UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

STEVEN JOHN KURTZ and
JENNIFER GRADECKI,

Plaintiffs,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

DECISION AND ORDER

16-cv-00104(JJM)

Plaintiffs Steven John Kurtz and Jennifer Gradecki commenced this action under the Freedom of Information Act ("FOIA"), 5 U.S.C §552, seeking the disclosure and release of certain Federal Bureau of Investigation ("FBI") records. Complaint [1].[1] The parties have consented to proceed before a Magistrate Judge [30]. Before the court are the parties' cross-motions for summary judgment pursuant to Fed. R. Civ. P. ("Rule") 56 [19, 23]. Having reviewed the parties' submissions [19-21, 23-26], the motion of the defendant United States Department of Justice ("DOJ") is granted, and plaintiffs' cross-motion is granted in part and denied in part.

BACKGROUND

Plaintiff Steven John Kurtz is an emeritus professor at the State University of New York at Buffalo ("SUNY Buffalo") and was a founding member of the Critical Art

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[1] Bracketed references are to the CM/ECF docket entries. Unless otherwise indicated, page references are to numbers reflected on the documents themselves rather than to the CM/ECF pagination.

Ensemble ("CAE"), an internationally acclaimed art and theater collective. Gradecki Affidavit [23-2], ¶4. In 2004 Kurtz was indicted on mail and wire fraud charges for possessing bacteria for one of the CAE's art projects. *See* United States v. Steven Kurtz, *et al.*, 04-CR-00155 (W.D.N.Y.). Those charges were ultimately dismissed on April 21, 2008. Id., [136].

Plaintiff Jennifer Gradecki is a Ph.D. candidate at SUNY Buffalo conducting research on Kurtz. Gradecki Affidavit [23-2], ¶2. When plaintiffs cross-moved for summary judgment in July 2017, Gradecki was seeking the FBI files on Kurtz to complete "a significant component" of her dissertation in order to graduate in the summer of 2018. Id., ¶3.[2]

The FBI received a Certificate of Identity from Kurtz dated November 17, 2014, which it interpreted as a FOIA request for any records about himself. DOJ's Statement of Undisputed Facts [21], ¶¶2-3. That request was followed in December 2014 by a FOIA request from Gradecki for Kurtz's records. Id., ¶4.

By letter dated December 24, 2014, the FBI acknowledged Kurtz's request and stated that it was searching the indices to its Central Records System ("CRS") for information responsive to the request. Id., ¶5. It later informed Kurtz by letter dated February 6, 2015 that it had located approximately 2,327 pages potentially responsive to his FOIA request, and advised him of the cost associated with the production. Id., ¶¶6-10. On February 14, 2015, Kurtz affirmed his willingness to accept the charges. Id., ¶12.

Approximately eight months later, in October 2015, the FBI informed Kurtz that, upon further review, it determined that it had underestimated the number of records, and that there were approximately 2,512 potentially responsive pages. Id., ¶13. Shortly thereafter, plaintiff Kurtz affirmed his willingness to pay the additional charges. Id., ¶16.

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[2] The case was initially referred to me on November 22, 2019 [28].

After apparently receiving nothing from the FBI in response to her FOIA request, Gradecki submitted an appeal to the DOJ Office of Information Policy ("OIP") in November 2015, indicating that she considered the "failure of the FBI to comply with [her] FOIA request within the time parameters set forth in the statute as a denial" [19-3], p. 12 of 16 (CM/ECF). By letter dated December 15, 2015, OIP advised that there was no action for OIP to consider on appeal, since it had not rendered an adverse determination. DOJ's Statement of Undisputed Facts [21], ¶19. This action ensued on March 30, 2016. Id., ¶20.[3]

Approximately one month after this action was commenced, the FBI made its first release of records to Kurtz. Id., 21. This was followed by a second, third and fourth releases of records in June and October 2016 and January 2017. DOJ's Response to Plaintiff's Statement of Undisputed Facts [25], ¶1. In March 2017, the FBI filed a Vaughn Index [12], as plaintiffs had sought in an earlier motion [5].[4] Thereafter, an additional 60 documents were produced to Kurtz in May 2017, which had previously been withheld in full pursuant to a court sealing order. Id. In total, the FBI processed 2,241 responsive pages, of which 580 pages were released in full, 1,111 pages released in part, and 501 pages withheld in full. Id; Second Hardy Declaration [26], ¶15 (explaining that while the FBI initially withheld 617 pages in full, 60 pages withheld in full pursuant to a court sealing order were subsequently produced, and 55 pages were withheld as duplicative of the other pages withheld in full).[5]

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[3] It is undisputed that plaintiffs exhausted their administrative remedies before commencing this suit. Plaintiffs' Statement of Material, Undisputed Facts [23-1], ¶2.

