

By way of this Motion, Defendant, the United States Department of Justice (“DOJ” or “Defendant”) respectfully moves for summary judgment pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7. The reasons for this Motion are set forth in the Memorandum of Points and Authorities in Support of Defendant’s Motion for Summary Judgment, the Statement of Material Facts as to Which There Is No Genuine Issue, and the Declaration of David M. Hardy (as well as the exhibits thereto). A proposed order is filed concurrently herewith.

Respectfully submitted,

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THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Case No. 13-cv-01159-GK
U.S. DEPARTMENT OF JUSTICE	)	
	)	
Defendant.	)	

**DEFENDANT'S STATEMENT OF MATERIAL FACTS**  
**AS TO WHICH THERE IS NO GENUINE ISSUE**

Pursuant to Local Rule 7(h)(1), Defendant respectfully submits the following statement of material facts as to which there is no genuine issue:

1. In a letter sent via facsimile on June 26, 2013 plaintiff submitted a FOIA request to the FBI. The request sought the following categories of records:
  - a. Records sufficient to show the source or sources of all drones used by the FBI from January 1, 2009 to the present;
  - b. Records sufficient to show the funding source for all drones used by the FBI from January 1, 2009 to the present;
  - c. Records sufficient to show who provided the FBI with any training to enable the FBI to use drones; and
  - d. All records reflecting or discussing any policy concerning the FBI's use of drones for any purpose.

*See* Exhibit A to the Declaration of David M. Hardy ("Hardy Decl."). Plaintiff also requested expedited processing and a fee waiver. *See id.*

2. On June 26, 2013, plaintiff sent a letter via facsimile to the Acting Director of the DOJ Office of Public Affairs, requesting that it grant plaintiff's request for expedition of the FOIA request. *See* Exhibit B to Hardy Decl.

3. In a letter dated July 3, 2013, the FBI informed plaintiff that its request for expedited processing of the FOIA request was denied. *See* Exhibit D to Hardy Decl.

4. The FBI made a total of six interim releases and one supplemental response of records to plaintiff between November 27, 2013 and May 30, 2014, in compliance with the Court's orders regarding a processing schedule. *See* Hardy Decl. ¶¶ 15-23 & Exhibits E-K; dkt. nos. 10, 12.

5. The standard FBI search for records in response to a FOIA request consists of a search-term query of the indices in the FBI's Central Records System ("CRS"). CRS is an investigative tool primarily managed and used by Special Agents to aid them in investigations. Hardy Decl. ¶ 26. The types of information typically found in the CRS include names of individuals, organizations, publications, activities, or foreign intelligence matters (or programs). *See id.* The FBI searched the CRS database using the following search terms: Drones, Unmanned Aerial Vehicle ("UAV"), UAV, Unmanned Aerial Vehicle Systems ("UAVS"), UAVS, Unmanned Aircraft Systems ("UAS"), and UAS. This search pulled up a few responsive records within three case files. These records were then processed for potential release. *See id.*

6. The FBI conducted a more individualized inquiry of the divisions and office that were determined to be the locations reasonably likely to have potentially responsive records based on the subject matter of plaintiff's FOIA request. *See id.* ¶ 27. The FBI issued an electronic communication called a "search EC" directing the more

than 60 FBI divisions (and office) identified to search for and provide for processing all retrievable agency records (electronic and hard copy) responsive to plaintiff's FOIA request. *Id.*

7. The Attorney General has designated Mr. David Hardy as an original classification and declassification authority. *See* Executive Order 13526 §§ 1.1(a)(1), 1.3; Hardy Decl. ¶ 2. Mr. Hardy ensured that the procedural requirements of Executive Order 13526 were followed for plaintiff's FOIA request, including proper identification and marking of documents. *See* Hardy Decl. ¶¶ 36-40.

8. The information withheld pursuant to Exemption 1 is under control of the United States Government, and contains information regarding intelligence activities, sources or methods and/or foreign relations or foreign activities of the United States. *See* Executive Order 13526 §§ 1.4(c), (d); Hardy Decl. ¶ 40.

9. Mr. Hardy determined that release of the information withheld pursuant to Exemption 1 reasonably could be expected to cause serious damage to the national security of the United States. Hardy Decl. ¶¶ 37, 49.

10. The information withheld pursuant to Exemption 1 would reveal the actual intelligence activities and methods used by the FBI against specific targets of foreign counterintelligence investigations or operations; would identify a target of a foreign counterintelligence investigation; and/or would disclose the intelligence-gathering capabilities of the activities or methods directed at specific targets. Hardy Decl. ¶ 42.

11. Some information withheld pursuant to Exemption 1 contains sensitive intelligence information gathered by the United States either about or from a foreign country. Hardy Decl. ¶ 46.

12. The FBI is one of 17 member agencies comprising the Intelligence Community. Hardy Decl. ¶ 52.

13. The Office of the Director of National Intelligence reviewed the information withheld under Exemption 3 and approved the FBI's assertion of the statutory authority of 50 U.S.C. § 3024(i)(1) to withhold intelligence sources and method information pursuant to Exemption 3. *Id.*

14. The FBI determined that the FBI's intelligence sources and methods would be revealed if any of the information withheld pursuant to Exemption 3 were to be released. *Id.* ¶ 53.

15. The FBI withheld a vendor's solicitation contract proposal pursuant to Exemption 4. *See* Hardy Decl. ¶ 56; CREW-2736 thru 2743, 2806. The solicitation included the vendor's Firm Fixed Pricing Summary Sheet, Conditions on Estimate, and a "Commercial U.S. Conditions – UAS Products 7 Services" statement. Hardy Decl. ¶ 56. The footer of each page of the solicitation states: "This proposal includes [Vendor name], proprietary or confidential data that shall not be disclosed outside the Government, nor shall it be duplicated or used by the recipient, in whole or in part, for any purpose other than to evaluate this proposal. Furthermore, this material is exempt from disclosure under FOIA because it contains trade secrets and/or commercial or financial information that is privileged or confidential. See 5 U.S.C. 552(b)(4), FAR 24.203." *Id.*

16. The proposal was submitted by the company to demonstrate its ability to perform the contract. It was not intended to be disclosed to competitors or sources outside the Government. Hardy Decl. ¶ 56.

17. The FBI also withheld vendor operating manuals and a vendor training schedule pursuant to Exemption 4. To determine whether to apply Exemption 4 to this information, the FBI provided notice to and sought input from the vendor. *See Hardy Decl.* ¶ 57.

18. The information in the manual “provides a comprehensive overview of the design, operation, capabilities, and maintenance of [the vendor’s] UAVS,” including “characteristics that are unique to [the vendor’s] UAVS” and a “detailed explanation of *every* operational aspect of [the vendor’s] UAVS.” *Id.* ¶ 58. This information is “highly competitive” and provided “only to customers when specifically required pursuant to contract.” *Id.* Disclosure of the information “would seriously and adversely affect [the] company’s competitive position and would be highly valuable to competitors of [the] company.” *Id.* This is because “a competitor could utilize this information to improve the designs of their own products to better compete against [the] company’s product line on future contracts.” *Id.*

19. The training documents “provide detailed insight into [the] company’s operations that are not otherwise publicly available and not available to [the] company’s competitors.” *Id.* ¶ 59. “When paired with publicly available information concerning U.S. Government contract awards, this information, which details the contents of [the] company’s training program, would enable a competitor to determine what [the] company offers to its customers at what price.” *Id.* The documents also “contain critical operational details” regarding the company’s “Digital Data Link (DDL)” feature on its aircraft. Disclosing this information would enable competitors to gain access to the company’s activities and sales opportunities. *Id.*

20. The FBI withheld information containing agency deliberations regarding the following pursuant to Exemption 5 (i) the development of UAV policy, including: directives regarding the justification and authority for using UAVS for investigative surveillance, system requirement development, procurement strategies, technical specifications, transition plans, and other UAV program policies; (ii) development of a “White paper”, or program summary, on UAVS for the FBI director; (iii) development of language for an Executive Order on the domestic use of UAS; (iv) FBI Office of General Counsel advice and opinions during the preparation of responses to Congressional inquiries regarding FBI UAV program use; (v) preparation of Certificates of Authorization (“COAs”) for the deployment of UAVS in particular circumstances; and (vi) the preparation of press releases. Hardy Decl. ¶ 64.

