UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LESLIE JAMES PICKERING,

Plaintiff,

v.

REPORT
and
RECOMMENDATION

U.S. DEPARTMENT OF JUSTICE, and
U.S. DEPARTMENT OF HOMELAND SECURITY,

19-CV-417A(F)

Defendants.

APPEARANCES: MICHAEL KUZMA, ESQ.
Attorney for Plaintiff
1893 Clinton Street
Buffalo, New York 14206

TRINI E. ROSS
UNITED STATES ATTORNEY
Attorney for Defendant
MICHAEL S. CERRONE
Assistant United States Attorney, of Counsel
Federal Centre
138 Delaware Avenue
Buffalo, New York 14202

JURISDICTION

This case was referred to the undersigned by Honorable Richard J. Arcara on August 19, 2019, for all pretrial matters including preparation of a report and recommendation on dispositive motions. The matter is presently before the court on motions for summary judgment filed November 30, 2020, by Defendant United States Department of Justice on behalf of U.S. Department of Homeland Security (Dkt. 23), the Bureau of Alcohol, Tobacco, Firearms, and Explosives (Dkt. 27), and the Federal Bureau of Investigation (Dkt. 31).

BACKGROUND

Plaintiff Leslie James Pickering ("Plaintiff" or "Pickering"), commenced this action pursuant to the Freedom of Information Act ("FOIA" or "the Act"), 5 U.S.C. § 552 *et seq*., on March 31, 2019, seeking an injunction and other relief, including the disclosure and release of agency records withheld by Defendants United States Department of Justice ("DOJ"), and its components Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), Federal Bureau of Investigation ("FBI"), and U.S. Department of Homeland Security ("DHS"), and DHS components Customs and Border Protection ("CBP"), Federal Emergency Management Agency ("FEMA"), Office of Intelligence and Analysis ("I&A"), and Transportation Security Administration ("TSA") to various FOIA requests made by Plaintiff. The information Plaintiff seeks pertains to suspected investigations of one Scott Crow ("Crow"). In the Second Amended Scheduling Order filed May 18, 2020 (Dkt. 18) ("SASO"), Plaintiff was directed to identify by May 29, 2020, his specific challenges to Defendants' FOIA determinations. SASO ¶ 2. Accordingly, on May 28, 2020, Plaintiff filed the affidavit of his attorney, Michael Kuzma, Esq. (Dkt. 19) ("First Kuzma Affidavit"), clarifying Plaintiff's challenges to the various FOIA Request responses. On November 30, 2020, summary judgment motions were filed by Defendant DOJ on behalf of DHS (Dkt. 23) ("DHS's Motion"), ATF (Dkt. 27) ("ATF's Motion"), and FBI (Dkt. 31) ("FBI's Motion").

DHS's Motion is supported by a Memorandum of Law (Dkt. 24) ("DHS Memorandum"), a Statement of Undisputed Facts (Dkt. 25) ("DHS Statement of Facts"), and the Declaration of Catrina M. Pavlik-Keenan (Dkt. 26) ("Pavlik-Keenan Declaration"), attaching exhibits A through G (Dkts. 26-1 through 26-8) ("DHS Exh(s).

__"). ATF's Motion is supported by a Memorandum of Law (Dkt. 28) ("ATF Memorandum"), a Statement of Undisputed Facts (Dkt. 29) ("ATF Statement of Facts"), and the Declaration of Adam C. Siple, Chief, Information and Privacy Governance Division, Bureau of Alcohol, Tobacco, Firearms and Explosives (Dkt. 30) ("Siple Declaration"). FBI's Motion is supported by a Memorandum of Law (Dkt. 32) ("FBI Memorandum"), a Statement of Undisputed Facts (Dkt. 33) ("FBI Statement of Facts"), and the Declaration of Michael G. Seidel (Dkt. 34) ("Seidel Declaration"), attaching exhibits A through H (Dkt. 34-1) ("FBI Exh(s). __").[1] Filed as FBI Exh. H (Dkt. 34-1 at 32-44) is the so-called "*Vaughn* Index" the requested government agency is required to furnish in responding to a FOIA request for records, purporting to identify each piece of information responsive to a FOIA request, as well as whether each responsive piece was released in full ("RIF"), released in part ("RIP"), or withheld in full ("WIF"), and the asserted reason why any information was withheld either in full or in part.[2]