[4] Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).

[5] The documents produced are Bates numbered "Kurtz-__".

Shortly after the FBI's additional production in May 2017, the parties cross-moved for summary judgment.[6] The government's motion is supported by the Declaration of David Hardy [19-1], the Section Chief of the Record/Information Dissemination Section ("RIDS") of the FBI's Records Management Division, which details the FBI's treatment of plaintiffs' FOIA requests and the claimed exemptions. Id., ¶1.

DISCUSSION

A. Summary Judgment Standard

"Summary judgment is the procedural vehicle by which most FOIA actions are resolved." Adelante Alabama Worker Center v. United States Department of Homeland Security, 376 F. Supp. 3d 345, 353 (S.D.N.Y. 2019). Although "FOIA generally calls for broad disclosure of Government records . . . . Congress provided that some records may be withheld from disclosure under certain exemptions". American Civil Liberties Union v. United States Department of Defense, 901 F.3d 125, 133 (2d Cir. 2018). Thus, "to prevail on a summary judgment motion in a FOIA case, an agency must demonstrate 'that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements.'" Ruotolo v. Department of Justice, Tax Division, 53 F.3d 4, 9 (2d Cir. 1995). Additionally, "the defending agency has the burden of showing that its search was adequate". Id.

[6] Dispositive motions by both parties were to have been filed by the same deadline. *See* Case Management Order [8], ¶5 (later extended, *see, e.g.*, [11, 15, 18]). Although plaintiffs did not file their cross-motion for summary judgment until the deadline for their response to the DOJ's summary judgment motion [22], the DOJ has not argued that plaintiffs' motion was untimely. Nor have plaintiffs sought to file a reply in further support of their cross-motion for summary judgment.

"To carry its burden, the defending agency may rely on a Vaughn index, which consists of 'affidavits to the court that describe with reasonable specificity the nature of the documents at issue and the justification for nondisclosure; the description provided in the affidavits must show that the information logically falls within the claimed exemption.'" Kuzma v. United States Department of Justice, 2014 WL 4829315, *2 (W.D.N.Y. 2014) (*quoting* Lesar v. United States Department of Justice, 636 F.2d 472, 481 (D.C.Cir.1980)).

B. Timeliness of the DOJ's Determination[7]

As a result of the DOJ's failure to begin producing responsive documents "until roughly 16 months after [plaintiffs] submit[ed] their FOIA request and a little less than three months after filing this lawsuit", plaintiffs ask "that the Court declare that [the DOJ] violated FOIA by failing to make a timely determination on [their] FOIA request". Plaintiffs' Memorandum of Law [23-3], p. 2 of 9 (CM/ECF) (*citing* 5 U.S.C. §552(a)(6)(A)(i)). The DOJ does not specifically dispute that it failed to timely comply with §552(a)(6)(A)(i), but rather argues that it "responded in good faith to plaintiffs . . . demands" and "processed a large amount of documents in a reasonable amount of time". DOJ's Reply Memorandum of Law [24], p. 8; DOJ's Response to Plaintiffs' Statement of Undisputed Facts [25], ¶1.

The District of Columbia Circuit Court has succinctly explained that

> "[a]n agency usually has 20 working days to make a 'determination' with adequate specificity, such that any withholding can be appealed administratively. 5 U.S.C. § 552(a)(6)(A)(i). An agency can extend that 20 - working - day

[7] In opposing the DOJ's motion for summary judgment and cross-moving for that relief, plaintiffs have only raised limited challenges. "It is well understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded." Yunes v. United States Department of Justice, 2016 WL 4506971, *4 (D.D.C. 2016). Therefore, I have limited my analysis to those issues addressed by plaintiffs and have treated the remaining arguments raised by the DOJ as conceded.

