

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

CHELSEA MANNING,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE and the
FEDERAL BUREAU OF INVESTIGATION,

Defendants.

Case No. 1:15-cv-01654-APM

**DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY
JUDGMENT**

Defendants U.S. Department of Justice and the Federal Bureau of Investigation ("FBI"), through the undersigned counsel, respectfully submit this reply in support of their motion for summary judgment (ECF No. 12) and in opposition to Plaintiff's cross-motion for summary judgment (ECF No. 14).

Dated: May 19, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

CHANNING D. PHILLIPS
United States Attorney

ELIZABETH J. SHAPIRO
Deputy Branch Director
Federal Programs Branch

/s/ Aimee W. Brown
AIMEE W. BROWN (IL Bar No. 6316922)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.

Washington, D.C. 20530
Telephone: (202) 305-0845
Fax: (202) 616-8470
Email: aimee.w.brown@usdoj.gov

Counsel for Defendants

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INTRODUCTION

Plaintiff Chelsea Manning's FOIA request sought all records involving the FBI's investigation of herself and any alleged civilian co-conspirators related to the disclosures of classified and sensitive information by Manning. In responding to her request, the FBI made clear that it was withholding all documents because they are part of an active, ongoing investigation into the disclosure of classified documents. The FBI's opening brief and accompanying declaration in this case reaffirmed that its investigation continues to this day and explained the harms that would result from disclosure of any of the records responsive to Manning's request. Despite these representations, Manning's Opposition and Cross-Motion for Summary Judgment evinces several misunderstandings as to the nature of the FBI's investigation and the records at issue. In an attempt to provide further clarity, the FBI now submits a second declaration to address the incorrect assumptions on which Manning has based her arguments.

As further explained below and within the attached declaration, the FBI's ongoing investigation is focused on any civilian involvement in Manning's leak of classified records published on WikiLeaks, and not on an investigation of Manning herself. Because of Manning's involvement in the leaks, there is information about her located in the FBI's pending files. Nevertheless, any information about Manning in the records is inextricably intertwined with its ongoing investigation of civilian involvement. Disclosure of these documents would harm the FBI's investigative efforts and any potential enforcement proceedings. The FBI has explained in detail the harms that would arise from each type of document that it has placed in functional categories, as permitted by this court. Moreover, the FBI has conducted a document-by-document review of the records it is withholding and has concluded that there is no reasonably

segregable material that it can disclose. Thus, the FBI has fulfilled its obligations under FOIA and the Court should grant its motion for summary judgment.

ARGUMENT

I. THE FBI IS ENTITLED TO SUMMARY JUDGMENT ON THE ADEQUACY OF ITS SEARCH

In their motion for summary judgment, Defendants explained that the search conducted by FBI was adequate and submitted a detailed declaration explaining the scope of the search, the search terms used, and the basis for the FBI's belief that its search would reasonably be expected to locate any responsive documents. *See* Defs.' Mot. 6–8. In her response, Manning has not mounted any serious challenge to the sufficiency of this search. The Court should thus grant Defendants' motion for summary judgment on this issue. *See Mosby v. Hunt*, No. 09-1917, 2010 WL 1783536, at *3 (D.D.C. May 5, 2010) (a plaintiff's "general criticism" is not enough to establish that the agency's search was not conducted in good faith); *Ford v. DOJ*, No. 07-1305, 2008 WL 2248267, at *4 (D.D.C. May 29, 2008) ("It is plaintiff's burden in challenging the adequacy of an agency's search to present evidence rebutting the agency's initial showing of a good faith search."); *Wilson v. DEA*, 414 F.Supp.2d 5, 12 (D.D.C. 2006) (finding that plaintiff failed to produce evidence to rebut the agency's initial showing of a good faith search); *Goldstein v. Treasury Inspector Gen. for Tax Admin.*, No. 14-cv-02189 (APM), 2016 WL 1180158, at *10 (D.D.C. Mar. 25, 2016) (declining to consider a challenge to the adequacy of the search raised for the first time in a reply brief).

II. THE FBI PROPERLY WITHHELD ALL RESPONSIVE DOCUMENTS UNDER EXEMPTION 7(A)

Manning raises several arguments contesting the propriety of the FBI's assertion that Exemption 7(A) protects from disclosure all records responsive to Manning's request. Manning

claims that the records related to her cannot be part of an ongoing investigation, that the FBI's use of categories is improper, and that the FBI's segregability analysis either did not take place at all or was insufficient. Because Manning's arguments reveal certain misunderstandings concerning the scope of the FBI's investigation and the FBI's process in withholding documents, the FBI has provided the attached supplemental declaration.¹ *See* 2d Hardy Decl. (attached hereto as Ex. 1). That declaration, along with Defendants' motion for summary judgment and the initial declaration, show that each of Manning's arguments must fail.

A. The Records Manning Requests Relate to Ongoing Investigations That Would Be Impaired By Disclosure

Manning does not contest, nor can she, that the records responsive to her request were compiled for law enforcement purposes. Instead, the premise of Manning's argument appears to be that because the FBI has not affirmatively indicated that it is not investigating Manning herself, the agency must be impermissibly withholding records related to her based on an enforcement proceeding that has already concluded. The FBI's declarations make clear, however, that this is not the case. The FBI asserts that its investigation into the WikiLeaks disclosure is active and ongoing and that "it is investigating whether anyone else was involved with plaintiff in the unauthorized disclosures of classified information made to WikiLeaks." *See* Hardy Decl. ¶ 34 & n.9; 2d Hardy Decl. ¶ 10. Manning contends that "[t]he Court cannot, on the

¹ Agencies often provide—and courts rely on—supplemental declarations filed with reply briefs to clarify the agency's search process and withholding of responsive records. *See, e.g., DeSilva v. U.S. Dep't of Hous. & Urban Dev.*, 36 F. Supp. 3d 65, 72 (D.D.C. 2014); *Whitaker v. CIA*, 31 F. Supp. 3d 23, 36 (D.D.C. 2014), *appeal filed*, (D.C. Cir. Nov. 12, 2014); *Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, 950 F. Supp. 2d 221, 229 (D.D.C. 2013); *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Veterans Affairs*, 828 F. Supp. 2d 325, 328 (D.D.C. 2011); *Vest v. Dep't of Air Force*, 793 F. Supp. 2d 103, 121 (D.D.C. 2011); *Physicians for Human Rights v. U.S. Dep't of Def.*, 675 F. Supp. 2d 149, 158 (D.D.C. 2009); *Schoenman v. FBI*, 573 F. Supp. 2d 119, 127 n.2 (D.D.C. 2008); *Judicial Watch, Inc. v. U.S. Food & Drug Admin.*, 514 F. Supp. 2d 84, 89 (D.D.C. 2007).

basis of the FBI's Declaration, draw the conclusion that the withheld records are connected to, or would interfere with, the investigation of others, apart from Ms. Manning." *See* Pl.'s Mot. at 15. But the FBI's declaration sets this out expressly. In its first declaration, the FBI explained that it searched for documents related to Manning's involvement in WikiLeaks (the first part of her request) and that its review of the files indicated that the responsive records were the same as those involving an investigation into alleged civilian co-conspirators (the second part of her request). *See* Hardy Decl. ¶ 32. The FBI then explained in great detail why release of any of the categories of documents responsive to Manning's request would interfere with its enforcement proceedings. *See id.* ¶¶ 44–48. In its second declaration, the FBI further explains that the information related to Manning appears in the file because her "conduct is pertinent to the FBI's investigation," but that the FBI "did not locate any records that were exclusively about plaintiff." 2d Hardy Decl. ¶¶ 6, 10. Moreover, the FBI reaffirms its conclusion that the harms described in the first declaration "could reasonably be expected to occur not only in relation to any prosecutions resulting from the FBI's investigation but also to the FBI's pending investigation of potential civilian involvement in the leaks itself." *Id.* ¶ 7. Manning's assumption that the FBI is maintaining records related only to her, separate from its ongoing investigation, is therefore belied by the FBI's declarations.

Indeed, in the prior case before this court involving the Electronic Privacy Information Center's FOIA request for documents related to the WikiLeaks investigation, the court addressed the relationship between the enforcement proceeding against Manning and the FBI's broader investigation.² In that case, the court noted that after the parties had briefed summary judgment,

² Despite Manning's claims to the contrary, the FBI's search for records responsive to her request confirmed that "[t]he investigative files containing records responsive to the first part of

but before the court issued an opinion, Manning was convicted and sentenced by a military tribunal. *See Elec. Privacy Info. Ctr. v. Dep't of Justice*, 82 F. Supp. 3d 307, 319 n.10 (D.D.C. 2015) (“*EPIC*”). Given the change in circumstances and the time-sensitive nature of Exemption 7(A), the court requested additional briefing to allow the parties to update the court on how the conviction affected the claimed exemptions. After considering the additional briefing, the court granted the FBI’s motion for summary judgment on the basis of Exemption 7(A). The court explained that “[r]egardless of whether the records interfere with Manning’s prosecution, the Court finds that the records interfere with an active, ongoing law enforcement investigation concerning the unauthorized release of classified materials on the WikiLeaks website. As such, the records qualify for Exemption 7(A) protection.” *Id.* As is made clear in the FBI’s declarations, that investigation continues today and would be adversely affected by disclosure of the documents Manning seeks. “Exemption 7(A) applies” because the FBI’s investigation “continues to gather evidence for a possible future . . . case, and that case would be jeopardized by the premature release of” the records at issue here. *Juarez v. Dep't of Justice*, 518 F.3d 54, 59 (D.C. Cir. 2008).

