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

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND SUMMARY OF ARGUMENT

At the center of this case are twelve very old documents about Eleanor Roosevelt that the FBI admits were not created for any law enforcement purpose. Nevertheless, the FBI claims that disclosure of these records would reveal intelligence sources and methods, reveal law enforcement techniques and procedures, and invade the privacy interests of individuals identified in the records. The FBI's two declarations, however, come nowhere close to justifying its withholdings under exemption 3, 5 U.S.C. § 552(b)(3), exemption 6, 5 U.S.C. § 552(b)(6), and exemptions 7(C) and 7(E), 5 U.S.C. § 552(b)(7)(C), (E).

The FBI offers little beyond a recitation of the statutory standards to justify its withholdings. The FBI does not tailor its exemption 3 claims to the context of the Eleanor Roosevelt documents, fails to show any harm from disclosure of the withheld information, and does not show that the redacted information pertains to intelligence sources and methods. Moreover, the FBI's second declaration confirms that it has not discovered any law enforcement purpose for these records, rendering all of its exemption 7 withholdings improper. As to the redactions of identifying information, the FBI admits that it made no effort to determine whether the individuals were deceased. That failure makes its exemption 6 withholdings improper.

The FBI sums up the inadequacies of its own declarations when it criticizes the arguments of plaintiff Christopher Brick as being "based not on the substance of the information withheld, but on what Plaintiff alleges are inadequacies of the Hardy Declaration." Def.'s Opp. at 1 (Dist. Ct. Dkt. 18). The FBI brought this gripe upon itself. Plaintiff cannot make arguments about the content of particular redactions because the FBI—the only party that knows what these redactions hide—has not adequately described its withholdings. The point of the declaration is to provide enough information about the substance of the redactions to give the plaintiff a chance to

challenge application of the exemption to the redactions, but Brick cannot argue about the substance of redactions that the FBI has refused to describe.

Because the FBI has not justified any of its withholdings, the Court should grant summary judgment to plaintiff Brick.

ARGUMENT

I. The FBI Has Not Established That Exemption 3 Covers the Withheld Information.

Apparently recognizing the deficiencies of its first declaration, the FBI has submitted a second declaration. Second Hardy Decl. (Dist. Ct. Dkt. 18-2). But this one fares no better than the first. The FBI's inadequate description of the exemption 3 withholdings leaves the Court unable to undertake its "only task," Def.'s Opp. at 2, of determining whether the redacted information "relates to intelligence sources and methods." *Id.* (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 762 (D.C. Cir. 1990)); *see* First Hardy Decl. ¶ 21 (Dist. Ct. Dkt. 12-1); Second Hardy Decl. ¶ 7.[1] The second declaration states that the withheld information "named specific intelligence sources, including a permanent source symbol number, as well as intelligence collected by the source" and "described specific intelligence methods used by the FBI to obtain information it used for national security investigations of third party individuals." Second Hardy Decl. ¶ 7 (footnote omitted). Rather than provide a meaningful basis for the Court's review of the exemption 3 claims, the FBI asks the Court to rely on a bare assertion that the information withheld "pertains to intelligence source[s] and methods," *id.*, because the FBI considers itself "especially competent" to make this determination, Def.'s Opp. at 3. Plaintiff does not contest

[1] Claiming exemption 3, the FBI withholds information under the National Security Act of 1947, which protects "intelligence sources and methods from unauthorized disclosure," 50 U.S.C. § 3024(i)(1).

the redaction of the single permanent source symbol number, but contests the remainder of the FBI's exemption 3 redactions on a number of grounds.

For one thing, the FBI must connect its exemption 3 claims to the documents at issue in this case. *See Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 147 (D.C. Cir. 2006) ("The agency must [ ] explain why the exemption applies to the document or type of document withheld and may not ignore the contents of the withheld documents."). The problem is not that the FBI fails to identify the exemptions that apply to each redaction, *see* Def.'s Opp. at 5, but that the FBI ignores the contents and context of the twelve documents and does not explain, on a "document-by-document basis, the information withheld from each responsive document." *Am. Civil Liberties Union v. Dep't of Def.*, 628 F.3d 612, 625 (D.C. Cir. 2011). Although the agency "may describe *commonalities* among its withholdings, it must avoid resorting to explanation in *generalities*." *Am. Immigration Council v. Dep't of Homeland Sec.*, 950 F. Supp. 2d 221, 236-37 (D.D.C. 2013).

