemption 7(D) permits the withholding of information in law enforcement records that "could reasonably be expected to disclose the identity of a confidential source[.]" 5 U.S.C. § 552(b)(7)(D). Exemption 7(D) also protects information "furnished by a confidential source" if it was "compiled by [a] criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security investigation[.]" *Id.* Unlike 7(c), Exemption 7(D) requires no balancing of public and private interests. *See McDonnell v. United States*, 4 F.3d 1227, 1257 (3d Cir. 1993). Instead, Exemption 7(D) applies if the agency establishes that a source has provided information under either an express or implied promise of confidentiality. *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 12 (1993). When an agency claims a source provided

[6] Exemption 2 exempts from disclosure information "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). In this case, FBI properly asserted Exemption 2, in conjunction with Exemptions 6 and 7(C) to protect the internal, non-public telephone numbers of FBI employees. *See, e.g., Truesdale v. U.S. Dep't of Justice*, No. 03-1332, 2005 WL 3294004 at *5 (D.D.C. Dec. 5, 2005) (upholding use of Exemption 2 to withhold telephone and facsimile numbers of FBI offices and special agents); *Edmonds v. Federal Bureau of Investigation*, 272 F. Supp. 2d 35, 51 (D.D.C. 2003) (Huvelle, J.) (same). While FBI originally asserted "High 2", in conjunction with Exemption 7(E), to protect records relating to investigative techniques and procedures, in light of the Supreme Court's recent decision in *Milner v. Dep't of the Navy*, 131 S. Ct. 1259 (2011), which eliminated the distinction between so-called "Low 2" and "High 2," the FBI has decided it will no longer continue to assert Exemption 2 for such information and instead, as discussed below, relies on Exemption 7(E) for these materials. Second Hardy Decl. ¶ 34.

information under an express assurance of confidentiality, the agency must "come forward with probative evidence that the source did in fact receive an express grant of confidentiality[.]" *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1061-62 (3d Cir. 1995). For assertions of implied promises of confidentiality, the agency must "describe circumstances that can provide a basis for inferring confidentiality." *Id*. at 1063.

***a. CRM Properly Invoked Exemption 7(D).***

CRM applied Exemption 7(D), in conjunction with Exemptions 7(A) and 7(F), to withhold information from an internal document prepared by CRM's Narcotics and Dangerous Drug Section. Second Ellis Decl. ¶ 61. Exemption 7D was applied because the document provides information about three confidential sources participating in drug cartel investigations and refers to information provided by these sources to law enforcement during criminal investigations. *Id*. ¶ 66. According to Ms. Ellis of the Criminal Division, under these circumstances, "there is at least an implied assurance of confidentiality to these individuals who were working with law enforcement to bring down significant domestic and international drug traffickers, one of whom severely injured a law enforcement official." *Id*; *see Mays v. Drug Enforcement Admin.*, 234 F.3d 1324, 1331 (D.C. Cir. 2000) (holding that there is "no doubt that a source of information about a conspiracy to distribute cocaine typically faces a sufficient threat of retaliation that the information he provides should be treated as implicitly confidential").

***b. DEA Properly Invoked Exemption 7(D).***

DEA applied Exemption 7(D) to withhold information that identifies, relates to, or was provided by confidential sources in connection with DEA criminal investigations under an express or implied promise of confidentiality. *See* Second Myrick Decl. ¶¶ 9f; 18. In certain instances, there was an express promise of confidentiality because the individuals signed a written agreement with DEA assuring them that their identities would remain confidential. *Id*. ¶ 9f(1). A private

institution also furnished information to DEA on a confidential basis under a non-disclosure agreement. *Id*. Where DEA was unable to determine that an express promise of confidentiality had been made, it concluded, as set forth in more detail in the Second Myrick Declaration and DEA's *Vaughn* index, that there was an implied promise of confidentiality based on factors such as the crime under investigation and the source's relation to the crime as well as numerous references to individuals as "confidential sources." *Id.* ¶ 9f(2); *see also* DEA *Vaughn* Index at 3, 9-10, 12, 14, 17-19.

***c. FBI Properly Invoked Exemption 7(D).***

FBI invoked Exemption 7(D), at times in conjunction with Exemption 1, to withhold information provided to it by a foreign government regarding on-going investigations under an express assurance of confidentiality. *Id*. ¶ 125. In addition, FBI invoked Exemption 7(D), again at times in conjunction with Exemption 1, to withhold information provided by companies to FBI pertaining to the subjects of criminal investigations. *Id*. ¶ 77. According to Mr. Hardy, to disclose the fact that these companies provided information to the FBI during the course of an investigation could harm the commercial interests of these enterprises by potentially deterring the public from employing their services. *Id*. Under these circumstances, FBI determined that an implied assurance of confidentiality had been given to the companies to protect the information they shared with FBI. *See id*.

