IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRISTOPHER BRICK, Plaintiff, v. DEPARTMENT OF JUSTICE, Defendant.	Civil Action No. 15-1246 Judge Ketanji Brown Jackson

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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"Eleanor Roosevelt's FBI file is one of the wonders of the Western world. It is one of the largest individual files that Hoover compiled. And it goes on for over 3,000 pages."[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

For over two decades, from 1940 through 1961, the Federal Bureau of Investigation (FBI) collected reports, newspaper articles, gossip, letters, and rumors about Eleanor Roosevelt. The result was thousands of pages about this first lady of the United States, tucked away in an FBI file. In 1982, the FBI released some of these records, but with significant withholdings. Plaintiff Christopher Brick, a historian researching Eleanor Roosevelt, filed a Freedom of Information Act (FOIA) request seeking release of some of the withheld information in the FBI's file on Eleanor Roosevelt. Twelve pages containing withheld information are at issue in this case.

The FBI, a component of defendant Department of Justice, claims that the withholdings in these twelve pages are justified under FOIA exemption 3, 5 U.S.C. § 552(b)(3), because they would reveal intelligence sources and methods; under exemption 7(E), 5 U.S.C. § 552(b)(7)(E), because they would reveal law enforcement techniques concerning the collection and analysis of intelligence; and under exemptions 6, 5 U.S.C. § 552(b)(6), and 7(C), 5 U.S.C. § 552(b)(7)(C), because they contain identifying information. To justify these withholdings, the FBI presents a declaration so vague and sweeping that it could apply to almost any exemption 3, 6, 7(C), or 7(E) case. The FBI does not explain its withholdings in the context of this case.

As to exemption 3, the FBI declaration fails to show a logical connection between the information deleted—all of it over 50 years old—and protected intelligence sources or methods.

[1] Blanche Wiesen Cook, historian and biographer of Eleanor Roosevelt, from the transcript of *The American Experience: Eleanor Roosevelt* (PBS television broadcast January 10, 2000), available at http://www.pbs.org/wgbh/americanexperience/features/transcript/eleanor-transcript/.

Moreover, because of its vagueness and failure to suggest a valid national security concern, the declaration is not entitled to any special deference.

As to exemption 7(E), the FBI also falls short. First, as the FBI admits, the records were not originally compiled for law enforcement purposes; FBI agents collected them to mollify the FBI Director, J. Edgar Hoover, who loathed Eleanor Roosevelt and suspected she was a communist. Nor does the FBI show that it ever created, gathered, or used these twelve documents for a law enforcement purpose. Second, the FBI does not demonstrate that the redactions protect law enforcement techniques or procedures, or that revealing the withheld information would reasonably risk circumvention of the law.

With respect to the FBI's redactions for privacy interests under exemptions 6 and 7(C), Mr. Brick objects to the withholdings under exemption 7(C) because the FBI has not shown that any of the records were compiled for law enforcement purposes. As for exemption 6, he does not challenge the FBI's withholding of names and identifying information for living persons. Because, however, the FBI has not taken any steps to determine whether the individuals in question are alive, its declaration fails to justify any of the withholdings under exemption 6.

Advocacy in FOIA cases is lopsided because only the agency knows what it has withheld. Agency affidavits are supposed to reduce this imbalance by explaining the agency's reasoning for the withholdings well enough that the plaintiff can challenge the withholdings and the court can review them. But the FBI's declaration says no more than that the withheld information is exempt because the FBI says so. Accepting this declaration as sufficient to justify any of the withholdings would allow the FBI to remove all semblance of advocacy from resolution of this FOIA dispute.

The agency's flimsy declaration does not justify withholding any of the information in these records. The Court should deny the FBI's motion for summary judgment, grant Mr. Brick's motion for summary judgment, and order the FBI to disclose all requested records that are not exempt.

BACKGROUND

I. Eleanor Roosevelt

Eleanor Roosevelt was first lady of the United States, a delegate to the United Nations, and a civil rights advocate who regularly ranked in international polls as "the world's most admired woman."[2] Her outspoken support for racial and economic justice and civil liberties made her a target of both the Ku Klux Klan, which put a bounty on her, and J. Edgar Hoover, the Director of the FBI, who instructed his agents to monitor her activities and telephone conversations.[3] For two decades, the FBI did so, collecting over 3,000 pages of information on her, the vast majority of which relates to her views on civil rights.[4]

In 1982, the FBI released records from Eleanor Roosevelt's file, but it redacted portions of those documents and continued to withhold other records in full. [5]

II. Mr. Brick's FOIA Request

Plaintiff Christopher Brick is the Project Director, Editor, and Principal Investigator for the Eleanor Roosevelt Papers Project ("Project") at The George Washington University. Brick Decl. ¶ 2, attached to Pl.'s Mot. for Summ. J. The Project's research currently focuses on Mrs.

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[2] *Mrs. Roosevelt, First Lady 12 Years, Often Called 'World's Most Admired Woman,'* N.Y. Times, Nov. 8, 1962, available at http://www.nytimes.com/learning/general/onthisday/bday/1011.html.

