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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PROJECT FOR PRIVACY AND SURVEILLANCE ACCOUNTABILITY, INC., *Plaintiff,* v. UNITED STATES DEPARTMENT OF JUSTICE, *Defendant*.	No. 21-cv-2362 (RC)

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff Project for Privacy and Surveillance Accountability respectfully requests that the Court enter summary judgment in its favor. As demonstrated in the accompanying memorandum of law, the Federal Bureau of Investigation has failed to carry its burden of demonstrating that it properly withheld records under Freedom of Information Act Exemptions 3, 7(D), and 7(E). Accordingly, the Court should deny the FBI's motion and grant Plaintiff's cross-motion for summary judgment.

January 4, 2024

Respectfully submitted,

/s/ Gene C. Schaerr

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[PROPOSED] ORDER

Upon consideration of Plaintiff's cross-motion for summary judgment and opposition to Defendant's motion for summary judgment, and the entire record herein, it is hereby:

ORDERED that Defendant's motion for summary judgment is DENIED; and it is

FURTHER ORDERED that Plaintiff's cross-motion for summary judgment is GRANTED, and judgment is entered in Plaintiff's favor.

SO ORDERED.

_____ _____

Date U.S. District Judge

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PROJECT FOR PRIVACY AND SURVEILLANCE ACCOUNTABILITY, INC., *Plaintiff,* v. UNITED STATES DEPARTMENT OF JUSTICE, *Defendant*.	No. 21-cv-2362 (RC)

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

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INTRODUCTION

Plaintiff Project for Privacy and Surveillance Accountability, Inc. ("PPSA") brought this Freedom of Information Act ("FOIA") action to better understand the extent to which the United States intelligence community is complicit in the unmasking of members of Congress. While the intelligence community understandably wishes to avoid public scrutiny of such abuses, many are already a matter of public record. Thus, there is no legal basis for the intelligence community's continuing to withhold records about such known abuses. Nor is there any legal basis for hiding additional examples of such abuses. Rather, the public is entitled to know the ways that the intelligence community responded to Congressional oversight by turning its surveillance tools on its Congressional overseers. Indeed, the possibility that the Executive is abusing its surveillance tools to escape Congressional accountability raises grave separation-of-powers concerns. As demonstrated below, these concerns are not theoretical. And FOIA is an important vehicle for holding the intelligence community accountable and airing any potential abuses.

Here, PPSA sought all Federal Bureau of Investigation ("FBI") records reflecting communications between any agency and any member of Congress concerning "unmasking" of members of Congress. Unfortunately, but perhaps unsurprisingly, the FBI responded by refusing to conduct any search for responsive records and invoking an untenable interpretation of the so-called *Glomar* doctrine. Yet this Court rejected that assertion in part and ordered the FBI to search for certain records.

Now, after finally searching for responsive records, the FBI still refuses to release large portions of responsive records. Rather than hiding behind *Glomar*, the FBI now asserts untenable views of FOIA Exemptions 3, 7(D), and 7(E). According to the FBI, these Exemptions permit it to withhold portions of a four-page email and large portions of an FBI Intelligence Program Policy

Guide. The FBI is mistaken, as its bald assertions do not satisfy its statutory burden to justify these withholdings. Accordingly, because the FBI failed to carry its burden, the Court should deny its motion for summary judgment and grant PPSA's cross-motion for summary judgment.

BACKGROUND

As noted, this case arises out of PPSA's FOIA request seeking communications about potential abuses of "unmasking"—a surveillance process that allows Executive Branch actors to de-anonymize information about United States persons caught in surveillance records.

On December 13, 2019, PPSA submitted a FOIA request to the FBI. As relevant here, one part of that request sought all correspondence "between … any agency" and any member of Congress or Congressional leadership "concerning the unmasking of Congressmen or Senators." Compl. ¶ 8 (ECF No. 1). For this portion of the request, PPSA identified several members of Congress who had made, or were otherwise associated with, public inquiries into the U.S. intelligence community's surveillance of them or other members. *Id.* For instance, at least one such member, Senator Lindsey Graham, publicly acknowledged that he had "*written* to the FBI, the NSA, and the CIA" about his own unmasking. Pl.'s Stmt. of Material Facts ¶ 1 ("Pl.'s Stmt.") (emphasis added). Moreover, the intelligence community has publicly disclosed so-called "Gates Procedures," which acknowledge that Congressional identity information is routinely unmasked, and that the intelligence community notifies Congress about such unmaskings "in writing." Ex. 4 at 6. Accordingly, the public record already confirmed the existence of responsive documents.

