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

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| **LAURA POITRAS,**<br><br>Plaintiff,<br><br>v.<br><br>**U.S. DEPARTMENT OF HOMELAND SECURITY ET AL.,**<br><br>Defendants. | Case No. 1:15-cv-1091 (KBJ) |

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

**TABLE OF CONTENTS**

## TABLE OF AUTHORITES

**Cases**

**Statutes**

## INTRODUCTION

This case concerns the nearly identical FOIA requests that Plaintiff submitted to the FBI, ODNI, DHS, and four DHS components (CBP, USCIS, ICE, TSA). Defendants have moved for summary judgment, and through nine substantive declarations have demonstrated the adequacy of their respective searches and the validity of their withholdings.

In her Opposition and Cross-Motion, Dkt. Nos. 17, 18 ("Pl.'s Br."), Plaintiff "does not contest the withholdings" of CBP, TSA, ODNI, or FBI's under Exemptions 1, 3, 6, and 7(C). Pl.'s Br. at 2. Nor does Plaintiff contest ICE's, USCIS'S, or DHS Headquarters' "failure to produce any respons[ive] records." *Id*. And while Plaintiff contests certain FBI withholdings, she does not challenge the adequacy of FBI's search. Defendants should be granted summary judgment on all issues not expressly challenged in Plaintiff's memoranda. *See, e.g., Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003), *aff'd sub nom. Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries, United Methodist Church*, 98 F. App'x 8 (D.C. Cir. 2004) ("[W]hen a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.").

This memorandum therefore addresses the following contested issues: whether FBI properly withheld information under the deliberative process privilege, whether information relating to the FBI's criminal investigation of Plaintiff was compiled for law enforcement purposes within the meaning of Exemption 7, whether FBI and CBP satisfied their segregabiltiy obligations, and whether CBP conducted an adequate search for responsive records. FBI and CBP are entitled to summary judgment on all of these issues.

## ARGUMENT

### I. FBI's Withholdings under the Deliberative Process Privilege Are Proper.

The FBI properly withheld information under Exemption 5's deliberative process privilege. The FBI has shown that the withheld paragraphs—found in Poitras 158, 159, and 163[1]—are predecisional and deliberative. *See* First Public Declaration of David M. Hardy, ex. 2 ("First Hardy Decl.") ¶ 62. In response, Plaintiff contends that FBI has failed to show that the information withheld from these three documents is actually part of the deliberative process because the agency has not provided sufficient detail about the decisions at issue. Pl.'s Br. at 13.

While the First Hardy Declaration provides sufficient detail to show that the redacted material was created as part of the deliberative process, and while an agency is not required to identify a specific decision as opposed to a deliberative process, *see, e.g.*, *Quarles v. Dep't of Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990), FBI has now submitted a supplemental declaration that provides further information on these documents and the decisions at issue therein. *See* Second Public Declaration of David M. Hardy, Ex. 1 ("Second Hardy Declaration"). As these declarations explain, FBI asserted Exemption 5 to withhold portions of an intra-agency electronic communication from the New York Field Office that provides analysis and recommendations relating to the FBI's investigation of Plaintiff. *See* First Hardy Decl. ¶ 62; Second Hardy Decl. ¶ 7. The author of the communication is an intelligence analyst, and the recipient a special agent assigned to the investigation. Second Hardy Decl. ¶ 7. The information redacted from the communication reflects (i) discussion of the results of a database check relating to the FBI's investigation of Plaintiff, (ii) deliberation over what further investigative steps the FBI could or

[1] The First Hardly declaration incorrectly identified Poitras 164 as a document containing information withheld under the deliberative process privilege.

should take in light of the results, and (iii) recommendations to the special agent as to how to proceed in the investigation, including recommendations to consider seeking a court order and coordinating with other agencies. First Hardy Decl. ¶ 62; Second Hardy Decl. ¶ 7. The Second Hardy Declaration further explains that the "objective of the document is to provide analytical support," and that the information withheld does not reflect a final decision but rather "information the [special agent] could consider when proceeding with the investigation." Second Hardy Decl. ¶ 7.

This information is sufficient to meet the agency's burden under FOIA because it shows that these documents reflect "recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Loving v. Dep't of Defense*, 550 F.3d 32, 38 (D.C. Cir. 2008) (quoting *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001)). In particular, the information is predecisional because it "was 'prepared in order to assist an agency decisionmaker in arriving at his decision.'" *Quarles*, 893 F.2d at 392. That it was prepared by someone who lacks decisionmaking authority with respect to the investigation (the intelligence analyst), for the benefit of someone who possesses such authority (the special agent), only reinforces the predecisional nature of the communication. *See Hopkins v. HUD*, 929 F.2d 81, 85 (2d Cir. 1991) (Documents prepared by agency officials who "themselves lack any authority to take final agency action . . . are necessarily predecisional"); *see also Tax Analysts v. IRS*, 152 F. Supp. 2d 1, 24-25 (D.D.C. 2001) (protecting memoranda "written by a component office without decisionmaking authority to a different component office" that had such authority), *aff'd in part, rev'd in part on other grounds and remanded*, 294 F.3d 71 (D.C. Cir. 2002); *Renegotiation Bd. v. Grunman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975) (holding that the

deliberative process privilege protected "final recommendations" issued by regional boards "[b]ecause only the full Board has the power by law to make the decision").

Further, the information is deliberative because it reflects "internal deliberations on the advisability of a[] particular course of action." *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 875 (D.C. Cir. 2010). The declarations not only provide "context into the specific agency decision or decision-making process," but they identify "the 'role that the withheld [paragraphs] played in that deliberative process'" as well as the "'positions . . . and job duties of the authors and recipients.'" Pl.'s Br. at 13.[2] While these kinds of analytical recommendations are deliberative by nature, *see* Second Hardy Decl. ¶ 7, there should also be "considerable deference to the [agency's] judgment as to what constitutes . . . 'part of the agency give-and-take — of the deliberative process — by which the decision itself is made"' because the agency is best situated "to know what confidentiality is needed 'to prevent injury to the quality of agency decisions."' *Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 600 F. Supp. 114, 118 (D.D.C. 1984) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). In this regard, Plaintiff has given the Court no reason to second-guess the FBI's characterizations about its own deliberative processes.