21. These records reflect agency deliberations, analysis, opinions, proposals, and unadopted recommendations during the development of the various policy and program issues identified above. *Id.* They contain an ongoing dialogue among and between FBI employees, other federal government personnel, and other federal law enforcement agencies. *Id.* This information is antecedent to the adoption of agency policy and/or decision about various aspects of the development of the UAV-related issues identified above. The information also specifically reflects the internal shaping of FBI policy regarding and internal analysis of the FBI’s UAV program, discussions regarding the FBI’s response to Congressional inquiries, the evaluation of different options for deployment of UAVS under particular circumstances, and shows the process of drafting and formulating information for public dissemination. *See id.*



22. The FBI also withheld draft records from disclosure pursuant to Exemption 5. These records include: (i) draft COAs for several UAVS; (ii) drafts of a Congressional response letter; (iii) a draft of a white paper for the FBI director; (iv) draft UAV transition plans; (v) drafts of language for an Executive Order regarding the domestic use of UAS; (vi) and draft policies on the FBI's use of UAVS. Hardy Decl. ¶ 64.

23. These records are preliminary versions of what may later become a final document that reflects an agency policy or decision. Some information may remain in draft format because the material may be discarded or changed during the give and take of the process leading to a final agency decision. *See id.* This information predates the policy and/or programmatic decisions necessary to finalize the documents. *Id.* It also reflects the give and take of the consultative process that led to the finalization of records or policies. *Id.*

24. The FBI withheld names and/or identifying information regarding the following individuals pursuant to Exemptions 6 and 7(C): (1) FBI special agents and support personnel; (2) third parties merely mentioned (including FBI vendor personnel); and (3) non-FBI Federal Government personnel, including foreign international law enforcement personnel. *See Hardy Decl. ¶¶ 71-74.*

25. Before withholding this information, the FBI examined each piece of information to determine the nature and strength of the privacy interest of every individual whose name and/or identifying information appears in the records. Hardy Decl. ¶ 70.

26. In each instance where it determined there were privacy interests at stake, the FBI analyzed whether there was a public interest and if so, whether that public interest was sufficient to outweigh the individual's privacy interests. *Id.* The FBI withheld information under Exemptions (b)(6) and (b)(7)(C) only after determining that the individual's privacy interests outweighed any public interest, or when the FBI determined that there was no public interest to balance against the individuals' privacy interests. *Id.*

27. The records withheld pursuant to Exemption 7 were compiled and/or created in furtherance of the FBI's law enforcement, national security, and intelligence missions. Hardy Decl. ¶ 66.

28. FBI Special Agents and personnel have privacy interests in being free from unnecessary and unofficial questioning regarding their involvement in the UAV program, whether or not they are currently employed by the FBI. *Id.* ¶¶ 71-72.

29. FBI Special Agents and personnel could become targets of harassing inquiries for unauthorized access to these developments if their identities were released. *Id.*

30. There is no public interest in the disclosure of the names and/or identifying information of FBI Special Agents or personnel because this information would not significantly increase the public's understanding of the operations and activities of the FBI. Hardy Decl. ¶ 72.

31. The FBI withheld pursuant to Exemptions 6 and 7(C) the names and identifying information of third parties, especially vendor personnel, who provided

information to the FBI in the course of its development of UAVS as an investigative technique and tool. Hardy Decl. ¶ 73.

32. Disclosure of these third-party individuals' names and identifying information in connection with the FBI's development of technology could subject them to harassment or intimidation. *Id.*

33. There would be no public interest in the disclosure of the names and/or identifying information of third parties withheld because the information would not shed light on the FBI's operations and activities. *Id.*

34. The FBI also withheld the names and/or identifying information of non-FBI federal law enforcement personnel and foreign international law enforcement personnel pursuant to Exemptions 6 and 7(C). Hardy Decl. ¶ 74. These individuals were responsible for conducting investigations and assisting the FBI in developing UAVS as an effective investigative technique and tool. *Id.*

35. Release of the names and/or identifying information of non-FBI federal law enforcement personnel and foreign international law enforcement personnel as being associated with FBI investigations and the development of UAVS could expose them to unofficial, harassing inquiries into their involvement, including for unauthorized access to these developments. *Id.* Disclosure could also hinder these individuals' effectiveness in conducting investigations and/or sharing technological data or other important knowledge. *Id.*

36. There would be no public interest in disclosure of the names and/or identifying information of non-FBI federal law enforcement personnel and foreign

international law enforcement personnel because disclosure would not significantly increase the public's understanding of the FBI's operations and activities.

37. The FBI withheld the following information pursuant to Exemption 7(E): (i) information regarding UAV operational capabilities and limitations, as well equipment specifications detailed in national security operations or testing; (ii) information identifying secure email and database portals, internal FBI secure and/or unpublished FBI fax numbers, and telephone lines; (iii) information that identifies FBI units and locations participating in training exercises and field operations, building and office locations where devices are developed and tested, as well as information regarding coordination of operations in the field and coordination with foreign law enforcement on shared developmental interests of UAVS as an investigative technique and tool; (iv) information regarding internal FBI databases, database search results and/or database screen shots that detail financial or commercial information; (v) information regarding the specific types of equipment, systems, software, hardware, control devices, and other details showing the capabilities, limitations, and technological advancements of certain UAVS, as well as the identity of UAV vendors and suppliers; (vi) information regarding the development of UAVS as an investigative tool (including information regarding procedures created to advance the development of UAVS such as program initiatives and operational developments, sensitive terms and definitions specific to the FBI relating to the application of these devices in collecting data in current and/or potential future investigations, and information that would expose the scope, direction, level of cooperation, and expertise related to UAV technology and procedures); (vii) specific information regarding UAV training, such as pilot qualifications, the number of qualified

pilots, training specifics on the use of the UAVS, testing locations (including flight schedules, times and dates), and training incidents; and (viii) specific information regarding the justification for UAV requisitions, as well as funding details pertaining to the acquisition and delivery (including funding accounts numbers, bank routing numbers, purchase order numbers, specific contractual terms and conditions, product numbers or codes, product descriptions (including parts, repair requests, and product pricing), purchase order approval procedures, and funding allocation and budgeting details). Hardy Decl. ¶ 81.

38. Subcategories (i), (v), (vi), (vii), and (viii) listed in paragraph 37, above, contain information specific to the development of UAVS as an effective investigative technical tool for national security and criminal investigations. Hardy Decl. ¶ 82. Disclosure of these technological and developmental aspects of UAVS – individually, or assembled in mosaic fashion – could provide key details on various law enforcement techniques and procedures, including the development, use, capabilities, limitations and vulnerabilities, scope of employment, equipment innovations and specifications of UAVS, and would reveal current and/or contemplated investigative applications. *See id.* If disclosed, this information would provide criminals and terrorists with a virtual “playbook” on how to evade the FBI’s use of UAVS, thus enhancing these individuals’ ability to avoid detection or apprehension. *Id.*

39. Subcategories (ii) and (iv) listed in paragraph 37, above, contain information specific to internal FBI databases, secure telephone and fax numbers, and unpublished telephone and/or email portals. Hardy Decl. ¶ 83. Disclosure of this information regarding various internal databases and communication systems would

expose the devices, equipment, and/or databases to hackers and unauthorized users. This could disrupt official business and compromise the effectiveness of the FBI's internal systems by providing individuals with means to access and tamper with the systems without detection. *See id.*

40. Subcategory (iii) listed in paragraph 37, above, relates to information regarding FBI units, unit locations, building/office locations developing UAVS or training with UAVS, and coordination with field units, other government agencies, and/or foreign law enforcement. *See Hardy Decl.* ¶ 84. Disclosure of the specific locations of certain offices and units developing UAVS, UAVS training locations, and coordination among developmental partners (including foreign law enforcement) would allow hostile elements to avoid the locations where surveillance operations and/or training is being conducted, or allow foreign governments to covertly penetrate these facilities to obtain information. *See id.*

41. The existence of these particular squads, units and sections, as well the existence of the FBI's coordination with other entities, is not known to the general public. *Id.* These squads, units, and sections, and the coordination, are also used to develop technological advancement of investigative techniques. They are responsible for implementing particular FBI technological studies, training exercises, and field operational investigations related to UAV development into an effective investigation tool. *Id.* Revealing the existence of these squads, development centers, training locations, and coordination of resources would reveal the level of FBI advancement, field operations, planning, and operational application studies. *Id.* Disclosing this information would enable criminals and enemies of the United States to discover where the FBI is

focusing its limited resources. This would enable them to plan and structure their activities in a manner to avoid the FBI's strengths, exploit its weaknesses, and steal its technological advancements. *Id.*

42. Within category (v), the FBI protected the identity of the vendor from which it procured UAV technology, as well as items purchased or contemplated for procurement, pursuant to Exemption 7(E). Hardy Decl. ¶ 85. Simply identifying the FBI's equipment source or UAV items intended to be procured (or actually purchased), would reveal information regarding the FBI's surveillance techniques and capabilities. *Id.*

43. The FBI has been vigilant about keeping its electronic surveillance techniques from becoming public knowledge. Permitting specific details to be released on the UAV program's equipment, operational capabilities, limitations, training, and funding would enable criminals outside the controlled, classified environment to provide foreign entities and operatives with key information that could be used in countermeasure efforts. If the FBI were forced to use compromised equipment it would have an immeasurable, negative effect on current and/or future investigations and law enforcement response capability of the FBI. Such a compromise of FBI UAVS capabilities and limitations could also reasonably place undercover agents and cooperating witnesses in elevated danger and/or enhance the ability of investigative subjects to avoid detection or apprehension. *Id.*

44. The FBI also protected non-public details regarding UAV use and tradecraft from disclosure pursuant to Exemption 7(E). Hardy Decl. ¶ 86. This information is found throughout the various Exemption (b)(7)(E) sub-categories. *Id.* ¶ 86

n.10. While the use of UAV technology as a general law enforcement technique is publicly known, the detailed information that has been withheld in this case about its application and use is not publicly known. *Id.* ¶ 86.