Yet the FBI refused to conduct a search for such records. Rather, on October 13, 2020, the FBI issued a searchless *Glomar* response to PPSA's request, relying on Exemptions 1, 3, 6, 7(C), and 7(E). Compl. ¶ 10. As noted, the Court ultimately rejected that assertion in part, concluding that the FBI had failed to carry its burden of demonstrating that its searchless-*Glomar* response

comported with FOIA's requirements. *See Project for Priv. & Surveillance Accountability, Inc. v. U.S. Dep't of Just.*, 633 F. Supp. 3d 108, 122–23 (D.D.C. 2022).

With respect to operational documents, the Court upheld the FBI's *Glomar* response. *Id.* But with respect to policy documents, the Court ordered the FBI to conduct a search for responsive documents that "discuss congressional unmasking as a matter of legislative interest, policy, or oversight." *Id.* at 115. The FBI then conducted a search for responsive documents and located 220 pages, releasing 28 pages in full and 72 pages in part on December 12, 2022 and October 13, 2023. Third Decl. of Michael G. Seidel ("Seidel Decl.) ¶¶ 4, 6–7 & Ex. C.

Upon review of these records and after multiple joint status reports, it became clear that several categories of withholdings were improper. Accordingly, the FBI filed its motion for summary judgment on October 31, 2023, arguing that its withholdings under Exemptions 3, 7(D), and 7(E) were proper. Def.'s Mot for Summ. J. ("FBI Mot.") at 5–16 (ECF No. 31). As reflected in that motion, the remaining dispute relates to redactions in the following two records: (1) a four-page email between FBI employees with redactions made under Exemptions 3, 7(D), and 7(E); and (2) large portions of an FBI Intelligence Program Policy Guide ("Policy Guide") withheld under Exemption 3, as well as other portions of that same guide withheld under Exemption 7(E).

LEGAL STANDARD

As in other contexts, summary judgment in a FOIA case is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As the D.C. Circuit has explained, "[t]o meet this exacting standard in a FOIA suit, the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the FOIA's inspection requirements." *Perry v. Block*, 684 F.2d 121, 126 (D.C. Cir. 1982) (cleaned up). The agency bears the burden of justifying the application of any exemptions, "which are exclusive and

must be narrowly construed." *Mobley v. CIA*, 806 F.3d 568, 580 (D.C. Cir. 2015); *see also Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (courts must construe FOIA exemptions "narrowly," in keeping with "FOIA's broad disclosure policy"). If the agency's affidavits or declarations in support of summary judgment fail to provide "reasonable specificity of detail rather than merely conclusory statements," or if they are "called into question by contradictory evidence in the record or by evidence of agency bad faith," summary judgment in favor of the agency is not appropriate. *Jud. Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 215 (D.C. Cir. 2013) (quotation omitted).

ARGUMENT

Although each of the FBI's arguments in favor of withholding fails for various reasons, the same core deficiency appears throughout its motion: the FBI relies on conclusory statements and recitations of statutory standards that do not carry its burden to justify its various withholdings. First, under Exemption 3, the FBI presents a broad and conclusory justification for its withholdings that fails to explain how the documents in question implicate intelligence sources and methods. Second, each of the FBI's Exemption 7 withholdings fails as a threshold matter because the agency failed to demonstrate that the records were created for law enforcement purposes. Third, the FBI's Exemption 7(D) withholding also fails because it did not offer evidence that an express assurance of confidentiality was ever given. Fourth, the FBI's Exemption 7(E) withholdings neither identify the law enforcement techniques or procedures that would be implicated by release, nor provide a non-conclusory explanation of the risk of circumvention. Finally, the FBI fails to satisfy its obligation to identify reasonably foreseeable harms that release would cause. Accordingly, the FBI has failed to carry its burden.

I. The FBI Failed to Carry its Burden Under Exemption 3.

The FBI's reliance on Exemption 3 to redact certain portions of the four-page email and Policy Guide cannot stand because it has failed to "demonstrate [Exemption 3's] applicability 'in

a nonconclusory and detailed fashion.'" *Shapiro v. U.S. Dep't of Just.*, 239 F. Supp. 3d 100, 123 (D.D.C. 2017) (quoting *Goland v. Cent. Intel. Agency*, 607 F.2d 339, 350 (D.C. Cir. 1978)). Where, as here, the agency's affidavit is "simply too broad and conclusory to allow the Court to perform the type of 'searching de novo review' required by the governing precedent," the Court should deny the FBI's motion for summary judgment on its Exemption 3 withholdings. *Id.* (quoting *Church of Scientology of Ca., Inc. v. Turner*, 662 F.2d 784, 786 (D.C. Cir. 1980)).

