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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)
ELECTRONIC PRIVACY)
INFORMATION CENTER)
)
Plaintiff,)
v.)
)
UNITED STATES DEPARTMENT)
OF JUSTICE)
)
Defendant.)
_____)

Civil Action No. 1:13-cv-01961(KBJ)

~~CLASSIFIED~~ **FOURTH DECLARATION OF DAVID M. HARDY**

I, David M. Hardy, declare as follows:

(1) (U) I am currently 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 joining the Federal Bureau of Investigation ("FBI"), from May 1, 2001 to July 21, 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) (U) In my official capacity as Section Chief of RIDS, I supervise approximately 233 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

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information pursuant to the FOIA, amended by the OPEN Government Act of 2007; the Open FOIA Act of 2009; the Privacy Act of 1974; Executive Order 13526; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and other Presidential and Congressional directives. I have been designated by the Attorney General of the United States as an original classification authority and a declassification authority pursuant to E.O. 13526, §§ 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) (U) 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 of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the FBI's handling of the Department of Justice referrals to the FBI from the National Security Division ("NSD"), pertaining to a Freedom of Information Act ("FOIA") request made by plaintiff, Electronic Privacy Information Center. The plaintiff requested records used to draft the semiannual reports on the use of pen registers and trap and trace ("PR/TT") devices for national security purposes.¹

PURPOSE OF THIS DECLARATION AND RELEVANT BACKGROUND

(4) (U) This Fourth Declaration supplements my previous three declarations filed in the above-captioned civil action and incorporates them by reference herein. This supplemental declaration will clarify our withholdings in Document 68, 124, 125, 126, 127, and 129. The plaintiff is challenging only the Westlaw case printout component of the Document 68

¹ The Foreign Intelligence Surveillance Act ("FISA") of 1978, P.L. 95-511, 50 U.S.C. § 1801 et seq, as amended, provides a statutory framework for the U.S. government to engage in electronic surveillance through the installation and use of pen registers and trap and trace devices for the purpose of obtaining foreign intelligence information. See Title IV of FISA, 50 U.S.C. §§ 1841-1846.

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withholdings and is no longer challenging the remainder, a government submission to the Foreign Intelligence Surveillance Court. Further, plaintiff is challenging only those portions of the Semi-Annual Reports ("SARs") that concern (i) significant legal interpretations of the FISC, (ii) its jurisdiction, or (iii) its procedures. Accordingly, this declaration will also address FBI equities contained in Documents 124, 125, 126, 127 and 129 which consist of SARs provided to Congress between the years 2005 through 2007.

DESCRIPTION OF THE DOCUMENTS

- (5) (U) The documents at issue are as follows:
1. Document 68 – Westlaw case printouts
 2. Document 124 – SAR covering January 1, 2005 through June 30, 2005
 3. Document 125 – SAR covering July 1, 2005 through December 31, 2005
 4. Document 126 – SAR covering January 1, 2006 through June 30, 2006
 5. Document 127 – SAR Dated June 2007
 6. Document 129 – SAR covering July 1, 2007 through December 31, 2007
- (6) (U) This Fourth Declaration justifies the FBI's withholding of information pursuant to FOIA exemptions 1, 3, and 7(e). 5 U.S.C. §§ 552 (b)(1), (b)(3) and (b)(7)(E).

EXEMPTION (b)(1) CLASSIFIED INFORMATION

- (7) (U) 5 U.S.C. § 552 (b)(1) exempts from disclosure records that are:
- (A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy; and
 - (B) are in fact properly classified pursuant to such Executive Order.

(8) (U) Before I consider an Exemption 1 claim for withholding agency records, I determine whether the information in those records is information that satisfies the requirements of E.O. 13526, the Executive Order that governs the classification and protection of information

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that affects the national security,² and whether the information complies with the various substantive and procedural criteria of that Executive Order. I am bound by the requirements of E.O. 13526, when making classification determinations.