Manning wrongly contends that *Citizens for Responsibility & Ethics in Washington v. U.S. Department of Justice*, 746 F.3d 1082 (D.C. Cir. 2014) (“*CREW*”) requires a different result. In that case, DOJ had asserted an interest related to the sentencing of certain specific individuals, all of whom were sentenced with no appeals pending when the court issued its opinion. *Id.* at 1097. DOJ also asserted an interest under Exemption 7(A) consisting of “all related criminal investigations.” *Id.* Nevertheless, the court stated that “a combination of factors

plaintiff’s request (for records about herself) were the same files located and processed by the FBI in response to the FOIA request at issue in *EPIC v. DOJ*.” *See Hardy Decl.* ¶ 37 n.11; 2d *Hardy Decl.* ¶ 8 n.2.

le[ft it] with considerable uncertainty about whether a criminal investigation in fact continues to this day.” *Id.* at 1098. Those factors included the “vague nature of the DOJ’s mention of ongoing investigations, especially when coupled with its reliance on other specifically enumerated proceedings,” the “passage of time” since the DOJ filed its declaration, and that “when asked at argument about ongoing proceedings,” counsel failed to cite any ongoing investigation and instead relied on a pending appeal that it had not cited prior to that point. *Id.* Based on these factors, the court concluded that DOJ had not met its burden. Nevertheless, the court “d[id] not hold that the requested information is not exempt.” *Id.* at 1099. It merely remanded the case to “clarify whether a related investigation is in fact ongoing and, if so, how the disclosure of documents relating to [Tom] DeLay,” who was admittedly no longer under investigation, would interfere. *Id.* “Of course,” the court clarified, “this is not to say the DOJ must recite the names of subjects under continuing investigation or otherwise disclose information that would jeopardize the investigation. We simply require the DOJ to be more specific about the existence *vel non* of such an investigation.” *Id.* Here, by contrast, the FBI has not sought to rely upon any investigation of Manning, but has made clear from the outset that its interest is in a broader investigation into civilian involvement in the WikiLeaks disclosures. There can be no question that the FBI has asserted that this investigation is ongoing and that releasing documents responsive to Manning’s requests—even the request related only to herself—would interfere with the investigation. Hardy Decl. ¶¶ 32, 45–58. Thus, none of the intervening circumstances that caused the *CREW* court to doubt the investigation exist here and Manning has offered no valid reason to call into question the FBI’s assertions. “[S]o long as ‘enforcement proceedings continue against *someone*, it matters not that proceedings have ended against someone *else*. . . . The investigation—writ large—continues, and that is enough under

Exemption 7(A).” *STS Energy Partners LP v. FERC*, 82 F. Supp. 3d 323, 333 (D.D.C. 2015). See also *Cucci v. Drug Enf’t Admin.*, 871 F. Supp. 508, 511–12 (D.D.C. 1994) (rejecting plaintiff’s request for documents related to himself after his conviction where the FBI asserted that the records were intertwined with other ongoing investigations).

B. The FBI Used Permissible Functional Categories in Classifying Its Withholdings

Plaintiff does not, and cannot, seriously contest the FBI’s detailed description of the harms that disclosure could have on the WikiLeaks investigation. *CREW*, 746 F.3d at 1098 (deferring “to an agency’s predictive judgment of the harm that will result from disclosure of information”). Plaintiff further admits, as she must, that a “categorical approach to redactions or withholdings is permissible under FOIA.” Pl.’s Mot. at 11–12 (quoting *Prison Legal News v. Samuels*, 787 F.3d 1142, 1149 (D.C. Cir. 2015)). Nevertheless, Manning contends that the FBI’s use of categories in this case constitutes “no more than an impermissible ‘blanket’ exemption.” Pl.’s Mot. at 12–13. Contrary to Plaintiff’s assertion, the FBI has not claimed that it cannot disclose the records at issue here “simply because they were found in investigatory files compiled for law enforcement purposes.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). Instead, the FBI satisfied all of its obligations in setting out and describing the categories into which it has sorted the records relevant to Manning’s request. *Id.* (explaining that in Exemption 7(A), “Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending . . . generally” could reasonably be expected to interfere with enforcement proceedings); *Mapother v. DOJ*, 3 F.3d 1533, 1542 (D.C. Cir. 1993) (explaining that *NLRB* and other cases “provide support for the proposition that categorical decisions” in deciding whether material requested under FOIA is exempt “may be appropriate and individual

circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction”) (quoting *DOJ v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 776 (1989)).

The FBI has “define[d] its categories functionally,” assigned documents to each category, and “explain[ed] to the court how the release of each category would interfere with enforcement proceedings.” *CREW*, 746 F.3d at 1098. *See Hardy Decl.* ¶¶ 44–48. The declaration describes documents that fall into two categories: evidentiary/investigative materials and administrative materials. *See Hardy Decl.* ¶ 45. The FBI further broke down these two categories and provided specific information on how revealing records from each category would interfere with its investigation, without providing so much detail as to undermine the very interests it seeks to protect in withholding the records. *See Hardy Decl.* ¶¶ 46–47. Indeed, this court has previously upheld FBI’s use of the precise categories it has utilized here. *See Tipograph v. Dep’t of Justice*, 83 F. Supp. 3d 234, 239–40 (D.D.C. 2015) (explaining the FBI’s breakdown of documents into evidentiary/investigative materials, including “[c]onfidential source and witness statements”; exchanges of information between local, state, or federal agencies; and “[i]nformation concerning physical and documentary evidence,” or administrative materials, including “reports on the progress of investigations; miscellaneous administrative documents; and administrative instructions on investigative procedures and strategies”). The court in *Tipograph* rejected the plaintiff’s challenge to the categorization, explaining that “[t]he declarations provide sufficient detail for the Court to trace a rational link between the information contained in the records and the potential interference with law enforcement proceedings.” *Id.* at 240. In contrast to an impermissible blanket exemption, the explanations the FBI has provided corresponding to each

of the categories here “describe[] the nature of the information contained in the records, rather than merely the nature of the records themselves.” *Id.*

C. The FBI Reviewed Each Document and Determined that No Segregable, Non-Exempt Material Can Be Released

In its first declaration the FBI asserted that its “review of the responsive records in the pending cases reveals no materials that can be released without jeopardizing current or prospective investigative and/or prosecutive efforts.” Hardy Decl. ¶ 44. Later in its declaration, the FBI reaffirmed this statement, explaining that its “segregability review determined there is no reasonably segregable information, including public source material, which can be released at this time, without adversely affecting the investigation and any resulting prosecutions.” *Id.* ¶ 49. Manning argues that this analysis is conclusory and insufficient and even contends that the FBI may not have completed any segregability analysis at all. That accusation lacks any factual basis. The FBI is “entitled to a presumption that [it] complied with the obligation to disclose reasonably segregable material.” *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). Contrary to Manning’s claims, the FBI represented in its first declaration that it did indeed conduct a segregability analysis in this case. *See* Hardy Decl. ¶ 44 (explaining that “the FBI’s review of the responsive records in the pending cases” revealed no segregable materials).

To the extent that any doubt remains, the FBI’s second declaration removes it entirely. The Second Hardy Declaration explains that the FBI based its initial assertion of Exemption 7(A) on its knowledge of the contents of the records responsive to Manning’s request from the litigation in *EPIC v. Department of Justice*. 2d Hardy Decl. ¶ 8. Because of its familiarity with the records at issue here, the FBI could confidently assert at that time that no information could be segregated and released to Manning. Once the litigation in this case began, the FBI conducted a document-by-document review of all the records responsive to Manning’s request and

confirmed that none of the records related only to Manning and that there was no reasonably segregable information that the agency could produce to her. 2d Hardy Decl. ¶¶ 9–10. To the extent that there is information about Manning located in the documents, the Second Hardy Declaration makes clear that disclosure could reasonably be expected to adversely affect the ongoing investigation in light of the context in which the information appears and that in some instances, information about Manning is inextricably intertwined with other exempt information, such that it cannot be segregated. 2d Hardy Decl. ¶ 10. Moreover, the FBI confirmed that there is no public source information regarding Manning located in the records responsive to Manning’s request. *Id.* Thus, the FBI has met its burden of demonstrating that there is no reasonably segregable material in the responsive records.