[3] *Questions and Answers About Eleanor Roosevelt*, The Eleanor Roosevelt Papers Project, https://www.gwu.edu/~erpapers/teachinger/q-and-a/q31.cfm

[4] *Id.*

[5] The released documents may be viewed at FBI Vault, Eleanor Roosvelt's File, https://vault.fbi.gov/Eleanor%20Roosevelt.

Roosevelt's life and work between 1953 and 1962. *Id.* By letter dated June 25, 2013, Brick filed a FOIA request with the FBI seeking records from the FBI's file on Eleanor Roosevelt that the FBI did not release in 1982. *Id.* ¶ 4; Dist. Ct. Dkt. 13-4, Exh. A. A little over a year later, the FBI released 338 pages from its Eleanor Roosevelt file. Brick Decl. ¶ 5; Dist Ct. Dkt. 13-4, Exh. C. The FBI withheld portions of the records under exemptions 6, 7(C), and 7(E). *Id.* Brick was particularly interested in twelve of the released documents, and he appealed the FBI's redactions in those documents. Brick Decl. ¶ 6 & Dist Ct. Dkt. 13-4, Exh. F. The FBI denied his appeal, Brick Decl. ¶ 7 & Dist Ct. Dkt. 13-4, Exh. H., and Brick filed suit. After he commenced this lawsuit, the FBI reprocessed his request. Brick Decl. ¶ 8 & Exh. A. The reprocessed pages have substantially the same redactions as before, but the FBI now claims that the withheld information falls within exemption 3, in addition to the previously cited exemptions. Brick Decl. ¶ 8 & Exhs. A & B.

III. The Disputed Redactions

The FBI withheld parts of all twelve pages at issue.[6] With respect to exemption 3, the FBI claims that "the FBI's intelligence sources and methods would be revealed if any of the withheld information is disclosed to plaintiff." Dist. Ct. Dkt. 13-3, Hardy Decl. ¶ 21. As for exemption 7(E), the FBI states that it has withheld "investigative techniques and procedures utilized to conduct national security investigations pertaining to the collection and analysis of intelligence." *Id.* ¶ 18. The FBI contends that "release of this information would disclose the identity of methods used in the collection and analysis of information, including how and from where the FBI collects information and the methodologies employed to analyze it once collected. Such disclosures would enable potential subjects of FBI investigations to circumvent similar currently

[6] The FBI numbered the twelve pages "Roosevelt-1" through "Roosevelt-12," *see* Dist. Ct. Dkt. 13-3, Hardy Decl. ¶ 15, and this memorandum refers to the documents using these page numbers.

used techniques." *Id*. ¶ 31. The FBI invoked exemptions 6 and 7(C) to withhold the names and identifying information of "FBI Special Agents ('SAs') and support personnel" because disclosing which investigations they were assigned to "may seriously prejudice their effectiveness in conducting other investigations," *id.* ¶ 26, and to protect them from "harassing inquiries," *id.* ¶ 27. The FBI also invoked exemptions 6 and 7(C) to withhold the names and identifying information of "third parties merely mentioned," *id.* ¶ 28, and "third party individuals who were of investigative interest," *id.* ¶ 29, because being associated with the FBI "carries a strong negative connotation[.]" *Id.*

STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine dispute as to any material fact," Fed. R. Civ. P. 56(a), with all reasonable inferences to be drawn in favor of the non-movant, *Burka v. Dep't of Health & Human Servs.*, 87 F.3d 508, 514 (D.C. Cir. 1996). The agency has the burden of proving that the withheld information comes within one of FOIA's nine statutory exemptions, *Summers v. Dep't of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998); 5 U.S.C. § 552(a)(4)(B), and the agency may satisfy its burden by affidavit, *DiBacco v. U.S. Army*, 795 F.3d 178, 195 (D.C. Cir. 2015). Summary judgment on the basis of agency affidavits is appropriate only if the "affidavits describe the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption[s], and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). This Court reviews the agency's claimed exemptions *de novo*. 5 U.S.C. § 552(a)(4)(B); *Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 755 (1989).

ARGUMENT

FOIA "sets forth a policy of broad disclosure of Government documents in order to ensure an informed citizenry, vital to the functioning of a democratic society." *FBI v. Abramson*, 456 U.S. 615, 621 (1982) (quotation marks omitted). "FOIA compels disclosure in every case where the government does not carry its burden of convincing the court that one of the statutory exemptions" applies. *Goldberg v. Dep't of State*, 818 F.2d 71, 76 (D.C. Cir. 1987). The issue here is whether the FBI has met its burden of showing that the withheld information falls within exemptions 3 and 7(E). It has not met its burden for any of the withholdings.

I. The Agency Has Not Shown That Exemption 3 Justifies Withholding Any of the Redacted Material.

Exemption 3 protects from disclosure matters that are "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). Here, the FBI relies on a provision of the National Security Act of 1947, which says that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). The National Security Act is an exemption 3 statute. *CIA v. Sims*, 471 U.S. 159, 167 (1985); *accord DiBacco*, 795 F.3d at 197. The question is whether the FBI's redactions fall within the statute—that is, "whether the withheld material relates to intelligence sources and methods." *Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009).