(9) (U) For information to be properly classified, and thus, properly withheld from disclosure pursuant to Exemption (b)(1), the information must meet the requirements set forth in E.O. 13526, §1.1 (a):

- (1) an original classification authority is classifying the information;
- (2) the information is owned by, produced by or for, or is under the control of the United States Government;
- (3) the information falls within one or more of the categories of information listed in §1.4 of this order; and
- (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

(10) (U) As I explain in further detail below, in my role as an original classification authority, I have determined that the information withheld pursuant to Exemption (b)(1) is under the control of the United States Government, is classified and requires a classification marking at the "Secret" level because "the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security" and at the "Top Secret" because "the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security." See E.O. 13526, §1.2(a)(1)and(2). In addition to these substantive requirements, certain procedural and administrative requirements of E.O. 13526 must be followed before information can be considered to be properly classified, such as proper

² Section 6.1 (cc) of E.O. 13526, defines "National Security" as "the national defense of foreign relations of the United States."

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identification and marking of documents. I made certain that all procedural requirements of E.O. 13526 were followed in order to ensure the information was properly classified. I made certain that:

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

Findings of Declarant

(11) (U) With the above requirements in mind, I personally and independently examined the information withheld from plaintiff pursuant to FOIA Exemption 1, including, in the context of plaintiff's FOIA request here, the Westlaw printouts that have been withheld in full and the SARs withheld in part. I have determined that this classified information is owned by, was produced by or for, and/or is under the control of the U.S. Government. I further determined that the classified information continues to warrant classification at the "Secret" and "Top Secret" levels, and is exempt from disclosure pursuant to E.O. 13526, §1.4, category (c) intelligence activities (including covert action), intelligence sources and methods, or cryptology.

(12) (U) E.O. 13526, § 1.4(c), exempts intelligence activities (including covert action), intelligence sources or methods, or cryptology from disclosure. An intelligence activity or

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method includes any intelligence action or technique utilized by the FBI against a targeted individual or organization who has been determined to be of national security interest. An intelligence method is used to indicate any procedure (human or non-human) utilized to obtain information concerning such individual or organization. An intelligence activity or method has two characteristics. First, the intelligence activity or method -- and information generated by it -- is needed by U. S. Intelligence Community to carry out its foreign intelligence and counterintelligence missions. Second, confidentiality must be maintained with respect to the activity or method if the viability, productivity and usefulness of its information is to be preserved. As described in detail below, the withheld information is protected by Exemption 1 because it describes intelligence activities, sources, and methods utilized by the FBI in gathering intelligence information. The information falls squarely within the meaning of §1.4(c). Additionally, the FBI is also asserting FOIA Exemption (b)(3) [50 U.S.C. § 3024 (i)(1)] (National Security Act of 1947) and FOIA Exemption (b)(7)(E) in conjunction with (b)(1).

(13) (U) The FBI has protected information under FOIA Exemption (b)(1) because it is classified and the release of such information would reveal actual intelligence activities and methods used by the FBI against specific targets who are the subject of foreign counterintelligence investigations or operations; or disclose the intelligence gathering capabilities of the activities or methods directed at specific targets.

EXEMPTION (b)(3)
INFORMATION PROTECTED BY STATUTE

(14) (U) 5 U.S.C. § 552 (b)(3) exempts from disclosure information that is specifically protected by statute, provided that such statute (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted

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after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph. The FBI asserted Exemption (b)(3) in conjunction with Exemption (b)(1) and, at times, in connection with (b)(7)(E) to protect the intelligence sources and methods described above. The basis for the FBI's invocation of Exemption (b)(3) is detailed below.

(15) (U) The FBI has asserted Exemption (b)(3) in conjunction with Exemptions (b)(1) and (b)(7)(E) to protect information pursuant to Section 102A(i)(1) of the National Security Act of 1947 ("NSA"), as amended by the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), 50 U.S.C. § 3024 (i)(1), which provides that the Director of National Intelligence ("DNI") "shall protect from unauthorized disclosure intelligence sources and methods."³ As relevant to U.S.C. § 552 (b)(3)(B), the National Security Act of 1947 was enacted before the date of enactment of the OPEN FOIA Act of 2009. On its face, this federal statute leaves no discretion to the DNI about withholding from the public information about intelligence sources and methods. Thus, the protection afforded to intelligence sources and methods by 50 U.S.C. § 3024(i)(1) is absolute. See CIA v. Sims, 471 U.S. 159 (1985).

(16) (U) To fulfill its obligation of protecting intelligence sources and methods, the DNI is authorized to establish and implement guidelines for the Intelligence Community ("IC") for the classification of information under applicable laws, Executive Orders, or other Presidential Directives, and for access to and dissemination of intelligence. 50 U.S.C. § 3024(i)(1). The FBI is one of 17 member agencies comprising the IC, and as such must protect intelligence sources and methods.