Under Exemption 3, an agency may only withhold information that is "specifically exempted from disclosure by statute." 5 U.S. Code § 552(b)(3). Here, the FBI invokes Section 102A(i)(1) of the National Security Act of 1947, which directs the Director of National Intelligence to "protect from unauthorized disclosure intelligence sources and methods." Seidel Decl. ¶ 13. PPSA does not dispute that this statute is a withholding statute under Exemption 3. *See Cent. Intel. Agency v. Sims*, 471 U.S. 159, 168 (1985). But the inquiry does not end there, as that "is only the first step of the inquiry." *Id.*

Rather, the Supreme Court requires that the FBI also demonstrate that the records "contain 'intelligence sources and methods' or [that] disclosure would reveal otherwise protected information." *Id.* To carry this burden, the D.C. Circuit explains, the FBI cannot rely on "[b]arren assertions that an exempting statute has been met." *Founding Church of Scientology*, 610 F.2d at 831; *see also Halperin v. Cent. Intel. Agency*, 629 F.2d 144, 148 (D.C. Cir. 1980) ("We have held that summary judgment may be granted on the basis of agency affidavits if they contain reasonable specificity of detail rather than merely conclusory statements."). And, although the FBI has authority to protect sources of intelligence, "the Court still has an independent role to play in the FOIA analysis." *Whitaker v. Cent. Intel. Agency*, 31 F. Supp. 3d 23, 37–38 (D.D.C. 2014), *aff'd*

sub nom. Whitaker v. U.S. Dep't of State, No. 14-5275, 2016 WL 9582720 (D.C. Cir. Jan. 21, 2016).

As to the email at issue here, the FBI attempts to justify its Exemption 3 withholdings with the bare assertion that: "Bates pages 2 and 3 contain briefing reports from multiple divisions regarding national security investigations, policies and practices, which, through discussion of information gathered, would reveal sources and techniques the FBI uses to gather information and intelligence in national security investigations." Seidel Decl. ¶ 16; *see also* FBI's Mot. at 6 (same). And, with respect to the Policy Guide, the FBI relies on even less detail to justify its expansive Exemption 3 withholdings: "if released, [the redacted sections] would compromise the ability of the intelligence community to carry out its mission because it would disclose how and when the FBI uses certain intelligence methods." *Id.*

Each of these assertions is merely a conclusory recitation of the statutory standards, instead of "the kind of detailed scrupulous description [of the withheld documents] that enables a District Court judge to perform a searching de novo review." *Church of Scientology*, 662 F.2d at 786. In other words, the FBI suggest that it need only reference "intelligence sources and methods" and the Court will blindly accept that assertion without further inquiry. That is not how this works, as "the Court still has an independent role to play in the FOIA analysis." *Whitaker*, 31 F. Supp. 3d at 37–38. As with the Exemption 7 withholdings discussed later, the FBI's growing insistence that Courts blindly accept its conclusory assertions about "sources and methods"—or law enforcement purposes under Exemption 7—must be met with serious judicial inquiry. Indeed, the FBI does not even attempt "to address specifically whether the disclosure of substantive information may be possible without the disclosure of source, and if not why not." *Ray v. Turner*, 587 F.2d 1187, 1196 (D.C. Cir. 1978).

When reviewing similarly bald assertions, other courts in this District have rejected Exemption 3 withholdings. In *Shapiro*, for instance, the Court rejected the NSA's attempt to withhold records under Exemption 3, concluding that the agency relied on "broad and conclusory" statements. 239 F. Supp. 3d at 123. Specifically, the NSA had relied on the conclusory assertion that the documents "include the strategic use of various sources to obtain intelligence related information … through a myriad of available methods of intelligence gathering, not all of which are known to the public." *Id.* (cleaned up). Those explanations were insufficient to carry the NSA's burden. *See id.*; *see also Whittaker*, 31 F. Supp. 3d at 37 (rejecting CIA's vague suggestion that "FOIA processing materials are themselves 'intelligence sources and methods,'" and concluding that this was insufficient to justify withholding under Exemption 7(E)). So too here. While it may be true that the withheld records contain information that reveals intelligence sources and methods, the FBI has not come close to carrying its burden to demonstrate as much.

Because the FBI offers nothing beyond these bald assertions, the FBI has failed to carry its burden under Exemption 3. Accordingly, the Court should reject the FBI's Exemption 3 withholdings.