The National Security Act protects two distinct categories of information: intelligence sources and intelligence methods. "An intelligence source provides, or is engaged to provide, information the Agency needs to fulfill its statutory obligations," *Sims*, 471 U.S. at 177, and is not limited to confidential sources, *id.* at 169. Protected intelligence sources include the names of private researchers participating in a secret project funded by the Central Intelligence Agency (CIA), *id.* at 173; information that would help identify informants for the agency, *Assassination*

Archives & Research Ctr. v. CIA, 334 F.3d 55, 58 (D.C. Cir. 2003); and the CIA's contacts with domestic officers and agencies, such as the New York Police Department, *Fitzgibbon v. CIA*, 911 F.2d 755, 764 (D.C. Cir. 1990). Protected intelligence methods include internal information about the CIA's organizational structure, *James Madison Project v. CIA*, 605 F. Supp. 2d 99, 114 (D.D.C. 2009); polygraph reports, *Sack v. CIA*, 49 F. Supp. 3d 15, 21 (D.D.C. 2014); the use of cryptonyms and pseudonyms, *Schoenman v. FBI*, No. 04-2202, 2009 WL 763065, at *25 (D.D.C. Mar. 19, 2009); and the results of CIA intelligence checks on an individual, *Subh v. CIA*, 760 F. Supp. 2d 66, 72 (D.D.C. 2011). Sometimes information qualifies as both an intelligence source and method, such as photographs of Srebrenica taken by a spy plane where the images could reveal the capabilities of the reconnaissance system that took the photographs. *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 835 (D.C. Cir. 2001).

The FBI breezes through its exemption 3 explanation by parroting the statutory text and omitting any mention of how the exemption applies to gossipy memos about Eleanor Roosevelt. The FBI's hurried explanations that the "information pertains to intelligence activities source [sic] and methods" and that "the FBI's intelligence sources and methods would be revealed if any of the withheld information is disclosed" do not demonstrate that the withholdings protect intelligence sources and methods. Dist. Ct. Dkt. 13-3, Hardy Decl. ¶ 21. There are twelve pages at issue here, and the FBI makes exemption 3 claims for significant deletions on each of those pages. Not once, however, does it "correlat[e] those claims with the particular part of a withheld document to which they apply." *Mead Data Cent., Inc. v. Dep't of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977). The documents span three-and-a-half years and mention as topics not only Eleanor Roosevelt but also "Tass News Agency," "Visitors to Iron Curtain Countries," and "UN Personnel," yet the FBI lumps together all the deletions as "pertain[ing] to information

prohibited from disclosure" under the National Security Act. Dist. Ct. Dkt. 13-3, Hardy Decl. ¶ 21; Brick Decl. Exh. B, Roosevelt-1 to Roosevelt-12.

The FBI also disregards the difference between intelligence sources and intelligence methods. It does not say which documents would identify sources and which would identify methods, let alone how the documents would do so. The only sign that the FBI even looked at the documents when drafting the Hardy declaration is the comment that "as evident by the markings on all twelve pages, the information withheld pursuant to exemption (b)(3) was originally classified," but has since been declassified. Dist. Ct. Dkt. 13-3, Hardy Decl. ¶ 21. However, it does not matter that the information was *once* classified, both because the information is not now classified, and because the agency has not claimed that the information is protected by exemption 1, which applies to classified information and is independent of exemption 3. *Larson*, 565 F.3d at 862.

Because the FBI's declaration does not show any logical connection between the redactions and protected intelligence sources and methods, it is not due the deference courts ordinarily give agency affidavits in the national security context. Only "*[i]f* an affidavit submitted by an agency contains sufficient detail to forge the 'logical connection between the information [withheld] and the claimed exemption,'" does the court "accord that affidavit substantial weight." *Oglesby v. Dep't of Army*, 79 F.3d 1172, 1178 (D.C. Cir. 1996) (quoting *Goldberg*, 818 F.2d at 78) (emphasis added); *see also King v. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987) (deference is given to "*detailed* agency explanations in the national security context." (emphasis added)).

In addition to lacking any detail, the FBI's declaration fails to raise a legitimate national security concern that could entitle it to deference. *See Ctr. for Nat'l Sec. Studies v. Dep't of*

Justice, 331 F.3d 918, 928 (D.C. Cir. 2003) (explaining that deference to the agency's affidavit is appropriate when national security concerns are implicated, "*so long as* the government's declarations raise *legitimate concerns* that disclosure would impair national security" (emphasis added)). It is not as though the Court can glean a national security concern from the snippets of unredacted text in these pages, which mention mundane facts such as that a "Roosevelt Day Dinner will be held on February 2, 1961[,] at 7:00 p.m. at the Astor Hotel." Brick Decl. Exh. B, Roosevelt-12. *Cf. Ctr. for Nat'l Sec. Studies*, 331 F.3d at 928 (according deference to the agency's affidavits where the request sought the names of detained September 11 terrorist suspects, obviously implicating national security concerns).