> timeline to 30 working days if unusual circumstances delay the agency's ability to search for, collect, examine, and consult about the responsive documents. Id. § 552(a)(6)(B). Beyond those 30 working days, an agency may still need more time to respond to a particularly burdensome request. If so, the administrative exhaustion requirement will not apply. But in such exceptional circumstances, the agency may continue to process the request . . . ensuring that the agency continues to exercise due diligence in processing the request. Id. § 552(a)(6)(C). If the agency does not adhere to FOIA's explicit timelines, the 'penalty' is that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court. This scheme provides an incentive for agencies to move quickly but recognizes that agencies may not always be able to adhere to the timelines that trigger the exhaustion requirement". Citizens for Responsibility & Ethics in Washington v. Federal Election Commission, 711 F.3d 180, 189 (D.C. Cir. 2013).

A "'determination' under [§]552(a)(6)(A)(i) must be more than just an initial statement that the agency will generally comply with a FOIA request and will produce non-exempt documents and claim exemptions in the future. Rather, in order to make a 'determination' and thereby trigger the administrative exhaustion requirement, the agency must at least: (i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the 'determination' is adverse." Id. at 188. However, "a 'determination' does not require actual *production* of the records to the requester at the exact same time that the 'determination' is communicated to the requester." Id. (emphasis in original). In any event, FOIA requires that the production be made "'*promptly* available,' which depending on the circumstances typically would mean within days or a few weeks of a 'determination,' *not months or years*." Id., *quoting* 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)(i) (emphasis added).

Although the DOJ does not specifically dispute that it failed to timely comply with both its determination and production obligations, plaintiffs have not demonstrated that they are entitled to the declaratory relief they seek for that untimeliness. A declaratory judgment is

proper where it "will serve a useful purpose in clarifying and settling the legal relations in issue, and when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding". Kidder, Peabody & Co. v. Maxus Energy Corp., 925 F.2d 556, 562 (2d Cir. 1991). However, "where the remedy sought is a mere declaration of law without implications for practical enforcement upon the parties", a declaratory judgment is not proper. S. Jackson & Son, Inc. v. Coffee, Sugar & Cocoa Exchange Inc., 24 F.3d 427, 431 (2d Cir. 1994). *See* Navigators Insurance Co. v. Department of Justice, 155 F. Supp. 3d 157, 168 (D. Conn. 2016). Hence, "in the FOIA context, courts have granted declaratory judgments where a plaintiff has shown that an agency engaged in a pattern or practice of delayed disclosure and that it is possible the violations will recur with respect to the same requesters". Navigators Insurance Co., 155 F. Supp. 3d at 168. *See also* Middle East Forum v. United States Department of Treasury, 317 F. Supp. 3d 257, 265 (D.D.C. 2018) ("[c]ourts will grant declaratory judgments in the FOIA context for 'policy or practice' violations, where agencies engage in patterns or have policies of denying FOIA requests").

Here, however, plaintiffs "have not alleged a pattern or practice of delay, and the Court will not, in any event, 'draw general conclusions about the [DOJ's] agency-wide patterns and practices from its handling of one case.' . . . Nor have Plaintiffs claimed that they are likely to file another request for documents in the near future. There would, in short, be no 'implications for practical enforcement upon the parties' if the Court granted Plaintiffs a declaratory judgment that the DOJ violated FOIA." Navigator's Insurance Co., 155 F. Supp. 3d at 168-69 (*quoting* Mitskovski v. Buffalo & Fort Erie Public Bridge Authority, 415 Fed.Appx. 264, 267 (2d Cir. 2011) (Summary Order)). Therefore, this portion of plaintiffs' motion is denied.

C. Adequacy of the Search

"[W]hen a plaintiff questions the adequacy of the search an agency made in order to satisfy its FOIA request, the factual question it raises is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant". Grand Central Partnership, Inc. v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999). Importantly, "[t]he adequacy of a search is not measured by its results, but rather by its method." New York Times Co. v. United States Department of Justice, 756 F.3d 100, 124 (2d Cir. 2014).