Manning’s contention that the FBI conflated its categorical analysis with its segregability analysis is also incorrect. The FBI is not required to provide a document-by-document segregability showing, as this would “eviscerate the policy considerations that have led courts to conclude that the government need not provide such an index to show that its withholding of responsive FOIA documents is justified under Exemption 7(A).” *Robbins, Geller, Rudman & Dowd, LLP v. SEC*, No. 3:14-cv-2197, 2016 WL 950995 (M.D. Tenn. Mar. 12, 2016) (citing *Curran v. Dep’t of Justice*, 813 F.2d 473, 475 (1st Cir. 1987)). *See also Kidder v. FBI*, 517 F. Supp. 2d 17, 32 (D.D.C. 2007) (holding that, where defendant declared that all information is exempt under 7(A) in its entirety, “[d]efendant has satisfied its burden, and its failure to make a document-by-document segregability determination is of no moment.”). Instead, it is sufficient that the FBI has asserted that it completed a segregability review, concluded that no information is reasonably segregable, and explained in its categorical analysis the harms that may arise should the information be disclosed. *See Dillon v. Dep’t of Justice*, 102 F. Supp. 3d 272, 298

(D.D.C. 2015) (holding that FBI satisfied its segregability obligation under FOIA by explaining that segregability was not possible for a majority of records because they were exempt from disclosure in their entirety pursuant to Exemption 7(A)); *EPIC*, 82 F. Supp. 3d at 322 (holding that the government supported its determination that there was no segregable material in the investigative records withheld under Exemption 7(A)); *Robbins, Geller*, 2016 WL 950995, at *8 (holding that the SEC properly determined that responsive records did not contain any reasonably segregable information because of the way the plaintiff phrased its FOIA request, which sought all documents provided by Walmart to the SEC that related to potential violations of the Foreign Corrupt Practices Act); *Cucci*, 871 F. Supp. at 512 (“Because the agency has met its burden of showing that all its records are exempt and relate to the continuing investigations . . . there are no non-exempt portions of the records to segregate.”).³

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their Motion for Summary Judgment and enter final judgment for them in this matter.

Dated: May 19, 2016

Respectfully submitted,

BENJAMIN C. MIZER

³ If the Court finds any material portion of the FBI’s submissions to be insufficient, Manning’s request for an order requiring immediate disclosure is not the proper remedy. Instead, the Court should require the agency to submit additional supplemental declarations on the applicability of Exemption 7(A), which may include an *ex parte* declaration. *See Campbell v. DOJ*, 164 F.3d 20, 31 (D.C. Cir. 1998) (“On remand, the district court can either review the documents *in camera* or require the FBI to provide a new declaration. . . . The latter course is favored where agency affidavits are facially inadequate.”); *Spirko v. USPS*, 147 F.3d 992, 997 (D.C. Cir. 1998) (listing potential remedies, including requiring additional affidavits); *Elec. Privacy Info. Ctr. v. Dep’t of Homeland Sec.*, 384 F. Supp. 2d 100, 120 (D.D.C. 2005) (permitting agencies to submit a revised *Vaughn* index). Even if the Court disagrees with the FBI’s application of Exemption 7(A), the agency has reserved its right to assert other exemptions in later briefing. *See* Joint Status Report, ECF No. 11. Thus, any discussion of disclosure is premature.

Principal Deputy Assistant Attorney General

CHANNING D. PHILLIPS
United States Attorney

ELIZABETH J. SHAPIRO
Deputy Branch Director
Federal Programs Branch

/s/ Aimee W. Brown
AIMEE W. BROWN (IL Bar No. 6316922)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 305-0845
Fax: (202) 616-8470
Email: aimee.w.brown@usdoj.gov

Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
CHELSEA MANNING,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 15-CV-01654-APM
)	
U.S. DEPARTMENT OF JUSTICE, <i>et al</i> ,)	
)	
Defendants.)	
_____)	

SECOND DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am the Section Chief of the Record/Information Dissemination Section (“RIDS”), Records Management Division (“RMD”), in Winchester, Virginia. I have held this position since August 1, 2002. Prior to my joining the Federal Bureau of Investigation (“FBI”), from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act (“FOIA”) policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 239 employees who staff a total of ten (10) Federal Bureau of Investigation Headquarters (“FBIHQ”) units and two (2) field operational service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and

information pursuant to the FOIA as amended by the OPEN Government Act of 2007 and the OPEN FOIA Act of 2009; the Privacy Act of 1974; Executive Order 13,526; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. My responsibilities also include the review of FBI information for classification purposes as mandated by Executive Order 13,526,¹ and the preparation of declarations in support of Exemption 1 claims asserted under the FOIA. I have been designated by the Attorney General of the United States as an original classification authority and a declassification authority pursuant to Executive Order 13,526 §§ 1.3 and 3.1. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information pursuant to the provisions of the FOIA, 5 U.S.C. § 552 and the Privacy Act (“PA”) of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the FBI’s response to the FOIPA request of plaintiff, Chelsea E. Manning, seeking access to certain FBI records relating to the “investigation conducted by the Washington Field Office of the Federal Bureau of Investigation and U.S. Attorney’s Office of the Eastern District of Virginia into the alleged disclosures of classified and sensitive but unclassified information by Private First Class (PFC) Bradley E. Manning” and relating to the investigation “into alleged civilian co-conspirators of the disclosures of information by Manning.”

(4) This is my second declaration in this case. It incorporates by reference my first declaration, *see* ECF No. 12-1, Declaration of David M. Hardy (“1st Hardy Decl.”), and is being

¹ 75 Fed. Reg. 707 (2010).

submitted in further support of the FBI's motion for summary judgment based on Exemption 7(A) in this case.

THE FBI'S PENDING INVESTIGATION

(5) Plaintiff suggests that because she was investigated by the Army and prosecuted and convicted by a military tribunal, no harm could come to the FBI's separate investigation regarding the leak of classified information that was published on the Wikileaks website. This is incorrect.

(6) To be clear, the FBI's investigation is focused on any civilian involvement in plaintiff's leak of classified records that were published on the Wikileaks website, although plaintiff's conduct is pertinent to the FBI's investigation. This explains why information about her was located in the FBI's pending files on the Wikileaks investigation. However, information about her in the FBI's investigative files must be considered in light of the FBI's investigative focus, and when viewed in that context, the FBI concluded that disclosure of responsive information from its pending investigative files could reasonably be expected to cause the harms described in my first declaration. 1st Hardy Decl. at ¶¶ 44-48.

(7) Contrary to plaintiff's assertion, the harms I described in my first declaration could reasonably be expected to occur not only in relation to any prosecutions resulting from the FBI's investigation but also to the FBI's pending investigation of potential civilian involvement in the leaks itself.

SEGREGABILITY

(8) The FBI's April 8, 2014, assertion of Exemption 7(A) to protect all records responsive to her request was based on its knowledge of the contents of the responsive investigative files as a result of previously reviewing those records in response to other FOIA

requests (including the request at issue in the *EPIC v. DOJ* litigation²). This prior knowledge and familiarity, along with continued discussions with Special Agents assigned to this investigation, informed the decision that no information could be segregated and released to plaintiff in response to her request.

(9) Moreover, by the time of my first declaration, RIDS had conducted a document-by-document review of all records containing information responsive to both parts of plaintiff's request to determine whether there was any reasonably segregable non-exempt information that could be released to her.

(10) As a result of the FBI's document-by-document review, the FBI did not locate any such information. The FBI did not locate any records that were exclusively about plaintiff, and to the extent that there was information about plaintiff in records that also contained other information, the FBI concluded that such information was not reasonably segregable.

(a) In some instances, disclosure of information about plaintiff in records that also contained other information could reasonably be expected to adversely affect the investigation in light of the context in which the information appears and the content of the information.

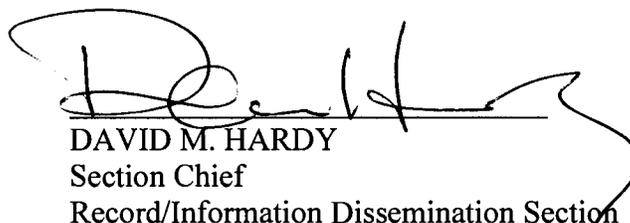
(b) In some instances, information about plaintiff was so comingled with other exempt information that it was inextricably intertwined and could not be reasonably segregated for release.

² Plaintiff asserts that the records requested in *EPIC* were not the same as she requested. Her assertion ignores the fact that she not only requested records about herself but also about third parties that the FBI is investigating in relation to the leak of classified information that was published on the Wikileaks website. As explained in my first declaration, the FBI was already aware of which files were responsive to the latter part of her request and the FBI's search of records specifically indexed in her name revealed no additional responsive files. *See* 1st Hardy Decl. at ¶ 32.

(c) Finally, although the FBI considered whether there was any public source information that could be released to plaintiff, it concluded that in this instance, there was not. Specifically, the FBI did not locate any public source information about plaintiff's arrest, prosecution, or conviction in the file.

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

Executed this 17th day of May, 2016.



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

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

CHELSEA MANNING,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE and the
FEDERAL BUREAU OF INVESTIGATION,

Defendants.