Here, the FBI gives one boilerplate exemption 3 explanation for all twelve pages of redactions, without distinguishing between documents that "named specific intelligence sources" and documents that "described specific intelligence methods." Second Hardy Decl. ¶ 7. Moreover, the "declaration makes no effort to assess how detailed a description of these Hoover-era methods the documents provide." *Campbell v. Dep't of Justice*, 164 F.3d 20, 31 (D.C. Cir. 1998) (applying exemption 1). The FBI does not say whether "named specific intelligence sources" refers to the names of informants, or whether that phrase simply encompasses the instance of a "permanent source symbol number." Second Hardy Decl. ¶ 7. In short, Plaintiff's criticism of the FBI's declarations is not that they parrot the statutory language, as the FBI would have it, Def.'s Opp. at 5, but that the FBI does no *more* than parrot the statutory language. The

FBI must go beyond reciting the statute and explain how the withheld information in these documents falls within the statute.

The FBI's exemption 3 justification is also inadequate because it does not "identify the 'particularized harm that could be expected to occur from production of the requested information.'" *Morley v. CIA*, 508 F.3d 1108, 1125 (D.C. Cir. 2007) (explaining that the CIA had met its burden under exemption 3 by drawing causal connections between the release of the information and the resulting danger to national security) (quoting *Church of Scientology of Cal., Inc. v. Turner*, 662 F.2d 784, 785 (D.C. Cir. 1980) (per curiam)); *see also Halperin v. CIA,* 629 F.2d 144, 148-149 (D.C. Cir. 1980) (upholding the CIA's withholding under exemption 3 as an intelligence method the names of attorneys retained by the CIA where the CIA identified three potential harms to national security from disclosure of the names); *Leopold v. CIA*, 106 F. Supp. 3d 51, 58 (D.D.C. 2015) (holding that the CIA could withhold specific expenditure amounts as intelligence methods under exemption 3 because disclosing those amounts would allow someone to figure out the "agency's capabilities and priorities"). The FBI states only that the withheld information "described specific intelligence methods used by the FBI" more than 55 years ago. Second Hardy Decl. ¶ 7. This "conclusory" statement is not enough. *Church of Scientology*, 662 F.2d at 785.

In addition, the FBI mistakenly relies on *James Madison Project v. CIA*, 607 F. Supp. 2d 109 (D.D.C. 2009), to support its assertion that it does not have to make a showing of harm. Def.'s Opp. at 6. However, in that case the court did not pass on the issue, because the plaintiff apparently accepted the defendant's contention that the agency did not have to make a showing of damage to national security. *Id*. at 125.

The FBI brushes aside plaintiff Brick's examples of adequate exemption 3 declarations, claiming that these "cases establish only what is sufficient, not what is necessary to invoke Exemption 3." Def.'s Opp. at 3 n.2. But whether the FBI's showing is "sufficient" is precisely the issue in this case, and the cases cited by Plaintiff demonstrate how much specificity is needed to "provide[] the kind of detailed, scrupulous description that enables a District Court judge to perform a searching de novo review." *Church of Scientology*, 662 F.2d at 786. The FBI fails to find a single decision upholding a justification as paltry as the FBI's here.

The lack of detail in the FBI's explanations means that the Court owes no deference to the FBI's declarations, as Plaintiff explained. *See* Pl.'s S.J. Memo. at 8 (Dist. Ct. Dkt. 14). In addition, the FBI's declarations are not entitled to the deference courts accord agency affidavits that implicate national security concerns, because the FBI has shown no legitimate national security concern here. *Id*. at 8-9; *see Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003). Contrary to the FBI's suggestion, Def.'s Opp. at 6, merely invoking exemption 3 is not enough to raise a legitimate national security concern, because "[j]udicial deference depends on the substance of the danger posed by disclosure—that is, harm to the national security—not the FOIA exemption invoked." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 928.

In addition, the FBI has not shown how the withheld information protects sources and methods used to gather *intelligence* information. Most of the FBI's functions relate to domestic law enforcement, and its methods for that are exclusively protected by exemption 7. *See* First Hardy Decl. ¶ 22 (describing the FBI's responsibilities). Exemption 3 has application only for those sources and methods that the FBI uses for the small subset of information it gathers pursuant to its intelligence functions. In *CIA v. Sims*, the Supreme Court explained that "[a]n

intelligence source provides, or is engaged to provide, information the Agency needs to fulfill its statutory obligations." 471 U.S. 159, 177 (1985) (holding that the CIA could withhold the names of researchers as intelligence sources, because they provided information the CIA needed to fulfill its statutory obligations with respect to foreign intelligence). In using the term "Agency," the Court in *Sims* was referring to the CIA, and the CIA's statutory obligations relate to national security and foreign intelligence. *Id.* at 173 (describing CIA's "responsibility to maintain national security"); *id.* at 169 (describing CIA's "mandate to conduct foreign intelligence"); 50 U.S.C. § 3036(d) (listing the responsibilities of the CIA Director as including the collection of foreign intelligence and intelligence relating to national security). In addition, the National Security Act defines "intelligence" as including "foreign intelligence and counterintelligence," and it defines "counterintelligence" as "information gathered, and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities." 50 U.S.C. § 3003(1), (3).