II. The FBI Failed to Carry its Burden to Show that the Withheld Records were Compiled for Law Enforcement Purposes.

The Court should also deny the FBI's attempt to withhold records under Exemption 7 because the FBI failed to carry its burden of demonstrating that the records were created for a law enforcement purpose. Of course, that is a threshold requirement the FBI must satisfy before it may rely on either Exemptions 7(D) or 7(E). *See* 5 U.S.C. § 552(b)(7); *Bartko v. U.S. Dep't of Just.*, 898 F.3d 51, 64 (D.C. Cir. 2018) (requiring a "threshold showing that the FOIA request seeks records compiled for law enforcement purposes"); *Kay v. FCC*, 976 F. Supp. 23, 37 (D.D.C. 1997), *aff'd*, 172 F.3d 919 (D.C. Cir. 1998).

In fact, the FBI hardly even attempts to satisfy this burden, relying instead on conclusory statements that fail to provide the record-specific details necessary to satisfy the FBI's two-part burden under the "law-enforcement-purpose inquiry." *Bartko*, 898 F.3d at 64. In this Circuit, that inquiry "focuses on how and under what circumstances the requested files were compiled, and whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding." *Id.* (quotation omitted). And, "[t]o qualify as law enforcement records, the documents must arise out of investigations which focus directly on *specifically alleged* illegal acts which could, if proved, result in civil or criminal sanctions." *Id.* (emphasis added; cleaned up).

In its attempt to satisfy this threshold burden, the FBI states in its motion (at 8) that it "is the primary investigative agency of the federal government with authority and responsibility to investigate all violations of federal law not exclusively assigned to another agency[.]" That may be true, but it does not carry the FBI's burden. Indeed, as the D.C. Circuit explained elsewhere, "FBI records are not law enforcement records simply by virtue of the function that the FBI serves." *Vymetalik v. FBI*, 785 F.2d 1090, 1095 (D.C. Cir. 1986). And the FBI's attempt to bolster this statement through the Seidel Declaration also falls short, similarly resting on the conclusory statement that "[t]he pertinent records were compiled for the development of policy in furtherance of the FBI's law enforcement, national security, and intelligence missions." Seidel Decl. ¶ 19.

As multiple courts in this District have confirmed, such conclusory assertions fail to carry this threshold burden under Exemption 7. *See, e.g.*, *Schoenman v. FBI*, 604 F. Supp. 2d 174, 203 (D.D.C. 2009) ("advis[ing]" the FBI to provide "a more detailed explanation in line with D.C. Circuit case law" on "this threshold question"); *Maydak v. Dep't of Just.*, 254 F. Supp. 2d 23, 38 (D.D.C. 2003) (holding that "BOP's failure to satisfy the threshold law enforcement requirement defeats its motion for summary judgment under exemption 7"). True, "[a]gencies classified as law

enforcement agencies receive a special deference in their claims of law enforcement purpose." *Pinson v. Dep't of Just.*, 236 F. Supp. 3d 338, 364 (D.D.C. 2017) (citation omitted). But "[t]his review … is not vacuous." Id. (quotation marks and citation omitted). And "[n]ot every document compiled by a law enforcement agency satisfies the law enforcement purpose inquiry." *Id.*

Even for those records the FBI withheld under Exemption 7(E), the FBI must still satisfy this threshold burden. While Exemption 7(E) more generally relates to "guidelines for law enforcement investigations or prosecutions," 5 U.S.C. § 552(b)(7)(E), that broader scope does not render Exemption 7's threshold worthless. Rather, the FBI must still "demonstrate that these 'guidelines, techniques, sources, and procedures [are] *for law enforcement investigations and prosecutions*.'" *New Orleans Workers' Ctr. for Racial Just. v. U.S. Immigr. & Customs Enf't,* 373 F. Supp. 3d 16, 65 (D.D.C. 2019) (quoting *Tax Analysts*, 294 F.3d at 79) (emphasis and alteration in original); *accord Pub. Emps. for Env't Resp. v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mexico,* 740 F.3d 195, 204 (D.C. Cir. 2014) (affirming an exemption 7(E) withholding of emergency response procedures because "preventing dam attacks and maintaining order and ensuring dam security during dam emergencies qualify as valid law enforcement purposes under the statute."); *Am. Immigr. Laws. Ass'n v. U.S. Dep't of Homeland Sec.*, 485 F. Supp. 3d 100, 111 (D.D.C. 2020) (concluding that the Exemption 7 threshold was satisfied because the agency showed that the withheld records "provide instructions on how to (1) interpret and apply the federal immigration laws; (2) assess and process travelers for entry into and removal out of the country; and (3) charge applicants for violating federal immigration laws") (internal citations omitted).