On January 8, 2021, Plaintiff filed the Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment (Dkt. 37) ("Plaintiff's Response"), the Affidavit of Michael Kuzma (Dkt. 37-1) ("Second Kuzma Affidavit") with exhibit A (DKt. 37-1 at 3-5) (Plaintiff's Exh. A"), and Plaintiff's Statement of Undisputed Facts and Response to ATF's, DHS's & FBI's Statement of Undisputed Facts (Dkt. 37-2) ("Plaintiff's Statement of Facts"). On March 5, 2021, DOJ filed, on behalf of the FBI,

[1] FBI Exhibits are filed under seal, and were refiled on December 30, 2020 (Dkt. 36), not under seal, but in redacted form.

[2] The "*Vaughn* Index" refers to an index prepared by the agency upon whom a FOIA request is made setting forth all materials otherwise responsive to the FOIA request but which the agency withholds as exempt as well as the exemptions asserted as justifying the withholdings. *See Vaughn v. Rosen*, 484 F.2d 820, 826-27 (D.C.Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) (requiring government agency, in responding to FOIA request, prepare a list of documents withheld as exempt, either in full or in part, and furnish detailed justification for the asserted exemptions).

ATF, and DHS, the Reply Memorandum of Law (Dkt. 40) ("Defendants' Reply"), and the Second Declaration of Michael G. Seidel (Dkt. 41) ("Seidel Reply Declaration"). Oral argument was deemed unnecessary.

Based on the following, DHS's Motion should be GRANTED; ATF's Motion should be GRANTED; FBI's Motion should be GRANTED.

FACTS[3]

Plaintiff is a proprietor of Burning Books ("Burning Books"), an independent book store located in Buffalo, New York ("Buffalo"), which Plaintiff describes as "specializing in social justice struggles and state repression." Complaint ¶ 3. By letters dated March 3, 2018, Plaintiff, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, requested from DHS, ATF, and the FBI copies of all records pertaining to one Scott Crow ("Crow"), also known as James Scott Haws, Hooks, and Tackhead. DHS Exh. A (Dkt. 26-1) ("DHS FOIA Request"); FBI Exh. A (Dkt. 34-1 at 2) ("FBI FOIA Request"); *see* Siple Declaration ¶ 3 (averring in March 2018, Plaintiff submitted a FOIA request ("ATF FOIA Request")) (together, "Plaintiff's FOIA Requests"). Each of Plaintiff's FOIA Requests was accompanied by the required DOJ Certificate of Identity, Form DOJ-361 ("Certificate of Identity forms"), completed with Crow's information and signature.

Crow authored numerous books and articles, and has given more than 200 presentations throughout the United States including at Burning Books on April 8, 2013. Crow and Kuzma were guest speakers at the 5th Annual Law and Disorder Conference at Portland State University in May 2014. Based on Kuzma's interactions with Crow, Kuzma believed Crow was targeted by an FBI informant named Brandon Darby

[3] Taken from the pleadings and motion papers filed in this action.

("Darby"), whose work as a government informant Plaintiff asserts was confirmed in an FBI press release dated May 21, 2009. According to Plaintiff, release of the documents Plaintiff seeks in his FOIA Requests will increase the public's understanding of how the FBI uses informants such as Darby to neutralize political activists like Crow.

With respect to the DHS FOIA Request, because functions within DHS are decentralized with each DHS component responsible for the FOIA requests received, DHS inquired of Plaintiff in which components Plaintiff believed information responsive to the DHS FOIA Request would be found. Because Plaintiff indicated records pertaining to Crow might be with CBP, FEMA, I&A, and TSA, on July 22, 2019, DHS transferred Plaintiff's DHS FOIA Request to the DHS components Plaintiff identified for handling, closed Plaintiff's DHS FOIA Request at DHS Headquarters, and DHS had no further involvement with Plaintiff's DHS FOIA Request because Plaintiff did not specify he was seeking any records from DHS.

With regard to the ATF FOIA Request, on March 28, 2018, ATF concluded its search for responsive records, but located none, and sent Plaintiff a response informing Plaintiff no responsive records were located. When the ATF realized it had not searched for the alternative names Plaintiff provided for Crow, the ATF conducted a subsequent search of its records using Crow's alternative names, which also yielded no responsive documents.