The FBI's declaration stands in stark contrast to agency declarations that courts have found sufficiently detailed to justify exemption 3 "sources and methods" withholdings. In *Church of Scientology of California, Inc. v. Turner*, 662 F.2d 784 (D.C. Cir. 1980) (per curiam), for example, the CIA's affidavits supporting its exemption 3 "sources and methods" withholdings "provided the kind of detailed, scrupulous description" allowing for effective judicial review where they gave "paragraph-by-paragraph analysis of each of the documents withheld," indicated for each "the sender, the recipient, the source of the information, and why partial release was or was not possible," and described the harm expected from disclosure. *Id.* at 786 & n.4. In *Leopold v. CIA*, __ F. Supp. 3d __, 2015 WL 2255957 (D.D.C. May 14, 2015)**,** the court upheld the CIA's exemption 3 withholdings based on the "sources and methods" statute where the CIA described the withholdings (the specific amounts spent on the CIA's detention and interrogation program) and tied disclosure of the withheld information to protected intelligence sources and methods by demonstrating that release of the expenditure figures would divulge the agency's intelligence priorities and would allow someone to extrapolate about

current funding levels for CIA programs. *Id.* at *4-*5. Similarly, in *American Civil Liberties Union v. Department of Defense*, 628 F.3d 612 (D.C. Cir. 2011), where the FOIA request sought information about several "high value" detainees held at Guantanamo Bay, the CIA adequately justified its exemption 3 "sources and methods" withholdings by describing, "on a document-by-document basis, the information withheld from each responsive document." *Id.* at 625. The CIA specified that it withheld "information regarding the capture of detainees; the detainees' confinement conditions and locations; questions posed to detainees that would reveal intelligence interests of the United States; intelligence information provided by detainees," as well as "information relating to the collection, analysis, and dissemination of foreign intelligence" and concerning "foreign relations and foreign activities of the United States." *Id.* at 625-26.

Compared to these detailed declarations, the FBI's declaration here is, "in a word, inadequate—wholly lacking in that specificity of description" that the D.C. Circuit has "repeatedly warned is necessary to ensure meaningful review of an agency's claim to withhold information subject to a FOIA request." *King*, 830 F.2d at 223 (holding that FBI's affidavits were so general that the court could not evaluate the withholdings). In providing "no functional description of the documents," but "only sweeping and conclusory assertions," the FBI also denies the plaintiff the opportunity to effectively contest the redactions. *Oglesby*, 79 F.3d at 1184 (holding that agency's declarations were too vague to justify withholdings under exemptions 1 and 3).

The FBI has not established that any of the withholdings protect "intelligence sources and methods." Having failed to meet its burden, the agency cannot withhold the redacted information under exemption 3.

II. The Agency Has Not Shown That Exemption 7(E) Justifies Any of the Withholdings.

An agency may withhold "records or information compiled for law enforcement purposes" to the extent that release of such records "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). The agency has failed to demonstrate that exemption 7(E) applies to any of the withheld information.

A. The Eleanor Roosevelt Documents Were Not Compiled for Law Enforcement Purposes.

To withhold records under exemption 7(E), the agency must make a threshold showing that it "compiled" the records "for law enforcement purposes." *Id.* This showing requires the agency to demonstrate that "the investigatory activity that gave rise to the documents is 'related to the enforcement of federal laws,' and [that] there is a rational nexus between the investigation at issue and the agency's law enforcement duties." *Jefferson v. Dep't of Justice*, 284 F.3d 172, 177 (D.C. Cir. 2002) (quoting *Pratt v. Webster*, 673 F.2d 408, 420-21 (D.C. Cir. 1982)). The agency must supply enough facts to support a "colorable claim" of a rational nexus between the agency's activity and its law enforcement duties. *Keys v. Dep't of Justice*, 830 F.2d 337, 340 (D.C. Cir. 1987) (quoting *Pratt*, 673 F.3d at 421).

The FBI has not shown that it created or used these records for law enforcement purposes. In fact, the FBI concedes that the documents were not compiled for law enforcement purposes, stating that the file "is not an investigative file," but "a collection of information concerning Roosevelt" between 1940 and 1961. Dist. Ct. Dkt. 13-3, Hardy Decl. ¶ 22. That is, the FBI did not have a law enforcement purpose when it collected these documents.

After admitting that the Eleanor Roosevelt file is not an "investigative file," and thus agreeing that it had no valid law enforcement purpose for monitoring Eleanor Roosevelt's activities, the FBI gives no plausible law enforcement purpose for which it ever used the withheld information. *See Pratt*, 673 F.2d at 420 (agency must establish that it was acting with a law enforcement purpose, "rather than merely engaging in a general monitoring of private individuals' activities"); *Rosenfeld v. Dep't of Justice*, 57 F.3d 803, 810 (9th Cir. 1995) (rejecting FBI's asserted law enforcement purpose as pretext for monitoring individuals and organizations involved in protests). Instead, the affidavit sweepingly states that the "responsive records herein were compiled in furtherance of the FBI's national security investigation into potential targets" and that the "information collected was integrated into national security/criminal investigation of third party individuals." Dist. Ct. Dkt. 13-3, Hardy Decl. ¶ 22. To be sure, records not originally compiled for law enforcement purposes may nonetheless fall within exemption 7 if they "were later gathered or used" for law enforcement purposes. *Pub. Employees for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mexico*, 740 F.3d 195, 203 (D.C. Cir. 2014) ("*PEER*"). Records do not qualify as having been compiled for law enforcement purposes, however, merely because information from them may have been incorporated into other records compiled for law enforcement purposes. In other words, the Eleanor Roosevelt documents do not retroactively become law enforcement records just because the FBI may have taken a piece of information from one of the pages and incorporated it into a different record that was compiled for law enforcement purposes.