But the FBI did not come close to providing the same level of information here to satisfy the Exemption 7 requirement. Rather, for its Exemption 7(E) withholding, the FBI offers only the following in support of this threshold requirement: "[T]he records at issue concern the

development of policy within the FBI's Directorate of Intelligence[.]" Seidel Decl. ¶ 19. That is woefully insufficient and does not even attempt to connect the records to any law enforcement purpose.

Indeed, the D.C. Circuit has previously explained that relying on such generic labels for records will not do. Rather, the FBI must demonstrate the relationship between a record and its label and between the label and a law enforcement purpose." *Campbell v. U.S. Dep't of Just.*, 164 F.3d 20, 32 (D.C. Cir. 1998), as amended (Mar. 3, 1999); *accord New Orleans Workers' Ctr. for Racial Just.*, 373 F. Supp. 3d at 65 ("Labeling this information as 'law enforcement sensitive' or 'used for law enforcement purposes' in such a conclusory fashion must be rejected.").

Because the FBI fails to satisfy its threshold obligation under Exemption 7, each of its Exemption 7 withholdings must all be rejected.

III. The FBI Failed to Provide Probative Evidence of an Express Offer of Confidentiality Under Exemption 7(D).

Even if the Court concludes that the FBI satisfied its threshold obligations under Exemption 7, the Court should still deny the FBI's motion with respect to Exemption 7(D) because the FBI does not offer "probative evidence that the source did in fact receive an express grant of confidentiality."[1] *Campbell*, 164 F.3d 20 (quoting *Davin v. U.S. Dep't of Just.*, 60 F.3d 1043, 1061 (3d Cir. 1995), *holding modified by Abdelfattah v. U.S. Dep't of Homeland Sec.*, 488 F.3d 178 (3d Cir. 2007)).

[1] The FBI also suggests that the withheld material is "not responsive to Plaintiff's request, but rather merely incidentally mentioned in records which were found to be responsive." Seidel Decl. ¶ 23. That is beside the point, as the FBI may only withhold information within a responsive record if an exemption applies. *Am. Immigr. Laws. Ass'n v. Exec. Off. for Immigr. Rev.*, 830 F.3d 667, 678–79 (D.C. Cir. 2016) ("For our purposes, the dispositive point is that, once an agency itself identifies a particular document or collection of material—such as a chain of emails—as a responsive "record," the only information the agency may redact from that record is that falling within one of the statutory exemptions.").

Exemption 7(D) protects information that "could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency[.]" 5 U.S.C. § 552(b)(7)(D). Under this exemption, a document is protected if "the particular *source* spoke with an understanding that the communication would remain confidential." *U.S. Dep't of Just. v. Landano*, 508 U.S. 165, 172 (1993). With respect to a claimed express assurance of confidentiality, as at stake here, "[n]o matter which method the agency adopts to meet its burden of proof, its declarations must permit meaningful judicial review by providing a sufficiently detailed explanation of the basis for the agency's conclusion." *Campbell*, 164 F.3d at 34.

Here, the FBI states in its affidavit that "the FBI has previously received an express request from a foreign government to withhold information pertaining to an ongoing investigation and possible pending charges in a case shared by the United States and that foreign law enforcement agency." Seidel Decl. ¶ 23. But this is the same reasoning the D.C. Circuit rejected in *Campbell*, 164 F.3d at 34–35. In *Campbell*, the FBI sought to withhold certain records under Exemption 7(D) based on express assurances of confidentiality. *Id.* There, the "FBI declaration simply assert[ed] that various sources received expressions of confidentiality without providing any basis for the declarant's knowledge of this alleged fact." *Id.* The D.C. Circuit concluded that "more information was necessary," and it provided guidance on the kind of information that may suffice to satisfy an agency's burden under Exemption 7(D): "notations on the face of a withheld document, the personal knowledge of an official familiar with the source, a statement by the source, or contemporaneous documents discussing practices or policies for dealing with the source or similarly situated sources." *Id.* at 35 (first quote); *id.* at 34 (second quote). Despite this clear guidance, the Seidel Declaration mirrors the inadequate declaration rejected in *Campbell*. *See Lazaridis v. U.S. Dep't of Just.*, 766 F. Supp. 2d 134, 148 (D.D.C. 2011) (similarly noting that the

declarant failed to "present[] … probative evidence of such an agreement. Therefore, DOJ is not entitled to summary judgment on this claim of an express grant of confidentiality.").