45. The release of specific UAVS application information would trigger immeasurable harm to law enforcement and national security operations. Disclosure would provide a virtual playbook for criminal elements, foreign intelligence agents, and terrorists on how to identify, avoid, or evade detection efforts related to the use of this technology. As a practical matter, disclosure would also enable potential targets to carefully plan their illicit activities and execute them in a manner that would avoid detection, thereby effectively neutralizing the FBI's ability to use the technique. Moreover, given the multi-faceted, technical nature of this information, release of even small pieces of information enhances the risk of circumvention as portions of information could be combined with information generally known about the technique to assemble a more detailed picture of how, when, and where the technique is employed. *Id.*

46. The FBI thoroughly reviewed all responsive records multiple times to achieve maximum disclosure consistent with the access provisions of the FOIA. Hardy Decl. ¶ 30. The FBI also examined each responsive page individually to identify non-exempt information. *See id.* ¶¶ 87-88. In addition, the FBI "re-reviewed all pages to ensure that all segregable non-exempt information has been released and that all exempt material has been redacted consistently." *Id.* ¶ 30.

47. Where pages of records were released in part with redactions, the pages contained a mixture of material that could be reasonably segregated for release, material that was exempt from disclosure, and information that was inextricably intertwined with



such material and therefore could not reasonably be segregated for release. *See id.* ¶ 88. Where pages were withheld in full, all information was either fully covered by one or more FOIA exemptions or any non-exempt information was so intertwined with exempt material that no information could be reasonably segregated for release. Any further segregation of the intertwined material would have produced disjointed words, phrases, or sentences that, taken separately or together, would have minimal or no informational content. *Id.*

DATED this 15th day of October, 2014.

Respectfully submitted,

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

# CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON

Plaintiff,

V.

U.S. DEPARTMENT OF JUSTICE

Defendant.

Case No. 13-cv-01159-GK

**DEFENDANT’S MEMORANDUM OF POINTS AND AUTHORITIES IN  
SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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## **I. INTRODUCTION**

This action concerns a Freedom of Information Act (“FOIA”) request by plaintiff Citizens for Responsibility and Ethics in Washington (“CREW” or “plaintiff”) to the Federal Bureau of Investigation (“FBI”), a component of defendant the U.S. Department of Justice (“defendant” or “DOJ”), for documents relating to the sources of, training regarding, and policy concerning the FBI’s use of unmanned aerial vehicle systems (“UAVS”), or drones. Defendant is entitled to summary judgment because the FBI has fully complied with its obligations under FOIA. The FBI conducted a reasonable search for records responsive to plaintiff’s FOIA request, and released responsive records in compliance with the processing schedule ordered by the Court. Moreover, the FBI properly redacted information from the released records pursuant to FOIA exemptions (b)(1), (b)(3), (b)(4), (b)(5), (b)(6), (b)(7)(C), and/or (b)(7)(E). Therefore, defendant’s motion for summary judgment should be granted.

## **II. BACKGROUND**

In a letter sent via facsimile on June 26, 2013 plaintiff submitted a FOIA request to the FBI. The request sought the following categories of records:

- a. Records sufficient to show the source or sources of all drones used by the FBI from January 1, 2009 to the present;
- b. Records sufficient to show the funding source for all drones used by the FBI from January 1, 2009 to the present;
- c. Records sufficient to show who provided the FBI with any training to enable the FBI to use drones; and
- d. All records reflecting or discussing any policy concerning the FBI’s use of drones for any purpose.

*See* Exhibit A to the Declaration of David M. Hardy (“Hardy Decl.”). Plaintiff also requested expedited processing and a fee waiver. *See id.* On the same day, pursuant to DOJ’s FOIA regulations, plaintiff sent a letter via facsimile to the Acting Director of the DOJ Office of Public Affairs, requesting that it grant plaintiff’s request for expedition of the FOIA request. *See* Exhibit B to Hardy Decl.

In a letter dated July 3, 2013, the FBI acknowledged receipt of CREW’s FOIA request, stated that it was searching the indices in its Central Records System for information responsive to the request, and said that plaintiff’s request for a fee waiver was being considered.<sup>1</sup> *See* Exhibit C to Hardy Decl. In another letter dated July 3, 2013, the FBI informed plaintiff that its request for expedited processing of the FOIA request was denied. *See* Exhibit D to Hardy Decl.

On July 30, 2013, plaintiff filed the complaint in this action, alleging wrongful withholding of non-exempt records and wrongful denial of expedition. *See* dkt. no. 1. The FBI then made a total of six interim releases and one supplemental response of records to plaintiff between November 27, 2013 and May 30, 2014, in compliance with the Court’s orders regarding a processing schedule. *See* Hardy Decl. ¶¶ 15-23 & Exhibits E-K; dkt. nos. 10, 12.<sup>2</sup>

In the course of preparing the *Vaughn* index in support of defendant’s motion for summary judgment, *see Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), the FBI

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<sup>1</sup> On November 27, 2013, the FBI informed plaintiff that its request for a fee waiver had been granted. *See* Exhibit E to Hardy Decl.

<sup>2</sup> This Court does not have jurisdiction over plaintiff’s claim for wrongful denial of expedition because the FBI has completed its processing of plaintiff’s FOIA request. *See* 5 U.S.C. § 552(a)(6)(E)(iv). *See also CREW v. DOJ*, 535 F. Supp. 2d 157, 160 n.1 (D.D.C. 2008) (plaintiff conceded that claim for failure to grant expedited processing was moot where DOJ had completed processing of request).

performed a subsequent segregability review to ensure that all reasonably segregable, non-exempt information has been provided to plaintiff. This page by page review identified additional information that could be segregated from exempt material and released to Plaintiff. *See* Hardy Decl. ¶ 24.<sup>3</sup>

In total, the FBI processed more than 9,000 pages of records in response to plaintiff's FOIA request. Of these more than 9,000 pages of processed records, a total of 6,304 pages were determined to be within the scope of Plaintiff's FOIA request. Of these, 4,296 pages were withheld in full ("WIF"), 1,553 pages were released in part ("RIP"), and 455 pages were released in full ("RIF"). Of the 4,296 pages WIF, 870 pages were duplicates of previously processed material, and 3,426 pages WIF were withheld pursuant to FOIA exemptions. *See* Hardy Decl. ¶¶ 29-30.

Defendant now moves for summary judgment in accordance with the briefing schedule ordered by the Court. *See* dkt. no. 15.

### **III. ARGUMENT**

#### **A. Legal Standard**

"FOIA cases typically and appropriately are decided on motions for summary judgment." *Judicial Watch, Inc. v. HUD*, Civil Action No. 12-1785 (ESH), 2014 WL 788353, at \*2 (D.D.C. Feb. 28, 2014) (citation and quotation omitted). A court reviews an agency's response to a FOIA request *de novo*. 5 U.S.C. § 552(a)(4)(B). "The defendant in a FOIA case must show that its search for responsive records was adequate, that any exemptions claimed actually apply, and that any reasonably segregable non-

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<sup>3</sup> The pages of records with modified processing are attached as Exhibit L to the Hardy Declaration. These pages include unresolved referral consultations, duplicates of other processed pages, or additional material that could be segregated and released. *See* Hardy Decl. ¶ 24.

exempt parts of records have been disclosed after redaction of exempt information.”

*Light v. DOJ*, 968 F. Supp. 2d 11, 23 (D.D.C. 2013).

#### **B. The FBI Conducted an Adequate Search for Responsive Records**

A defendant agency is entitled to summary judgment in a FOIA case with respect to the adequacy of its search if the agency shows “that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Oglesby v. U.S. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). “There is no requirement that an agency search every record system.” *Id.* “[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*.” *Weisberg v. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). An agency can establish the reasonableness of its search by “reasonably detailed, nonconclusory affidavits describing its efforts.” *Baker & Hostetler LLP v. Dep’t of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006). “Agency affidavits are accorded a presumption of good faith, which cannot be rebutted by ‘purely speculative claims about the existence and discoverability of other documents.’” *SafeCard Servs. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (citation omitted).