In other words, "intelligence" is not just any information, but information that has a foreign component, and an "intelligence source" is something that provides the foreign-related information needed to fulfill the CIA's national security and foreign intelligence obligations. The post-*Sims* amendment to the National Security Act giving the Director of National Intelligence, as opposed to the Director of Central Intelligence, the authority to delegate the protection of intelligence sources and methods, *see DiBacco v. U.S. Army*, 795 F.3d 178, 197 (D.C. Cir. 2015), does not change this analysis because the amendment did not change the definition of what the Director must protect: *intelligence* sources and methods.

For the FBI to claim exemption 3 under the National Security Act, the FBI must show that the redacted information protects sources or methods for gathering information needed for maintaining national security or conducting foreign intelligence. *Sims*, 471 U.S. at 177. The FBI tries to get around this concern by stating that the fact that "this information was classified in the past" shows "the intelligence nature of the information." Second Hardy Decl. ¶ 7. However, this fact does not help the FBI, because the FBI gives no basis or authority for having classified the information. The FBI has offered no facts showing that it has withheld sources or methods used to gather intelligence, as defined by the Supreme Court in *Sims* and the National Security Act.

Faced with a shortage of facts to justify its exemption 3 withholdings, the FBI argues that the Court should presume that exemption 3 applies to the redactions based on the content of the unredacted text. *See* Def.'s Opp. at 3-4. The FBI asserts—without citation to the declarations—that the documents describe "intelligence provided by various sources, including informants," that the information in the documents "was obtained through intelligence-gathering activities,"[2] and therefore, that the Court should jump to the conclusion that "revealing the withheld information would identify specific intelligence sources and methods utilized by the FBI." Def.'s Opp. at 4. However, the Hardy declarations never state that revealing information obtained through intelligence sources would reveal the source itself, and they also do not support the assumption in the FBI's argument that the information obtained cannot be segregated from its source. In addition, the FBI has redacted huge blocks of text that leave nothing to "illuminate the nature of the redacted material." Def.'s Opp. at 3 (quoting *Judicial Watch, Inc.*, 449 F.3d at 145).

[2] Contrary to the FBI's characterization, Plaintiff does not "effectively concede[ ]" that the information was obtained through intelligence-gathering activities. Def.'s Opp. at 4. The Plaintiff has no knowledge of how the information in these documents was obtained.

The FBI falls back on the argument that reciting more than the statutory standard would reveal too much. Def.'s Opp. at 4. But that excuse does not work here, where "the information appears to describe no more than routine FBI surveillance and monitoring techniques[,]" and therefore "it is implausible to baldly assert that such material is so sensitive that the FBI is incapable of providing any descriptive information." *Campbell*, 164 F.3d at 31 (evaluating the FBI's withholding under exemption 1, for information concerning national security).

Moreover, the FBI's reliance on *Morley v. CIA* for the argument that it does not have to elaborate on its exemption 3 claims, Def.'s Opp. at 3, is misplaced. 508 F.3d at 1124. First, the FBI cites to language in the *Morley* decision discussing exemption 1, not exemption 3. *Id.* (explaining that "the text of Exemption 1 itself suggests that little proof or explanation is required beyond a plausible assertion that information is properly classified."). Second, the *Morley* court explained that exemption 3 requires a more detailed explanation than exemption 1, *id.*, and praised the agency's "more elaborate description on Exemption 3" which "provid[es] the court substantial insight into the CIA's reasons for protecting intelligence sources and methods[.]" *Id.* at 1125.

In addition to skimping on its exemption 3 descriptions, the FBI applies the exemption too broadly. Disturbingly, the FBI claims exemption 3 protection for the intelligence information collected by an intelligence source—a category of information that the National Security Act does not protect. Second Hardy Decl. ¶ 7 (relying on exemption 3 to justify redaction of "intelligence collected by the source"). However, the National Security Act "protect[s] *intelligence sources and methods* from unauthorized disclosure," 50 U.S.C. § 3024(i)(1) (emphasis added), not *information gathered* through sources and methods.

The FBI's improperly broad use of exemption 3 is also illustrated by its processing of one of the documents, Roosevelt-5. After Plaintiff pointed out that the FBI had previously released a less redacted version of this document, Pl.'s S. J. Memo. at 14-15, the FBI admitted that "it waived any exemption claimed" as to that information. Second Hardy Decl. ¶ 11. Putting aside the waiver issue, what is concerning is the type of information the FBI tried to withhold under exemptions 3 and 7(E), namely, the statement: "concerning Mrs. ROOSEVELT and her proposed visit to Moscow from 9/7-28." *Compare* Brick Decl., Exh. B, Roosevelt-5 (Dkt. No. 14-2), *with* Second Hardy Decl. ¶ 11 & Exh. A (the reprocessed Roosevelt-5). That the FBI sought to hide this information as revealing intelligence sources or methods calls into question its other exemption 3 redactions. For instance, the exemption 3 redactions on most of the documents span many lines, much longer than a "permanent source symbol number" or the name of a source or method.