Instead, the FBI relies (at 10) on prior decisions from this Court that are distinguishable from this case or are incompatible with the D.C. Circuit's *Campbell* decision. For instance, this Court's decision in *Shapiro*, affirming the FBI's Exemption 7(D) withholding, was based on the documents "contain[ing] markings indicating information provided by a 'Cooperating Witness ("CW")," and other documents had markings "that identified an individual using a 'symbol source number.'" *Shapiro v. Dep't of Just.*, No. 12-cv-0313 (BAH), 2020 WL 3615511, at *33 (D.D.C. July 2, 2020), *aff'd in part, remanded in part sub nom. Shapiro v. U.S. Dep't of Just.*, 40 F.4th 609 (D.C. Cir. 2022). But the Seidel Declaration offers no evidence of any such markings here. *See* Seidel Decl. ¶ 23.

Likewise, in *Property of the People, Inc. v. Dep't of Justice*, the court blessed an Exemption 7(D) withholding because the agency had "done more than make 'bald assertion[s] that express assurances were given,' and it has demonstrated the agency's policy and practice with regard to foreign governments as well as specific facts as to this government and its confidential relationship." 539 F. Supp. 3d 16, 27 (D.D.C. 2021) (quoting *Billington v. U.S. Dep't of Justice*, 233 F.3d 581, 584 (D.C. Cir. 2000)) (internal citation omitted). Again, the Seidel Declaration lacks any of these features or details. *See* Seidel Decl. ¶ 23.

Because the FBI's explanation of its express assurance of confidentiality is a conclusory restatement of the legal standard that lacks evidence that "permit[s] meaningful judicial review," the Court should reject the FBI's withholding of material under Exemption 7(D). *Campbell*, 164 F.3d at 34.

IV. The FBI's Exemption 7(E) Withholdings Rest on Conclusory Assertions of Law Enforcement Techniques and Risks of Circumvention.

The FBI also fails to carry its burden of justifying its Exemption 7(E) withholdings.[2] To justify such withholdings, the FBI must satisfy two requirements. The FBI must first demonstrate that each withholding would "disclose techniques and procedures for law enforcement investigations or prosecutions, or [] disclose guidelines" for such investigations or prosecutions. 5 U.S.C. § 552(b)(7)(E); *Whittaker v. U.S. Dep't of Just*., No. 18-cv-1434-APM, 2019 WL 2569915, at *1, *3 (D.D.C. June 21, 2019). And the FBI must prove that "such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). The FBI fails at each turn.

A. The FBI Fails to Show that its Redactions Protect Law Enforcement Techniques or Procedures.

As noted, the FBI must first demonstrate that the withheld material would "disclose techniques and procedures[.]" To carry this burden, the FBI "cannot rely on such 'vaguely worded categorical description[s],' but 'must provide evidence from which the Court can deduce something of the nature of the techniques in question.'" *New Orleans Workers'*, 373 F. Supp. 3d at 65 (quoting *Clemente v. FBI*, 741 F.Supp.2d 64, 88 (D.D.C. 2010)). But the FBI relies only on such "categorical descriptions" here.

1. As to the Policy Guide, the FBI baldly asserts in its motion (at 13) that the redactions fall within this category: "[T]he statute explicitly protects materials like the portions of the policy

[2] PPSA does not challenge the withholding from the email of "specific identifying details (name, locality, unique details, and investigation name reference)[.]" Seidel Decl. ¶ 27. Nor does PPSA challenge the withholdings from the "[f]irst two pages within an internal email between FBI employees (21-cv-2362-1 through 4) providing daily 'close-out' updates on specific investigative matters, with specific analytical techniques discussed in three blocks of 21-cv-2362-2 and two blocks on 21-cv-2362-3. Additionally, the sensitive location and unit used to conduct the analysis are withheld." *Id.* ¶ 30.

guide withheld here." And the FBI's supporting affidavit offers little more, asserting that the redactions cover "certain techniques and strategies, as well as techniques and strategies used to analyze information obtained from national security investigations," Seidel Decl. ¶ 30, without ever explaining the "nature of the techniques in question," *Ctr. for Racial Just.*, 373 F. Supp. 3d 65; *see, e.g.*, Seidel Decl. ¶ 30 (failing to explain how "protected information on numerous pages within an Intelligence Program Policy Guide" contains "specific roadmaps for how the FBI uses certain techniques and strategies"). Elsewhere, the FBI similarly attempts to justify withholding alleged operational procedures in the Policy Guide by resorting to additional generalities about "FBI investigative procedures, techniques, and strategies regarding intelligence gathering." Seidel Decl. ¶ 31.