Further, the FBI does not show that any of the withheld information was ever gathered or used to enforce the law. Its blanket explanation does not identify "a particular individual or a particular incident as the object of its investigation and the connection between that individual or

incident and a possible security risk or violation of federal law," and it does not specify a "plausible basis" for the FBI's decision to undertake this unspecified investigation. *Pratt*, 673 F.2d at 420-21. Specifically, the FBI's declaration gives no facts indicating what prompted the "integrat[ion]" of information from these documents into unspecified investigations. It also supplies no facts tethering the agency's activities—the "collection" of information about Eleanor Roosevelt and the "integrat[ion]" of that information into other investigations—to protecting the United States "from terrorism and threats to the national security." Dist. Ct. Dkt. 13-3, Hardy Decl. ¶ 22. *Compare Quinon v. FBI*, 86 F.3d 1222, 1229 (D.C. Cir. 1996) (holding that FBI did not satisfy the exemption 7 threshold where it failed to supply facts justifying the investigation that gave rise to the documents and instead "simply allude[d] to 'certain events,'" which it failed "to describe or characterize," that prompted the investigation), *with Keys*, 830 F.2d at 341-42 (holding that FBI established a valid exemption 7 law enforcement purpose for its files on the American author Louis Adamic by pointing to two directives that prompted the FBI's creation of the Adamic files and by citing to Adamic's contact with a group under investigation for espionage), *and PEER*, 740 F.3d at 204 (concluding that emergency action plans for certain dams were created for law enforcement purposes because they set forth the security measures law enforcement should implement during emergency conditions).

Moreover, the FBI's explanation contradicts itself: The affidavit says both that the records were not compiled as an investigative file and that they were. Dist. Ct. Dkt. 13-3, Hardy Decl. ¶ 22 (stating both that "file 62-62735 is not an investigative file" and that "the responsive records herein were compiled in furtherance of the FBI's national security investigation into potential targets"). The declaration is also inconsistent with the record. Despite the FBI's assertion that the withheld information "was integrated" into the "investigation of third party

individuals," only two of the twelve pages contain redactions for "Names and/or Identifying Information of Third Parties of Investigative Interest." Brick Decl. Exh. B, Roosevelt-7 & Roosevelt-9. Thus, ten pages do not identify any third party of investigative interest. The FBI's own redactions contradict the agency's assertion that these records were somehow compiled for the purpose of investigating third parties.

Turning to the documents themselves, the subjects covered are not plausibly related to any "national security" or "criminal investigation" of third parties, as the government asserts. Dist. Ct. Dkt. 13-3, Hardy Decl. ¶ 22. The documents track Eleanor Roosevelt's activities, not those of third parties, belying the FBI's claim that the agency used the information to investigate third parties. The first six pages appear to report on Eleanor Roosevelt's two trips to the Soviet Union, in September 1957 and in September 1958. Brick Decl. ¶¶ 10-21 & Exh. B, Roosevelt-1 to Roosevelt-6. The last six pages seem to apprise the FBI of events at which Eleanor Roosevelt might encounter Soviet United Nations personnel. Brick Decl. ¶¶ 22-25 & Exh. B, Roosevelt-7 to Roosevelt-12. No national security or criminal investigation of a third party is plausibly connected to Eleanor Roosevelt's travel itineraries, Brick Decl. ¶¶ 17 & 20, the citizenship of her travel companion, *id.* ¶¶ 12-13, her attendance at a Carnegie Hall concert, *id.* ¶ 23, or her possible encounters with Soviet United Nations personnel, *id.* ¶ 25.

In addition, the FBI waived any exemption claims for much of the information in Roosevelt-5, because in 1982, the FBI released a less redacted, identical version of that document to the public. Brick Decl. ¶¶ 19-20 & Exh. D. "[T]he government cannot rely on an otherwise valid exemption claim to justify withholding information that has been 'officially acknowledged' or is in the 'public domain.'" *Davis v. Dep't of Justice*, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (quoting *Afshar v. Dep't of State,* 702 F.2d 1125, 1130-34 (D.C. Cir. 1983)).

Comparing the two versions shows that the FBI deleted the following text in Roosevelt-5: "concerning Mrs. ROOSEVELT and her proposed visit to Moscow from 9/7-28." Brick Decl. Exh. D. Incredibly, the FBI now claims that this information falls within exemptions 3 and 7(E). That the FBI hid this innocuous information under the cover of intelligence sources and methods and law enforcement investigative methods shows how improperly and broadly the FBI has applied these exemptions to withhold information.