Because the FBI has failed to justify its exemption 3 withholdings, the Court should order the withheld information released.

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

A. The Eleanor Roosevelt Documents Were Not Created or Compiled For Law Enforcement Purposes.

The FBI concedes that the records at issue were not created for law enforcement purposes. First Hardy Decl. ¶ 22 ("file 62-62735 [Eleanor Roosevelt's file] is not an investigative file, rather a collection of information concerning Roosevelt between the years 1950 and 1961"); Second Hardy Decl. ¶ 8 ("I reiterate that file number 62-62735 (a '62' file) was a collection of information concerning Roosevelt between the years 1940 and 1961, it is not an investigative file on Roosevelt."). Therefore, whether the FBI has met the exemption 7 threshold that the "records or information [were] compiled for law enforcement purposes," 5 U.S.C. § 552(b)(7), comes

down to whether the FBI has shown that the withheld information was later compiled for law enforcement purposes. It has not.

The FBI argues that the records meet the threshold requirement because they resemble records that could be found in a law enforcement investigation. Second Hardy Decl. ¶ 8. But speculation about a possible purpose for the records based on their appearance does not satisfy the FBI's burden under exemption 7. The FBI states that "the information collected on limited pages" within Eleanor Roosevelt's file was "recompiled in other national security/criminal investigative files *based on the content and markings of the material*." Second Hardy Decl. ¶ 8 (emphasis added). The FBI notes that "pages Roosevelt-7, 9-11 directly indicate the information was recompiled in other files bearing file classification numbers 100 and 105" and that "[t]hese file classifications pertain to national security/criminal investigations." *Id.* But these four pages are memos that include the 100 or 105 on the "From" or "To" line of the memo, indicating that these pages had these file numbers on them when they were prepared. Because these numbers were there from the start, they could not possibly indicate that these pages were later "recompiled" into law enforcement records.[3] Brick Decl., Exh. B, Roosevelt-7, 9-11 (Dkt. No. 14-2).

Indeed, the FBI never affirmatively states that any of the withheld information, including the information on these four pages, was in fact later compiled into a "national security/criminal

[3] To be clear, none of the four pages is marked with a stand-alone "100" or "105." On the "From:" line of the memos denoted as Roosevelt-7, Roosevelt-10, and Roosevelt-11, it says: "SAC, NEW YORK (100-92701)." That same 8-digit number appears at the bottom of the page. The "To:" line of the memo marked as Roosevelt-9 says: "DIRECTOR, FBI (105-48607)" and the "From:" line says: "SAC, NEW YORK (105-18989)," and both 8-digit numbers are repeated at the bottom of the page, along with the following: "New York (100-92701)." The FBI does not explain what the numbers following 100 or 105 mean, or why there are multiple alleged file classifications on a single page, or why these file classifications appear on the "From" or "To" lines of the memos.

investigation." The FBI hazards a guess that the information must have been recompiled into national security or criminal investigation files based only on its observation of a 100 or 105 somewhere on these pages. But if the information was recompiled and used in a later investigation, then the FBI should be able to locate that other investigation, verify that this information was indeed used in that investigation, and say so in its declaration. It did not do so.

For the eight documents that do not have a 100 or 105 on them, the FBI takes its appearance argument one step further, asking the court "to conclude" that all of these documents were "compiled for a law enforcement/national security related matter" because of the unspecified "subject matter, nature and context" of the records, the "markings" that suggest information was shared with other agencies, and because "each page pertains to confidential source reporting," and was "previously classified." Second Hardy Decl. ¶ 8. In other words, the FBI admits that it cannot locate any "national security/criminal investigative files" that contain a recompilation of the information in *any* of these documents; it asserts only that it is "reasonable to conclude" that the records were recompiled for some other investigation. *Id.* As a result, the FBI's justification for withholding these records depends on its guesswork that at some unknown time, for an unknown reason, the FBI compiled all of this information "for a law enforcement/national security related matter."[4] *Id.*

This justification is absurd. "Under the text of Exemption 7, the withheld record must have been compiled 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*"). Where, as here, the FBI claims that the records were later compiled into a law

[4] The FBI anachronistically refers to compiling the records pursuant to the FBI's authority "to protect the United States from terrorism." First Hardy Decl. ¶ 22. There is no possibility that surveillance of Eleanor Roosevelt 55 years ago had anything to do with terrorism.

enforcement investigation, "the agency should be able to 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." *Pratt v. Webster*, 673 F.2d 408, 420 (D.C. Cir. 1982). The *Pratt* test "in no wise requires a court to sanction agency claims that are pretextual or otherwise strain credulity." *King v. Dep't of Justice*, 830 F.2d 210, 230 (D.C. Cir. 1987). In addition to identifying the object of its investigation, the FBI must "supply facts that would justify" the investigation. *Quinon v. FBI*, 86 F.3d 1222, 1229 (D.C. Cir. 1996). The FBI's declarations lack all of these pieces: an identified law enforcement investigation, the target of the investigation, and facts justifying the investigation.