(17) (U) As described above, Congress enacted the NSA, as amended by the IRTPA, to protect the IC's sources and methods of gathering intelligence. Disclosure of such information

³ Section 1024(i)(1) of the National Security Act was previously codified at 50 U.S.C. § 403(i)(1). As a result of the reorganization of Title 50 of the U.S. Code, Section 102A(i)(1) is now codified at 50 U.S.C. § 3024(i)(1).

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presents the potential for individuals to develop and implement countermeasures, which would result in the loss of significant intelligence information, relied upon by national policymakers and the IC. Given that Congress specifically prohibited the disclosure of information pertaining to intelligence sources and methods used by the IC as a whole, I have determined that the FBI's intelligence methods and activities would be revealed if any of the withheld information, which pertains to particular sources and methods as described above, is disclosed to plaintiff.

EXEMPTION (b)(7) THRESHOLD

(18) (U) Exemption (b)(7) of the FOIA protects from mandatory disclosure records or information compiled for law enforcement purposes, but only to the extent that disclosure could reasonably be expected to cause one of the six sets of harms enumerated in the subpart of the exemption. See 5 U.S.C. § 552 (b)(7). The enumerated harm that could reasonably be expected to result is that the disclosed information could reasonably be expected to interfere with and reveal law enforcement techniques and procedures which, if made public, could be used to circumvent the law.

(19) (U) Before an agency can invoke any of the harms enumerated in Exemption (b)(7), it must first demonstrate that the records or information at issue were compiled for law enforcement purposes. Pursuant to 28 U.S.C. §§ 533, 534, and Executive Order 12,333 as implemented by the Attorney General's Guidelines for Domestic FBI Operations (AGG-DOM) and CFR § 0.85, the FBI is the primary investigative agency of the federal government with authority and responsibility to investigate all violations of federal law not exclusively assigned to another agency, to conduct investigations and activities to protect the United States and its people from terrorism and threats to its national security, and further the foreign intelligence objectives of the United States. Under this investigative authority, the responsive records herein

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were compiled for the purposes of investigating and gathering intelligence information, and apprehending and prosecuting subjects who have committed acts of terrorism against the United States, and such records relate to the enforcement of federal laws and such activity is within the law enforcement duty of the FBI. Accordingly, the responsive records were generated pursuant to the law enforcement duties of the FBI as articulated above. Documents 68 and the withheld information within the semi-annual reports to Congress (Documents 124-127, and 129) were drawn from FBI investigative files that were generated and compiled pursuant to the law enforcement duties of the FBI. The FBI is responsible for detecting and investigating violations of Federal criminal laws, international terrorism, and threats to national security. All records responsive to plaintiff's request and referred to the FBI pertain to national security investigations and specify the methods and techniques used in gathering intelligence information through FISA-related documents submitted to the FISC and Congress. These records were thus compiled for law enforcement purposes; squarely within the law enforcement duties of the FBI; and therefore, readily meet the threshold requirement of Exemption (b)(7). The remaining inquiry concerns whether the disclosure of such records might disclose investigative techniques and procedures and such disclosure could reasonably be expected to risk circumvention of the law. As explained below, the withheld records also meet this requirement.

EXEMPTION (b)(7)(E)
INVESTIGATIVE TECHNIQUES AND PROCEDURES

(20) (U) 5 U.S.C. § 552 (b)(7)(E) provides protection for:

law enforcement records which would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.

(21) (U) Exemption (b)(7)(E) has been asserted to protect information which contains

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internal and highly-sensitive investigatory techniques and procedures that are authorized for use by the FBI. The release of the portions of these documents would disclose techniques and/or procedures used in law enforcement and national security investigations or prosecutions, as discussed in greater detail in the classified paragraphs that follow that could reasonably be expected to risk circumvention of the law. To publicly describe the protected information in any further detail would identify and highlight the sensitive information the FBI seeks to protect. The revelation of such details could enable the targets of these techniques to develop countermeasures or avoid detection in order to circumvent the FBI's law enforcement efforts.