The Hardy Declaration demonstrates that the FBI conducted an adequate search for records responsive to plaintiff’s FOIA request. As the Declaration explains, because of the breadth and scope of plaintiff’s FOIA request and the fact that it sought primarily non-investigative records, the request did not lend itself to the searches that the FBI routinely conducts in response to FOIA requests seeking access to FBI investigative files. Hardy Decl. ¶ 25. The standard FBI search for responsive records in response to a FOIA

request consists of a search-term query of the indices in the FBI's Central Records System ("CRS"). CRS is an investigative tool primarily managed and used by Special Agents to aid them in investigations. *Id.* ¶ 26. The types of information typically found in the CRS include names of individuals, organizations, publications, activities, or foreign intelligence matters (or programs). *See id.* Even though plaintiff's request did not lend itself to a CRS search, the FBI searched the database using search terms that could reasonably be expected to produce information responsive to plaintiff's request. This search pulled up a few responsive records within three case files. These records were then processed for potential release. *See id.*

Given the small number of records located through the CRS search and the nature of plaintiff's request as described above, the FBI conducted a more individualized inquiry of the divisions and office that were determined to be the locations reasonably likely to have potentially responsive records based on the subject matter of the request. *See id.* ¶ 27. The FBI issued an electronic communication called a "search EC" directing the more than 60 FBI divisions (and office) identified to search for and provide for processing all retrievable agency records (electronic and hard copy) responsive to plaintiff's FOIA request. *Id.* In all, more than 9,000 pages of potentially responsive material were located. *See id.* ¶¶ 28-29. Of this total, 6,304 pages were determined to be responsive and within the scope of the request. *See id.* ¶ 29.

By conducting an individualized inquiry of those FBI divisions and office that were deemed most likely to have potentially responsive records, the FBI employed a reasonable and adequate search "using methods which can be reasonably expected to



produce the information requested.” *Oglesby*, 920 F.2d at 68 (citations omitted).

Therefore, Defendant is entitled to summary judgment on this issue.

### **C. The FBI Has Properly Withheld Information Under Applicable Exemptions**

The FOIA represents a balance struck by Congress “between the right of the public to know and the need of the Government to keep information in confidence.”

*John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (citation omitted).

Congress recognized “that legitimate governmental and private interests could be harmed by release of certain types of information and provided nine specific exemptions under which disclosure could be refused.” *FBI v. Abramson*, 456 U.S. 615, 621 (1982). While these exemptions are to be “narrowly construed,” *id.* at 630, courts must not fail to give them “meaningful reach and application.” *John Doe*, 493 U.S. at 152.

“An agency that has withheld responsive documents pursuant to a FOIA exemption can carry its burden to prove the applicability of the claimed exemption by affidavit.” *Larson v. Dep’t of State*, 565 F.3d 857, 862 (D.C. Cir. 2009). “Summary judgment is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail . . . and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.” *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (citation and internal quotation marks omitted). “Ultimately, an agency’s justification for invoking a FOIA exemption is sufficient if it appears ‘logical’ or ‘plausible.’” *Id.* at 374-75 (citation omitted).

Here, the information withheld “implicat[es] national security, a uniquely executive purview.” *Ctr. for Nat’l Sec. Studies v. DOJ*, 331 F.3d 918, 926-27 (D.C. Cir. 2003) (“both the Supreme Court and this Court have expressly recognized the propriety

of deference to the executive in the context of FOIA claims which implicate national security”). *See also Larson*, 565 F.3d at 865 (“Today we reaffirm our deferential posture in FOIA cases regarding the ‘uniquely executive purview’ of national security.”). The DC Circuit has “consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review.” *Ctr. for Nat’l Sec. Studies*, 331 F.3d at 927. This deference applies to all relevant exemptions “so long as the government’s declarations raise legitimate concerns that disclosure would impair national security.” *Id.* at 928.

Defendant is entitled to summary judgment with regard its application of exemptions because the Hardy Declaration provides detailed justifications for the withholding of information. Moreover, the Hardy Declaration is accompanied by an index that separates the categories of information outlined in plaintiff’s FOIA request, and provides a detailed summary of the contents of the records, a summary of the bases for withholdings, and the disposition of each document page (withheld-in-full or released-in part). *See Hardy Decl.* ¶ 31 & Exhibit M.

### ***1. The FBI Properly Withheld Information Pursuant to Exemption 1***

First, the FBI properly withheld classified information pursuant to FOIA Exemption 1. This exemption protects from disclosure records that are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1). *See also Hardy Decl.* ¶ 35. Pursuant to Executive Order 13526, which “prescribes a uniform system for classifying,

safeguarding, and declassifying national security information,” an agency may classify information if the following conditions are met:

1. an original classification authority is classifying the information;
2. the information is owned by, produced by or for, or is under the control of the United States Government;
3. the information falls within one or more of the categories of information listed in section 1.4 of [the Executive Order]; and
4. the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, . . . and the original classification authority is able to identify or describe the damage.

Executive Order 13526 § 1.1(a), 75 Fed. Reg. 707 (Jan. 5, 2010). *See also* Hardy Decl.

¶ 38.

A court “accord[s] substantial weight to an agency’s affidavit concerning the details of the classified status of the disputed record because the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of a particular classified record.” *Larson*, 565 F.3d at 864 (citation and quotation marks omitted). *See also Ctr. for Nat’l Sec. Studies*, 331 F.3d at 927 (“[W]e have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review.”).

The Hardy Declaration demonstrates that the FBI has adhered to the procedures set forth in Executive Order 13526 in determining that the information withheld pursuant to Exemption 1 is classified. *See* Hardy Decl. ¶¶ 36-40. The Attorney General has designated Mr. Hardy as an original classification and declassification authority. *See* Executive Order 13526 §§ 1.1(a)(1), 1.3; Hardy Decl. ¶ 2. Mr. Hardy ensured that the

procedural requirements of Executive Order 13526 were followed for this FOIA request, including proper identification and marking of documents. *See* Hardy Decl. ¶¶ 36-40.

The classified information withheld in this case also meets the substantive requirements of Executive Order 13526. The withheld information is under control of the United States Government, and contains information regarding intelligence activities, sources or methods and/or foreign relations or foreign activities of the United States, all of which are authorized bases for classification. *See* Executive Order 13526 §§ 1.4(c), (d); Hardy Decl. ¶ 40. As further discussed below, Mr. Hardy determined that release of this information reasonably could be expected to cause serious damage to the national security of the United States, and therefore should be classified at the “Secret” level. Hardy Decl. ¶¶ 37, 49. Mr. Hardy evaluated the withheld information in the context of the impact that disclosure would have on other sensitive information contained elsewhere in the United States Intelligence Community’s files, as well as the impact that other information that is either available in the public domain or that is likely known or suspected by present or potential adversaries of the United States would have on the withheld information. *Id.* ¶¶ 48-49. Any greater specificity in the descriptions and justifications set forth below with respect to the information withheld could reasonably be expected to jeopardize the national security of the United States. *Id.*

a. Intelligence Activities, Sources and Methods (E.O. 13526 § 1.4(c))

Much of the classified information withheld in this case relates to intelligence activities and methods used by the FBI for gathering intelligence data. Information that reveals intelligence activities or methods is protected from disclosure pursuant to section 1.4(c) of Executive Order 13526 and Exemption 1. The information withheld here would

reveal the actual intelligence activities and methods used by the FBI against specific targets of foreign counterintelligence investigations or operations; would identify a target of a foreign counterintelligence investigation; and/or would disclose the intelligence-gathering capabilities of the activities or methods directed at specific targets. Hardy Decl. ¶ 42. The withheld information is also very specific in nature, provided during a specific time period, and is known to very few individuals. *See id.* These activities and methods are still used by the FBI and the information is related to the development of sources and methods related to UAV technology. *See id.* ¶ 43.