Plaintiff is wrong to suggest that FBI cannot withhold a predecisional document unless it has released or at least identified a corresponding final version. *See* Pls.' Br. at 14. Courts routinely uphold Exemption 5 withholdings of predecisional materials even though final versions of the documents either do not exist or have not been publicly released. *See, e.g., ICM Registry, LLC v. U.S. Dep't of Commerce*, 538 F. Supp. 2d 130, 137 (D.D.C. 2008) (approving draft's withholding, notwithstanding the fact that a final version of the document was never produced, because the draft

[2] Plaintiff incorrectly asserts that the redacted paragraphs on Page 163 "do not fall within the same section of the document" as the redacted paragraphs in Poitras 158 and 159. *Id.* As the Second Hardy Declaration explains, the redacted paragraphs in Poitras 163 are a continuation of the intelligence analyst's recommendations from Poitras 158 and 159. Second Hardy Decl. ¶ 7.

"contains 'options' regarding final agency policy, and thus makes a plain contribution to agency deliberations on final policy"). By suggesting that a predecisional document may be withheld only if a subsequent version exists, Plaintiff "misconceives what constitutes a 'final decision' in the context of Exemption 5." *Bureau of National Affairs, Inc. v. U.S. Dep't of Justice*, 742 F.2d 1484, 1497 (D.C. Cir. 1984). The predecisional nature of a recommendation does not depend upon the existence of a subsequently created document memorializing the decision, because "[r]ecommendations on how best to deal with a particular issue are themselves the *essence* of the deliberative process," *Nat'l Wildlife Fed. v. U.S. Forest Serv.*, 861 F.2d 1114, 1121 (9th Cir. 1988). This is especially true where, as here, the recommendations were made for another decisionmaker who had "ultimate authority" over the decision. *Bureau of National Affairs*, 742 F.2d at 1497-98.

Plaintiff also contends that FBI improperly relied on the deliberative process privilege to withhold factual material. Plaintiff's argument is overbroad and legally flawed. Contrary to Plaintiff's suggestion, the FBI has conducted a segregability review of the documents, as shown by the fact that FBI released portions of all three pages containing information withheld under the deliberative process privilege.

Finally, even if certain information in these paragraphs were not protected by the deliberative process privilege, the bulk of the information would still be properly withheld under Exemption 7(E), because it involves sensitive details relating to the FBI's investigation of Plaintiff, as well as recommendations as to how the investigation should proceed. *See* Second Hardy Declaration ¶ 7, n. 4. Apart from a meritless argument that Exemption 7 is not applicable at all (discussed below), Plaintiff does not contest the FBI's specific withholdings under Exemption 7(E), which provide an independent basis for protecting the information in question. For these reasons, FBI properly withheld these communications under the deliberative process privilege.

## II. FBI has Satisfied the Threshold Requirement for Exemption 7.

The First Hardy declaration explains that the records withheld under Exemption 7 were compiled as part of a criminal investigation into Plaintiff's "possible involvement with anti-coalition forces during her time in Iraq as an independent media representative." First Hardy Decl. ¶ 64.

Plaintiff does not dispute that she was the subject of an FBI investigation into her potential involvement in an ambush on U.S. Forces near Baghdad that resulted in the death of one U.S. soldier and serious injuries to several others. *Id*. ¶ 31. She does not dispute that the investigation was undertaken at the request of the U.S. military, after the FBI received further information about Plaintiff's involvement in the ambush, including the possibility that she had prior knowledge of the ambush and chose not to report it. *Id*. Nor does she dispute that the records at issue were compiled in the course of the FBI's investigation and stored on the FBI's Central Record System. *Id*. ¶ 34. Instead, her principal response is to attack the legitimacy of the investigation itself, insisting that the FBI lacked "a good-faith belief" for undertaking the investigation in the first place, and that "Plaintiff was monitored and harassed for purposes unrelated to enforcement of federal law." Pl.'s Br. at 18.

These arguments misunderstand the scope of the question before the Court. This case concerns requests for information under FOIA, and the application of Exemption 7 requires a determination not of whether the Government should have investigated a particular episode, but rather whether the records at issue were compiled for law enforcement purposes. *See* 5 U.S.C. § 552(b)(7).

On that issue, there can be little question that the FBI has met its burden of showing that the responsive records were "compiled for law enforcement purposes." To satisfy the threshold

requirement in Exemption 7, an agency must "identify a particular individual or a particular incident as the object of its investigation" and specify "the connection between that individual or incident and a possible security risk or violation of federal law." *King v. U.S. Dep't of Justice*, 830 F.2d 210, 229 (D.C. Cir. 1987) (internal citations and quotations omitted). While the Department of Justice's "claim of a law enforcement purpose is entitled to deference," *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 926 (D.C. Cir. 2003), no deference is required to determine that both of these requirements are easily met here. *See, e.g.*, *Jefferson v. Dep't of Justice, Office of Prof'l Responsibility*, 284 F.3d 172, 77 (D.C. Cir. 2002) (records are generated for law enforcement purposes where they concern investigations "that focus directly on specific alleged illegal acts which could result in civil or criminal sanctions"); *DeMartino v. FBI*, 577 F. Supp. 2d 178, 181 (D.D.C. 2008). The FBI has identified a "particular individual" (Plaintiff) and a "particular incident" (the ambush on U.S. Forces) as the object of its investigation, *see King*, 830 F.2d at 229, and it has specified a rational "connection" between that incident and a possible security risk or violation of federal law. To the extent there were any doubt that the investigation was consistent with the FBI's law enforcement functions, they have been dispelled by the Second Hardy Declaration, which shows that the investigation fell squarely within the Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection. Second Hardy Decl. ¶ 8.[3]

[3] Plaintiff, in passing, contends that the U.S. Army Criminal Investigation Command (USACIC) has not made a showing that the information it withheld under Exemption 7 was compiled for law enforcement purposes. However, as the Ali Declaration explains, *see* Dkt. No. 14-1, Ex. K, USACIC's overarching mission is to conduct law enforcement investigations, and the documents in question were generated in connection with that mission. *See* Ali Decl. ¶ 7. In particular, the information withheld concerns "U.S. Government personnel investigating suspected terrorists and their organizations," *id.* ¶ 9, and, more specifically, "law enforcement techniques associated with investigating and detaining suspects," and "identification numbers assigned to detainees," *id.* ¶ 18. This information plainly satisfies the Exemption 7 threshold requirement.