"FOIA does not give requesters the right to Monday-morning-quarterback the agency's search . . . . Indeed, the search need not be 'perfect" in Plaintiffs' estimation (or even the Court's), so long as the agency has provided logical explanations for each of the decisions it made as to search terms to be used and how to conduct the searches, evincing a good faith effort to design a comprehensive search." Immigrant Defense Project v. United States Immigration and Customs Enforcement, 208 F. Supp. 3d 520, 527 (S.D.N.Y. 2016). *See also* McLean on behalf of J.N.M. v. Social Security Administration, 2019 WL 2495333, *3 (S.D.N.Y.), adopted, 2019 WL 1074273 (S.D.N.Y. 2019) ("[p]erfection . . . is not required").

"To demonstrate the reasonableness of its search, an agency can submit a 'reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched.'" DeFraia v. Central Intelligence Agency, 311 F. Supp. 3d 42, 46 (D.D.C. 2018) (*quoting* Oglesby v. United States Department of Army, 920 F.2d 57, 68 (D.C. Cir. 1990)). Ultimately, "[a]gency 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 Services, Inc. v. Securities and Exchange Commission, 926 F.2d 1197, 1201 (D.C. Cir. 1991).

With respect to the FBI's search, Hardy explains that the CRS is where the FBI maintains information about individuals, organizations, events, and other subjects of investigative interest for future retrieval, and encompasses the records of the FBI headquarters, field offices, and legal attachè offices. Hardy Declaration [19-1], ¶¶24, 67.[8] The general indices to the CRS permit the FBI to "reasonably and adequately locate pertinent files". Id., ¶26 The indices are kept alphabetically according to a variety of subject matters, including individuals, organization, or events. Id. The indices reference "main entries" (*i.e.*, records indexed in the name of the main subject) and "references" or "cross-reference" entries (*i.e.*, "records that merely mention or reference an individual, organization, or other subject matter that is contained in a 'main' file record about a different subject matter"). Id.

Based upon plaintiffs' request for all records pertaining to Kurtz, RIDS employed an index search of the terms "Steven John Kurtz", "Steven John Kurtz", and "Steven Kurtz", as well as a search of its manual indices. DOJ's Statement of Undisputed Facts [21], ¶¶75-76, 78. That search revealed Kurtz's main file (279B-BF-37927), as well as two cross-reference files (66F-CG-A112039 SUB J serial 298 and 80-BF-34035 serial 474). Hardy Declaration [19-1], ¶37.

The main file was compiled "in the course of the FBI's investigation into Plaintiff for the possible possession or transportation of weapons of mass destruction, and the cross-reference files were compiled . . . to document information provided by another government

[8] Hardy provides a much more detailed description of the FBI's databases and retrieval mechanisms, which are undisputed and not germane to plaintiff's specific challenges. Statement of Undisputed Facts [12], ¶¶34-56, 58-65.

agency . . . and press releases compiled to show the Buffalo Field Office's investigative efforts". Id. The materials contained in the cross-reference files were determined to be duplicative of the other pages processed. DOJ's Statement of Undisputed Facts [21], ¶84.

In challenging the sufficiency of the search, plaintiffs points out that while the FBI has indicated that it located a main file (279B-CF-37927) and cross-reference files (66F-CG-1120139 SUB J serial 298 and 80-BF-34035 serial 474), the documents produced from those files reveal "a number of other file numbers". Plaintiffs' Memorandum of Law [23-3], p. 2 of 9 (CM/ECF). Specifically, they note that "file numbers 66F-HQ-C1222332-C, 66F-HQ-C1315029-BF, 66F-HQ-C1315029-DE, 66F-HQ-C1315029-PG and 66F-HQ-C1315029-NY were noted on Kurtz-134, file number 67-HQ-1413638 serial 31 was found on Kurtz-16, 315N-BF-37927-108 on Kurtz-442, 66F-CG-112039-18 on Kurtz-801, 174A-SF-134984-662 on Kurtz-805, 66F-BF-C36942-264 on Kurtz-1148 and 1-100-BF-36231-338 on Kurtz-1279". Id., p. 3 of 9. Plaintiffs contend that "the FBI should indicate whether [these] files contain additional records concerning Kurtz". Id.