Disclosure of this information could reasonably be expected to cause serious damage to the national security for several reasons. First, because the information would reveal actual or contemplated intelligence activities methods used by the FBI, disclosure would allow hostile entities to discover the current intelligence-gathering methods being used by the agency. Second, disclosure would reveal current specific targets of the FBI's national security investigations. Third, disclosure would reveal criteria used and priorities assigned by the FBI to conduct current intelligence or counterintelligence investigations. Fourth, disclosure would reveal the technological and operational intelligence-gathering capabilities and/or limitations of UAV equipment systems, as well as tradecraft details about their deployment, which would degrade or eliminate the usefulness of UAVS as an intelligence asset. Fifth, disclosure of the information would reveal operational partners of the FBI, and thus reveal intelligence sources. Sixth, and finally, disclosure would reveal information about FBI UAV intelligence-gathering methodology. *See id.*

If this detailed information is disclosed, hostile entities could develop countermeasures that would severely disrupt the FBI's intelligence-gathering capabilities. *See id.* ¶ 44. This would also result in severe damage to the FBI's efforts to detect and apprehend violators of the national security and criminal laws of the United States. *Id.*<sup>4</sup>

b. Foreign Relations or Foreign Activities (E.O. 13526 § 1.4(d))

Section 1.4(d) of Executive Order 13526 protects foreign relations or foreign activities of the United States, including confidential sources. The information withheld here contains sensitive intelligence information gathered by the United States either about or from a foreign country. Due to the delicate nature of international diplomacy, disclosure of this sensitive information could jeopardize the fragile relationships that exist between the United States and certain foreign governments. *See Hardy Decl.* ¶ 46. Moreover, the unauthorized disclosure of information concerning foreign relations or foreign activities of the United States can reasonably be expected to lead to curtailment in the diplomatic or law enforcement sharing of intelligence and/or new investigative equipment advancements. It could also reasonably be expected to identify the target, scope, or time frame of intelligence activities of the United States in or about a foreign country, which could result in the curtailment or cessation of these activities. Disclosure of the information could also reasonably be expected to enable hostile entities to assess the country's intelligence gathering activities in or about a foreign country and devise countermeasures against these activities. Finally, disclosure of the information could

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<sup>4</sup> Information withheld under this category has also been withheld pursuant to Exemption (b)(3), and in some instances pursuant to Exemption (b)(7)(E), both of which are discussed below. *Hardy Decl.* ¶ 44.

reasonably be expected to compromise cooperative foreign sources, which may jeopardize their safety and curtail the flow of information from these sources. *Id.* ¶ 47.

The discussion above demonstrates that the FBI has met both the procedural and substantive requirements of Executive Order 13526. Therefore, the FBI has sustained its burden of justifying nondisclosure of information pursuant to Exemption 1.

## ***2. The FBI Properly Withheld Information Pursuant to Exemption 3***

Exemption 3 permits agencies to withhold from disclosure records that are “specifically exempted from disclosure by statute.” 5 U.S.C. § 552(b)(3). Under this exemption, the FBI “need only show that the statute claimed is one of exemption as contemplated by Exemption 3 and that the withheld material falls within the statute.” *Larson*, 565 F.3d at 865.

In this case, the FBI invokes Section 102A(i)(1) of the National Security Act of 1947, as amended (now codified at 50 U.S.C. § 3024(i)(1)) which requires the Director of National Intelligence to “protect intelligence sources and methods from unauthorized disclosure.” It is well established that Section 102A(i)(1) is an exemption 3 statute. *See Larson*, 565 F.3d at 865 (citation omitted). *See also Sack v. CIA*, Case No. 1:12-cv-00537 (CRC), 2014 WL 2769103, at \*4 (D.D.C. June 17, 2014). In fact, the Supreme Court has recognized the “wide-ranging authority” provided by the National Security Act to protect intelligence sources and methods. *See CIA v. Sims*, 471 U.S. 159, 169-70, 177 (1985). Thus, the only remaining question is whether the withheld material relates to intelligence sources and methods. The Hardy Declaration demonstrates that it does.

Section 102A(i)(2)(A) provides that “the Director of National Intelligence shall establish and implement guidelines for the intelligence community for the . . .

[c]lassification of information under applicable law, Executive orders, or other Presidential directives.” 50 U.S.C. § 3024(i)(2)(A). *See also* Hardy Decl. ¶ 52. The FBI is one of 17 member agencies comprising the Intelligence Community. Therefore, it is obligated to protect intelligence sources and methods. *See id.* The Office of the Director of National Intelligence reviewed the information withheld under this exemption and approved the FBI’s assertion of the statutory authority of 50 U.S.C. § 3024(i)(1) to withhold intelligence sources and method information pursuant to Exemption 3 (and in conjunction with Exemptions 1 and 7(E) where applicable). *Id.* *See Sims*, 471 U.S. at 179 (“The decisions of the Director, who must of course be familiar with ‘the whole picture,’ as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake.”). The FBI has determined that the FBI’s intelligence sources and methods would be revealed if any of the information withheld pursuant to this Exemption were to be released. Hardy Decl. ¶ 53. The FBI’s index provides a summary of the information contained in each document where information is withheld pursuant to this Exemption. *Id.* Therefore, the FBI has properly withheld information pursuant to Exemption 3.

### ***3. The FBI Properly Withheld Information Pursuant to Exemption 4***

Exemption 4 permits an agency to withhold “trade secrets and commercial or financial information obtained from a person” that is “privileged or confidential.” 5 U.S.C. § 552(b)(4). Unlike other types of information, materials implicating Exemption 4 are generally procured from third parties, rather than developed within the agency. *Judicial Watch v. FDA*, 449 F.3d 141, 148 (D.C. Cir. 2006). Therefore, the Exemption is intended to protect the interests of both the government and submitters of information.



*See Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 767-70 (D.C. Cir. 1974).

The exemption applies when the provider of the information has a commercial interest in information submitted to the agency. *Baker & Hostetler*, 473 F.3d at 319.

In *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992), the D.C. Circuit explained that material may be withheld as “financial or commercial information” pursuant to Exemption 4 under two circumstances. First, information provided to the government on a voluntary basis is confidential for purposes of Exemption 4 “if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.” *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 147 (D.C. Cir. 2001) (quoting *Critical Mass*, 975 F.2d at 879). On the other hand, financial or commercial information provided to the government on a mandatory basis is confidential if “disclosure would be likely either (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” *Id.* (quoting *Critical Mass*, 975 F.2d at 878). The difference is due to the fact that

When the Government obtains information as part of a mandatory submission, the Government’s access to the information normally is not seriously threatened by disclosure; the private interest is the principal factor tending against disclosure, and the harm to the private interest must be significant to prevent public access to information. However, when the Government receives information voluntarily, it has a strong interest in ensuring continued access, and therefore both the Government and private interests weigh against overly broad disclosure.

*Ctr. for Auto Safety*, 244 F.3d at 148 (internal and other citations omitted).

Here, two subcategories of commercial information are withheld: (a) solicitation-related material and (b) operator manuals and a vendor training schedule. Hardy Decl.

¶ 55. Both subcategories of information were properly withheld for the following reasons.

a. Solicitation-related material

The first subcategory comprises a vendor's solicitation for a contract proposal. *See* Hardy Decl. ¶ 56 (discussing CREW-2736 thru 2743, 2806). In the solicitation the vendor voluntarily included the following information: a Firm Fixed Pricing Summary Sheet, Conditions on Estimate, and a "Commercial U.S. Conditions – UAS Products 7 Services" statement. *Id.* To emphasize the fact that this type of information should be exempt from disclosure, the vendor placed the following notice on the footer of each page: "This proposal includes [Vendor name],<sup>5</sup> proprietary or confidential data that shall not be disclosed outside the Government, nor shall it be duplicated or used by the recipient, in whole or in part, for any purpose other than to evaluate this proposal. Furthermore, this material is exempt from disclosure under FOIA because it contains trade secrets and/or commercial or financial information that is privileged or confidential. See 5 U.S.C. 552(b)(4), FAR 24.203." *Id.* The proposal was submitted by this company to demonstrate its ability to perform the contract; it was not intended to be disclosed to competitors or sources outside the Government. *Id.* Therefore, this information was properly withheld pursuant to Exemption 4. *See Ctr. for Auto Safety*, 244 F.3d at 147.

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<sup>5</sup> As the Hardy Declaration explains, the name of the vendor is also protected from release pursuant to Exemption 7(E), because identifying the vendor would reveal knowledge about the FBI's surveillance capabilities. *See* Hardy Decl. ¶ 56 n.10. This is because the vendor only sells this equipment to qualified law enforcement and Department of Defense entities "in order to protect the techniques of the equipment." *Id.*

b. Operator manuals and vendor training schedule

To determine whether to apply Exemption 4 to the second subcategory of information (operator manuals and vendor training documents), the FBI provided notice to and sought input from the vendor pursuant to 28 C.F.R. §16.8. *See Hardy Decl.* ¶ 57.