The cases cited by the FBI, Def.'s Opp. at 9, do not require anything less to satisfy the exemption 7 threshold. *See King*, 830 F.2d at 230 (finding that the FBI satisfied the exemption 7 threshold by identifying the target of the investigation, the criminal statutes the FBI suspected the individual had violated, and explaining why the FBI suspected the individual of violating these laws); *Abdelfattah v. U.S. Immigration & Customs Enforcement*, 851 F. Supp. 2d 141, 145 (D.D.C. 2012) (holding that the threshold was satisfied where the agency identified the subject of the investigation, the laws, and the reason for compiling the records, and where its assertions were "unrebutted"); *Willis v. Dep't of Justice*, 581 F. Supp. 2d 57, 75 (D.D.C. 2008) (finding the threshold satisfied where the FBI's "unrebutted" statements identified the subject of the investigations, the laws, and its investigatory purpose in creating the documents); *Jordan v. Dep't of Justice*, No. CV 07-2303, 2010 WL 3023795, at *5 (D. Colo. Apr. 19, 2010) (holding that the agency satisfied the threshold requirement for a roster listing federal prison employees and their duties where it was "undisputed" that the roster was "created to assist [the Bureau of Prisons] in carrying out its mission.").

Furthermore, the FBI cannot satisfy its burden by stating that the withheld information may have later ended up in "investigative files," as it tries to do. *See* Second Hardy Decl. ¶ 8. Exemption 7 does not apply to any record that happens to turn up in an investigatory file; the records themselves must have been compiled for a law enforcement purpose. Exemption 7 originally applied to "investigatory files" but was amended in 1974 to apply to "investigatory records." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 221-22 (1978) (internal quotation marks and citation omitted). The "thrust of congressional concern in its amendment of Exemption 7 was to make clear that the Exemption did not endlessly protect material simply because it was in an investigatory file." *Id.* at 230. Therefore, to the extent the FBI's explanation can be read as asserting that these documents merely ended up in investigative files, that assertion does not carry the FBI's burden.

Additionally, the FBI's inability to pinpoint whether it was the documents themselves, or some information in the documents, or both, that the FBI allegedly recompiled goes to show that the FBI never recompiled any of it for law enforcement purposes. The FBI's explanations refer at times to the *records* themselves as having been recompiled, and at other times to the *information* in those documents as having been recompiled. *Compare* First Hardy Decl. ¶ 22 ("the responsive *records* herein were recompiled"), *and id.* ("these *records* were compiled"), *and* Second Hardy Decl. ¶ 8 ("the *records* were compiled"), *and* Def.'s Opp. at 7 ("the *documents* in question were compiled"), *with* First Hardy Decl ¶ 22 ("the *information* collected was integrated"), *and id.* ("the *information* readily meets the threshold requirement"), *and* Second Hardy Decl. ¶ 8 ("the *information* collected on limited pages . . . [was] recompiled"), *and id.* ("pages Roosevelt-7, 9-11 directly indicate the *information* was recompiled in other files").

Along these same lines, the FBI misconstrues the distinction Plaintiff makes between information that is later compiled for law enforcement purposes and the records from which that information is taken. Def.'s Opp. at 8-9; Pl.'s S. J. Memo. at 12. Information not originally compiled for law enforcement purposes that is later compiled for law enforcement purposes meets the exemption 7 threshold. *See PEER*, 740 F.3d at 203. But the record from which that piece of information originated does turn into a law enforcement record. If the FBI had taken information from one of the pages in Eleanor Roosevelt's file, and used that information in a subsequent criminal investigation, that would not turn that particular page from her file, or any of the other pages, into records compiled for law enforcement purposes. The FBI cites no decisions holding otherwise.

Because the FBI does not establish that "the files sought relate to anything that can fairly be characterized as an enforcement proceeding," the information withheld under exemption 7(E) and 7(C) must be disclosed. *Jefferson v. Dep't of Justice, Office of Prof'l Responsibility*, 284 F.3d 172, 177 (D.C. Cir. 2002) (internal quotation marks and citation omitted).

B. The FBI Has Not Shown That the Withholdings Protect Techniques and Procedures for Law Enforcement Investigations.

Like the first declaration, the FBI's second declaration does not show that the redactions protect "techniques and procedures for law enforcement investigations or prosecutions." 5 U.S.C. § 552(b)(7)(E). The FBI says it is withholding "the identity of methods used in the collection and analysis of intelligence to use in national security investigations of third parties," Second Hardy Decl. ¶ 10. This generic description gives no indication of the nature of the techniques or procedures and fails to "place[ ] each document into its historical . . . context." *Keys v. Dep't of Justice*, 830 F.2d 337, 350 (D.C. Cir. 1987).