As for Plaintiff's FBI FOIA Request, on October 15, 2019, the FBI advised Plaintiff that 500 pages responsive to the FBI FOIA Request were located and reviewed, redactions made as to information the FBI maintains is exempt from disclosure under FOIA, with 165 pages released in full or in part ("First FBI Release"). On November 15,

2019, the FBI advised Plaintiff an additional 274 pages responsive to the FBI FOIA Request were located and reviewed, redactions made as to information the FBI maintains is exempt from disclosure under FOIA, with 162 pages released in full or in part ("Second FBI Release"). The FBI also provided two digital video discs ("DVDs"), from which some material was deleted to protect information the FBI maintains is exempt from disclosure under FOIA. The FBI further advised that after consulting with the ATF, two pages were withheld in full.

In connection with the pending motions, explanations as to how Plaintiff's FOIA Request was processed are provided by Catrina M. Pavlik-Keenan ("Pavlik-Keenan"), Acting Deputy Chief FOIA Officer for DHS Privacy Office ("Privacy Office"), Adam Siple ("Siple"), Chief, Information and Privacy Governance Division ("IPG"), ATF, and Michael G. Seidel ("Seidel"), Section Chief of the Record/Information Dissemination Section ("RIDS"), Information Management Division ("IMD"). Pavlik-Keenan explains that because Plaintiff indicated in his DHS FOIA Request that records pertaining to Crow might be with the DHS components CBP, FEMA, I&A, and TSA, DHS transferred Plaintiff's DHS FOIA Request to such components. Further, because Plaintiff never specified he was seeking any records from DHS, Plaintiff's DHS FOIA Request was then closed on July 19, 2018.

Siple, on behalf of the ATF, explains that upon receiving Plaintiff's ATF FOIA Request, the IPG initiated its search for responsive documents through "N-Force" and the Treasury Enforcement Communications System ("TECS"), the two records system where ATF records of criminal investigations are housed. "N-Force" is ATF's official case file of record for documenting, investigative activity and information, creating

reports, tracking investigative leads, and linking data, and is a case management system designed to support ATF law enforcement operations as a single-point data entry system, enabling users to store, utilize, and query investigative information and to prepare investigative documents. Each criminal investigation opened by a case user is assigned a unique case number. N-Force contains information in several broad fields, each of which has specific sub-data fields. Information within N-Force may be queried according to an individual's name, date of birth, or social security number, associated property and vehicles, or through a text search identifying specific words found in ATF Reports of Investigation contained in the database. TECS is a text-based database, owned and maintained by DHS component agency CBP, and contains information that may be of interest to law enforcement agencies. TECS is also a computerized information system designed to identify individuals and businesses suspected of or involved in violations of federal law. As a communications system, TECS permits message transmittal between Federal law enforcement officers and other international, state, and local law enforcement agencies. Siple maintains IPG queried both N-Force and TECS for information on Crow, as per Plaintiff's ATF FOIA Request, but located none. IPG then concluded its search for records responsive to Plaintiff's ATF FOIA Request, and on March 28, 2018, informed Plaintiff no responsive records were located. IPG subsequently realized that it overlooked searching for the alternative names Plaintiff supplied for Crow, such as James Haws, Hooks, and Tackhead, and conducted an additional search of both N-Force and TECS for the alternative names, which also yielded no records responsive to Plaintiff's ATF FOIA Request.

According to Seidel, in fulfilling its integrated missions and functions as a law enforcement, counterterrorism, and intelligence agency, the FBI compiles and maintains in the Central Records System ("CRS") records "consisting of applicant, investigative, intelligence, personnel, administrative, and general files . . . ." Seidel Declaration ¶ 13. The CRS maintains records for the entire FBI organization including FBI Headquarters ("FBIHQ"), FBI Field Offices, and FBI Legal Attached Officers ("Legats") worldwide.

CRS files are numerically sequenced and organized according to designated subject categories referred to as "FBI classifications." As each FBI case file is opened, the file is assigned a Universal Case File Number ("UCFN") consisting of three sequential components including (1) the CRS file classification number; (2) the abbreviation of the FBI Office of Origin ("OO") initiating the file; and (3) the assigned individual case file number for that particular subject matter. Within each case file, certain documents of interest are "serialized," *i.e.*, assigned a document number in the order in which the document is added to the file, typically in chronological order.