Plaintiff's reliance on *Shapiro v. U.S. Dep't of Justice*, 37 F. Supp. 3d 7 (D.D.C. 2014), is misplaced. In *Shapiro*, the FBI sought to protect "documents compiled as a result of assistance FBI rendered to various state and local law enforcement agencies" that were investigating potential criminal activity by protestors involved in the "Occupy" movement in Houston. *Id*. at 29. The records had been compiled while the FBI was working with state and local law enforcement authorities to assess the protests for potential terrorist threats or criminal activity. *Id*. In concluding that the FBI's averments as to the Exemption 7 threshold were too generalized, the court reasoned that the FBI had not "suppl[ied] specific facts as to the basis for FBI's belief that the Occupy protestors might have been engaged in terroristic or other criminal activity." *Id*.

Here, by contrast, the FBI *has* provided specific facts about Plaintiff's potential involvement in the ambush against U.S. Forces, including the U.S. military's receipt of information in 2004 that Plaintiff filmed the ambush from atop a nearby building, Plaintiff's subsequent confirmation that she was on the roof of the building working on a documentary at the time of the ambush, and the FBI's receipt of further information in 2006 that Plaintiff had prior knowledge of the ambush but chose not to report it. *See* First Hardy Decl. ¶ 31. Unlike the records at issue in *Shapiro*, which related to general assistance the FBI provided to state and local law enforcement authorities in connection with their investigations into potential criminal activity of unspecified protestors, the investigation at issue here arose from a specific incident and involved specific allegations of criminal activity on the part of a particular individual. Indeed, even the *Shapiro* court recognized that Exemption 7 applies where records are compiled "in connection with investigations that focus directly on specific alleged illegal acts." 37 F. Supp. 3d at 29. This is precisely such a case, and *Shapiro* is therefore no help to Plaintiff.[4]

[4] Plaintiff's reliance on *Lamont v. U.S. Dep't of Justice*, 475 F. Supp. 761 (S.D.N.Y. 1979), is similarly unpersuasive. There, the court found that the FBI had carried out a proper investigation for 13 years, but that, after the FBI

## III. FBI and CBP Have Satisfied their Segregability Obligations.

Both FBI and CBP have demonstrated that they complied with their segregability obligations under FOIA. Both agencies conducted line-by-line reviews of the records determined to be responsive and concluded that all reasonably segregable portions of the relevant records have been released to Plaintiff. First Hardy Decl. ¶ 110; Declaration of Sabrina Burroughs, Ex. 4 ("Burroughs Decl.") ¶ 52.

Plaintiff argues that this analysis is conclusory and insufficient and even asserts that there is a "near certainty that the agencies have withheld more information than is otherwise justifiable." Pl.'s Br. at 20. This argument lacks any factual basis, and the Court should grant the FBI and CBP summary judgment on this claim because both agencies have met their burden on this issue.

To satisfy the segregability burden, an agency must "show with 'reasonable specificity' why [responsive] document[s] cannot be further segregated," which can be done through "[t]he combination of the *Vaughn* index and [its] affidavits." *Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002). In this context, an agency 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). As a result, a court need not conduct "a page-by-page review of an agency's work," but instead "may rely on [the] agency's declaration in making its segregabiltiy determination." *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 779 (9th Cir. 2015); *cf Anderson v. CIA*, 63 F. Supp. 2d 28, 30 (D.D.C. 1999) (declining, "especially in the highly classified context of this case," to "infer from the absence of the word 'segregable' [in the agency's affidavit] that segregability was possible").

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indicated that its investigation had ended, the subsequent 17 years of generalized surveillance lacked a clear connection to law enforcement purposes. *Id*. at 774-76. Here, the documents at issue were generated in the course of a criminal investigation in furtherance of FBI's law enforcement mission.

CBP and FBI have satisfied this burden. In addition to attestations from senior FOIA officials that all responsive records were reviewed—document-by-document, line-by-line—to ensure that there was no reasonably segregable information the agencies could produce, *see* First Hardy Decl. ¶ 110; Burroughs Decl. ¶ 52, both agencies have submitted declarations and *Vaughn* indexes identifying the documents provided to Plaintiff in response to her FOIA request, describing the contents of the documents, and explaining the agencies' justifications for each redaction or category of redactions.[5] When viewed together, these materials more than satisfy the agencies' segregability obligations. *See, e.g.*, *Loving v. U.S. Dep't of Def.*, 496 F. Supp. 2d 101, 110 (D.D.C. 2007), *aff'd sub nom. Loving v. Dep't of Def.*, 550 F.3d 32 (D.C. Cir. 2008) (holding that "government's declaration and supporting material are sufficient to satisfy its burden to show with 'reasonable specificity' why the document cannot be further segregated, where declaration averred that agency had "released to plaintiff all material that could be reasonably segregated"); *Elec. Frontier Found. v. U.S. Dep't of Justice*, No. 07-00403, slip op. at 17 (D.D.C. Aug. 14, 2007) (concluding that although agency declarations never explicitly used term "segregability," statements "[c]onsidered as a whole," desmonstrate agency's segregability analysis), reconsideration denied, 532 F. Supp. 2d 22 (D.D.C. 2008).