(22) (U) For these documents, Exemption (b)(7)(E) has been asserted in conjunction with Exemptions 1 and 3 to protect information regarding the techniques and procedures utilized by the FBI in conducting national security investigations including information that would reveal the types of techniques and procedures that are routinely used in such investigations, and are not publicly known to be used in such investigations. The government's use of pen register/trap and trace ("PR/TT") and pen register/business records ("PR/BR") to obtain information is a known public fact; however, the specific techniques and the FBI's ability to covertly utilize these techniques under a PR/TT or PR/BR order are not well-known. These investigative techniques are described and discussed in the Westlaw case printouts as well as throughout the withheld portions of the SARs.

(23) (U) Details about how, when, and under what circumstances these techniques are relied upon as well as the desired target in the context of national security investigations are not disclosed nor are these details otherwise known to the public. Disclosure of such information could enable individuals and organizations to circumvent the use of these techniques, and the relative benefit of it could be diminished if details were revealed. Additionally, it would risk

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allowing individuals, who are the subject of on-going investigations, to uncover information that reveals the circumstances under which these techniques are used, the usefulness of the techniques in particular types of investigations, and the value of the information obtained. Release of this type of information could enable subjects of investigations to educate themselves about the use of these techniques and develop countermeasures to circumvent or negate the effectiveness of these techniques. Specific details regarding these investigative techniques are provided in the classified paragraphs of this declaration below. The redacted portions of each document were withheld in concert under FOIA Exemptions (b)(1), (b)(3), and (b)(7)(E).

DOCUMENTS AT ISSUE

Document 68

(24) ~~(S)~~

[REDACTED]

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[REDACTED]

(25) ~~SECRET~~

[REDACTED]

(26) ~~SECRET~~

[REDACTED]

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[REDACTED]

(27) (U) As described above, Congress enacted the NSA, as amended by the IRTPA, to protect the IC's sources and methods of gathering intelligence. Given that 50 U.S.C. § 3024(i)(1) leaves no discretion to IC components to fail to protect its intelligence sources and methods, I have determined that the FBI's intelligence methods and activities would be revealed

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if any of the withheld information, pertaining to particular sources and methods as described above, is disclosed to plaintiff. Thus, the FBI is prohibited by law from disclosing information falling under 50 U.S.C. § 3024(i)(1). Accordingly, the Westlaw printouts are properly withheld in full pursuant to Exemption (b)(3), based on 50 U.S.C. § 3024(i)(1).

(28) (U) For these reasons, I have determined the information withheld in Document 68 is properly classified at the Secret level and is exempt from disclosure pursuant to FOIA Exemptions (b)(1), (b)(3) and (b)(7)(E).

Document 124

(29) (U) The FBI is legally and statutorily prohibited from releasing information withheld in Document 124. The withheld portions include summaries of significant legal interpretations by the FISC, a discussion on the scope of the FISC's jurisdiction, as well as information on the use of classified surveillance techniques. This information is exempt from disclosure pursuant to FOIA Exemptions (b)(1), (b)(3), and (b)(7)(E).

(30) ~~(S)~~

[REDACTED]

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[REDACTED]

(31) ~~(S)~~ [REDACTED]

[REDACTED]

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[REDACTED]

(32) (U) For these reasons, I have determined the information withheld in Documents 124 is properly classified at the Top Secret and Secret levels, and is exempt from disclosure pursuant to FOIA Exemptions (b)(1), (b)(3) and (b)(7)(E).

Document 125

(33) (U) The FBI is legally and statutorily prohibited from releasing information withheld in Document 125. The withheld portions include summaries of briefs filed by the government before the FISC. The withheld information details the use of a classified surveillance technique, as well as significant legal interpretations and holdings of the FISC. The information is exempt from disclosure pursuant to FOIA Exemptions (b)(1), (b)(3), and (b)(7)(E).

(34) ~~(S)~~ [REDACTED]

⁴Please see Classified Third Hardy Decl. at ¶¶ 8-24 for additional information on this technique.

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[REDACTED]

(36) ~~(S)~~ [REDACTED]

5 For more information, please see Classified First Hardy Decl. at ¶ 31.

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[REDACTED]

(37) (U) For these reasons, I have determined the information withheld in Documents 125 is properly classified at the Secret level and is exempt from disclosure pursuant to FOIA Exemptions (b)(1), (b)(3) and (b)(7)(E).