Records are located within the CRS through its general indices with the files alphabetized according to subject matter including individuals, organizations, events and subjects of investigative interest. Entries in the general indices fall into two categories including (1) a main entry created for each individual or non-individual, *i.e.*, an organization or other entity, that is the subject or focus of an investigation, and (2) a reference or "cross-reference" entry created for individuals or non-individuals associated with a case, but not the main subject or focus of an investigation. Reference subjects typically are not identified in the case title of a file. CRS indexing information is done by FBI investigators who have the discretion to deem information sufficiently significant to

warrant indexing for future retrieval. Thus, not every individual name, organization, event, or other subject matter is separately indexed in the general indices.

In 1995, Automatic Case Support ("ACS"), an electronic, integrated case management system was implemented with CRS records converted from automated systems previously utilized by the FBI into a single, consolidated case management system accessible by all FBI offices. ACS searches were conducted through use of the Universal Index ("UNI") which provides an electronic means to search by indexing pertinent investigative information including such identifying information as name, date of birth, race, sex, locality, social security number, address, and date of an event. On July 1, 2012, the Sentinel system ("Sentinel") became the effective FBI-wide case management system. Sentinel includes the same automated applications utilized in ACS, and also provides a web-based interface to FBI users. Sentinel did not replace ACS, however, until August 1, 2018, when ACS data was migrated into Sentinel including ACS indices data and digitalized investigative records. Sentinel also retains the index search methodology and function whereby the CRS is queried via Sentinel for pertinent indexed main or reference entries in case files. As such, CRS index data from the UNI application previously searched via ACS is now searched within Sentinel using the "ACS Search" function.

Accordingly, upon receiving FOIPA requests for information on subject matters predating implementation of Sentinel, RIDS begins its searching efforts by conducting index searches via Sentinel's ACS Search function, followed by an index search of Sentinel records to ensure any subsequent records or data relevant to the FOIPA

request are located. The CRS automated indices are updated daily with searchable material newly indexed in Sentinel.

Each page of the records responsive to Plaintiff's FOIA Request is Bates-stamped. The FBI provides a "*Vaughn* Index" listing a description of each document with the associated Bates-stamped page number, and a chart indicating for each record whether it was released in full, released in part, or withheld in full, as well as on which FOIA Exemption the FBI relies to support withholding the information. The *Vaughn* Index (Dkt. 34-1 at 32-44) shows the FBI identified 773 pages responsive to Plaintiff's FBI FOIA Request, of which 49 were RIF, 280 were WIP, and 444 were WIF. Of the 444 pages WIF, 356 were determined exempt pursuant to one or more FOIA Exemptions, 76 pages were duplicative of other pages accounted for elsewhere in the FBI's production, and 12 pages are sealed pursuant to a United States Court Order and, thus, unavailable, *i.e.*, because the information is protected from disclosure by a statute such as the Pen Register Act, 18 U.S.C. § 3123, or the Juvenile Justice and Delinquency Act, 18 U.S.C. § 5038, for release through FOIA.

DISCUSSION

1. Summary Judgment

Defendant DOJ moves for summary judgment on behalf of its three components, including DHS, ATF, and FBI on Plaintiff's challenges to the adequacy of each component's respective responses to Plaintiff's FOIA Requests. Summary judgment of a claim or defense will be granted when a moving party demonstrates that there are no genuine issues as to any material fact and that a moving party is entitled to judgment as

a matter of law. Fed.R.Civ.P. 56(a) and (b); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986); *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003). The court is required to construe the evidence in the light most favorable to the non-moving party, *Collazo v. Pagano*, 656 F.3d 131, 134 (2d Cir. 2011), and summary judgment may not be granted based on a credibility assessment. *See Reyes v. Lincoln Automotive Financial Services*, 861 F.3d 51, 55 (2d Cir. 2017) ("Adverse parties commonly advance conflicting versions of the events throughout a course of litigation. In such instances on summary judgment, the court is required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." (citations, quotation marks, and brackets omitted)). The party moving for summary judgment bears the burden of establishing the nonexistence of any genuine issue of material fact and if there is any evidence in the record based upon any source from which a reasonable inference in the non-moving party's favor may be drawn, a moving party cannot obtain a summary judgment. *Celotex*, 477 U.S. at 322; *see Anderson*, 477 U.S. at 247-48 ("summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party"). "A fact is material if it 'might affect the outcome of the suit under governing law.'" *Roe v. City of Waterbury*, 542 F.3d 31, 35 (2d Cir. 2008) (quoting *Anderson*, 477 U.S. at 248).