In response, Hardy explains that "[m]any of these additional files are known as control files (with the exception of files 315N-BF-37927 and 174A-SF-134984 listed by Plaintiffs), which the FBI uses to document various types of information not necessarily of investigative nature". Second Hardy Declaration [26], ¶7. Hardy explains that the references to these other files "merely means [that] duplicates of th[e] same document were filed within the separate file numbers listed". Id., ¶8. However, the separate file numbers listed were "not necessarily indexed under [Kurtz's] name", since he "was not deemed pertinent enough to . . . be indexed as a subject". Id. Hence, "the FBI has found no indication that additional searches within

the files noted by Plaintiffs will result in the location of anything other than duplicative records". Id.[9]

Although that explanation may not be satisfactory to plaintiff, "the 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. U.S. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (emphases in the original). "Absent some reason to believe that these locations are likely to contain responsive materials, Plaintiff's arguments are insufficient to require the FBI to conduct further searches." Rosenberg v. United States Department of Immigration & Customs Enforcement, 13 F. Supp. 3d 92, 104 (D.D.C. 2014).

Plaintiffs further note that "Kurtz-563 . . . indicates 'that certain ELSUR [electronic surveillance] sub-files were opened'", and contend that the FBI should conduct "a more rigorous search for documents and/or recordings that may be contained in the Kurtz ELSUR sub-files". Plaintiffs' Memorandum of Law [23-3], p. 3 of 9 (CM/ECF). In response, Hardy states that FBI has re-reviewed the reference on Kurtz-563 to the recording of a 911 call it located in sub-file number 279B-BF-37927-ELA, determined that the call was responsive, and produced it on July 31, 2017. Id., ¶13; July 31, 2017 letter [26], p. 15 of 16 (CM/ECF). Therefore, I consider that portion of the motion moot, and conclude that the DOJ be granted summary judgment on the sufficiency of its search.

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[9] Hardy offers additional arguments to some of the files identified by plaintiffs. For example, he notes that 315N-BF-37927 was the initial file number assigned to Kurtz's FBI investigation, but that the prefix on the file number changed during the course of the investigation because of the shift in investigative focus. Second Hardy Declaration [26], p. 3 n. 2. He also notes that file number 66F-CG-112039 was located during the FBI's search efforts (at Kurtz-2236-239), but was removed as duplicative of Kurtz-801-04. Id., ¶8. *See also* Vaughn Index [12], p. 112.

D. Segregability

Where some portion of a document is exempt from disclosure, the FOIA requires the government to disclose "[a]ny reasonably segregable portion," 5 U.S.C. §552(b), unless the non-exempt information is "inextricably intertwined with exempt portions". Mead Data Central, Inc. v. United States Department of Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977). "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material." Sussman v. United States Marshals Service, 494 F.3d 1106, 1117 (D.C. Cir. 2007). "Before approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld." Id. at 1116.

Here, Hardy states that for the pages withheld in full, "RIDS determined that any non-exempt information on these pages was so intertwined with exempt material, that no information could be reasonably segregated for release. Any further segregation of this intertwined material would employ finite resources only to produce disjointed words, phrases, or sentences, that taken separately or together, would have minimal or no informational content". Hardy Declaration [19-1], ¶106(C). In response, plaintiffs argue that "the FBI's failure to describe the documents it has withheld in full and the justifications for nondisclosure with reasonably specific detail precludes summary judgment for the FBI as to the propriety of its withholding 550 pages of material in their entirety". Plaintiffs' Memorandum of Law [23-3], p. 5 of 9 (CM/ECF).