Although this Court may be "more deferential" to the FBI's asserted purpose for the records because the FBI's principal function is law enforcement, *PEER*, 740 F.3d at 203, "FBI records are not law enforcement records simply by virtue of the function that the FBI serves," *Vymetalik v. FBI*, 785 F.2d 1090, 1095 (D.C. Cir. 1986). Courts will not "take it for granted" that records were compiled for law enforcement purposes based on the agency's law enforcement function; rather, the agency must specify facts tying the documents to its law enforcement purpose. *Am. Immigration Council v. Dep't of Homeland Sec.*, 950 F. Supp. 2d 221, 245-46 (D.D.C. 2013) (finding that Immigration and Customs Enforcement (ICE) did not satisfy the exemption 7 threshold where its "argument appear[ed] to rest almost entirely on the premise that, as a law-enforcement agency, ICE's records and documents are necessarily produced for law-enforcement purposes"). Here, the FBI has not carried its burden of establishing that the records were compiled for law enforcement purposes.

B. Disclosure of the Withheld Information Will Not Reveal Techniques or Procedures for Law Enforcement Investigations or Prosecutions.

Not only did the FBI fail to satisfy the exemption 7 threshold requirement that a document be compiled for law enforcement purposes, it has failed to establish under exemption 7(E) that disclosure of the withheld information "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law

enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E); *see Blackwell v. FBI*, 646 F.3d 37, 41 (D.C. Cir. 2011).

Part of the FBI's burden under exemption 7(E) is to demonstrate that the "withholdings contain 'techniques and procedures' not generally known to the public." *Am. Immigration Council*, 950 F. Supp. 2d at 246 (citing *Nat'l Whistleblower Ctr. v. Dep't of Health & Human Servs.*, 849 F. Supp. 2d 13, 36 (D.D.C. 2012)). The FBI admits that it is withholding "techniques" that "may be known by the public in a general sense." Dist. Ct. Dkt. 13-3, Hardy Decl. ¶ 31. Therefore, to justify withholding, the agency must explain how the documents would reveal details not publicly known about the use of those generally known techniques that would enable criminals to circumvent them. *Billington v. Dep't of Justice*, 69 F. Supp. 2d 128, 140 (D.D.C. 1999) ("Exemption 7(E) . . . may not be used to shield well-known or commonplace techniques or procedures."), *reversed in part on other grounds,* 233 F.3d 581 (D.C. Cir. 2000).

Here, the FBI's generic description of the techniques fails to justify any of the withholdings. The FBI's declaration must contain enough information that the Court can "deduce something of the nature of the techniques in question," enough detail that the Court has something concrete to latch onto in reviewing the obliterated text. *Clemente v. FBI*, 741 F. Supp. 2d 64, 88 (D.D.C. 2010). The FBI declaration, however, says only that the method involves collection and analysis of information—a description that could apply to any technique one dreams up, from an encrypted note to polygraph tests to wiretaps to GPS trackers to computer hacking. The broad description thus cannot justify the redactions.

The cases cited by the FBI highlight that its declaration lacks the detail needed to support withholding under exemption 7(E). For instance, in *Piper v. Dep't of Justice*, 294 F. Supp. 2d 16,

30 (D.D.C. 2003), the FBI's declaration explained that the agency withheld "logistical considerations involved in polygraph examinations" and the identity and application of an electronic monitoring device. *Id.* at 31. In *Mayer Brown LLP v. IRS*, 562 F.3d 1190 (D.C. Cir. 2009), the Internal Revenue Service (IRS) claimed exemption 7(E) to protect its settlement practices, including settlement strategies, assessments of litigation hazards, and acceptable ranges for settlements. *Id.* at 1192. In *Techserve Alliance v. Napolitano*, 803 F. Supp. 2d 16 (D.D.C. 2011), the U.S. Customs and Immigration Services appropriately withheld documents related to "requests for evidence" concerning H1-B visa processing materials. *Id.* at 29. And in *Morley v. CIA*, 508 F.3d 1108 (D.C. Cir. 2007), the CIA withheld background investigation and security clearance procedures for prospective CIA employees. In each case, the agency indicated the nature of the technique it sought to protect from disclosure.[7] *Id.* at 1128-29.

Citing *Morley*, the government incorrectly suggests that it can satisfy exemption 7(E) by showing that the documents would "provide insight" into the agency's investigatory procedures or techniques. Dist. Ct. Doc. 13-1, Def.'s Summ. J. Memo. at 12. *Morley* involved a FOIA request for the security clearance procedures used by the CIA in assessing job applicants.