After reviewing the material (described in Exhibit M as UAVS Operator Manual pages), the vendor determined that it should be exempt from disclosure in its entirety because disclosure would cause substantial harm to the vendor's competitive position. *See id.* The vendor explained that the information in the manual "provides a comprehensive overview of the design, operation, capabilities, and maintenance of our UAVS," including "characteristics that are unique to our UAVS" and a "detailed explanation of *every* operational aspect of our UAVS." *Id.* ¶ 58. This information is "highly competitive" and provided "only to customers when specifically required pursuant to contract." *Id.* Disclosure of the information, explains the vendor, "would seriously and adversely affect our company's competitive position and would be highly valuable to competitors of our company." *Id.* This is because "a competitor could utilize this information to improve the designs of their own products to better compete against our company's product line on future contracts." *Id.*

Releasing the information contained in the training documents would also cause substantial harm to the vendor's competitive position because the documents "provide detailed insight into [the] company's operations that are not otherwise publicly available and not available to [the] company's competitors." *Id.* ¶ 59. "When paired with publicly available information concerning U.S. Government contract awards, this information, which details the contents of [the] company's training program, would enable a

competitor to determine what [the] company offers to its customers at what price.” *Id.* The documents also “contain critical operational details” regarding the company’s “Digital Data Link (DDL)” feature on its aircraft. Disclosing this information would enable competitors to gain access to the company’s activities and sales opportunities. *Id.*

#### ***4. The FBI Properly Withheld Information Pursuant to Exemption 5***

The FBI properly withheld information pursuant to Exemption 5. Exemption 5 protects from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency.” 5 U.S.C. § 552(b)(5). Records are exempt from disclosure if they would be “normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Thus, Exemption 5 incorporates the privileges that are available to an agency in civil litigation, including the deliberative process privilege. *See id.* at 148-50.

Here the FBI withheld documents pursuant to the deliberative process privilege, which protects intra- or inter-agency documents that are both “predecisional and deliberative.” *Mapother v. DOJ*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). A document is predecisional if “it was generated before the adoption of an agency policy” and it is deliberative if “it reflects the give-and-take of the consultative process.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The deliberative process privilege therefore applies broadly to “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Id.* at 866.

Here, the FBI asserted the deliberative process privilege with regard to two categories of information: (1) information reflecting the give and take of agency deliberations and (2) drafts. Hardy Decl. ¶ 64.

a. Records Reflecting the Give and Take of Agency Deliberations

The withheld information in this category reflects agency deliberations regarding (i) the development of UAV policy, including directives regarding the justification and authority for using UAVS for investigative surveillance, system requirement development, procurement strategies, technical specifications, transition plans, and other UAV program policies; (ii) development of a “White paper”, or program summary, on UAVS for the FBI director; (iii) development of language for an Executive Order on the domestic use of UAS; (iv) FBI Office of General Counsel advice and opinions during the preparation of responses to Congressional inquiries regarding FBI UAV program use; (v) preparation of Certificates of Authorization (“COAs”) for the deployment of UAVS in particular circumstances; and (vi) the preparation of press releases. Hardy Decl. ¶ 64.

These records reflect agency deliberations, analysis, opinions, proposals, and unadopted recommendations during the development of the various policy and program issues identified above. *Id.* They contain an ongoing dialogue among and between FBI employees, other federal government personnel, and other federal law enforcement agencies. *Id.* This information is predecisional because it is antecedent to the adoption of agency policy and/or decision about various aspects of the development of the UAV-related issues identified above. The information is also deliberative because it specifically reflects the internal shaping of FBI policy regarding and internal analysis of the FBI’s UAV program, discussions regarding the FBI’s response to Congressional

inquiries, the evaluation of different options for deployment of UAVS under particular circumstances, and shows the process of drafting and formulating information for public dissemination. *See id.* Therefore, this information clearly falls within the scope of the deliberative process privilege. *See, e.g., ACLU v. DOJ*, 265 F. Supp. 2d 20, 34 (D.D.C. 2003) (“intra-agency conversations concerning the best ways to respond to the Judiciary Committee’s questions” are “paradigmatic” deliberative process material); *Soghoian v. DOJ*, 885 F. Supp. 2d 62, 74 (D.D.C. 2012) (draft material for manual, analysis and commentary by DOJ attorneys, and draft guidance were properly withheld pursuant to the deliberative process privilege).

b. Draft Documents

The FBI also withheld draft documents from disclosure. These records include: (i) draft COAs for several UAVS; (ii) drafts of a Congressional response letter; (iii) a draft of a white paper for the FBI director; (iv) draft UAV transition plans; (v) drafts of language for an Executive Order regarding the domestic use of UAS; and (vi) draft policies on the FBI’s use of UAVS. Hardy Decl. ¶ 64. Because these records are drafts, by their very nature they are preliminary versions of what may later become a final document that reflects an agency policy or decision. Some information may remain in draft format because the material may be discarded or changed during the give and take of the deliberative process leading to a final agency decision. *See id.* This information qualifies as predecisional because it predates the policy and/or programmatic decisions necessary to finalize the documents. *Id.* The information is deliberative because it reflects the give and take of the consultative process that led to the finalization of records or policies. *Id.* Therefore, it was properly withheld pursuant to Exemption 5. *See, e.g.,*

*People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 303 (D.D.C. 2007) (“drafts are commonly found exempt under the deliberative process exemption”); *Judicial Watch v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995) (upholding nondisclosure of draft responses to Congressional inquiry).

**5. *The FBI Properly Withheld Information Pursuant to Exemptions 6 & 7(C)***

The FBI properly withheld names and/or identifying information regarding the following individuals pursuant to Exemptions 6 and 7(C): (1) FBI special agents and support personnel; (2) third parties merely mentioned (including FBI vendor personnel); and (3) non-FBI Federal Government personnel, including foreign international law enforcement personnel. *See Hardy Decl.* ¶¶ 71-74.

Exemption 6 protects from disclosure “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 U.S. Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 599–600 (1982) (“[T]he primary concern of Congress in drafting Exemption 6 was to provide for the confidentiality of personal matters.”) (citation omitted). For this exemption to apply, the information at issue must be maintained in a government file and “appl[y] to a particular individual.” *Id.* at 602. Once this threshold requirement is met, Exemption 6 requires the agency to balance the individual’s right to privacy against the public’s interest in disclosure. *See Reed v. NLRB*, 927 F.2d 1249, 1251 (D.C. Cir. 1991).

The balancing analysis required by Exemption 6 is similar to the balancing analysis required by Exemption 7(C), which authorizes withholding of records compiled for law enforcement purposes if their release “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C). This exemption

also requires the agency to balance the relevant individual privacy rights against the public interest in disclosure. *See DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989). The balancing analysis is similar to the analysis conducted under Exemption 6, but the analysis under Exemption 7(C) tilts more in favor of nondisclosure. *See id.* at 756 (comparing statutory language of Exemption 6 and Exemption 7(C)); *Reed*, 927 F.2d at 1251 (explaining similarity of Exemption 6 analysis and Exemption 7(C) analysis).

“To fall within any of the exemptions under the umbrella of Exemption 7, a record must have been ‘compiled for law enforcement purposes.’” *Pub. Emps. for Envtl. Responsibility v. Int’l Boundary & Water Comm’n (“PEER”)*, 740 F.3d 195, 202 (D.C. Cir. 2014) (quoting 5 U.S.C. § 552(b)(7)). “According to the Supreme Court, the term ‘compiled’ in Exemption 7 requires that a document be created, gathered, or used by an agency for law enforcement purposes at some time before the agency invokes the exemption.” *Id.* at 203 (citation omitted). “If the agency’s principal function is law enforcement” a court is “more deferential to the agency’s claimed purpose for particular records.” *Id.* (citation and internal quotation marks omitted). Here, the Hardy declaration explains that the information withheld pursuant to Exemption 7 was compiled and/or created in furtherance of the FBI’s law enforcement, national security, and intelligence missions. Hardy Decl. ¶ 66. *See Ctr. for Nat’l Sec. Studies*, 331 F.3d at 926.

Courts broadly construe the privacy interests protected by Exemptions 6 and 7(C). *See Reporters Comm.*, 489 U.S. at 763 (“privacy encompass[es] the individual’s control of information concerning his or her person”). On the other hand, “the only relevant public interest in the . . . balancing analysis [is] the extent to which disclosure of the



information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *DOD v. Fed. Labor Relation Auth.*, 510 U.S. 487, 497 (1994) (citation and internal quotation marks omitted).

For the three categories of information described below, the FBI examined each item of information and determined that the individual's interest in personal privacy outweighed any public interest in the information, or that there was no public interest in disclosure to balance against the individual's privacy interest. Hardy Decl. ¶ 70.

Therefore, the information was properly withheld pursuant to Exemptions 6 and 7(C). *See Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1115 (D.C. Cir. 2007) (upholding withholding of names and other private information regarding law enforcement officials, other government employees, and third-party individuals); *Light*, 968 F. Supp. 2d at 28-29 (upholding withholding of names of federal and state law enforcement officers, as well as third parties merely mentioned in records, pursuant to Exemptions 6 and 7(C)).

a. FBI Special Agents and Support Personnel

The FBI has withheld the names and/or identifying information of FBI Special Agents and support personnel who were responsible for conducting investigations and developing UAVS as an effective investigative technique and tool. Hardy Decl. ¶ 71. The FBI concluded that these individuals have privacy interests in being free from unnecessary and unofficial questioning regarding their involvement in the UAV program, whether or not they are currently employed by the FBI. *Id.* ¶¶ 71-72. Moreover, these individuals could become targets of harassing inquiries for unauthorized access to these developments if their identities were released. *Id.* Law enforcement officers and support personnel have a substantial privacy interest in not having their identities disclosed where

disclosure of their identities can expose them to threats or harassment. *See, e.g., Baez v. DOJ*, 647 F.2d 1328, 1339 (D.C. Cir. 1980); *Moore v. Bush*, 601 F. Supp. 2d 6, 14 (D.D.C. 2009) (“Generally, government employees and officials, especially law enforcement personnel, have a privacy interest in protecting their identities because disclosure ‘could subject them to embarrassment and harassment in the conduct of their official duties and personal affairs.’”) (citation omitted)).