Plaintiff's contention that the FBI and CBP have offered only "empty invocations" of their segregability obligations would be more persuasive if Defendants had merely rested their case on representations that all reasonably segregable information had been produced. But again, those representations have been made in conjunction with descriptions of the process by which

[5] The Second Hardy declaration elaborates on FBI's practice as it relates to segregation, explaining that (i) non-duplicate pages were withheld in full only if releasing non-exempt information would result in disjointed words and phrases that had negligible informational value, or if it was not technically feasible to segregate exempt information from non-exemption information; (ii) all segregable information on each document that was withheld in part was released to Plaintiff; and (iii) the only information withheld by the FBI would trigger reasonably foreseeable harm to one or more interests protected by the FOIA exemptions. Second Hardy Decl. ¶ 7.

segregation determinations are made, as well as detailed descriptions of the documents or portions of documents withheld and the specific reasons for the withholdings. Plaintiff, on the other hand, rests her segregation challenge on the naked assertion that Defendants simply *must* have missed something in their segregation review (there is a "near certainty that the agencies have withheld more information than is otherwise justifiable," Pl.'s Br. at 20), while failing to point to a single paragraph or sentence that supposedly contains segregable information. Under these circumstances, FBI and CBP are entitled to summary judgment on Plaintiff's segregability challenge.

## IV. CBP Conducted an Adequate Search.

CBP's declaration demonstrates that the component made a good faith effort to undertake a search for the requested records, using methods "reasonably calculated to uncover all relevant documents." *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). An adequate search is based on a reasonable interpretation of the scope of the request and the records sought. *See Larson v. U.S. Dep't of State*, 565 F.3d 857, 869 (D.C. Cir. 2009).

In particular, the Burroughs Declaration explains that CBP FOIA personnel determined that any responsive records would most likely be located within two CBP computer systems—TECS (and its subsystems) and the Automated Targeting System ("ATS"). Burroughs Decl. ¶ 5. CBP searched TECS and ATS using search terms encompassing Plaintiff's name and date of birth. *Id*. ¶¶ 5, 26. Based on the results of those searches, CBP FOIA personnel further determined that additional responsive records were likely to be found in CBP's New York field office, and CBP accordingly conducted both paper and electronic searches of the New York field office. *Id*. ¶ 31.

Plaintiff challenges the adequacy of CBP's search on two grounds. First, she argues that there are "positive indications of overlooked materials" – in particular, records relating to materials

that Plaintiff alleges were taken from her and photocopied by CBP in the course of her encounters with CBP agents at various custom borders. Pl.'s Br. at 21. Second, she argues that CBP does not provide sufficient information for the Court to assess the adequacy of its search methodology. *Id*. at 22. Neither argument has merit.

**a. Alleged Positive Indications of Overlooked Material**

Plaintiff impugns the adequacy of CBP's search by noting that CBP's production did not include certain photocopies that Plaintiff expected to receive. But Plaintiff cannot challenge the adequacy of a search by merely identifying documents which she believes should exist but were not produced. It is well-established that the adequacy of a FOIA search "is generally determined not by the fruits of the search, but the appropriateness of the methods used to carry out the search." *Budik v. Dep't of Army*, 742 F. Supp. 2d 20, 30 (D.D.C. 2010). "[T]he [mere] fact that a particular document was not found does not demonstrate the inadequacy of a search." *Boyd v. Criminal Div. of U.S. Dep't of Justice*, 475 F.3d 381, 391 (D.C. Cir. 2007). Thus, absent a viable challenge to the adequacy of CBP's search methods, the fact that CBP did not produce a particular document or set of documents is not sufficient to render the search inadequate.

Accepting Plaintiff's statements as true, there are numerous reasons why such photocopies, to the extent they were even retained by CBP, may not have been included in CBP's production. As the D.C. Circuit stated while rejecting a similar, and indeed more specific, search-adequacy challenge, "particular documents may have been accidentally lost or destroyed, or a reasonable and thorough search may have missed them." *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). Absent a viable challenge to the adequacy of CBP's search methods, the fact that CBP's production did not include particular documents does not render the search inadequate.

**b. CBP Adequately Described Its Search Methodology**

Plaintiff's contention that CBP provided insufficient detail about its electronic searches is meritless. According to Plaintiff, the Burroughs declaration states "only that CBP personnel 'performed searches on relevant databases within [TECS and ATS] using Plaintiff's name and date of birth'," but "fail[s] to provide the specific search terms utilized." Pl.'s Br. at 22. This is a puzzling argument, because Plaintiff's name and date of birth *were* the search terms utilized by CBP. *See* Burroughs Decl. ¶¶ 5, 26. Given the nature of Plaintiff's FOIA request, which sought CBP records about herself, this search was appropriately targeted. *See, e.g.*, *Strunk v. U.S. Dep't of State*, 845 F. Supp. 2d 38, 44 (D.D.C. 2012) (CBP's search of TECS for individual travel records using name and date of birth was reasonably calculated to locate responsive records); *Barnard v. Dep't of Homeland Security*, 598 F. Supp. 2d 1, 3 (D.D.C. 2009) (CBP search of TECS and ATS in response to request for "all records about me" was reasonable). Plaintiff offers no authority or credible argument to the contrary. By explaining the scope of the search, the types of files searched, and the parameters of those searches, CBP's declaration is "relatively detailed, nonconclusory, and submitted in good faith." *Greenberg v. U.S. Dep't of Treasury*, 10 F. Supp. 2d 3, 12-13 (D.D.C. 1998).

Nor is there any merit to Plaintiff's contention that CBP provided insufficient details about the search of its New York field office. Plaintiff claims that the Burroughs Declaration states only that CBP "searched paper files and performed an electronic search on email records using Plaintiff's name and other relevant search terms." Pl.'s Br. at 22. In fact, the Burroughs Declaration goes on to provide the very details Plaintiff suggests it has omitted, including methodology ("several custodians reasonably likely to have information related to Plaintiff or the August 1, 2010 encounter"), search terms ("'Poitras,' 'Laura Poitras,' and the name and email

address of Plaintiff's legal counsel related to the August 1, 2010 encounter"), and the date range ("August 1, 2010 through October 31, 2010"). This is more than sufficient to warrant summary judgment on this issue.