Although not as detailed as plaintiffs may seek, "[c]ourts often rely on [similar] affirmances . . . which are entitled to a presumption of good faith absent a showing to the contrary". Spadaro v. United States Customs & Border Protection, 2019 WL 1368786, *7 (S.D.N.Y. 2019) ("the affiants . . . stated that they reviewed the documents withheld by their

respective agencies and concluded that all reasonably segregable information has been disclosed"). *See* Marck v. Department of Health & Human Services, 314 F. Supp. 3d 314, 329 (D.D.C.), aff'd, 2018 WL 6167381 (D.C. Cir. 2018) (where the government similarly represented that "'no information could be reasonably segregated for release'" and that "'[a]ny further segregation of this intertwined material would employ finite resources only to produce disjointed words, phrases, or sentences, that taken separately or together, would have minimal or no informational content'", the court concluded that it had "adequately explained that all segregable information has been provided and only exempt information was redacted"). Hardy's representations are also "buttressed by the nature of the documents and the claimed exemptions themselves. . . . For example, many of the documents were withheld in full because they . . . . are grand jury-related documents, and therefore there is no portion of segregable information contained therein". Spadaro, 2019 WL 1368786, *7. *See* Vaughn Index [12], Kurtz-740-44, 838-1081, 1728-740, 1771-788.

Challenging Hardy's assertion that the remaining non-exempt information would contain no useful content, plaintiffs argue that "'FOIA mandates disclosure of information, not solely disclosure of helpful information". Plaintiffs' Memorandum of Law [23-3], p. 4 of 9 (CM/ECF). However, "FOIA requires only separation of what is *reasonably* segregable, permitting the agency to avoid committing significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content." Marck v. Department of Health & Human Services, 314 F. Supp. 3d 314, 329 (D.D.C. 2018), aff'd, 2018 WL 6167381 (D.C. Cir. 2018) (emphasis added).

Plaintiffs argue that "[i]n order to ensure that the FBI has fulfilled its obligation under FOIA, this . . . Court should conduct an *in camera* inspection of the sought-after

documents to determine whether the FBI has indeed adequately segregated exempt from non-exempt data". Plaintiffs' Memorandum of Law [14-2], pp. 3-4 of 9 (CM/ECF). However, plaintiffs have not demonstrated any specific deficiency in the adequacy of the FBI's disclosure to overcome the presumption that it has complied with its obligation to disclose reasonably segregable material.

In Kuzma v. U.S. Department of Justice, 2016 WL 9446868, *7 (W.D.N.Y. 2016), aff'd, 692 Fed. App'x 30 (2d Cir. 2017) (Summary Order), a similar challenge was rejected: "Plaintiff presents no substantive challenge to the FBI's segregability determination. Rather, he requests *in camera* review to determine if the FBI met its segregability obligations. But Plaintiff's simple desire for this Court to review the FBI's determinations, unaccompanied by any allegation or evidence of error, is not cause for *in camera* review."[10] The result here should be no different. *See* Local 3, International Brotherhood of Electrical Workers, AFL-CIO v. National Labor Relations Board, 845 F.2d 1177, 1180 (2d Cir. 1988) ("*[i]n camera* review is considered the exception, not the rule, and the propriety of such review is a matter entrusted to the district court's discretion"). *See also* Carter v. United States Department of Commerce, 830 F.2d 388, 393 (D.C. Cir. 1987) ("if there is evidence of agency bad faith - for example, if information contained in agency affidavits is contradicted by other evidence in the record - then, *in camera* inspection may be necessary to insure that agencies do not misuse the FOIA exemptions to conceal non-exempt information").

[10] In that case, Hardy stated that "'[e]very effort was made to provide plaintiff with all material in the public domain and with all reasonably segregable, non-exempt information in the responsive records'", and that "'[n]o reasonably segregable, nonexempt portions have been withheld from plaintiff'". 2016 WL 9446868, *6.

D. Applicability of the Exemptions

When relying on a FOIA exemption, "[a]gencies . . . may use declarations to satisfy their burden of proving the applicability of claimed exemptions, but these declarations must provide reasonably detailed explanations". American Civil Liberties Union, 901 F.3d at 133. "Summary judgment is appropriate where the agency affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith. Ultimately, an agency may invoke a FOIA exemption if its justification appears logical or plausible." American Civil Liberties Union v. Department of Justice, 681 F.3d 61, 69 (2d Cir. 2012). "Agency affidavits, including a Vaughn index, are presumed to have been made in good faith", New York Times Co. v. United States Department of Justice, 390 F. Supp. 3d 499, 512 (S.D.N.Y. 2019), and "privacy interests protected by the exemptions to FOIA are broadly construed". Long v. Office of Personnel Management, 692 F.3d 185, 195 (2d Cir. 2012).