Case No. 1:15-cv-01654-APM

DEFENDANTS’ RESPONSE TO PLAINTIFF’S STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 7(h) of the Civil Rules of the U.S. District Court for the District of Columbia, Defendants respond, by and through undersigned counsel, as follows to Plaintiff’s Statement of Material Facts Not in Dispute. Plaintiff’s numbered statements are reproduced below, each followed by Defendants’ response.

1. In 2010, the United States Army charged Ms. Manning, then known as Private Bradley E. Manning, with various violations of the Uniform Code of Military Justice and the United States Code for allegedly disclosing classified and confidential information to the media organization, WikiLeaks. *U.S. Soldier Charged with Leaking Classified Information*, CNN (Jul. 6, 2010) <http://www.cnn.com/2010/WORLD/meast/07/06/iraq.soldier.leak.charge/>.

Response: Undisputed.

2. Ms. Manning pled guilty to some of the charges in February 2013. *Judge Accepts Manning’s Guilty Pleas in WikiLeaks Case*, CBS News (Feb. 28, 2013), <http://www.cbsnews.com/news/judge-accepts-mannings-guilty-pleas-in-wikileaks-case/>, and

proceeded to trial on the remaining charges that summer. Charlie Savage, *Manning is Acquitted of Aiding the Enemy*, New York Times, (Jul. 30, 2013),

<http://www.nytimes.com/2013/07/31/us/bradley-manning-verdict.html>.

Response: Undisputed.

3. At trial Ms. Manning was acquitted of aiding the enemy, but convicted of charges related to espionage, theft, and computer fraud under the United States Code, as well as various other military-related offenses. *Id.*; Manning General Court-Martial Order No. 4 (Apr. 10, 2014).

Response: Undisputed.

4. In August 2013, a military judge sentenced her to thirty-five years of imprisonment and a dishonorable discharge from the Army. Richard A. Serrano, WikiLeaks Trial: Bradley Manning Sentenced to 35 Years in Prison, Los Angeles Times (Aug. 21, 2013), <http://articles.latimes.com/2013/aug/21/nation/la-na-nn-wikileaks-bradley-manning-sentenced-20130820>. She is currently serving her sentence at the Fort Leavenworth Disciplinary Barracks in Fort Leavenworth, Kansas.

Response: Undisputed.

5. The conduct that formed the basis of Ms. Manning's conviction and sentence also formed the basis of the FBI's criminal investigation. *See* Hardy Decl. ¶ 37 (describing the "ongoing investigation into the unauthorized disclosure of classified information that subsequently was published on the WikiLeaks website.").

Response: Disputed. As explained in the First and Second Hardy Declarations, the FBI's investigation is not focused on Manning, but on the involvement of any civilians in the

unauthorized disclosure of classified documents. *See* Hardy Decl. ¶¶ 34 & n.9; Hardy 2d Decl. ¶ 10.

6. On February 20, 2014, Ms. Manning submitted a FOIA request to the FBI seeking:

- a. Documents, papers, reports, letters, memoranda, films, electronic data, photographs, audio and video recordings of or relating to investigation conducted by the Washington Field Office of the Federal Bureau of Investigation and the U.S. Attorney's Office of the Eastern District of Virginia into the alleged disclosures of classified and sensitive but unclassified information by Private First Class (PFC) Bradley E. Manning beginning in late 2010 and continuing until an unknown date, but as late as mid-2012.
- b. Any other documents, papers, reports, letters, memoranda, films, electronic data, photographs, audio and video recordings of or relating to the investigation conducted by the Federal Bureau of Investigation and the U.S. Attorney's Office of the Eastern District of Virginia into alleged civilian co-conspirators of the disclosures of information by Manning.

Doc. 12-2

Response: Undisputed, although Defendants respectfully direct the Court to the referenced document for a complete and accurate statement of its contents.

7. On March 7, 2014, the FBI acknowledged Ms. Manning's request and notified her that the request "did not contain sufficient information to conduct an accurate search of the Central Records System." Doc. 12-3 at 2.

Response: Undisputed, although Defendants respectfully direct the Court to the referenced document for a complete and accurate statement of its contents.

8. On March 18, 2014, Ms. Manning supplemented her request with the additional information and modified her request so that it read:

- a. Documents, papers, reports, letters, memoranda, films, electronic data, photographs, audio and video recordings of or relating to the investigation

conducted by the Washington Field Office (WFO), the Department of Justice Counterepionage [*sic*] Section (CES), the U.S. Attorney's Office for the Eastern District of Virginia (E.D.Va.) into the alleged disclosures of classified and sensitive by [*sic*] unclassified information by then-Private First Class (PFC) Bradley Edward Manning (a.k.a. Chelsea Elizabeth Manning).”

- b. Any other documents, papers, reports, letters, memoranda, films, electronic data, photographs, audio and video recordings of or relating to the investigation conducted by the Federal Bureau of Investigation and other agencies into suspected or alleged civilian co-conspirators of the disclosures alleged to have been conducted by Manning.

Doc. 12-4 at 3.

Response: Undisputed, although Defendants respectfully direct the Court to the referenced document for a complete and accurate statement of its contents.

9. On April 8, 2014, the FBI performed a search only for the records identified in part (a) of Ms. Manning's request and used search terms that included a “six-way phonetic breakdown” of her name, her date and place of birth, Ms. Manning's description of the investigation, and the file number Ms. Manning provided. Hardy Decl. ¶ 30.

Response: Undisputed, although Defendants respectfully direct the Court to the referenced document for a complete and accurate statement of its contents.

10. The FBI did not conduct a second search “for records responsive to the second part” of Ms. Manning's request because the FBI was aware, based on experience from a separate case, that those records “were maintained in the same files” as those records concerning Ms. Manning. *Id.* at ¶ 32.

Response: Undisputed, although Defendants respectfully direct the Court to the referenced document for a complete and accurate statement of its contents.

11. The FBI located “potentially responsive” records to Ms. Manning’s request. *Id.* ¶ 30. However, the FBI does not indicate the number of located records.

Response: Undisputed, although Defendants respectfully direct the Court to the referenced document for a complete and accurate statement of its contents.

12. On the same day that it searched for records responsive to Ms. Manning’s request, April 8, 2014, the FBI uniformly and categorically denied Ms. Manning’s request. Doc. 12-7; *see also* Doc. 12 at 4. The FBI justified its categorical denial by explaining that the “material [Plaintiff] requested is located in an investigative file which is exempt from disclosure pursuant to 5 U.S.C. § 552(b)(7)(A).” Doc. 12-7 at 2; *see also* Hardy Decl. ¶ 11.

Response: Undisputed, although Defendants respectfully direct the Court to the referenced documents for a complete and accurate statement of their contents.

13. Although the FBI has not provided any evidence regarding the nature of its “segregability review,” the agency purports to have “determined that there is no reasonably segregable information, including public source materials, which can be released at this time without adversely affecting the investigation and any resulting prosecutions.” Hardy Decl. ¶ 49.

Response: Disputed. The FBI provided information regarding the nature of its segregability review in the first Hardy Declaration, *see* Hardy Decl. ¶¶ 44, 49, and has provided further details in its second declaration, *see* 2d Hardy Decl. ¶¶ 8-10. Defendants respectfully direct the Court to these documents for a complete and accurate statement of their contents.

14. Ms. Manning appealed the agency’s denial of her request for records to the Department of Justice (DOJ) Office of Information Policy (OIP). *See* Doc. 12-10 at 2. On May 7, 2014, the OIP acknowledged receipt of her appeal. *Id.*

Response: Undisputed, although Defendants respectfully direct the Court to the referenced document for a complete and accurate statement of its contents.

15. On August 7, 2014, the OIP affirmed and reiterated the FBI's categorical denial of Ms. Manning's request for the records and denied her appeal, reasoning that the:

FBI properly withheld this information *in full* because it is protected from disclosure under the FOIA pursuant to 5 U.S.C. § 552(b)(7)(A). This provision concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to interfere with enforcement proceedings.

Doc. 12-12 at 2 (emphasis added).

Response: Undisputed, although Defendants respectfully direct the Court to the referenced document for a complete and accurate statement of its contents.

16. On January 5, 2015, Ms. Manning sought the assistance of the Office of Government Information Services (OGIS) and asked the agency to "mediate and resolve the dispute between [Plaintiff] and the Attorney General regarding [Plaintiff's] Freedom of Information Act (FOIA) 5 U.S.C. § 552 [sic] request[.]" Doc. 12-13.

Response: Undisputed, although Defendants respectfully direct the Court to the referenced document for a complete and accurate statement of its contents.

17. The OGIS responded to Ms. Manning's request for mediation by repeating the FBI's categorical and purported grounds for denial of her request and stating that "Exemption 7(A) [was] still applicable to records sought at the time of the appeal." Doc. 12-15 at 3.

Response: Undisputed, although Defendants respectfully direct the Court to the referenced document for a complete and accurate statement of its contents.

Dated: May 19, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

CHANNING D. PHILLIPS
United States Attorney

ELIZABETH J. SHAPIRO
Deputy Director

/s/ Aimee W. Brown
AIMEE W. BROWN (IL Bar No. 6316922)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 305-0845
Fax: (202) 616-8470
Email: Aimee.W.Brown@usdoj.gov

Counsel for Defendants

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

CHELSEA MANNING,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE and the
FEDERAL BUREAU OF INVESTIGATION,

Defendants.