**CONCLUSION**

For the foregoing reasons, as well as the reasons set forth in Defendants' opening brief, the Court should grant the Defendants' Motion for Summary Judgment, deny Plaintiff's Cross-Motion for Summary Judgment, and enter judgment in favor of the Defendants.

September 26, 2016

Respectfully submitted,

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FOR THE DISTRICT OF COLUMBIA

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| LAURA POITRAS<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF JUSTICE, et. al.<br><br>Defendants. | ) | Civil Action No. 1:15-cv-01091 |

**SECOND DECLARATION OF DAVID M. HARDY**

I, David M. Hardy, declare as follows:

(1) I am currently the Section Chief of the Record/Information Dissemination Section ("RIDS"), Records Management Division ("RMD"), of the Federal Bureau of Investigation ("FBI"), in Winchester, Virginia. I have held this position since August 1, 2002. Prior to joining the 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 247 employees who staff a total of ten (10) FBI 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. 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 from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Specifically, I am familiar with the FBI's handling of plaintiff's January 24, 2014 Freedom of Information/Privacy Act ("FOIPA") request to the FBI for all information concerning Laura Poitras.

(4) The FBI submits its second declaration in response to plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment ("Plaintiff's Opposition"). This declaration supplements and incorporates by reference the information previously provided in my first declaration. *See* ECF No. 14, Declaration of David M. Hardy ("First Hardy Declaration").

(5) The background of this matter is set forth in my prior declarations and will not be fully recounted. Only information directly relevant to this declaration has been repeated here. In Plaintiff's Opposition, the plaintiff challenges the FBI's withholdings under FOIA exemptions (b)(5) and (b)(7), as well as the FBI's conclusion that it has complied with its segregability obligations. As a result, this supplemental declaration is being submitted in support of the FBI's position that all exemptions applied are justified and that all responsive, non-exempt records

and/or information have been released. This declaration also includes a more detailed description of the documents withheld in full.

## JUSTIFICATION FOR THE ASSERTION OF FOIA EXEMPTIONS

### *I. FOIA EXEMPTION (b)(5)*

(6) As discussed in my First Hardy Declaration at ¶¶ 57-59, Exemption 5 allows the FBI to protect information contained in an inter-agency or intra-agency document which would not be available by law to a party other than an agency in litigation with the agency. In this case, the FBI protected information pursuant to the deliberative process privilege.

(b)(5)-1 Deliberative Process Privilege

(7) As explained in the First Hardy Declaration ¶ 62, the FBI protected intelligence analysis for the results of database queries from the New York Field Office ("NY FO") pursuant to the deliberative process privilege of Exemption 5.[1] The information withheld warrants protection pursuant to the deliberative process privilege because it is: a) contained within an intra-agency document; b) deliberative; and c) pre-decisional. As evidenced in the Electronic Communication ("EC")[2] at Poitras-157-163[3], the information is contained within an intra-agency document generated by an Intelligence Analyst ("IA") from the NY FO and sent to another component within the FBI. Additionally, the information is deliberative because it involves the FBI IAs' gathering, sorting, and compiling multitudinous facts with the aim of

[1] The FBI inadvertently stated in the First Hardy Declaration that FOIA exemption (b)(5)-1 was applied to Poitras-164.

[2] Electronic Communication (EC) is an interim summary of information, usually of the investigative activities of one of the field offices of the FBI in a particular case, and is designed to alert other field offices and/or FBI headquarters of a pertinent development that may or may not require attention. ECs have replaced FBI communications such as Airtels, Letters, Memos, and Immediate/Priority Teletypes.

[3] The FBI only cites the deliberative process privilege on Bates Stamped pages Poitras-158-159, 163; however, I cite the entire EC here as a reference to show how the information on these pages pertain to the deliberative intelligence analysis process as a whole.

determining the potential course and scope of a then-active investigation. Finally, the information is also clearly pre-decisional because the result of this analysis was presented to influence and therefore provide recommendations toward an investigatory decision on how the Special Agent ("SA") should proceed with the investigation of plaintiff. The information withheld does not reflect a final decision; it is simply information the SA could consider when proceeding with the investigation. At Poitras-157, an FBI IA advises that the objective of the document is to provide analytical support. What follows at Poitras-158 and 163 are the IA's recommendations based on that analysis. Because the information in these documents constitutes intra-agency, deliberative intelligence analysis made in the course of a pre-decisional recommendation to an SA, the FBI properly protected the information pursuant to Exemption 5.[4]

## *II. FOIA EXEMPTION (b)(7)*

(8) Plaintiff's Opposition states the FBI "failed to make the required threshold showing that the records or information were compiled for law enforcement purposes." In this case, the FBI initiated an investigation on the basis of an allegation and information indicating that the plaintiff may have been involved in an activity constituting a federal crime and/or threat to national security. During the course of the investigation, the FBI obtained information relating to the activity (i.e.—the ambush against U.S. military in Iraq) and plaintiff's alleged role and/or involvement in the activity. The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection ("AGG/NSIG") Part II.B provide the FBI with conditions for initiating an investigation. Poitras-297 identifies the grounds for the investigation per the AGG/NSIG Parts II.C.1.a and II.D.1.

[4] In any event, as reflected in the FBI's production, the bulk of the information withheld under the deliberative process is also protected under Exemption 7(E), because the information involves sensitive details about the FBI's investigation of Plaintiff and suggestions as to how that investigation should proceed.

i) AGG/NSIG Part II.C.1.a
The FBI may initiate an investigation "when there is information or an allegation indicating the existence of a circumstance described" in Part II.B.1 of the AGG/NSIG.

ii) AGG/NSIG Part II.D.1
The FBI may initiate an investigation "if there are specific and articulable facts that give reason to believe that a circumstance described" in Part II. B.1 of the AGG/NSIG exists.