There is no public interest in the disclosure of the names and/or identifying information of these employees because this information would not significantly increase the public’s understanding of the operations and activities of the FBI. Hardy Decl. ¶ 72. Therefore, the FBI properly withheld these individuals’ names and/or identifying information. *See Nat’l Ass’n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989) (noting that privacy interests always prevail in the Exemption 6 balancing analysis if there is no public interest in disclosure because “something, even a modest privacy interest, outweighs nothing every time”).

b. Third Parties Merely Mentioned

The FBI also withheld the names and identifying information of third parties merely mentioned in the responsive documents. Hardy Decl. ¶ 73. These individuals are third parties, especially vendor personnel, who provided information to the FBI in the course of its development of UAVS as an investigative technique and tool. Disclosure of these individuals’ names and identifying information in connection with the FBI’s development of technology could subject them to harassment or intimidation. Therefore, these individuals have a substantial privacy interest in non-disclosure. Conversely, there would be no public interest in the disclosure of the information because the information

would not shed light on the FBI's operations and activities. *See id.* Therefore, the FBI properly withheld this information pursuant to FOIA Exemptions 6 and 7(C). *See Sussman*, 494 F.3d at 1115 (upholding withholding of names and other private information regarding third-party individuals); *Light*, 968 F. Supp. 2d at 28-29 (upholding withholding of names of third parties merely mentioned in records, pursuant to Exemptions 6 and 7(C)).

c. Non-FBI Federal Law Enforcement Personnel and Foreign International Law Enforcement Personnel

The FBI also withheld the names and/or identifying information of non-FBI federal law enforcement personnel and foreign international law enforcement personnel pursuant to Exemptions 6 and 7(C). Hardy Decl. ¶ 74. These individuals were responsible for conducting investigations and assisting the FBI in developing UAVS as an effective investigative technique and tool. The FBI's reasons for withholding this information are similar to its reasons for withholding personal information regarding FBI personnel. Release of these individuals' names and/or identifying information as being associated with FBI investigations and the development of UAVS could expose them to unofficial, harassing inquiries into their involvement, including for unauthorized access to these developments. Disclosure could also hinder these individuals' effectiveness in conducting investigations and/or sharing technological data or other important knowledge. The individuals' privacy interests are thus substantial, and there would be no public interest in disclosure of the information because disclosure would not significantly increase the public's understanding of the FBI's operations and activities. Therefore, the FBI properly withheld this information. *Id. See Sussman*, 494 F.3d at 1115 (upholding withholding of names and other private information regarding law enforcement officials);

*Light*, 968 F. Supp. 2d at 28-29 (upholding withholding of names of federal and state law enforcement officers pursuant to Exemptions 6 and 7(C)).

**6. *The FBI Properly Withheld Information Pursuant to Exemption 7(E)***

The FBI has also properly withheld information pursuant to Exemption 7(E). This exemption has been applied to the records at issue here to protect non-public investigative techniques and procedures utilized by the FBI to pursue its law enforcement mission – including both national security as well as criminal investigations and prosecutions – and to non-public details regarding techniques and procedures that are otherwise known to the public. Hardy Decl. ¶¶ 76-77. Revelation of the non-public details could enable targets of these techniques to avoid detection or to develop countermeasures to circumvent the ability of the FBI to effectively use this important law enforcement technique. *Id.* ¶ 79. The FBI withheld eight specific categories of information pursuant to this Exemption. *Id.* ¶ 76.

To withhold information pursuant to Exemption (7)(E), the agency must demonstrate that release of the 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). Courts are divided as to whether the phrase “if such disclosure could reasonably be expected to risk circumvention of the law” applies only to “guidelines” or also applies to “techniques and procedures.” See *PEER*, 740 F.3d at 204 & n.4. However, the better reasoned decisions recognize that providing categorical protection to “techniques and procedures” (i.e., not requiring a showing that “disclosure could reasonably be expected to risk circumvention

of the law”) is consistent with both the plain meaning of the statute and the history of the amendments to exemption (7)(E) in 1986. *See Allard K. Lowenstein Int’l Human Rights Project v. DHS*, 626 F.3d 678, 681 (2d Cir. 2010) (finding that the “sentence structure of Exemption (b)(7)(E)” and “basic rules of grammar and punctuation dictate that the qualifying phrase modifies only the . . . ‘guidelines’ clause” and that “[a]ny potential ambiguity in the statute’s plain meaning is removed . . . by the history of the statute’s amendments”). *See also, e.g., Durrani v. DOJ*, 607 F. Supp. 2d 77, 91 (D.D.C. 2009) (techniques and procedures entitled to categorical protection under (7)(E)) (citation and quotation omitted); *Jewett v. U.S. Dep’t of State*, Civil Action No. 11-cv-1852 (RLW), 2013 WL 550077, at \*9 (D.D.C. Feb. 14, 2013).

Even if a showing that “disclosure could reasonably be expected to risk circumvention of the law” were required to protect these “techniques and procedures” from disclosure, the “risk circumvention of the law” requirement presents a “low bar.” *See PEER*, 740 F.3d at 204 n.4 (saying that “it is not clear” that the issue of whether an agency needs to show that disclosure of a technique or procedure could reasonably be expected to risk circumvention of the law “matters much in practice” given the “low bar” for the circumvention requirement). “[T]he text of exemption 7(E) is much broader” than other exemptions that “set a high standard.” *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1194 (D.C. Cir. 2009). “Rather than requiring a highly specific burden of showing how the law will be circumvented, exemption 7(E) only requires that the [agency] ‘demonstrate[] logically how the release of [the requested] information might create a risk of circumvention of the law.’” *See id.* (citation omitted). Therefore, 7(E) “exempts

from disclosure information that could increase the risks that a law will be violated or that past violators will escape legal consequences.” *See id.* at 1193.

Exemption 7(E) also permits an agency to withhold information regarding non-public details about commonly-known procedures if the disclosure of such details could reduce or nullify their effectiveness. *See, e.g., Barnard v. DHS*, 598 F. Supp. 2d 1, 23 (D.D.C. 2009) (recognizing that “[t]here is no principle . . . that requires an agency to release all details concerning these and similar techniques simply because some aspects of them are known to the public.”).

Pursuant to the above, the FBI’s withholding of the following detailed information related to the application of UAV technology as a law enforcement technique (and its associated procedures) was proper.<sup>6</sup> The withheld information includes:

(i) information regarding UAV operational capabilities and limitations, as well equipment specifications detailed in national security operations or testing (withheld in conjunction with Exemption 3); (ii) information identifying secure email and database portals, internal FBI secure and/or unpublished FBI fax numbers, and telephone lines; (iii) information that identifies FBI units and locations participating in training exercises and field operations, building and office locations where devices are developed and tested, as well as information regarding coordination of operations in the field and coordination with foreign law enforcement on shared developmental interests of UAVS as an investigative technique and tool; (iv) information regarding internal FBI databases, database search results and/or database screen shots that detail financial or commercial

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<sup>6</sup> The Hardy Declaration provides as much information as the FBI has determined it can provide regarding the redacted material without potentially increasing the risk that these FBI techniques or procedures will be circumvented or that potential lawbreakers will be encouraged to engage in illicit activities. *See Hardy Decl.* ¶¶ 77, 80.

information; (v) information regarding the specific types of equipment, systems, software, hardware, control devices, and other details showing the capabilities, limitations, and technological advancements of certain UAVS, as well as the identity of UAV vendors and suppliers; (vi) information regarding the development of UAVS as an investigative tool (including information regarding procedures created to advance the development of UAVS such as program initiatives and operational developments, sensitive terms and definitions specific to the FBI relating to the application of these devices in collecting data in current and/or potential future investigations, and information that would expose the scope, direction, level of cooperation, and expertise related to UAV technology and procedures); (vii) specific information regarding UAV training, such as pilot qualifications, the number of qualified pilots, training specifics on the use of the UAVS, testing locations (including flight schedules, times and dates), and training incidents; and (viii) specific information regarding the justification for UAV requisitions, as well as funding details pertaining to the acquisition and delivery (including funding accounts numbers, bank routing numbers, purchase order numbers, specific contractual terms and conditions, product numbers or codes, product descriptions (including parts, repair requests, and product pricing), purchase order approval procedures, and funding allocation and budgeting details). Hardy Decl. ¶ 81.