Case No. 1:15-cv-01654-APM

**DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY
JUDGMENT**

Defendants U.S. Department of Justice and the Federal Bureau of Investigation ("FBI"), through the undersigned counsel, respectfully submit this reply in support of their motion for summary judgment (ECF No. 12) and in opposition to Plaintiff's cross-motion for summary judgment (ECF No. 14).

Dated: May 19, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

CHANNING D. PHILLIPS
United States Attorney

ELIZABETH J. SHAPIRO
Deputy Branch Director
Federal Programs Branch

/s/ Aimee W. Brown
AIMEE W. BROWN (IL Bar No. 6316922)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.

Washington, D.C. 20530
Telephone: (202) 305-0845
Fax: (202) 616-8470
Email: aimee.w.brown@usdoj.gov

Counsel for Defendants

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INTRODUCTION

Plaintiff Chelsea Manning's FOIA request sought all records involving the FBI's investigation of herself and any alleged civilian co-conspirators related to the disclosures of classified and sensitive information by Manning. In responding to her request, the FBI made clear that it was withholding all documents because they are part of an active, ongoing investigation into the disclosure of classified documents. The FBI's opening brief and accompanying declaration in this case reaffirmed that its investigation continues to this day and explained the harms that would result from disclosure of any of the records responsive to Manning's request. Despite these representations, Manning's Opposition and Cross-Motion for Summary Judgment evinces several misunderstandings as to the nature of the FBI's investigation and the records at issue. In an attempt to provide further clarity, the FBI now submits a second declaration to address the incorrect assumptions on which Manning has based her arguments.

As further explained below and within the attached declaration, the FBI's ongoing investigation is focused on any civilian involvement in Manning's leak of classified records published on WikiLeaks, and not on an investigation of Manning herself. Because of Manning's involvement in the leaks, there is information about her located in the FBI's pending files. Nevertheless, any information about Manning in the records is inextricably intertwined with its ongoing investigation of civilian involvement. Disclosure of these documents would harm the FBI's investigative efforts and any potential enforcement proceedings. The FBI has explained in detail the harms that would arise from each type of document that it has placed in functional categories, as permitted by this court. Moreover, the FBI has conducted a document-by-document review of the records it is withholding and has concluded that there is no reasonably

segregable material that it can disclose. Thus, the FBI has fulfilled its obligations under FOIA and the Court should grant its motion for summary judgment.

ARGUMENT

I. THE FBI IS ENTITLED TO SUMMARY JUDGMENT ON THE ADEQUACY OF ITS SEARCH

In their motion for summary judgment, Defendants explained that the search conducted by FBI was adequate and submitted a detailed declaration explaining the scope of the search, the search terms used, and the basis for the FBI's belief that its search would reasonably be expected to locate any responsive documents. *See* Defs.' Mot. 6–8. In her response, Manning has not mounted any serious challenge to the sufficiency of this search. The Court should thus grant Defendants' motion for summary judgment on this issue. *See Mosby v. Hunt*, No. 09-1917, 2010 WL 1783536, at *3 (D.D.C. May 5, 2010) (a plaintiff's "general criticism" is not enough to establish that the agency's search was not conducted in good faith); *Ford v. DOJ*, No. 07-1305, 2008 WL 2248267, at *4 (D.D.C. May 29, 2008) ("It is plaintiff's burden in challenging the adequacy of an agency's search to present evidence rebutting the agency's initial showing of a good faith search."); *Wilson v. DEA*, 414 F.Supp.2d 5, 12 (D.D.C. 2006) (finding that plaintiff failed to produce evidence to rebut the agency's initial showing of a good faith search); *Goldstein v. Treasury Inspector Gen. for Tax Admin.*, No. 14-cv-02189 (APM), 2016 WL 1180158, at *10 (D.D.C. Mar. 25, 2016) (declining to consider a challenge to the adequacy of the search raised for the first time in a reply brief).

II. THE FBI PROPERLY WITHHELD ALL RESPONSIVE DOCUMENTS UNDER EXEMPTION 7(A)

Manning raises several arguments contesting the propriety of the FBI's assertion that Exemption 7(A) protects from disclosure all records responsive to Manning's request. Manning

claims that the records related to her cannot be part of an ongoing investigation, that the FBI's use of categories is improper, and that the FBI's segregability analysis either did not take place at all or was insufficient. Because Manning's arguments reveal certain misunderstandings concerning the scope of the FBI's investigation and the FBI's process in withholding documents, the FBI has provided the attached supplemental declaration.¹ *See* 2d Hardy Decl. (attached hereto as Ex. 1). That declaration, along with Defendants' motion for summary judgment and the initial declaration, show that each of Manning's arguments must fail.

A. The Records Manning Requests Relate to Ongoing Investigations That Would Be Impaired By Disclosure

Manning does not contest, nor can she, that the records responsive to her request were compiled for law enforcement purposes. Instead, the premise of Manning's argument appears to be that because the FBI has not affirmatively indicated that it is not investigating Manning herself, the agency must be impermissibly withholding records related to her based on an enforcement proceeding that has already concluded. The FBI's declarations make clear, however, that this is not the case. The FBI asserts that its investigation into the WikiLeaks disclosure is active and ongoing and that "it is investigating whether anyone else was involved with plaintiff in the unauthorized disclosures of classified information made to WikiLeaks." *See* Hardy Decl. ¶ 34 & n.9; 2d Hardy Decl. ¶ 10. Manning contends that "[t]he Court cannot, on the

¹ Agencies often provide—and courts rely on—supplemental declarations filed with reply briefs to clarify the agency's search process and withholding of responsive records. *See, e.g., DeSilva v. U.S. Dep't of Hous. & Urban Dev.*, 36 F. Supp. 3d 65, 72 (D.D.C. 2014); *Whitaker v. CIA*, 31 F. Supp. 3d 23, 36 (D.D.C. 2014), *appeal filed*, (D.C. Cir. Nov. 12, 2014); *Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, 950 F. Supp. 2d 221, 229 (D.D.C. 2013); *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Veterans Affairs*, 828 F. Supp. 2d 325, 328 (D.D.C. 2011); *Vest v. Dep't of Air Force*, 793 F. Supp. 2d 103, 121 (D.D.C. 2011); *Physicians for Human Rights v. U.S. Dep't of Def.*, 675 F. Supp. 2d 149, 158 (D.D.C. 2009); *Schoenman v. FBI*, 573 F. Supp. 2d 119, 127 n.2 (D.D.C. 2008); *Judicial Watch, Inc. v. U.S. Food & Drug Admin.*, 514 F. Supp. 2d 84, 89 (D.D.C. 2007).

basis of the FBI's Declaration, draw the conclusion that the withheld records are connected to, or would interfere with, the investigation of others, apart from Ms. Manning." *See* Pl.'s Mot. at 15. But the FBI's declaration sets this out expressly. In its first declaration, the FBI explained that it searched for documents related to Manning's involvement in WikiLeaks (the first part of her request) and that its review of the files indicated that the responsive records were the same as those involving an investigation into alleged civilian co-conspirators (the second part of her request). *See* Hardy Decl. ¶ 32. The FBI then explained in great detail why release of any of the categories of documents responsive to Manning's request would interfere with its enforcement proceedings. *See id.* ¶¶ 44–48. In its second declaration, the FBI further explains that the information related to Manning appears in the file because her "conduct is pertinent to the FBI's investigation," but that the FBI "did not locate any records that were exclusively about plaintiff." 2d Hardy Decl. ¶¶ 6, 10. Moreover, the FBI reaffirms its conclusion that the harms described in the first declaration "could reasonably be expected to occur not only in relation to any prosecutions resulting from the FBI's investigation but also to the FBI's pending investigation of potential civilian involvement in the leaks itself." *Id.* ¶ 7. Manning's assumption that the FBI is maintaining records related only to her, separate from its ongoing investigation, is therefore belied by the FBI's declarations.

Indeed, in the prior case before this court involving the Electronic Privacy Information Center's FOIA request for documents related to the WikiLeaks investigation, the court addressed the relationship between the enforcement proceeding against Manning and the FBI's broader investigation.² In that case, the court noted that after the parties had briefed summary judgment,

² Despite Manning's claims to the contrary, the FBI's search for records responsive to her request confirmed that "[t]he investigative files containing records responsive to the first part of

but before the court issued an opinion, Manning was convicted and sentenced by a military tribunal. *See Elec. Privacy Info. Ctr. v. Dep't of Justice*, 82 F. Supp. 3d 307, 319 n.10 (D.D.C. 2015) (“*EPIC*”). Given the change in circumstances and the time-sensitive nature of Exemption 7(A), the court requested additional briefing to allow the parties to update the court on how the conviction affected the claimed exemptions. After considering the additional briefing, the court granted the FBI’s motion for summary judgment on the basis of Exemption 7(A). The court explained that “[r]egardless of whether the records interfere with Manning’s prosecution, the Court finds that the records interfere with an active, ongoing law enforcement investigation concerning the unauthorized release of classified materials on the WikiLeaks website. As such, the records qualify for Exemption 7(A) protection.” *Id.* As is made clear in the FBI’s declarations, that investigation continues today and would be adversely affected by disclosure of the documents Manning seeks. “Exemption 7(A) applies” because the FBI’s investigation “continues to gather evidence for a possible future . . . case, and that case would be jeopardized by the premature release of” the records at issue here. *Juarez v. Dep't of Justice*, 518 F.3d 54, 59 (D.C. Cir. 2008).