The FBI's contention that its description of the techniques and procedures provides "more detail than in other cases where courts have affirmed Exemption 7(E) withholdings" is undermined by the very cases cited by the FBI. Def.'s Opp. at 11-12. In those cases, the agencies describe the nature of the techniques with references to the contexts of the records, and do not resort to broad, categorical descriptions such those provided here. *See Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011) (holding that agency could withhold computer forensic examination procedures and the "methods of data collection, organization and presentation contained in ChoicePoint reports"); *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1192 (D.C. Cir. 2009) (finding that agency properly withheld "settlement strategies and objectives, assessments of litigating hazards, [and] acceptable ranges of percentages for settlement"); *Morley*, 508 F.3d at 1129 (finding that CIA could protect information that would reveal security clearance procedures); *Labow v. Dep't of Justice*, 66 F. Supp. 3d 104, 127 (D.D.C. 2014) (finding that agency could withhold nine categories of information, including "dates and types of investigations (preliminary or full investigations)," "database information and/or printouts," "computer analysis response team ('CART') reports and/or data," and "location and identity of FBI and/or joint units." (internal quotation marks omitted)).[5]

Moreover, the FBI has not established that it is justified in withholding the identity of techniques that are generally known to the public. "[T]he purpose of Exemption 7(E) is to prevent the public from learning about the existence of confidential law enforcement techniques, not to prevent it from learning about the use of already-disclosed law enforcement techniques." *Shapiro v. Dep't of Justice*, No. CV 13-555, __ F. Supp. 3d __, 2016 WL 287051, at *11 (D.D.C.

[5] *Labow* does not support the FBI's position for the additional reason that the court did not address the sufficiency of the exemption 7(E) descriptions. The plaintiff did not contest the adequacy of the descriptions, but instead argued that some of the techniques should not be withheld because they were publicly known. 66 F. Supp. 3d at 127.

Jan. 22, 2016). The FBI says that the "the technical analysis" of the techniques is not generally known, but it does not say that disclosure of the information would in fact reveal this unspecified "technical analysis." First Hardy Decl. ¶ 31. In *Labow*, which the FBI cites as an example of similar proof, Def.'s Opp. at 14, the agency's declarations affirmatively stated that the agency withheld "the non-public details about the investigative techniques." *Labow,* 66 F. Supp. 3d at 127. Yet here, the FBI offers no assurance that only non-public details have been withheld. Moreover, the FBI argues that revealing the publicly known techniques would "erode the techniques' effectiveness," Def.'s Opp. at 14. But that argument finds no support in the declarations, which only provide this perplexing statement: "The relative utility of these techniques could be diminished if the actual techniques were released in this matter." First Hardy Decl. ¶ 31. The FBI gives no explanation of the difference between "these techniques" and the "actual techniques," and how disclosure of the "actual techniques" would diminish the relative utility of "these techniques."

C. The FBI Has Not Shown That Disclosure Could Risk Circumvention of the Law.

Contrary to the language of the statute and the law in this Circuit, the FBI contends that it does not have to establish that disclosure of the techniques and procedures could reasonably be expected to risk circumvention of the law. Def.'s Opp. at 14-15. In support, the FBI cites an unpublished decision that did not decide the issue, *Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Prot.*, No. CV 04-377, 2006 WL 1826185, at *7 (D.D.C. June 30, 2006). The D.C. Circuit, however, "has applied the 'risk circumvention of the law' requirement both to records containing guidelines and to records containing techniques and procedures." *PEER*, 740 F.3d at 204 n.4 (citing *Blackwell,* 646 F.3d at 41–42); *see also Citizens*

for Responsibility & Ethics in Washington v. Dep't of Justice, 746 F.3d 1082, 1102 n.8 (D.C. Cir. 2014) (citing *PEER*'s acknowledgement of "some disagreement" on the issue).

Missing from the FBI's declarations is any "explanation of how the information, if released, could risk circumvention of the law," or any "explanation of what laws would purportedly be circumvented." *Am. Civil Liberties Union of S. California v. U.S. Citizenship & Immigration Servs.*, No. CV 13-861, __ F. Supp. 3d __, 2015 WL 5726667, at *5 (D.D.C. Sept. 30, 2015) (finding agency's declarations inadequate to justify withholdings under exemption 7(E)). The FBI tries to make up for this failure by arguing that "it should be obvious" how disclosure of these "methods" could risk circumvention of the law. Def.'s Opp. at 16. This argument impermissibly shifts the burden of sustaining the withholdings onto the Court. And it is not obvious; that is why the FBI must supply facts supporting its exemption claim. In short, the "Hardy Declaration lacks any case-specific, meaningful explanation as to how any particular technique, procedure or guideline at issue *in this case* would make it easier for individuals to evade the law." *Jett v. FBI*, No. CV 14-276, __ F. Supp. 3d __, 2015 WL 5921898, at *7 (D.D.C. Sept. 30, 2015) (finding that the FBI's "formulaic statements" did not satisfy its burden under exemption 7(E)).