"[T]he evidentiary burdens that the respective parties will bear at trial guide district courts in their determination of summary judgment motions." *Brady v. Town of Colchester*, 863 F.2d 205, 211 (2d Cir. 1988)). A defendant is entitled to summary

judgment where "'the plaintiff has failed to come forth with evidence sufficient to permit a reasonable juror to return a verdict in his or her favor on'" an essential element of a claim on which the plaintiff bears the burden of proof. *In re Omnicom Group, Inc., Sec. Litig.*, 597 F.3d 501, 509 (2d Cir. 2010) (quoting *Burke v. Jacoby*, 981 F.2d 1372, 1379 (2d Cir. 1992)). Once a party moving for summary judgment has made a properly supported showing of the absence of any genuine issue as to all material facts, the nonmoving party must, to defeat summary judgment, come forward with evidence that would be sufficient to support a jury verdict in its favor. *Goenaga v. March of Dimes Birth Defects Foundation*, 51 F.3d 14, 18 (2d Cir. 1995). "[F]actual issues created solely by an affidavit crafted to oppose a summary judgment motion are not 'genuine' issues for trial." *Hayes v. New York City Dep't of Corrections*, 84 F.3d 614, 619 (2d Cir. 1996). "An issue of fact is genuine and material if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Cross Commerce Media, Inc. v. Collective, Inc.*, 841 F.3d 155, 162 (2d Cir. 2016) (citing *SCR Joint Venture L.P. v. Warshawsky*, 559 F.3d 133,137 (2d Cir. 2009)).

In the instant case, DHS argues in support of summary judgment that Plaintiff's FOIA claims asserted against DHS must be dismissed because the records Plaintiff sought are not DHS agency records. DHS Memorandum at 2-5. ATF argues in support of summary judgment that its search for records responsive to Plaintiff's ATF FOIA Request was adequate yet failed to uncover any records responsive to the request, such that ATF did not withhold any records. ATF Memorandum at 4-6. The FBI, the only DOJ component that provided records responsive to one of Plaintiff's FOIA Requests, argues in support of summary judgment that its records search was

adequate, FBI Memorandum at 4-7, the FBI's FOIA Response was proper and complied with segregability requirements,[4] *id*. at 8-9, and records were properly withheld in full or in part pursuant to FOIA Exemptions 3, 6, 7(C), 7(D), and 7(E). *Id*. at 9-16. The court addresses each of the three summary judgment motions in turn.

2. FOIA Overview

"The Freedom of Information Act adopts as its most basic premise a policy strongly favoring public disclosure of information in the possession of federal agencies." *Halpern v. F.B.I.*, 181 F.3d 279, 286 (2d Cir. 1999) (citing cases). "As noted by the Supreme Court, under FOIA, 'federal jurisdiction is dependent on a showing that an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records.'" *Grand Cent. Partnership, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999) (quoting *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1980) (quoting *Kissinger v. Reporters Comm. for Freedom of Press*, 445 U.S. 136, 150 (1980))). "Only when each of these criteria is met may a district court 'force an agency to comply with the FOIA's disclosure requirements.'" *Id*.

"[T]he strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *United States Dep't of State v. Ray,* 502 U.S. 164, 173 (1991). The agency has the initial burden to show it conducted an adequate search for responsive records. *Carney v. United States Dep't of Justice*, 19 F.3d 807, 812 (2d Cir.), *cert. denied*, 513 U.S. 823 (1994). A search is considered adequate if it was reasonably calculated to uncover all relevant documents, yet

[4] For an explanation of segregability, *see* Discussion, *infra*, at 19-21.

reasonableness does not demand perfection, and a reasonable search need not uncover every document extant. *Grand Cent. Partnership, Inc.,* 166 F.3d at 489.