These conclusory explanations are obviously insufficient on their face. But they are particularly insufficient considering that the FBI relied on such perfunctory statements to withhold entire pages of the Policy Guide. *See id.* Rather than providing the requisite details, the Seidel Declaration only "provides a categorical description of the material withheld, without providing any exhibits or page references to allow the Court to assess whether the defendant's claims, in context, are meritorious." *Elec. Priv. Info. Ctr. v. Customs & Border Prot.*, 160 F. Supp. 3d 354, 359 (D.D.C. 2016). This failure to provide detailed explanations of the withholdings strips this Court of the ability to perform de novo review.

Faced with similar conclusory explanations, the D.C. Circuit and other courts in this District have rejected agencies' attempts to withhold records under Exemption 7(E). *See, e.g.*, *Citizens for Resp. & Ethics in Washington v. U.S. Dep't of Just.*, 746 F.3d 1082, 1102 (D.C. Cir. 2014) (holding that "the agency must at least provide some explanation of what procedures are involved and how they would be disclosed.") ("*CREW*"); *Kowal v. United States Dep't of Just.*,

No. 18-cv-0938, 2021 WL 3363445, at *6 (D.D.C. Aug. 3, 2021) ("[I]t is unclear what law enforcement procedures are at stake and how references to the DEA Agents' Manual might disclose those procedures."); *Strunk v. U.S. Dep't of State*, 845 F. Supp. 2d 38, 47 (D.D.C. 2012) ("FOIA demands 'a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.'"); *Petrucelli v. Dep't of Just.*, 51 F. Supp. 3d 142, 171 (D.D.C. 2014) ("[T]he Court neither can determine whether FOIA Exemption 7(E) applies with respect to the information withheld nor whether any reasonably segregable information can be disclosed.").

On this, *Kowal* is particularly instructive, as the court refused to affirm the DEA's withholding of "material that would reveal sensitive, non-public references to the DEA's Agents' Manual" under Exemption 7(E). 2021 WL 3363445, at *6 (quoting agency affidavit). The court rejected the agency's withholdings, concluding that "[b]ecause of the brevity and vagueness of these statements, the Court is unable to determine whether such references truly risk revealing techniques unknown to the public," and because "it [wa]s unclear what law enforcement procedures are at stake and how references to the DEA Agents' Manual might disclose those procedures." *Id.* So too here, where the FBI relies on conclusory affidavits, such that it is unclear what "law enforcement procedures are at stake," and such that the Court cannot determine how release of the withheld information "might disclose those procedures." *Id.*

2. The same is true for the FBI's redactions of the e-mail, where the FBI again provides nothing more than bald and general assertions. Specifically, the FBI withheld "identifying details" that it asserted "would reveal non-public investigative focuses of the FBI." Seidel Decl. ¶ 27. And the FBI further asserted that it withheld "updates on specific investigative matters with specific analytical techniques discussed[.]" *Id.* ¶ 30. However, the FBI again fails to provide even a

generalized description of the investigative matters in question or the "analytical techniques" to allow the Court to "deduce something of the nature of the techniques in question.'" *New Orleans Workers'*, 373 F. Supp. 3d at 65 (quoting *Clemente v. FBI*, 741 F.Supp.2d 64, 88 (D.D.C. 2010)).

As noted above, the D.C. Circuit has previously rejected similarly vague justifications for Exemption 7(E) withholdings. In *CREW*, the D.C. Circuit rejected DOJ's "near-verbatim recitation of the statutory standard [as] inadequate" where DOJ relied on Exemption 7(E) "to protect procedures and techniques used by FBI [agents] during the investigation." 746 F.3d at 1102 (alteration in original; citation omitted). This was insufficient, the D.C. Circuit explained, because: "We are not told what procedures are at stake. (Perhaps how the FBI conducts witness interviews? Or how it investigates public corruption?)." *Id.* Additionally, the D.C. Circuit noted that DOJ had not explained how releasing the withheld information "could reveal such procedures." *Id.* For instance, "[a]re the procedures spelled out in the documents? Or would the reader be able to extrapolate what the procedures are from the information contained therein?" *Id.* Acknowledging the "low bar" to justify Exemption 7(E) withholdings, the D.C. Circuit nonetheless held that "the agency must at least provide some explanation of what procedures are involved and how they would be disclosed." *Id.* (emphasis in original). Yet the FBI fails to provide such an explanation here about the redactions in the e-mail, which is fatal to its Exemption 7(E) withholdings.