1. Exemptions 6 and 7(C)

Exemption 6 permits the withholding of "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). In determining whether identifying information may be withheld pursuant to Exemption 6, the Court must "1) determine whether the identifying information is contained in personnel and medical files and similar files; and (2) balance the public need for the information against the individual's privacy interest in order to assess whether disclosure would constitute a clearly unwarranted invasion of personal privacy." Associated Press v. United States

Department of Defense, 554 F.3d 274, 291 (2d Cir. 2009). All information that relates to an individual qualifies for consideration under exemption (b)(6). *See* Department of State v. Washington Post Co., 456 U.S. 595, 602 (1982).

Exemption 7(C) similarly protects "information compiled for law enforcement purposes" to the extent it "could reasonably be expected to constitute an unwarranted invasion of personal privacy". 5 U.S.C. §552(b)(7)(C). "It is properly invoked when the invasion of personal privacy outweighs the public's interest in disclosure." Kuzma, 2016 WL 9446868, *8.

Plaintiffs seek "*only* . . . the names of FBI Special Agents involved in the Kurtz investigation". Plaintiffs' Memorandum of Law [23-3], p. 5 of 9 (CM/ECF) (emphasis added). They argue that there "is substantial public interest in the investigation and subsequent criminal prosecution of Kurtz. The Buffalo News, New York Times, The London Daily Telegraph, USA Today and the Nation have published articles about the Kurtz case . . . . Gradecki intends to make the released FBI records concerning Kurtz available on a website that will be easily accessible by the general public". Id., pp. 5-6 of 9 (emphasis omitted).

According to the DOJ, "[p]ublicity (adverse or otherwise) regarding any particular investigation to which they have been assigned may seriously prejudice their effectiveness in conducting other investigations. The privacy consideration is also to protect FBI SAs, as individuals, from unnecessary, unofficial questioning . . . . It is possible for an individual targeted by . . . law enforcement . . . to carry a grudge which may last for years. These individuals may seeks revenge on the agents". Hardy Declaration [19-1], ¶75. According to the DOJ, it balanced those privacy interests against "the non-existent public interest" in withholding the identity of the FBI agents involved in the investigation. Id., ¶77

The DOJ argues that plaintiffs fail to provide "any reasonably recent proof of public interest", and that they "fail to explain how release of individual employees' identities could expand knowledge concerning the actions of the FBI as an agency". Second Hardy Declaration [26], ¶¶18, 20. It also argues that plaintiffs provide "no proof or founded allegation of misconduct . . . by particular FBI Special Agents involved in the investigation". Id., ¶20.

"The FBI properly withholds the names of and identifying information about all the law enforcement officers and support personnel, whether federal, state or local, and about the other third parties whose names appear in the relevant law enforcement records." Sellers v. United States Department of Justice, 684 F. Supp. 2d 149, 160 (D.D.C. 2010). *See also* Judicial Watch, Inc. v. Reno, 2001 WL 1902811, *8 (D.D.C. 2001) ("[t]here is undoubtably a privacy interest in th[e] agent's identity as an 'agent by virtue of his official status does not forgo altogether any privacy claim in matters related to official business'" Lesar v. Department of Justice, 636 F.2d 472, 487 (D.C.Cir. 1980)).

"The identities of federal . . . law enforcement personnel . . . would not shed light on the government's conduct with respect to any closed or ongoing investigation . . . . The deletion of the names and other identifying data of these individuals respects their privacy interests without interfering unduly with plaintiff's access to information under the FOIA." Putnam v. United States Department of Justice, 880 F. Supp. 40, 42 (D.D.C. 1995). Plaintiffs do not articulate why the identity of the FBI agents in particular would assist the public interest in the case. Under these circumstances, I conclude that the DOJ properly invoked Exemptions 6 and 7(C).