Subcategories (i), (v), (vi), (vii), and (viii) contain information specific to the development of UAVS as an effective investigative technical tool for national security and criminal investigations. Hardy Decl. ¶ 82. Disclosure of these technological and developmental aspects of UAVS could reasonably be expected to risk circumvention of the law because this information – individually, or assembled in mosaic fashion – would

provide key details on various law enforcement techniques and procedures, including the development, use, capabilities, limitations and vulnerabilities, scope of employment, equipment innovations and specifications of UAVS, and would reveal current and/or contemplated investigative applications. *See id.* If disclosed, this information would provide criminals and terrorists with a virtual “playbook” on how to evade the FBI’s use of UAVS, thus enhancing these individuals’ ability to avoid detection or apprehension. *See Soghoian*, 885 F. Supp. 2d at 75 (information on investigative techniques to be used in conducting investigations properly withheld under Exemption 7(E)); *Lewis-Bey v. DOJ*, 595 F. Supp. 2d 120, 138 (D.D.C. 2009) (details of ATF electronic surveillance techniques, including the specific location where they were employed and specific timing, were exempt from disclosure pursuant to (7)(E)); *Durrani*, 607 F. Supp. 2d at 91 (ICE surveillance techniques not known to subjects or potential subjects of an ongoing investigation were properly withheld pursuant to (7)(E)); *Elec. Frontier Found. v. DHS* (“EFF”), No. C 12-5580 PJH, 2014 WL 1320234, at \*4, \*6-8 (N.D. Cal. March 31, 2014) (upholding withholding of information regarding location and frequency of UAV operations, and information regarding UAV operational capabilities and limitations, pursuant to Exemption 7(E)).

Within category (v), the FBI protected the identity of the vendor from which it procured UAV technology, as well as items purchased or contemplated for procurement. Hardy Decl. ¶ 85. Simply identifying the FBI’s equipment source or UAV items intended to be procured (or actually purchased), would reveal information regarding the FBI’s surveillance techniques and capabilities. *Id.* The FBI has been vigilant about keeping its electronic surveillance techniques from becoming public knowledge.



Permitting specific details to be released on the UAV program's equipment, operational capabilities, limitations, training, and funding would enable criminals outside the controlled, classified environment to provide foreign entities and operatives with key information that could be used in countermeasure efforts. If the FBI were forced to use compromised equipment it would have an immeasurable, negative effect on current and/or future investigations and law enforcement response capability of the FBI. Such a compromise of FBI UAVS capabilities and limitations could also reasonably place undercover agents and cooperating witnesses in elevated danger and/or enhance the ability of investigative subjects to avoid detection or apprehension. *Id. See EFF*, 2014 WL 1320234, at \*6-8 (upholding withholding of information regarding UAV operational capabilities and limitations pursuant to Exemption 7(E)).

Subcategories (ii) and (iv) contain information specific to internal FBI databases, secure telephone and fax numbers, and unpublished telephone and/or email portals. Hardy Decl. ¶ 83. Disclosure of this information regarding various internal databases and communication systems could reasonably be expected to risk circumvention of the law because it would expose the devices, equipment, and/or databases to hackers and unauthorized users. This could disrupt official business and compromise the effectiveness of the FBI's internal systems by providing individuals with means to access and tamper with the systems without detection. *See id.* Courts have upheld the FBI's withholding of similar information pursuant to Exemption 7(E). *See Light*, 968 F. Supp. 2d at 29; *Jewett*, 2013 WL 550077, at \*9 (D.D.C. Feb. 14, 2013).

Subcategory (iii) relates to information regarding FBI units, unit locations, building/office locations developing UAVS or training with UAVS, and coordination

with field units, other government agencies, and/or foreign law enforcement. *See Hardy Decl.* ¶ 84. Disclosure of the specific locations of certain offices and units developing UAVS, UAVS training locations, and coordination among developmental partners (including foreign law enforcement) could reasonably be expected to risk circumvention of the law because this type of information would allow hostile elements to avoid the locations where surveillance operations and/or training is being conducted, or allow foreign governments to covertly penetrate these facilities to obtain information. *See id.* The existence of these particular squads, units and sections, as well the existence of the FBI's coordination with other entities, is not known to the general public. *Id.*

These squads, units, and sections, and the coordination, are also used to develop technological advancement of investigative techniques. They are responsible for implementing particular FBI technological studies, training exercises, and field operational investigations related to UAV development into an effective investigation tool. *Id.* Revealing the existence of these squads, development centers, training locations, and coordination of resources would reveal the level of FBI advancement, field operations, planning, and operational application studies. *Id.* Disclosing this information would enable criminals and enemies of the United States to discover where the FBI is focusing its limited resources. This would enable them to plan and structure their activities in a manner to avoid the FBI's strengths, exploit its weaknesses, and steal its technological advancements. *Id.* *See Soghoian*, 885 F. Supp. 2d at 75 (“Knowing what information is collected, how it is collected, and more importantly, when it is *not* collected, is information that law enforcement might reasonably expect to lead would-be offenders to evade detection.”); *Lewis-Bey*, 595 F. Supp. 2d at 138 (details of ATF

electronic surveillance techniques, including the specific location where they were employed and specific timing, were exempt from disclosure pursuant to (7)(E)); *Durrani*, 607 F. Supp. 2d at 91 (ICE surveillance techniques not known to subjects or potential subjects of an ongoing investigation were properly withheld pursuant to (7)(E)); *EFF*, 2014 WL 1320234, at \*4, \*7 (upholding withholding of information regarding location and frequency of UAV operations pursuant to Exemption 7(E)).

Finally, the FBI protected non-public details regarding UAV use and tradecraft from disclosure pursuant to Exemption 7(E). Hardy Decl. ¶ 86. This information is found throughout the various Exemption (b)(7)(E) sub-categories. *Id.* ¶ 86 n.13. While the use of UAV technology as a general law enforcement technique is publicly known, the detailed information that has been withheld in this case about its application and use is not publicly known. The release of specific UAVS application information would risk circumvention of the law and would trigger immeasurable harm to law enforcement and national security operations. Disclosure would provide a virtual playbook for criminal elements, foreign intelligence agents, and terrorists on how to identify, avoid, or evade detection efforts related to the use of this technology. As a practical matter, disclosure would also enable potential targets to carefully plan their illicit activities and execute them in a manner that would avoid detection, thereby effectively neutralizing the FBI's ability to use the technique. Moreover, given the multi-faceted, technical nature of this information, release of even small pieces of information enhances the risk of circumvention as portions of information could be combined with information generally known about the technique to assemble a more detailed picture of how, when, and where the technique is employed. *Id.* ¶ 86. *See Durrani*, 607 F. Supp. 2d at 91 (ICE

surveillance techniques not known to subjects or potential subjects of an ongoing investigation were properly withheld pursuant to (7)(E)).

#### **D. The FBI Released All Reasonably Segregable Documents**

FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). The FBI has met that burden here because it “thoroughly reviewed” all responsive records “multiple times to achieve maximum disclosure consistent with the access provisions of the FOIA.” Hardy Decl. ¶ 30. *See also id.* ¶¶ 87-88 (stating that the FBI examined each responsive page individually to identify non-exempt information). The FBI also “re-reviewed all pages to ensure that all segregable non-exempt information has been released and that all exempt material has been redacted consistently.” *Id.* ¶ 30.

Where pages of records were released in part with redactions, the pages contained a mixture of material that could be reasonably segregated for release, material that was exempt from disclosure, and information that was inextricably intertwined with such material and therefore could not reasonably be segregated for release. *See id.* ¶ 88. Where pages were withheld in full, all information was either fully covered by one or more FOIA exemptions or any non-exempt information was so intertwined with exempt material that no information could be reasonably segregated for release. Any further segregation of the intertwined material would have produced disjointed words, phrases, or sentences that, taken separately or together, would have minimal or no informational content. *Id.* *See Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776-77 (D.C. Cir. 2002) (agency demonstrated there was no reasonably segregable non-exempt

information where it submitted affidavit showing that agency had conducted line-by-line review of each document withheld in full).

This thorough review is evidenced by the fact that the FBI performed an additional segregability review in connection with its preparation of the *Vaughn* index, due to the volume of material initially processed for release. *See* Hardy Decl. ¶ 24. As a result of this page-by-page review, the FBI identified additional material that could be segregated from exempt material and released to Plaintiff. *See id.* Therefore, the FBI is entitled to summary judgment on this issue. *See Sussman*, 494 F.3d at 1117 (“Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material.”) (citation omitted).

#### **IV. CONCLUSION**

For the foregoing reasons, the Court should grant Defendant’s motion for summary judgment.