[7] *See also PEER*, 740 F.3d at 205 (the agency withheld emergency action plans for certain dams that outlined guidelines for detecting the cause of emergency dam failure and security precautions in emergency conditions); *Blackwell*, 646 F.3d at 42 (FBI withheld the "details about procedures used during the forensic examination of a computer" and "methods of data collection, organization and presentation contained in ChoicePoint reports"); *Bigwood v. Dep't of Defense*, __ F. Supp. 3d __, 2015 WL 5675769, at *20 (D.D.C. Sept. 25, 2015) (protecting information that detailed "the degree of measures" to take in response to terrorist threats to military facilities). *Cf. Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice*, 746 F.3d 1082, 1102 (D.C. Cir. 2014) (FBI's explanation that its withholdings "protect procedures and techniques used by FBI [agents] during the investigation" was insufficiently detailed to justify exemption 7(E) withholdings (internal quotation marks omitted)); *Strunk v. Dep't of State*, 845 F. Supp. 2d 38, 47 (D.D.C. 2012) (agency failed to justify exemption 7(E) withholdings with a declaration that listed only the techniques and procedures that "may" be included in the withheld information, not the ones in fact included); *Davis v. FBI*, 770 F. Supp. 2d 93, 100 (D.D.C. 2011) (FBI's "generic description of the documents as 'prosecution memoranda . . . detailing evidence gathering efforts and prosecution strategies'" did not justify exemption 7(E) withholdings).

Although the agency's declaration did not state that revealing the security clearance techniques "could be expected to risk circumvention" and instead stated that release of the information could "provide insight" into the security clearance procedure, the court declined to take "an overly formalistic approach that would require the agency's response to mirror the statutory text" because it was "self-evident that information revealing security clearance procedures could render those procedures vulnerable." *Morley*, 508 F.3d at 1129. The court's decision that the CIA had adequately justified its withholding, because it was "self-evident" that disclosure would risk circumvention of the law, is not implicated here. In this case, there is nothing self-evident about whether disclosure of the unspecified techniques would risk circumvention of the law, because the FBI has provided no facts about the nature of these techniques, what law enforcement purpose these techniques served, what realm these techniques were used in, or even what sort of laws are at risk of circumvention.

Exemption 7(E) may set a "low bar for the agency to justify withholding," *Blackwell*, 646 F.3d at 42, but it is not so low that the agency can fail to provide any explanation of relevant techniques and how they would be revealed by disclosure. *Citizens for Responsibility & Ethics in Wash.*, 746 F.3d at 1102.

C. Disclosure of the Withheld Records Could Not Reasonably Be Expected to Risk Circumvention of the Law.

The agency also fails to explain how disclosure of the unspecified techniques threatens a particular harm. The FBI contends that "[t]he relative utility of these techniques could be diminished if the actual techniques were released in this matter" and that release of the information "would enable criminals to educate themselves about the techniques employed for the collection and analysis of information and therefore allow these individuals to take countermeasures to circumvent the effectiveness of these techniques and to continue to violate

the law and engage in intelligence, terrorist, and criminal activities"—an explanation that is noteworthy only for using so many words to convey so little. Dist. Ct. Dkt. 13-3, Hardy Decl. ¶ 31. The FBI does not indicate what laws are at risk of being circumvented, why there is a reasonable risk of circumvention of the unspecified laws if the information is disclosed, and what countermeasures are at play. In contrast, the FBI's declaration in *PHE, Inc. v. Dep't of Justice*, 983 F.2d 248 (D.C. Cir. 1993), explained that the withheld material "detailed specific documents, records and sources of information available to Agents investigating obscenity violations, as well as the type of patterns of criminal activity to look for when investigating certain violations." *Id.* at 251. The declaration also explained that release of this information would risk circumvention of the law because "[k]nowing what records or documents are likely to be scrutinized by the FBI and who would be a good source of information provides violators with an opportunity to impede lawful investigations by destroying or altering evidence and possibly rendering harm to sources." *Id.*; *see also Mayer Brown LLP*, 562 F.3d at 1193-94 (release of IRS settlement practices could encourage tax evasion); *Techserve Alliance*, 803 F. Supp. 2d at 29 (release of H1-B visa processing material would reveal the "selection criteria, fraud indicators, and investigative process" that agencies use in fraud investigations of the H–1B visa process); *Piper*, 294 F. Supp. 2d at 30 (release of the questions and answers of administered polygraph examinations could allow someone to figure out a pattern to the questioning technique).

Finally, the context of the redactions does not allow the Court to infer that the FBI has withheld information protected by exemption 7(E). When, as in this case, the agency has "not described each chunk of redacted text individually but instead has grouped it into a descriptive category, the agency satisfies its obligations under the FOIA only if the context of the redacted

material suffices to show that the information withheld falls within the relevant category and hence is truly exempt from disclosure." *Clemente*, 741 F. Supp. 2d at 81; *King*, 830 F.2d at 221 (describing the FBI's categorical system as "only as good as its results, and the vital result must be an adequate representation of context which, when combined with descriptions of deletions, enables de novo review of the propriety of withholding"). The FBI does not explain how exemption 7(E) applies to any of the specific withholdings and instead labels the redactions with category "(b)(7)(E)-1" for "Investigative Techniques and Procedures Utilized to Conduct National Security Investigations Pertaining to the Collection and Analysis of Intelligence." Dist. Ct. Dkt. 13-3, Hardy Decl. ¶¶ 18, 31. The documents numbered Roosevelt-2, -3, -9, and -10 have so many redactions that they convey no context at all. The unredacted text in the remaining documents conveys such benign information that there can be no inference of a law enforcement purpose for these documents, let alone an inference of law enforcement techniques that must be protected to prevent the risk of circumvention of the law. Therefore, the context of these exemption 7(E) withholdings does nothing to fill in the gaping holes in the FBI's declaration. At most, the context suggests that the FBI investigates public figures by talking to informants about the public figures' activities. Information at once so generic and obvious will hardly help any criminal or terrorist evade detection.