"The FOIA requires that agency records be made available promptly upon a request that 'reasonably describes such records and ... is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed.'" *Ruotolo v. Dep't of Justice, Tax Division*, 53 F.3d 4, 9 (2d Cir. 1995) (quoting 5 U.S.C. § 552(a)(3)). FOIA, however, exempts from disclosure nine categories of information. 5 U.S.C. § 552(b)(1) through (9) ("Exemption (b)(__)"). "Accordingly, 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*, 53 F.3d at 9 (quoting *Nat'l Cable Television Ass'n Inc. v. FCC*, 479 F.2d 183, 186 (D.C. Cir. 1973)). Furthermore, "'to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate.'" *Id*. (quoting *Carney*, 19 F.3d at 812).

"'Affidavits submitted by an agency are accorded a presumption of good faith; accordingly, discovery relating to the agency's search and the exemptions it claims for withholding records generally is unnecessary if the agency's submissions are adequate on their face.'" *Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior*, 36 F. Supp. 3d 384, 398 (S.D.N.Y. 2014) (quoting *Carney,* 19 F.3d at 812 (citation omitted)). "'In order to justify discovery once the agency has satisfied its burden, the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations, or provide some tangible evidence that an exemption claimed

by the agency should not apply or summary judgment is otherwise inappropriate.'" *Id.* (citations omitted).

"Summary judgment is the preferred procedural vehicle for resolving FOIA disputes." *Bloomberg, L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 649 F.Supp.2d 262, 271 (S.D.N.Y. 2009). "In order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA." *Carney*, 19 F.3d at 812. In contrast, "'[s]ummary judgment in favor of [a] FOIA plaintiff is appropriate when an agency seeks to protect material which, even on the agency's version of the facts, falls outside the proffered exemption.'" *Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior*, 36 F.Supp.3d 384, 398 (S.D.N.Y. 2014) (quoting *NY. Times Co. v. U.S. Dep't of Def.*, 499 F.Supp.2d 501, 509 (S.D.N.Y. 2007)). In resolving a summary judgment motion in a FOIA action, the district court conducts a *de novo* review of an agency's response to a FOIA request including any government records which the agency claims are exempt from disclosing. *See Lee v. F.D.I.C.*, 923 F.Supp. 451, 453 (S.D.N.Y. 1996) (citing 5 U.S.C. § 552(a)(4)(B); and *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361-62 (1976)). Such "*de novo* review requires the court to reweigh the evidence compiled by the agency to determine whether the agency's findings are correct, not just whether they are reasonable." *Id*. at 453-54. Although FOIA authorizes *in camera* inspection of the documents in question, it is not required. *Id*. (citing 5 U.S.C. § 552(a)(4)(B)).

3. DHS FOIA Request

On behalf of DHS, the DOJ argues in support of summary judgment that FOIA functions within DHS are decentralized for each DHS component, with each component responsible for receiving and responding to FOIA requests received. DHS Memorandum at 3. The DOJ explains that after receiving Plaintiff's DHS FOIA Request, DHS requested from Plaintiff which DHS components Plaintiff believed may contain records responsive to Plaintiff's DHS FOIA Request, and Plaintiff advised records may be found with CBP, FEMA, I&A, and TSA. *Id*. at 4 (citing Pavlik-Keenan Declaration ¶¶ 9-10; DHS Exhs. B and C). On July 22, 2019, DHS transferred Plaintiff's DHS FOIA Request for handling and response to the components Plaintiff identified, including CBP, FEMA, I&A and TSA, and advised Plaintiff of the transfer. *Id*. (citing Pavlik-Keenan Declaration ¶ 15; DHS Exh. G). Subsequent to transferring Plaintiff's DHS FOIA Request to the DHS components Plaintiff identified, DHS was not further involved in the processing or handling the request because Plaintiff did not assert that any records responsive to the request were created or maintained by DHS. *Id*. (citing Pavlik-Keenan Declaration ¶ 16). Accordingly, DOJ,on behalf of DHS, seeks summary judgment because Plaintiff cannot show DHS improperly withheld agency records. *Id*. at 5. In opposition, Plaintiff argues DHS is a proper party to this action because Plaintiff sent his DHS FOIA Request to DHS which is an agency as defined under FOIA. Plaintiff's Response at 1-2. Alternatively, Plaintiff maintains that if the court decides DHS is not a proper party to this action, then TSA should be substituted in place of DHS. *Id*. at 2. In reply, DOJ argues Plaintiff improperly frames DOJ's argument as asserting DHS is not a proper party to this action, whereas DOJ argues for dismissal of

the claims against it because Plaintiff has provided no evidence that DHS improperly withheld agency records. DOJ's Reply at 2.