Manning wrongly contends that *Citizens for Responsibility & Ethics in Washington v. U.S. Department of Justice*, 746 F.3d 1082 (D.C. Cir. 2014) (“*CREW*”) requires a different result. In that case, DOJ had asserted an interest related to the sentencing of certain specific individuals, all of whom were sentenced with no appeals pending when the court issued its opinion. *Id.* at 1097. DOJ also asserted an interest under Exemption 7(A) consisting of “all related criminal investigations.” *Id.* Nevertheless, the court stated that “a combination of factors

plaintiff’s request (for records about herself) were the same files located and processed by the FBI in response to the FOIA request at issue in *EPIC v. DOJ*.” *See Hardy Decl.* ¶ 37 n.11; 2d *Hardy Decl.* ¶ 8 n.2.

le[ft it] with considerable uncertainty about whether a criminal investigation in fact continues to this day.” *Id.* at 1098. Those factors included the “vague nature of the DOJ’s mention of ongoing investigations, especially when coupled with its reliance on other specifically enumerated proceedings,” the “passage of time” since the DOJ filed its declaration, and that “when asked at argument about ongoing proceedings,” counsel failed to cite any ongoing investigation and instead relied on a pending appeal that it had not cited prior to that point. *Id.* Based on these factors, the court concluded that DOJ had not met its burden. Nevertheless, the court “d[id] not hold that the requested information is not exempt.” *Id.* at 1099. It merely remanded the case to “clarify whether a related investigation is in fact ongoing and, if so, how the disclosure of documents relating to [Tom] DeLay,” who was admittedly no longer under investigation, would interfere. *Id.* “Of course,” the court clarified, “this is not to say the DOJ must recite the names of subjects under continuing investigation or otherwise disclose information that would jeopardize the investigation. We simply require the DOJ to be more specific about the existence *vel non* of such an investigation.” *Id.* Here, by contrast, the FBI has not sought to rely upon any investigation of Manning, but has made clear from the outset that its interest is in a broader investigation into civilian involvement in the WikiLeaks disclosures. There can be no question that the FBI has asserted that this investigation is ongoing and that releasing documents responsive to Manning’s requests—even the request related only to herself—would interfere with the investigation. Hardy Decl. ¶¶ 32, 45–58. Thus, none of the intervening circumstances that caused the *CREW* court to doubt the investigation exist here and Manning has offered no valid reason to call into question the FBI’s assertions. “[S]o long as ‘enforcement proceedings continue against *someone*, it matters not that proceedings have ended against someone *else*. . . . The investigation—writ large—continues, and that is enough under

Exemption 7(A).” *STS Energy Partners LP v. FERC*, 82 F. Supp. 3d 323, 333 (D.D.C. 2015). See also *Cucci v. Drug Enf’t Admin.*, 871 F. Supp. 508, 511–12 (D.D.C. 1994) (rejecting plaintiff’s request for documents related to himself after his conviction where the FBI asserted that the records were intertwined with other ongoing investigations).

B. The FBI Used Permissible Functional Categories in Classifying Its Withholdings

Plaintiff does not, and cannot, seriously contest the FBI’s detailed description of the harms that disclosure could have on the WikiLeaks investigation. *CREW*, 746 F.3d at 1098 (deferring “to an agency’s predictive judgment of the harm that will result from disclosure of information”). Plaintiff further admits, as she must, that a “categorical approach to redactions or withholdings is permissible under FOIA.” Pl.’s Mot. at 11–12 (quoting *Prison Legal News v. Samuels*, 787 F.3d 1142, 1149 (D.C. Cir. 2015)). Nevertheless, Manning contends that the FBI’s use of categories in this case constitutes “no more than an impermissible ‘blanket’ exemption.” Pl.’s Mot. at 12–13. Contrary to Plaintiff’s assertion, the FBI has not claimed that it cannot disclose the records at issue here “simply because they were found in investigatory files compiled for law enforcement purposes.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). Instead, the FBI satisfied all of its obligations in setting out and describing the categories into which it has sorted the records relevant to Manning’s request. *Id.* (explaining that in Exemption 7(A), “Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending . . . generally” could reasonably be expected to interfere with enforcement proceedings); *Mapother v. DOJ*, 3 F.3d 1533, 1542 (D.C. Cir. 1993) (explaining that *NLRB* and other cases “provide support for the proposition that categorical decisions” in deciding whether material requested under FOIA is exempt “may be appropriate and individual

circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction”) (quoting *DOJ v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 776 (1989)).

The FBI has “define[d] its categories functionally,” assigned documents to each category, and “explain[ed] to the court how the release of each category would interfere with enforcement proceedings.” *CREW*, 746 F.3d at 1098. *See Hardy Decl.* ¶¶ 44–48. The declaration describes documents that fall into two categories: evidentiary/investigative materials and administrative materials. *See Hardy Decl.* ¶ 45. The FBI further broke down these two categories and provided specific information on how revealing records from each category would interfere with its investigation, without providing so much detail as to undermine the very interests it seeks to protect in withholding the records. *See Hardy Decl.* ¶¶ 46–47. Indeed, this court has previously upheld FBI’s use of the precise categories it has utilized here. *See Tipograph v. Dep’t of Justice*, 83 F. Supp. 3d 234, 239–40 (D.D.C. 2015) (explaining the FBI’s breakdown of documents into evidentiary/investigative materials, including “[c]onfidential source and witness statements”; exchanges of information between local, state, or federal agencies; and “[i]nformation concerning physical and documentary evidence,” or administrative materials, including “reports on the progress of investigations; miscellaneous administrative documents; and administrative instructions on investigative procedures and strategies”). The court in *Tipograph* rejected the plaintiff’s challenge to the categorization, explaining that “[t]he declarations provide sufficient detail for the Court to trace a rational link between the information contained in the records and the potential interference with law enforcement proceedings.” *Id.* at 240. In contrast to an impermissible blanket exemption, the explanations the FBI has provided corresponding to each

of the categories here “describe[] the nature of the information contained in the records, rather than merely the nature of the records themselves.” *Id.*

C. The FBI Reviewed Each Document and Determined that No Segregable, Non-Exempt Material Can Be Released

In its first declaration the FBI asserted that its “review of the responsive records in the pending cases reveals no materials that can be released without jeopardizing current or prospective investigative and/or prosecutive efforts.” Hardy Decl. ¶ 44. Later in its declaration, the FBI reaffirmed this statement, explaining that its “segregability review determined there is no reasonably segregable information, including public source material, which can be released at this time, without adversely affecting the investigation and any resulting prosecutions.” *Id.* ¶ 49. Manning argues that this analysis is conclusory and insufficient and even contends that the FBI may not have completed any segregability analysis at all. That accusation lacks any factual basis. The FBI is “entitled to a presumption that [it] complied with the obligation to disclose reasonably segregable material.” *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). Contrary to Manning’s claims, the FBI represented in its first declaration that it did indeed conduct a segregability analysis in this case. *See* Hardy Decl. ¶ 44 (explaining that “the FBI’s review of the responsive records in the pending cases” revealed no segregable materials).

To the extent that any doubt remains, the FBI’s second declaration removes it entirely. The Second Hardy Declaration explains that the FBI based its initial assertion of Exemption 7(A) on its knowledge of the contents of the records responsive to Manning’s request from the litigation in *EPIC v. Department of Justice*. 2d Hardy Decl. ¶ 8. Because of its familiarity with the records at issue here, the FBI could confidently assert at that time that no information could be segregated and released to Manning. Once the litigation in this case began, the FBI conducted a document-by-document review of all the records responsive to Manning’s request and

confirmed that none of the records related only to Manning and that there was no reasonably segregable information that the agency could produce to her. 2d Hardy Decl. ¶¶ 9–10. To the extent that there is information about Manning located in the documents, the Second Hardy Declaration makes clear that disclosure could reasonably be expected to adversely affect the ongoing investigation in light of the context in which the information appears and that in some instances, information about Manning is inextricably intertwined with other exempt information, such that it cannot be segregated. 2d Hardy Decl. ¶ 10. Moreover, the FBI confirmed that there is no public source information regarding Manning located in the records responsive to Manning’s request. *Id.* Thus, the FBI has met its burden of demonstrating that there is no reasonably segregable material in the responsive records.