(9) In this case, specifically on Poitras-297, it was alleged that U.S. media representative, Laura Poitras, may have been involved with an ambush by anti-coalition forces that resulted in the death of one U.S. soldier and serious injuries of several others. **(*See* Exhibit A.)** Per Poitras-298, plaintiff watched and filmed the ambush from on top of a nearby building and when questioned denied being present on the roof when several U.S. soldiers had positively identified her as being present during the ambush. **(*See* Exhibit B.)** Per Poitras-59, the military believed plaintiff had prior knowledge of the ambush and had the means to report it but purposely did not. **(*See* Exhibit C.)** Because the alleged activities constitute a federal crime and a threat to national security, the FBI initiated an investigation for potential prosecution and intelligence purposes. The scope of authorized activities under AGG/NSIG Part II "is not limited to criminal investigations,[5] but rather encompasses gathering information for broader analytic and intelligence purposes authorized by E.O. 12333.[6] Thus, the records were compiled for a law enforcement purpose and they squarely fall within the law enforcement duties of the FBI; therefore, the information readily meets the threshold requirement of Exemption 7.

## *III. SEGREGABILITY*

(10) Plaintiff has been provided all non-exempt pages or portions thereof that are responsive to her FOIA request to the FBI. During the processing of plaintiff's request, each

[5] *See* AGG/NSIG Part II.

[6] *See* Id. fn. 5.

responsive page was individually examined to identify non-exempt information that could be reasonably segregated from exempt information for release. The FBI conducted a page-by-page, line-by-line review of all responsive information. Non-duplicate pages were withheld in full only if releasing non-exempt information would result in disjointed words and phrases that had minimal if any informational content, or if, due to the format of the record, it was not technically feasible to segregate the exempt information from the nonexempt information. Therefore, any pages that have been withheld in full have been thoroughly scrutinized before any determination was made to withhold in full.

(11) In addition, all segregable information on each page has been released to plaintiff. As demonstrated herein and in the First Hardy Declaration, the only information withheld by the FBI consists of information that would trigger reasonably foreseeable harm to one or more interests protected by the cited FOIA exemptions.[7] In addition, for pages withheld in full ("WIF"), the below index provides a detailed analysis citing which exemption(s) applied to each WIF document. Some documents WIF were withheld because they were duplicates. Therefore, the document description lists the original page to which each duplicate corresponds and the exemptions applied (if any) on the original document.

| BATES NUMBERS "POITRAS" | DOCUMENT DATE | DOCUMENT DESCRIPTION | EXEMPTIONS CITED |
|---|---|---|---|
| 1-3 | 05/23/2006 | Database results | 6/7C-1, 2<br>7E-1, 3, 5 |
| 5-6 | (no document date found) | Database results | 6/7-2<br>7E-5 |

[7] As discussed in the First Hardy Declaration, the FBI's *Vaughn* index provided a block by block analysis of the location of each piece of exempt information and the basis of its withholding for pages withheld in part and full. The FBI also textually described the Bates page and redaction block location.

| BATES NUMBERS "POITRAS" | DOCUMENT DATE | DOCUMENT DESCRIPTION | EXEMPTIONS CITED |
|---|---|---|---|
| 10-13 | 02/06/2006 | U.S. Army Criminal Investigation Command ("USACIC") document involving a sworn statement of third party | Direct/Referral[8] to USACIC |
| 14-15 | 04/06/2006 | A letter from USACIC notifying the FBI Office of General Counsel ("OGC") of plaintiff's possible involvement in the ambush of U.S. forces in Iraq and requesting action if FBI deems appropriate. | Direct/Referral to USACIC |
| 16-17 | 02/27/2006 | Memorandum from USACIC to the Commander advising final information report. | Direct/Referral to USACIC |
| 18-19 | 02/27/2006 | A military police investigative report concerning the request for assistance from USACIC. | Direct/Referral to USACIC |
| 20-22 | 02/06/2006 | USACIC document involving a sworn statement of third party | Direct/Referral to USACIC |
| 23-27 | 11/22/2004 | Memorandum from the Department of the Army to the Commander advising contact report. | Direct/Referral to USACIC. |
| 28-30 | 11/22/2004 | Memorandum for the record concerning the military's observation report. | Direct/Referral to USACIC |
| 31-44 | 11/16/2006 | USACIC document involving a sworn statement of third party, email correspondence, and interview worksheet | Direct/Referral to USACIC |
| 48-50 | 05/19/2006 | A report that analyzes the findings of a national security threat assessment. | 6/7C-2<br>7E-1, 3, 5 |
| 51-52 | 05/19/2006 | Database results | 6/7C-1, 2<br>7E-1, 3, 5 |
| 71-95 | 05/26/2007 | Department of Homeland Security ("DHS") encounter package. | Direct/Referral to DHS-U.S. Customs and Border Protection ("CBP") |
| 101-102 | 10/25/2007 | Letter from the Assistant United States Attorney ("AUSA") | Direct/Referral to Executive Office for |

[8] A Direct/Referral is *generally* made when an analyst locates a document in a FBI file which originated with another government agency ("OGA"). The FBI requests the specific OGA to respond directly to the requester regarding the referred documents.