III. The Agency Has Not Shown That Exemption 7(C) Justifies Withholding Any Identifying Information and Has Not Shown That Exemption 6 Justifies Withholding Identifying Information of Deceased Persons.

The FBI deleted names and identifying information on five pages pursuant to both exemptions 6 and 7(C). Brick Decl. Exh. B, Roosevelt-3, -6, -7, -8, -9. Exemption 7(C) permits withholding records "compiled for law enforcement purposes" if disclosure of those records "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5

U.S.C. § 552(b)(7)(C). Because the FBI has not shown that the records were compiled for law enforcement purposes, exemption 7(C) does not justify withholding any names or identifying information in these twelve pages. *See supra* Argument, Section II.A, pp. 11-15.

Exemption 6 covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). This exemption "requires the court to balance the individual's right of privacy against the basic policy of opening agency action to the light of public scrutiny." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (internal quotation marks omitted). The "requirement that disclosure be 'clearly unwarranted' . . . tilt[s] the balance (of disclosure interests against privacy interests) in favor of disclosure," creating a "heavy burden" for the agency to show that its exemption 6 withholdings are necessary. *Morley*, 508 F.3d at 1127 (citations omitted). Where the information relates to a deceased individual, "the privacy interest in nondisclosure of identifying information may be diminished." *Schrecker v. Dep't of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003). As a result of the diminished privacy interest for deceased individuals, the agency must "ma[k]e a reasonable effort to ascertain life status" of the persons in question before invoking a privacy interest under exemptions 6 or 7(C). *Id.* at 662.

Mr. Brick does not object to the FBI withholding names and identifying information for *living* persons under exemption 6. But the FBI's declaration fails to specify whether the individuals concerned are alive or whether the FBI took any steps to learn whether they are alive. Consequently, the agency has failed to provide a basis for this Court to find that "the Government reasonably balanced the interests in personal privacy against the public interest in release of the information at issue." *Schrecker v. Dep't of Justice*, 254 F.3d 162, 167 (D.C. Cir. 2001). Moreover, the FBI's failure to make any effort to determine the life status of the persons

at issue raises "a serious question whether the Bureau's invocation of the privacy interest represented a reasonable response to the FOIA request," and suggests that it improperly invoked the privacy exemptions. *Davis v. Dep't of Justice*, 460 F.3d 92, 95 (D.C. Cir. 2006) (internal quotation marks and citations omitted). The FBI's invocation of privacy exemptions without determining whether the records concern living individuals is especially improper because the records all date from more than 50 years ago, making it more likely that the individuals are not alive. The District Court has already "caution[ed] the FBI" that D.C. Circuit precedent requires the agency to "take pains to ascertain life status in the first instance, i.e., in initially balancing the privacy and public interests at issue," *Schoenman v. FBI*, 576 F. Supp. 2d 3, 10 (D.D.C. 2008), "rather than waiting to be prompted to do so by Court Order," *id.* at 14.

To the extent the FBI is withholding the identifying information of deceased persons, that information should be disclosed. Any privacy interests of the deceased persons are weak compared to the public interest in understanding how the FBI used (or misused) its authority and resources to keep tabs on Eleanor Roosevelt and her associates—a two-decade undertaking motivated by the FBI Director's disdain for her views. One of the basic purposes of FOIA is "to ensure an informed citizenry," which is "needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Disclosing the identifying information in these records would reveal the breadth of FBI Director Hoover's surveillance of Eleanor Roosevelt, by showing which of Mrs. Roosevelt's contacts the FBI monitored and how far the FBI intruded into her private relationships. *See Stern v. FBI*, 737 F.2d 84, 94 (D.C. Cir. 1984) ("The public has a great interest in being enlightened about that type of malfeasance by this senior FBI official . . .") (applying exemptions 6 and 7(C)).

The FBI is well aware of its burden under exemption 7. Having failed to sustain it, the agency should not be given a second chance, and the Court should order the agency to disclose all information withheld under exemption 7. As for exemption 6, however, the Court should order the FBI to ascertain the life status of the individuals in question and to disclose the identifying information concerning deceased individuals.

CONCLUSION

The FBI had its opportunity to justify its withholdings. It failed to do so. Therefore, FOIA compels disclosure of these records in their entirety. This Court should grant plaintiff's motion for summary judgment and deny defendant's motion for summary judgment with respect to defendant's withholding of records pursuant to exemptions 3, 6, 7(C), and 7(E). This Court should order defendant to disclose all information withheld under exemptions 3, 7(C), and 7(E), and further order defendant to disclose identifying information for deceased persons withheld under exemption 6.

Respectfully submitted,

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