***4. Defendant Properly Withheld Materials Pursuant To Exemption 7(E).***

Exemption 7(E) protects from disclosure "records or information compiled for law enforcement purposes" where release of such information "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). This exemption is comprised of two

clauses: the first relates to law enforcement "techniques or procedures," and the second relates to "guidelines for law enforcement investigations or prosecutions." The latter category of information may be withheld only if "disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). No such showing of harm is required for the withholding of law enforcement "techniques or procedures"; these materials receive categorical protection from disclosure. *See Smith v. Bureau of Alcohol, Tobacco & Firearms*, 977 F. Supp. 496, 501 (D.D.C. 1997) (citing *Fisher v. U.S. Dep't of Justice*, 772 F.Supp. 7, 12 n.9 (D.D.C. 1991), *aff'd*, 968 F.2d 92 (D.C. Cir. 1992)).

***a. CRM Properly Invoked Exemption 7(E).***

As explained by Ms. Ellis of the Criminal Division, "Plaintiff's request, by its very terms, seeks information that would detail how to evade lawful electronic surveillance by law enforcement." Second Ellis Decl. ¶ 38. Unsurprisingly, then, "the responsive information CRM located is replete with Exemption 7(E) material that implicitly or explicitly reveals the parameters of the Department's surveillance techniques and guidelines; details the difficulties, vulnerabilities, and/or technical limitations of conducting such surveillance on specific carriers/service providers or on specific devices." *Id.* ¶ 39.

For these reasons, Ms. Ellis explains that "release of this information would provide a detailed road map that would permit criminals to evade lawful electronic surveillance by law enforcement and thwart investigative efforts, thus posing a real and significant threat of circumvention of the law." Second Ellis Decl. ¶ 39. Moreover, this information details "the use and limitations of electronic surveillance, implicates law enforcement techniques and guidelines that are not well-known to the public and that, if disclosed, would risk circumvention of the law." *Id.* Consequently, CRM properly applied Exemption 7(E) to withhold such information. 5 U.S.C. § 552(b)(7)(E).

***b. DEA Properly Invoked Exemption 7(E).***

As Ms. Myrick of DEA explains, "Exemption 7(E) applies in full or in part to nearly every responsive page" given that these materials contain "information regarding the employment of specific surveillance techniques, the procedures employed by DEA, DOJ and other law enforcement agencies for the conduct of such surveillance; the difficulties, vulnerabilities, and/or limitations of conducting such surveillance . . . and the exploitation of such vulnerabilities or limitations by criminal elements and international drug trafficking organizations." Second Myrick Decl. ¶ 9g. "The responsive pages also include guidance on how to conduct investigations of communication systems or networks to work around intercept difficulties and/or how to employ countermeasures to intercept evasion practices employed by criminal elements." *Id*. According to Ms. Myrick, if this information were released, "[c]riminal elements would gain valuable insight about the conduct of law enforcement surveillance operations and the exploitation of capability weaknesses." *Id.* For these reasons, and those set forth in the Second Declaration of Ms. Myrick and DEA's Vaughn index, DEA properly withheld this information pursuant to Exemption 7(E).

***c. FBI Properly Invoked Exemption 7(E).***

FBI applied Exemption 7(E) in full or part to 1,650 pages out of the total 2,662 pages that were responsive to Plaintiff's request. Second Hardy Decl. ¶ 83. According to Mr. Hardy of the FBI, "the release of this detailed information about surveillance techniques and associated problems or vulnerabilities . . . would enable [criminal elements] to structure their . . . communications in a manner to evade lawful intercept and/or thwart investigative efforts." Second Hardy Decl. ¶ 84. For these reasons, and those set forth in the Second Hardy Declaration and FBI's *Vaughn* indexes, FBI has properly withheld this information pursuant to Exemption (b)(7)(E).

**III. Defendant Has Released All Reasonably Segregable Information.**

As required by the FOIA, CRM, DEA and FBI have provided all "reasonably segregable" responsive information that is not protected by an exemption. 5 U.S.C. § 552(b). *See* Second Ellis Decl. ¶ 30 ("CRM conducted an exacting, line-by-line review of the records located during our wide-ranging search to identify any non-exempt information that could reasonably be segregated and released without adversely affecting the Government's legitimate law enforcement interests."); Second Myrick Decl. ¶ 9j (stating that "[a]ll responsive pages were examined to determine whether any reasonably segregable information could be released"); Second Hardy Decl. ¶ 22 (stating that "FBI has taken all reasonable efforts to ensure that no segregable, nonexempt portions were withheld from plaintiff.").[7]

**CONCLUSION**

For the reasons stated above, Defendant respectfully requests that the Court grant its Motion for Summary Judgment.

Dated: March 1, 2012

Respectfully Submitted,

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[7] The Court has authorized the parties to file motions for summary judgment not to exceed 35 pages. (ECF No. 38).

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 1, 2012, I caused a copy of the foregoing to be served on counsel for Plaintiff via the Court's ECF system.

*/s/ Nicholas Cartier*
NICHOLAS CARTIER