2. Exemptions 7(D) and 7(E)

Exemption 7(D) protects confidential sources or information, and exemption 7(E) safeguards investigative techniques and procedures. *See* 5 U.S.C. §§(b)(7)(D) and (E). Plaintiffs argue that the DOJ has not made a sufficient showing that these exemptions protect "database search results located through non-public databases used for official law enforcement purposes by the FBI and/or law enforcement personnel". Plaintiffs' Memorandum of Law [23-3], p. 6 of 9 (CM/ECF). They contend that "[t]he FBI's use of databases, both public and non-public, is a publicly known law enforcement technique". Id.

In response, the DOJ argues that it used FOIA Exemption 7(E) "to protect database search results and printouts either in full or in part on approximately 109 pages". Second Hardy Declaration [26], ¶22. According to the DOJ, it "only redacted database information when there was a readily apparent law enforcement circumvention harm associated with its release". Id., ¶23. It explains that "[t]hese pages contain descriptions of numerous law enforcement databases utilized to house and disseminate accumulated investigative information. The manner in which these databases are utilized by the FBI in its investigations are not publicly known . . . . criminals could use this database information to a) deprive the FBI of key investigative data that could otherwise be utilized to enforce the law; b) predict the FBI's investigative tactics based on when and why it queries certain investigative databases; and or c) develop an understanding of what criminal activities may or may not have been detected by the FBI, allowing them to judge whether they, or their co-conspirators, should modify or continue their current criminal activities" Id., ¶22.

Based on the record, I have no reason to disbelieve the FBI's representations. Accordingly, I find that the FBI has properly withheld this material under Exemptions 7(D) and

7(E). Plaintiffs' reliance on Island Film, S.A. v. Department of the Treasury, 869 F. Supp. 2d 123, 138 (D.D.C. 2012) does not compel a different result. Plaintiffs' Memorandum of Law [23-3], p. 7 of 9 (CM/ECF). There, the Department of the Treasury "merely recite[d] the language of the exemption" in seeking to withhold certain database printouts. Island Film, S.A.,869 F. Supp. 2d at 138. Significantly more has been set forth here.

E. Plaintiffs' Request for Attorney's Fees and Costs

The FOIA provides that "[t]he court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. §552(a)(4)(E)(i). A complainant substantially prevails "if the complainant has obtained relief through . . . a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial". 5 U.S.C. §552(a)(4)(E)(ii).

If the complainant has established an eligibility for attorney's fees by having "substantially prevailed" under the statute, the court must determine the complainant is "entitled" to fees, by weighing the following four factors: "(1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) whether the Government had a reasonable basis for withholding requested information." Pietrangelo v. United States Army, 568 F.3d 341, 343 (2d Cir. 2009). *See* Schwartz v. United States Drug Enforcement Administration, 2019 WL 1299192, *2 (E.D.N.Y.), adopted, 2019 WL 1299660 (E.D.N.Y. 2019).

Plaintiffs argue that they are eligible for attorney's fees because the DOJ unilaterally changed its position by producing responsive documents after they filed suit.

Plaintiffs' Memorandum of Law [23-3], p. 8 of 9 (CM/ECF). They also contend that they are entitled to these fees because the production "will help increase the public's understanding of the facts and circumstances surrounding the investigation and prosecution of Kurtz", they "have not and will not derive any commercial benefit from the released records", and Gradecki intends to create a website at her own expense to disseminate this information to the general public. Id.

The DOJ does not dispute plaintiffs' entitlement to attorneys' fees. Instead, it argues that "plaintiffs' request for attorneys' fees and costs should be limited". DOJ's Reply Memorandum of Law [24], p. 7. However, it offers no explanation of what that limitation should be (*e.g.*, fees incurred through the production). Therefore, by April 3, 2020 plaintiffs shall submit an itemization of their attorneys' fees and costs. The DOJ may file a response by April 24, 2020, and plaintiffs may reply by April 30, 2020, after which time I will take this issue under advisement.

CONCLUSION

For these reasons, the DOJ's motion for summary judgment [19] is granted; and plaintiffs' cross-motion for summary judgment [23] is denied, except to the extent that it seeks an award of attorney's fees and costs, the amount of which will be determined upon receipt of the additional submissions.

SO ORDERED

Dated: March 16, 2020

/s/ Jeremiah J. McCarthy
JEREMIAH J. MCCARTHY
United States Magistrate Judge