In addition, the FBI claims that disclosure would reveal "the circumstances under which the specific techniques were used or requested" as well as "the specifics of how and in what setting [the techniques] are employed." Hardy Decl. ¶ 31. However, the FBI provides no information supporting the idea that these techniques could even be used in like "circumstances" or "setting[s]" today. If these techniques are so obsolete that they would never be used in similar situations today, then disclosure would pose no risk of circumvention of the law.

For all of these reasons, the FBI must release the information it has improperly withheld under exemption 7.

III. Exemption 7(C) Does Not Justify Withholding Any Identifying Information and Exemption 6 Does Not Justify Withholding Identifying Information of Deceased Individuals.

As discussed above with regard to exemption 7(E), the FBI has not shown that the records were compiled for law enforcement purposes. Having failed to meet the threshold exemption 7 requirement, the FBI cannot properly rely on exemption 7(C) to justify withholding any names or identifying information in the twelve pages.

Plaintiff Brick has explained that he does not object to the FBI withholding identifying information for living individuals under exemption 6, which allows an agency to withhold "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); *see* Pl.'s S. J. Memo. at 21. Because, however, the FBI has not met its "heavy burden" of showing that exemption 6 protects the identifying information of deceased individuals, that information should be disclosed. *Morley*, 508 F.3d at 1127 (citations and quotations marks omitted).

In evaluating an agency's claim of exemption 6, the court must "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 and citation omitted). Because an individual's death diminishes his privacy interest, *Davis v. Dep't of Justice*, 460 F.3d 92, 97-98 (D.C. Cir. 2007), a proper balancing requires the agency to make "a reasonable effort to ascertain life status" of the individuals on whose behalf the agency redacts information, as the FBI agrees. *See* Def.'s Opp. at 18 (quoting *Schrecker v. Dep't of Justice*, 349 F.3d 657, 662 (D.C. Cir. 2003) (*Schrecker II*)). Here, the FBI made no effort to

ascertain life status. Accordingly, it has improperly withheld identifying information under exemption 6. *See Davis*, 460 F.3d at 95.

The FBI says it looked through the *twelve* responsive records for a birthdate—that was the extent of its effort. *See* Second Hardy Decl. ¶ 13 (stating that the "FBI was unable to apply the 100 year rule" because "[t]here was no date of birth" in the responsive records); Def.'s Opp. at 18 (explaining that "the FBI reviewed the records at issue in an attempt to locate a birth date"). Reviewing twelve pages for a birthdate amounts to no effort at all, let alone "a reasonable effort to account for the death of a person on whose behalf the FBI invokes" a privacy exemption. *Schrecker II*, 349 F.3d at 662.

Incredibly, the FBI says that "there are no reasonable alternative methods that the agency failed to employ." Def.'s Opp. at 18. The FBI also says that it does not have "ready access" to "data bases that could resolve the issue," *id.* (quoting *Schrecker II*, 349 F.3d at 662) (emphasis omitted), and goes so far as to suggest that Plaintiff should have proposed an alternative search method, *id*. Here is one alternative: "Why, in short, doesn't the FBI just Google the [ ] names?" *Davis*, 460 F.3d at 102 (concluding that the FBI did not make a reasonable effort to ascertain whether two speakers on an audiotape were still alive). Associates and companions of Eleanor Roosevelt are likely to be prominent enough that plugging their names into an Internet search engine would yield helpful results, such as obituaries. *Id.* ("Surely, in the Internet age, a 'reasonable alternative' for finding out whether a prominent person is dead is to use Google (or any other search engine) to find a report of that person's death.").

In *Schrecker II*, the court held that searching beyond the responsive records for birth dates would impose an unreasonable burden on the government, because the government had already searched the *24,000 pages* of responsive records. 349 F.3d at 664-65. No such

burdensome problem arises where the FBI has glanced through a total of *twelve* responsive records. Moreover, the FBI gives no reason why it should expect these twelve pages, which appear to track Eleanor Roosevelt's contacts with the Soviet Union, to contain any birth dates. "[W]hen the only search method[ ] the FBI did employ w[as] plainly fated to reach a dead end," there is a "serious question" whether the FBI correctly invoked exemption 6. *Davis*, 460 F.3d at 103 (internal quotation marks omitted in second quote).