B. The FBI Fails to Show that Release of the Alleged Techniques and Procedures Would Lead to Circumvention.

Additionally, the FBI must demonstrate that disclosure of the identified "techniques and procedures … could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E); *accord Sack v. U.S. Dep't of Defense*, 823 F.3d 687, 694 (D.C. Cir. 2016) (same). Here, the FBI fails to satisfy this requirement because it "simply cite[s] Exemption 7(E) and

expect[s] the court to rubber stamp its withholdings." *Long v. Immigr. & Customs Enf't*, 279 F. Supp. 3d 226, 234 (D.D.C. 2017) ("*Long II*"). But "[c]ourts have a responsibility to ensure that an agency is not simply manufacturing an artificial risk and that the agency's proffered risk assessment is rooted in facts." *Long v. Immigr. & Customs Enf't*,149 F.Supp.3d 39, 53 (D.D.C. 2015) ("*Long I*"). And "[a]n affidavit that contains merely a categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate." *Campbell*, 164 F.3d at 30 (internal citation and quotation marks omitted). Such an inadequate affidavit is exactly what the FBI offers here. *See* Seidel Decl. ¶¶ 30–31.

The FBI, in its attempt to carry its burden here, simply repeats the conclusory statements in the Seidel Declaration, claiming that release of the alleged techniques and procedures as well as operational directives would allow criminals to circumvent the law. *See* FBI Mot. at 14. In essence, the FBI rests on a "categorical indication of anticipated consequences" such that the Court has no way of assessing whether "the agency's proffered risk assessment is rooted in facts." *Campbell*, 164 F.3d at 30 (first quote); *Long I*, 149 F. Supp. 3d at 53 (second quote). Although the FBI's burden in this case is not a high one, the FBI's position here would turn it into "a toothless one." *Long II*, 279 F.Supp.3d at 234. As such, the FBI's motion for summary judgment on its Exemption 7(E) withholdings should be denied.

V. The FBI's Bare Assertion of Foreseeable Harm is Insufficient

Finally, even were the Court to conclude that the FBI has satisfied each of the requirements discussed above, its motion for summary judgment should still be denied because the FBI fails to satisfy its burden of demonstrating foreseeable harm. Indeed, the FBI's bare assertions of foreseeable harm are insufficient because the FBI "broadly failed to 'specifically focus[ ]' its foreseeable harm demonstration 'on the information at issue in [the documents] under review.'" *Reps. Comm. for Freedom of the Press v. Fed. Bureau of Investigation*, 3 F.4th 350, 370 (D.C. Cir.

2021) (quoting *Machado Amadis v. United States Dep't of State*, 971 F.3d 364, 371 (D.C. Cir. 2020)). Yet the FOIA Improvement Act of 2016 added a requirement that "[a]n agency shall ... withhold information under this section only if ... the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection." 5 U.S.C. § 552(a)(8)(A)(i). And an agency cannot satisfy this burden with "a series of boilerplate and generic assertions," nor can it rely on an "assertion of harm" that is "wholly generalized and conclusory." *Reps. Comm.*, 3 F.4th at 370.

But that is all the FBI offers here. *See* Seidel Decl. ¶ 32 ("In each of the withheld records at issue here (or portions of withheld records), the FBI conducted this two-part analysis and only withheld records (or portions of records) where it determined the withheld record (or portion) met both of these criteria [falling under an exemption and causing foreseeable harm].") Because the FBI failed to carry this burden with respect to its Exemption 7 withholdings, they respectively fail as matter of law.[3]

CONCLUSION

The intelligence community's own unmasking policies and actions are of considerable public interest. After much resistance, the FBI produced some responsive records about those practices. But the FBI redacted those released records beyond all recognition. Because the FBI failed to carry its burden to justify any of those redactions, the Court should deny the FBI's motion for summary judgment, grant PPSA's cross-motion for summary judgment, and order the FBI to release the withheld records.

[3] PPSA does not make this argument with respect to Exemption 3 because the FOIA Improvement Act of 2016 does not require a showing of foreseeable harm when "disclosure is prohibited by law." 5 U.S.C. § 552(a)(8)(A)(i)(II). And Exemption 3 withholdings are those which are "specifically exempted from disclosure by statute." 5 U.S. Code § 552(b)(3). Thus, Exemption 3 withholdings do not require a showing of foreseeable harm.

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Respectfully submitted,

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