| BATES NUMBERS "POITRAS" | DOCUMENT DATE | DOCUMENT DESCRIPTION | EXEMPTIONS CITED |
|---|---|---|---|
| | | advising of a grand jury subpoena. | United States Attorneys ("EOUSA") |
| 105-106 | 10/26/2007 | Letter from the Assistant United States Attorney ("AUSA") advising of a grand jury subpoena. | Direct/Referral to Executive Office for United States Attorneys ("EOUSA") |
| 107 | 04/21/2008 | Duplicate to Poitras-144 | (Original document RIP)<br>6/7C-1, 2<br>7E-1, 4, 6 |
| 121 | 12/17/2008 | Portion of an EC to NY FO analyzing federal grand jury material. | 3-1<br>6/7C-3<br>7E-5 |
| 133 | *[9] | Receipt of source payment | 6/7C-5<br>7D-2<br>7E-8 |
| 135 | * | Receipt of source payment | 6/7C-5<br>7D-2<br>7E-8 |
| 137 | * | Receipt of source payment | 6/7C-5<br>7D-2<br>7E-8 |
| 139 | * | Receipt of source payment | 6/7C-5<br>7D-2<br>7E-8 |
| 141 | 07/25/2011 | Duplicate to Poitras-145 | (Original document RIP)<br>6/7C-1<br>7E-1, 4, 6 |
| 142 | 04/21/2008 | Duplicate to Poitras-144 | (Original document RIP)<br>6/7C-1, 2<br>7E-1, 4, 6 |
| 143 | 07/25/2011 | Duplicate to Poitras-145 | (Original document RIP)<br>6/7C-1<br>7E-1, 4, 6 |
| 203-204 | 08/09/2007 | An EC providing a response to FBI New York regarding a request for information on third party individuals. The EC also provides intelligence on a third party. | 6/7C-3, 4<br>7E-1, 4, 5 |
| 208 | 08/09/2007 | EC providing a response to FBI New York regarding a request for | 6/7C-3, 4<br>7E-1, 4, 5 |

[9] The disclosure of the document date would jeopardize the identity of the source.

| BATES NUMBERS "POITRAS" | DOCUMENT DATE | DOCUMENT DESCRIPTION | EXEMPTIONS CITED |
|---|---|---|---|
| | | information regarding third party individuals. | |
| 247 | 10/02/2008 | A report distributing information to a foreign government. | 6/7C-1<br>7E-4, 5, 7 |

(12) Finally, there were 344 responsive pages identified: 257 pages released in full or part and 87 pages WIF. Of those pages WIF, 4 pages were WIF because they were deemed to be duplicative of other pages released to plaintiff, and 64 pages were WIF because they were referred to OGAs for a direct response to plaintiff. Only 19 pages were withheld in full per applicable FOIA exemptions. In other words, the FBI only withheld less than one third of the material it reviewed, despite its extremely sensitive nature.

## CONCLUSION

(13) The FBI has processed and released all reasonably segregable information from the records found responsive to plaintiff's request. In its justifications for assertion of FOIA exemptions, the FBI has demonstrated that the information has been properly withheld pursuant to contested FOIA exemptions (b)(5) and (b)(7). The FBI has carefully examined the responsive records and has determined that there is no further reasonably segregable information to be released.

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

Executed this 26th day of September, 2016.

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

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| LAURA POITRAS<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF JUSTICE, et. al.<br><br>Defendants. | ) | Civil Action No. 1:15-cv-01091 |

**Exhibit A**

~~SECRET~~

LAURA POITRAS
[redacted]

b7E -6

In addition, provide an unclassified narrative below that identifies the grounds for the investigation, including the *information or allegation* [redacted] or the *specific and articulable facts* [redacted] forming the basis of the investigation, per AGG/NSIG Parts II.C.1.a and II.D.1.

b7E -3

Classified information, if necessary to identify the grounds for the investigation, should be segregated from the above in a separate paragraph that is clearly marked with the appropriate classification.

(U) ~~(S)~~ ~~Derived From : G-3~~
~~Declassify On: X1~~

(U) **Details:** ~~(S)~~ New York is [redacted] based on the request from [redacted] to further investigate LAURA POITRAS (USPER) activities while in Iraq.

b7E -3, 4

(U) ~~(S)~~ On 05/18/2006, FBIHQ received a package from the U.S Army Criminal Investigation Command (USACIC) concerning a U.S citizen, LAURA POITRAS, who may have been involved with anti-coalition forces during her time in Iraq as a independent media representative. Due to POITRAS' subsequent return to the U.S., USACIC has requested this matter be investigated by the FBI. USACIC considers this matter a high priority as the event that POITRAS was involved with resulted in the death of one U.S soldier and the serious injuries of several others. Due to the seriousness of the allegations that a U.S media representative may have been involved with anti-coalition forces, FBIHQ requests NYO open a [redacted] to immediately address this situation. The enclosed package summarizes the USACIC's investigation to date.

b7E -3

b6 -6 per National Guard
b7C -6 per National Guard

(U) The following is background provided by the USACIC. On 01/31/2006, USACIC headquarters received information from Lieutenant Colonel [redacted] Headquarters, 249th Regional Training Institute, Oregon National Guard, Monmouth, OR 97361, pertaining to an American independent film maker possibly being involved in an ambush on U.S Forces near Adhamiyah (Baghdad), Iraq. Lieutenant Colonel [redacted] reported that on November 20, 2004, soldiers from his unit were ambushed by anti-coalition forces while on patrol. As a result of the ambush, one soldier died and several others were seriously injured. A meeting between Lieutenant Colonel [redacted] and the local leaders on November 22, 2004, revealed one of the local leaders, along with LAURA POITRAS, an American independent film maker, apparently

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| LAURA POITRAS<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF JUSTICE, et. al.<br><br>Defendants. | ) | Civil Action No. 1:15-cv-01091 |

**Exhibit B**

~~SECRET~~

LAURA POITRAS

b7E -6

b6 -6 per National Guard
b7C -6 per National Guard

watched and filmed the ambush from on top of a nearby building. Soldiers from Lieutenant Colonel unit saw POITRAS filming the ambush and positively identified both POITRAS and the local leader as they attended the meeting with Lieutenant Colonel During the meeting, Lieutenant Colonel said he questioned both the local leader and POITRAS as to their whereabouts during the ambush and whether the ambush had been filmed. POITRAS became significantly nervous and denied being present on the roof or filming the attack.

b6 -4, 6 per National Guard and FBI
b7C -4, 6 per National Guard and FBI

(U) On his return from Iraq, Lieutenant Colonel completed an interview about his war experiences with a historian from Dallas, OR. After discussing the ambush and the possibility of POITRAS filming it, contacted POITRAS via email. After exchanging several emails, POITRAS said she was working on a documentary for HBO and admitted she was the female on top of the building that the soldiers saw filming during the ambush. BYRNING said POITRAS was positively identified by several soldiers as she had prior association with the U.S military when obtaining clearance to be in the area. her media project entailed her living with a local Iraqi family and documenting the upcoming Iraqi elections from the perspective of regular Iraqis. The Iraqi family she was living with was later identified as one of the local Iraqi leaders. pointed out that the area where POITRAS stayed was predominately Sunni, very pro-SADDAM HUSSEIN, and was known as an area where western journalists were being abducted and executed.

b6 -4
b7C -4

(U) states that he strongly believed POITRAS had prior knowledge of the ambush and had the means to report it to U.S Forces; however, she purposely did not report it so she could film the attack for her documentary. also said he felt POITRAS most likely still possessed the film footage she took during the ambush.