Manning’s contention that the FBI conflated its categorical analysis with its segregability analysis is also incorrect. The FBI is not required to provide a document-by-document segregability showing, as this would “eviscerate the policy considerations that have led courts to conclude that the government need not provide such an index to show that its withholding of responsive FOIA documents is justified under Exemption 7(A).” *Robbins, Geller, Rudman & Dowd, LLP v. SEC*, No. 3:14-cv-2197, 2016 WL 950995 (M.D. Tenn. Mar. 12, 2016) (citing *Curran v. Dep’t of Justice*, 813 F.2d 473, 475 (1st Cir. 1987)). *See also Kidder v. FBI*, 517 F. Supp. 2d 17, 32 (D.D.C. 2007) (holding that, where defendant declared that all information is exempt under 7(A) in its entirety, “[d]efendant has satisfied its burden, and its failure to make a document-by-document segregability determination is of no moment.”). Instead, it is sufficient that the FBI has asserted that it completed a segregability review, concluded that no information is reasonably segregable, and explained in its categorical analysis the harms that may arise should the information be disclosed. *See Dillon v. Dep’t of Justice*, 102 F. Supp. 3d 272, 298

(D.D.C. 2015) (holding that FBI satisfied its segregability obligation under FOIA by explaining that segregability was not possible for a majority of records because they were exempt from disclosure in their entirety pursuant to Exemption 7(A)); *EPIC*, 82 F. Supp. 3d at 322 (holding that the government supported its determination that there was no segregable material in the investigative records withheld under Exemption 7(A)); *Robbins, Geller*, 2016 WL 950995, at *8 (holding that the SEC properly determined that responsive records did not contain any reasonably segregable information because of the way the plaintiff phrased its FOIA request, which sought all documents provided by Walmart to the SEC that related to potential violations of the Foreign Corrupt Practices Act); *Cucci*, 871 F. Supp. at 512 (“Because the agency has met its burden of showing that all its records are exempt and relate to the continuing investigations . . . there are no non-exempt portions of the records to segregate.”).³

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their Motion for Summary Judgment and enter final judgment for them in this matter.

Dated: May 19, 2016

Respectfully submitted,

BENJAMIN C. MIZER

³ If the Court finds any material portion of the FBI’s submissions to be insufficient, Manning’s request for an order requiring immediate disclosure is not the proper remedy. Instead, the Court should require the agency to submit additional supplemental declarations on the applicability of Exemption 7(A), which may include an *ex parte* declaration. *See Campbell v. DOJ*, 164 F.3d 20, 31 (D.C. Cir. 1998) (“On remand, the district court can either review the documents *in camera* or require the FBI to provide a new declaration. . . . The latter course is favored where agency affidavits are facially inadequate.”); *Spirko v. USPS*, 147 F.3d 992, 997 (D.C. Cir. 1998) (listing potential remedies, including requiring additional affidavits); *Elec. Privacy Info. Ctr. v. Dep’t of Homeland Sec.*, 384 F. Supp. 2d 100, 120 (D.D.C. 2005) (permitting agencies to submit a revised *Vaughn* index). Even if the Court disagrees with the FBI’s application of Exemption 7(A), the agency has reserved its right to assert other exemptions in later briefing. *See* Joint Status Report, ECF No. 11. Thus, any discussion of disclosure is premature.

Principal Deputy Assistant Attorney General

CHANNING D. PHILLIPS
United States Attorney

ELIZABETH J. SHAPIRO
Deputy Branch Director
Federal Programs Branch

/s/ Aimee W. Brown
AIMEE W. BROWN (IL Bar No. 6316922)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 305-0845
Fax: (202) 616-8470
Email: aimee.w.brown@usdoj.gov

Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
CHELSEA MANNING,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 15-CV-01654-APM
)	
U.S. DEPARTMENT OF JUSTICE, <i>et al</i> ,)	
)	
Defendants.)	
_____)	

SECOND DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am the Section Chief of the Record/Information Dissemination Section (“RIDS”), Records Management Division (“RMD”), in Winchester, Virginia. I have held this position since August 1, 2002. Prior to my joining the Federal Bureau of Investigation (“FBI”), from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act (“FOIA”) policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 239 employees who staff a total of ten (10) Federal Bureau of Investigation Headquarters (“FBIHQ”) units and two (2) field operational service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and

information pursuant to the FOIA as amended by the OPEN Government Act of 2007 and the OPEN FOIA Act of 2009; the Privacy Act of 1974; Executive Order 13,526; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. My responsibilities also include the review of FBI information for classification purposes as mandated by Executive Order 13,526,¹ and the preparation of declarations in support of Exemption 1 claims asserted under the FOIA. I have been designated by the Attorney General of the United States as an original classification authority and a declassification authority pursuant to Executive Order 13,526 §§ 1.3 and 3.1. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information pursuant to the provisions of the FOIA, 5 U.S.C. § 552 and the Privacy Act (“PA”) of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the FBI’s response to the FOIPA request of plaintiff, Chelsea E. Manning, seeking access to certain FBI records relating to the “investigation conducted by the Washington Field Office of the Federal Bureau of Investigation and U.S. Attorney’s Office of the Eastern District of Virginia into the alleged disclosures of classified and sensitive but unclassified information by Private First Class (PFC) Bradley E. Manning” and relating to the investigation “into alleged civilian co-conspirators of the disclosures of information by Manning.”

(4) This is my second declaration in this case. It incorporates by reference my first declaration, *see* ECF No. 12-1, Declaration of David M. Hardy (“1st Hardy Decl.”), and is being

¹ 75 Fed. Reg. 707 (2010).

submitted in further support of the FBI's motion for summary judgment based on Exemption 7(A) in this case.

THE FBI'S PENDING INVESTIGATION

(5) Plaintiff suggests that because she was investigated by the Army and prosecuted and convicted by a military tribunal, no harm could come to the FBI's separate investigation regarding the leak of classified information that was published on the Wikileaks website. This is incorrect.

(6) To be clear, the FBI's investigation is focused on any civilian involvement in plaintiff's leak of classified records that were published on the Wikileaks website, although plaintiff's conduct is pertinent to the FBI's investigation. This explains why information about her was located in the FBI's pending files on the Wikileaks investigation. However, information about her in the FBI's investigative files must be considered in light of the FBI's investigative focus, and when viewed in that context, the FBI concluded that disclosure of responsive information from its pending investigative files could reasonably be expected to cause the harms described in my first declaration. 1st Hardy Decl. at ¶¶ 44-48.

(7) Contrary to plaintiff's assertion, the harms I described in my first declaration could reasonably be expected to occur not only in relation to any prosecutions resulting from the FBI's investigation but also to the FBI's pending investigation of potential civilian involvement in the leaks itself.

SEGREGABILITY

(8) The FBI's April 8, 2014, assertion of Exemption 7(A) to protect all records responsive to her request was based on its knowledge of the contents of the responsive investigative files as a result of previously reviewing those records in response to other FOIA

requests (including the request at issue in the *EPIC v. DOJ* litigation²). This prior knowledge and familiarity, along with continued discussions with Special Agents assigned to this investigation, informed the decision that no information could be segregated and released to plaintiff in response to her request.

(9) Moreover, by the time of my first declaration, RIDS had conducted a document-by-document review of all records containing information responsive to both parts of plaintiff's request to determine whether there was any reasonably segregable non-exempt information that could be released to her.

(10) As a result of the FBI's document-by-document review, the FBI did not locate any such information. The FBI did not locate any records that were exclusively about plaintiff, and to the extent that there was information about plaintiff in records that also contained other information, the FBI concluded that such information was not reasonably segregable.

(a) In some instances, disclosure of information about plaintiff in records that also contained other information could reasonably be expected to adversely affect the investigation in light of the context in which the information appears and the content of the information.

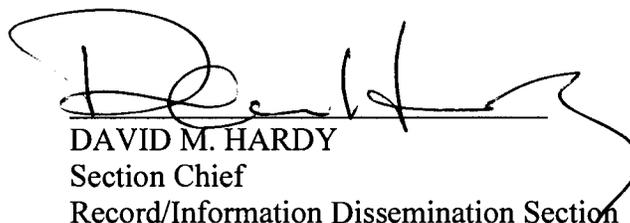
(b) In some instances, information about plaintiff was so comingled with other exempt information that it was inextricably intertwined and could not be reasonably segregated for release.

² Plaintiff asserts that the records requested in *EPIC* were not the same as she requested. Her assertion ignores the fact that she not only requested records about herself but also about third parties that the FBI is investigating in relation to the leak of classified information that was published on the Wikileaks website. As explained in my first declaration, the FBI was already aware of which files were responsive to the latter part of her request and the FBI's search of records specifically indexed in her name revealed no additional responsive files. *See* 1st Hardy Decl. at ¶ 32.

(c) Finally, although the FBI considered whether there was any public source information that could be released to plaintiff, it concluded that in this instance, there was not. Specifically, the FBI did not locate any public source information about plaintiff's arrest, prosecution, or conviction in the file.

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

Executed this 17th day of May, 2016.



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

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

CHELSEA MANNING,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE and the
FEDERAL BUREAU OF INVESTIGATION,

Defendants.