Document 126

(38) (U) The FBI is legally and statutorily prohibited from releasing information withheld in Document 126. The withheld portions contained in pages 56 through 58 are identical to the classified investigative methods and techniques described in Document 125 on pages 3 through 5 and 52. Accordingly, the FBI will address the withheld material contained in pages 59 and 60 that were not already addressed pursuant to Document 125. The withheld information details the use of specific classified surveillance techniques, as well as legal interpretations and holdings of the FISC. The information is exempt from disclosure pursuant to FOIA Exemptions (b)(1), (b)(3), and (b)(7)(E).

(39) ~~(S)~~ [REDACTED]

[REDACTED]

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[REDACTED]

(40) (U) For these reasons, I have determined the information withheld in Documents 126 is properly classified at the Secret level and is exempt from disclosure pursuant to FOIA Exemptions (b)(1), (b)(3) and (b)(7)(E).

Document 127

(41) (U) The FBI is legally and statutorily prohibited from releasing information

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withheld in Document 127. The information regarding classified investigative methods and techniques contained in Document 127, pages 58 through 61, is identical to the information withheld in Document 125, page 52 and in Document 126, pages 58 through 60. For the same reasons detailed above pursuant to Documents 125 and 126, the information withheld in Document 127 is properly classified at the Secret level and is also exempt from disclosure pursuant to FOIA Exemptions (b)(1), (b)(3), and (b)(7)(E).

Document 129

(42) (U) The FBI is legally and statutorily prohibited from releasing information withheld in Document 129. The withheld portions include information on the retention and use of results from PR/TT during a specific time period, namely July 1, 2007 through December 31, 2007, including significant legal interpretations by the FISC. This information is exempt from disclosure pursuant to FOIA Exemptions (b)(1), (b)(3), and (b)(7)(E).

(43) ~~(S)~~ [REDACTED]

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[REDACTED]

(44) (U) For these reasons, I have determined the withheld information in Document

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129 is properly classified at the Secret level and is exempt from disclosure pursuant to FOIA Exemptions (b)(1), (b)(3) and (b)(7)(E).

SEGREGABILITY

(45) (U) All responsive, non-exempt records or portions of records referred to the FBI by NSD have been provided to the plaintiff. During the processing of these records, each page was individually examined to identify all non-exempt information and to determine whether it could be reasonably segregated from the exempt information. Even though some information, if examined in isolation, would appear benign or not sensitive, when read in conjunction with other responsive documents, it reveals sensitive information about FBI techniques and procedures used in national security investigations. The portions of Document 68 still in dispute (the Westlaw printouts), although seemingly public in nature, cannot be reasonably segregated from the context even though identified as responsive to plaintiff's FOIA request. As such, when read or viewed within the context of other available documents and information, this material could reasonably be expected to reveal highly sensitive information to sophisticated adversaries. These same reasons were discussed in my prior declaration concerning another public Westlaw printout, see First Hardy Decl. ¶¶ 13, 16, 21; accord id. ¶ 53. Thus, I have determined that the Westlaw printouts contained in Document 68 were properly withheld in full pursuant to FOIA Exemptions (b)(1), (b)(3), and (b)(7)(E) in the context of this litigation and its relation to FISA PR/TT authority. Additionally, Documents 124-127 and 129 were individually reviewed identifying all non-exempt information. The FBI conducted a page-by-page, line-by-line review determining what information, if any, could be released. All portions of a sentence and paragraph that are non-exempt and contain substantive information were released to plaintiff. The withheld portions contain sensitive law enforcement information as well as details regarding

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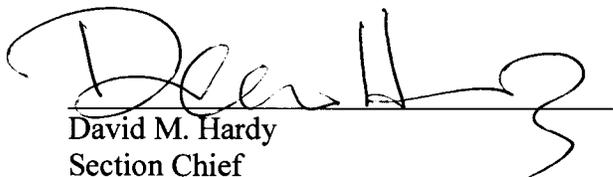
critical FBI investigative methods and techniques used in national security investigations.

Furthermore, the FBI determined that the withheld information, if disclosed, could reasonably be expected to cause serious or exceptionally grave damage to our national security as well as interfere with the FBI's ability to carry out its counterintelligence mission, and reveal critical investigative techniques used in national security investigations.

(46) (U) All segregable information has been provided to the plaintiff. The FBI only withheld information that was classified, protected by statute, or information, if released, would trigger reasonably foreseeable harm to one or more interests protected by the cited FOIA Exemptions.

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

Executed this 18th day of March, 2016.



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