(U) Internet open source information indicates that LAURA POITRAS produced and directed "My Country, My Country" a film that focuses on the January 30, 2005 Iraqi elections.

(U) The Department of Motor Vehicle's database indicates that LAURA POITRAS has a valid New York State Drivers License residing at 135 Hudson Street Apartment #3F New York, New York Client ID#

FRCP 5.2

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| LAURA POITRAS<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF JUSTICE, et. al.<br><br>Defendants. | ) | Civil Action No. 1:15-cv-01091 |

**Exhibit C**

~~SECRET~~

To: [redacted] From: New York
(U) Re: ~~(S)~~ [redacted] 03/05/2007 b7E -1, 4

as an area where western journalists were being abducted and executed. b6 -4 per USACIC b7C -4 per USACIC

(U) [redacted] states that he strongly believed POITRAS had prior knowledge of the ambush and had the means to report it to U.S Forces; however, she purposely did not report it so she could film the attack for her documentary. [redacted] also said he felt POITRAS most likely still possessed the film footage she took during the ambush.

(U) Detective [redacted] Sgt. [redacted] and Inv. [redacted] traveled to Salem, Oregon on 01/30/2007, and interviewed members of the Oregon National Guard who were present during the ambush on November 20, 2004. Additionally LAURA POITRAS was identified by a soldier from a photo array as the woman filming on the roof. b6 -2, 6 per FBI, USACIC b7C -2, 6 per FBI, USACIC b6 -2, 6 b7C -2, 6

(U) ~~(S)~~ The Federal Bureau of Investigation New York Office, Detective [redacted], Sgt. [redacted] and Inv. [redacted] will travel to Guantanamo Bay, Cuba on 03/20/2007, interview Captain [redacted] Aide de Camp to the Deputy Commander who was a member of the Oregon National Guard Military Intelligence who was present during the ambush on November 20, 2004.

(U) ~~(S)~~ The NYO requests country clearance for Detective [redacted] Sgt. [redacted] and Inv. [redacted] to travel to GTMO from 03/20/2007 - 03/23/2007 and provides the following biographical information: b6 -2, 6 b7C -2, 6

Name: [redacted]
SSN:
DOB:
POB:
Official Passport: [redacted]
Issued at Washington, D.C.

Name: [redacted]
SSN:
DOB:
POB:
Official Passport: [redacted]
Issued at Washington, D.C.

b6 -2
b7C -2

~~SECRET~~

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

| | |
|---|---|
| **LAURA POITRAS,**<br><br>Plaintiff,<br><br>v.<br><br>**U.S. DEPARTMENT OF HOMELAND SECURITY ET AL.,**<br><br>Defendants. | Case No. 1:15-cv-1091 (KBJ) |

**DEFENDANTS' RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE**

Pursuant to L. Civ. R. 7(h), Defendants submit this reply to Plaintiff's response to Defendants' statement of material facts as to which there is no genuine dispute, as well as Defendants' response to Plaintiff's statement of material facts not in dispute. Defendants' incorporate in full their statement of material facts submitted in support of their motion for summary judgment.

## I. DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

No reply is necessary to Plaintiff's response to the statements of fact in the following paragraphs: 1-3, 5-15, 17-19, 21-25, 27-29, 36, 40, 45-49, 60-61, 63, 68, 70, 74-75, 77-78, 81.

With respect to paragraphs 4, 16, 20, 26, 30-35, 37-39, 41-44, 50-59, 62, 64-67, 69, 71-73, 76, 79-80, 82-85, Plaintiff's contention that the factual statements contained in these paragraphs are "legal conclusions" is wrong. These statements describe actions taken and findings made by Defendants and their respective FOIA offices in the course of processing Plaintiff's FOIA request. While some of these statements refer to legal conclusions reached by the agencies during the FOIA process, it is the fact that such conclusions were reached, and not the conclusions themselves, that

is relevant for the purposes of Rule 7(h). Further, because Plaintiff raises no objection that the facts set forth in these paragraphs are not supported by admissible evidence, *see* Fed. R. Civ. P. 56(c)(2), and does not "proffer proper evidence" to dispute Defendants' evidence supporting these facts, Plaintiff does not raise "a triable issue of material fact that will preclude awarding summary judgment to the defendant." *Piper v. U.S. Dep't of Justice*, 294 F. Supp. 2d 16, 21 (D.D.C. 2003).

## II. DEFENDANT'S REPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

3. This paragraph does not contain facts material to Plaintiff's claims. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.")

4. This paragraph does not contain facts material to Plaintiff's claims. *See id*. at 248.

5. This paragraph does not contain facts material to Plaintiff's claims. *See id*. at 248.

6. This paragraph does not contain facts material to Plaintiff's claims. *See id*. at 248.

7. This paragraph does not contain facts material to Plaintiff's claims. *See id*. at 248.

8. Disputed to the extent Plaintiff suggests that the record establishes that Defendants found such documents and chose to withhold them pursuant to FOIA exemptions.

September 26, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

MARCIA BERMAN
Assistant Branch Director,
Federal Programs Branch

*/s/ Samuel M. Singer*
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