Case No. 1:15-cv-01654-APM

DEFENDANTS' RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 7(h) of the Civil Rules of the U.S. District Court for the District of Columbia, Defendants respond, by and through undersigned counsel, as follows to Plaintiff's Statement of Material Facts Not in Dispute. Plaintiff's numbered statements are reproduced below, each followed by Defendants' response.

1. In 2010, the United States Army charged Ms. Manning, then known as Private Bradley E. Manning, with various violations of the Uniform Code of Military Justice and the United States Code for allegedly disclosing classified and confidential information to the media organization, WikiLeaks. *U.S. Soldier Charged with Leaking Classified Information*, CNN (Jul. 6, 2010) <http://www.cnn.com/2010/WORLD/meast/07/06/iraq.soldier.leak.charge/>.

Response: Undisputed.

2. Ms. Manning pled guilty to some of the charges in February 2013. *Judge Accepts Manning's Guilty Pleas in WikiLeaks Case*, CBS News (Feb. 28, 2013), <http://www.cbsnews.com/news/judge-accepts-mannings-guilty-pleas-in-wikileaks-case/>, and

proceeded to trial on the remaining charges that summer. Charlie Savage, *Manning is Acquitted of Aiding the Enemy*, New York Times, (Jul. 30, 2013), <http://www.nytimes.com/2013/07/31/us/bradley-manning-verdict.html>.

Response: Undisputed.

3. At trial Ms. Manning was acquitted of aiding the enemy, but convicted of charges related to espionage, theft, and computer fraud under the United States Code, as well as various other military-related offenses. *Id.*; Manning General Court-Martial Order No. 4 (Apr. 10, 2014).

Response: Undisputed.

4. In August 2013, a military judge sentenced her to thirty-five years of imprisonment and a dishonorable discharge from the Army. Richard A. Serrano, WikiLeaks Trial: Bradley Manning Sentenced to 35 Years in Prison, Los Angeles Times (Aug. 21, 2013), <http://articles.latimes.com/2013/aug/21/nation/la-na-nn-wikileaks-bradley-manning-sentenced-20130820>. She is currently serving her sentence at the Fort Leavenworth Disciplinary Barracks in Fort Leavenworth, Kansas.

Response: Undisputed.

5. The conduct that formed the basis of Ms. Manning's conviction and sentence also formed the basis of the FBI's criminal investigation. *See* Hardy Decl. ¶ 37 (describing the "ongoing investigation into the unauthorized disclosure of classified information that subsequently was published on the WikiLeaks website.").

Response: Disputed. As explained in the First and Second Hardy Declarations, the FBI's investigation is not focused on Manning, but on the involvement of any civilians in the

unauthorized disclosure of classified documents. *See* Hardy Decl. ¶¶ 34 & n.9; Hardy 2d Decl. ¶ 10.

6. On February 20, 2014, Ms. Manning submitted a FOIA request to the FBI seeking:

- a. Documents, papers, reports, letters, memoranda, films, electronic data, photographs, audio and video recordings of or relating to investigation conducted by the Washington Field Office of the Federal Bureau of Investigation and the U.S. Attorney's Office of the Eastern District of Virginia into the alleged disclosures of classified and sensitive but unclassified information by Private First Class (PFC) Bradley E. Manning beginning in late 2010 and continuing until an unknown date, but as late as mid-2012.
- b. Any other documents, papers, reports, letters, memoranda, films, electronic data, photographs, audio and video recordings of or relating to the investigation conducted by the Federal Bureau of Investigation and the U.S. Attorney's Office of the Eastern District of Virginia into alleged civilian co-conspirators of the disclosures of information by Manning.

Doc. 12-2

Response: Undisputed, although Defendants respectfully direct the Court to the referenced document for a complete and accurate statement of its contents.

7. On March 7, 2014, the FBI acknowledged Ms. Manning's request and notified her that the request "did not contain sufficient information to conduct an accurate search of the Central Records System." Doc. 12-3 at 2.

Response: Undisputed, although Defendants respectfully direct the Court to the referenced document for a complete and accurate statement of its contents.

8. On March 18, 2014, Ms. Manning supplemented her request with the additional information and modified her request so that it read:

- a. Documents, papers, reports, letters, memoranda, films, electronic data, photographs, audio and video recordings of or relating to the investigation

conducted by the Washington Field Office (WFO), the Department of Justice Counterepionage [*sic*] Section (CES), the U.S. Attorney's Office for the Eastern District of Virginia (E.D.Va.) into the alleged disclosures of classified and sensitive by [*sic*] unclassified information by then-Private First Class (PFC) Bradley Edward Manning (a.k.a. Chelsea Elizabeth Manning).”

- b. Any other documents, papers, reports, letters, memoranda, films, electronic data, photographs, audio and video recordings of or relating to the investigation conducted by the Federal Bureau of Investigation and other agencies into suspected or alleged civilian co-conspirators of the disclosures alleged to have been conducted by Manning.

Doc. 12-4 at 3.

Response: Undisputed, although Defendants respectfully direct the Court to the referenced document for a complete and accurate statement of its contents.

9. On April 8, 2014, the FBI performed a search only for the records identified in part (a) of Ms. Manning's request and used search terms that included a “six-way phonetic breakdown” of her name, her date and place of birth, Ms. Manning's description of the investigation, and the file number Ms. Manning provided. Hardy Decl. ¶ 30.

Response: Undisputed, although Defendants respectfully direct the Court to the referenced document for a complete and accurate statement of its contents.

10. The FBI did not conduct a second search “for records responsive to the second part” of Ms. Manning's request because the FBI was aware, based on experience from a separate case, that those records “were maintained in the same files” as those records concerning Ms. Manning. *Id.* at ¶ 32.

Response: Undisputed, although Defendants respectfully direct the Court to the referenced document for a complete and accurate statement of its contents.

11. The FBI located “potentially responsive” records to Ms. Manning’s request. *Id.* ¶
30. However, the FBI does not indicate the number of located records.

Response: Undisputed, although Defendants respectfully direct the Court to the referenced document for a complete and accurate statement of its contents.

12. On the same day that it searched for records responsive to Ms. Manning’s request, April 8, 2014, the FBI uniformly and categorically denied Ms. Manning’s request. Doc. 12-7; *see also* Doc. 12 at 4. The FBI justified its categorical denial by explaining that the “material [Plaintiff] requested is located in an investigative file which is exempt from disclosure pursuant to 5 U.S.C. § 552(b)(7)(A).” Doc. 12-7 at 2; *see also* Hardy Decl. ¶ 11.

Response: Undisputed, although Defendants respectfully direct the Court to the referenced documents for a complete and accurate statement of their contents.

13. Although the FBI has not provided any evidence regarding the nature of its “segregability review,” the agency purports to have “determined that there is no reasonably segregable information, including public source materials, which can be released at this time without adversely affecting the investigation and any resulting prosecutions.” Hardy Decl. ¶ 49.

Response: Disputed. The FBI provided information regarding the nature of its segregability review in the first Hardy Declaration, *see* Hardy Decl. ¶¶ 44, 49, and has provided further details in its second declaration, *see* 2d Hardy Decl. ¶¶ 8-10. Defendants respectfully direct the Court to these documents for a complete and accurate statement of their contents.

14. Ms. Manning appealed the agency’s denial of her request for records to the Department of Justice (DOJ) Office of Information Policy (OIP). *See* Doc. 12-10 at 2. On May 7, 2014, the OIP acknowledged receipt of her appeal. *Id.*

Response: Undisputed, although Defendants respectfully direct the Court to the referenced document for a complete and accurate statement of its contents.

15. On August 7, 2014, the OIP affirmed and reiterated the FBI's categorical denial of Ms. Manning's request for the records and denied her appeal, reasoning that the:

FBI properly withheld this information *in full* because it is protected from disclosure under the FOIA pursuant to 5 U.S.C. § 552(b)(7)(A). This provision concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to interfere with enforcement proceedings.

Doc. 12-12 at 2 (emphasis added).

Response: Undisputed, although Defendants respectfully direct the Court to the referenced document for a complete and accurate statement of its contents.

16. On January 5, 2015, Ms. Manning sought the assistance of the Office of Government Information Services (OGIS) and asked the agency to "mediate and resolve the dispute between [Plaintiff] and the Attorney General regarding [Plaintiff's] Freedom of Information Act (FOIA) 5 U.S.C. § 552 [sic] request[.]" Doc. 12-13.

Response: Undisputed, although Defendants respectfully direct the Court to the referenced document for a complete and accurate statement of its contents.

17. The OGIS responded to Ms. Manning's request for mediation by repeating the FBI's categorical and purported grounds for denial of her request and stating that "Exemption 7(A) [was] still applicable to records sought at the time of the appeal." Doc. 12-15 at 3.

Response: Undisputed, although Defendants respectfully direct the Court to the referenced document for a complete and accurate statement of its contents.

Dated: May 19, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

CHANNING D. PHILLIPS
United States Attorney

ELIZABETH J. SHAPIRO
Deputy Director

/s/ Aimee W. Brown
AIMEE W. BROWN (IL Bar No. 6316922)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 305-0845
Fax: (202) 616-8470
Email: Aimee.W.Brown@usdoj.gov

Counsel for Defendants