Although not mentioned in the FBI's brief, the second Hardy declaration states that "the FBI uses institutional knowledge gained from prior FOIA requests or internal records" to determine the life status of individuals. Second Hardy Decl. ¶ 13. The FBI does not say whether it actually did so here. At any rate, the D.C. Circuit has rejected this method, because the court has "no idea what [it] means," *Davis*, 460 F.3d at 99, "the Bureau's method of accessing that [institutional] knowledge is so constrained as to render it effectively useless," *id.* at 98, and "with respect to the FBI's reliance on its institutional knowledge, it appears that the Bureau has 'been completely passive on the issue, taking death into account only if the fact has happened to swim into [its agents'] line of vision,'" *id.* at 99 (quoting *Summers v. Dep't of Justice*, 140 F.3d 1077, 1085 (D.C. Cir. 1998) (Williams, J., concurring)).

Although the FBI admits that the law requires the "fact of death" "to be taken into account in the balancing decision whether to release information," the FBI asks the court to overlook this required consideration here, because it asserts that there is a strong privacy interest and no public interest in disclosure. Def.'s Opp. at 19 (quoting *Schrecker v. Dep't of Justice*, 254 F.3d 162, 166 (D.C. Cir. 2001) (internal quotation marks omitted)). Yet the FBI's contention that these documents implicate strong privacy interests, Def.'s Opp. at 20, rests on the assumption that the records in this case are law enforcement records. As discussed, they are not law

enforcement records. *See* First Hardy Decl. ¶ 22; Second Hardy Decl. ¶ 8. And the decisions cited by the FBI do not apply where, as here, the individual is not associated with a law enforcement investigation. *See* Def.'s Opp. at 19-20; *Davis v. Dep't of Justice*, 968 F.2d 1276 (D.C. Cir. 1992) (addressing the privacy interests of individuals whose voices the FBI recorded as part of a major organized crime investigation) (exemption 7(C)); *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991) (holding that exemption 7(C) protects the names and addresses of individuals identified in the Securities and Exchange Commission's investigation of illegal stock trading); *Am. Civil Liberties Union v. Dep't of Justice*, 750 F.3d 927 (D.C. Cir. 2014) (applying exemption 7(C) and holding that defendants who were indicted but not convicted have a substantial privacy interest in not having the details of their prosecutions revealed).

Unlike those cases, this case does not implicate "the stigma that hangs over the targets of law enforcement investigations." *McCutchen v. Dep't of Health & Human Servs.*, 30 F.3d 183, 187 (D.C. Cir. 1994) (concluding that exemption 7(C) protects the names of scientists investigated for misconduct where there was no finding of wrongdoing). Here, all that would be revealed to the public is that the deceased person was somehow associated with Eleanor Roosevelt. The FBI fails to show any privacy concern implicated by being associated with Eleanor Roosevelt.

Furthermore, and contrary to the FBI's contention, Def.'s Opp. at 20, there is a strong public interest in knowing the breadth of the FBI's intrusion into Eleanor Roosevelt's life. The FBI is incorrect that Plaintiff must come forward with compelling evidence that the FBI was engaged in illegal activity. *Id.* at 21. That requirement only applies to withholdings of "names and addresses of private individuals appearing in files within the ambit of Exemption 7(C)" *SafeCard Servs., Inc.*, 926 F.2d at 1206, and where "the justification for disclosure" is

"governmental misconduct." *Davis*, 968 F.2d at 1282. Exemption 7(C) does not apply here, and plaintiff Brick does not claim that the public interest is governmental misconduct. The significance of the public interest in knowing how extensively the FBI monitored Eleanor Roosevelt and her cohorts does not depend on whether the FBI had the authority to conduct such monitoring. Moreover, the fact that the FBI "collect[ed]" thousands of pages "of information concerning Roosevelt between the years 1940 and 1961" with no justification, *see* First Hardy Decl. ¶ 22; Second Hardy Decl. ¶ 8, is "evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004).

Having failed to justify withholding any of the identifying information, the FBI should release the identifying information withheld under exemption 7(C) and all identifying information of deceased individuals withheld under exemption 6.

IV. The Court Should Order the FBI to Disclose the Improperly Withheld Information.

The FBI asks the Court to give it another chance to submit a third declaration, if the Court finds the FBI's submissions inadequate. Def.'s Opp. at 22. The Court should deny this request. The FBI's request for another chance to meet its burden illustrates the underlying problem in this case: From its initial processing of Plaintiff's FOIA request up through its filing of two insufficient declarations, the FBI has disregarded the Supreme Court's directive that with FOIA, "disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The FBI attempts to make secrecy the governing rule in this case by seeking repeatedly to file declarations in an endeavor to test for the smallest increment of information that will satisfy its burden.

CONCLUSION

For the reasons stated, the FBI has failed to justify its withholdings under exemptions 3, 6, 7(C), and 7(E). The Court should order the FBI to disclose all of the information it has withheld pursuant to exemptions 3, 7(C), and 7(E), and further order the FBI to disclose identifying information for deceased individuals withheld under exemption 6.

Respectfully submitted,

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