Preliminarily, insofar as Plaintiff relies on *Jean-Pierre v. Federal Bureau of Prisons*, 880 F.Supp.2d 95, 101 (D.D.Cir. 2012) ("*Jean-Pierre*"), for the proposition that the court can *sua sponte* substitute TSA for DHS, *Jean-Pierre* is inapposite, as well as the two cases on which it relies, as it involved liberally construing a *pro se* plaintiff's complaint to substitute the named defendant, which was a non-suable entity, with the suable entity of which the named defendant was a subcomponent. *See Jean-Pierre*, 880 F.Supp.2d at 101 (citing *Kone v. Dist. of Columbia,* 2011 WL 666886, at *1 (D.D.C. Feb. 14, 2011); and *Di Lella v. Univ. of Dist. of Columbia David A. Clarke Sch. of Law,* 2009 WL 3206709, at *1 (D.D.C. Sept. 30, 2009)). In contrast, in the instant case, not only does Plaintiff have legal counsel, but DHS is not a non-suable entity, but an incorrectly sued entity. Accordingly, Jean-Pierre does not support *sua sponte* substituting TSA for DHS. Moreover, as DOJ asserts, upon clarifying his DHS FOIA Request pursuant to DHS's inquiry, Plaintiff failed to specify he was seeking any records created or maintained by DHS subsequent to which DHS performed no searches of records maintained in any of DHS's databases. Plaintiff thus has no claim against DHS and DHS's Motion should be GRANTED.

4. ATF FOIA Request

DOJ, on behalf of ATF, argues in support of summary judgment that upon receiving Plaintiff's ATF FOIA Request, ATF conducted a thorough and adequate search of the databases ATF maintains pertaining to criminal investigations, including N-Force and TECS, for records responsive to the FOIA Request, but none were found.

ATF Memorandum at 5-6. As such, DOJ maintains ATF is entitled to summary judgment. *Id*. at 6. Plaintiff has not argued in opposition, and DOJ relies on this failure in arguing in further support of summary judgment for ATF. DOJ's Reply at 1-2.

As DOJ asserts, Plaintiff has not challenged ATF's assertion in support of summary judgment that ATF's search of its databases were adequate, yet yielded no records responsive to the ATF FOIA Request. Nor does Plaintiff argue in opposition to ATF's Motion, as DOJ observes. DOJ Reply at 1-2. Accordingly, summary judgment should be GRANTED in favor of ATF.

5. FBI FOIA Request

The DOJ, on behalf of the FBI, argues in support of summary judgment that its search for records responsive to Plaintiff's FBI FOIA Request was adequate, FBI Memorandum at 4-7, FBI's FOIA response was proper, including with regard to segregability, *id*. at 8-9, and the withholding of records pursuant to FOIA Exemptions 3, *id*. at 9-11, 6 and 7(C), *id*. at 11-14, 7(D), *id*. at 14-15, and 7(E), *id*. at 15-16. In opposition, Plaintiff argues the FBI failed to comply with its burden of establishing that documents withheld in full contain no segregable information, *i.e.*, information that is not inextricably intertwined with the exempt portions and which should have been released, Plaintiff's Response at 2-4, and also failed to establish information was properly withheld pursuant to FOIA Exemptions 3, *id*. at 5, 6(b) and 7(C), *id*. at 5-6, 7(D) and 7(E), *id*. at 6-10, and the FBI's search of records responsive to the FBI's FOIA Request was inadequate. *Id*. at 10-11. Plaintiff also seeks an award of attorney fees and litigation costs incurred in connection wth this action. *Id*. at 11. In further support of

summary judgment, the DOJ relies on the arguments set forth in the Seidel Declaration and the Seidel Reply Declaration. DOJ's Reply at 2.

A. Segregability

The DOJ asserts that after identifying 773 pages of records responsive to Plaintiffs' FBI FOIA Request, the FBI further determined 49 pages would be released in full ("RIF"), 280 would be released in part ("RIP"), and 444 would be withheld in full ("WIF"). FBI Memorandum at 8. DOJ explains that the 280 pages RIP contain redacted information pursuant to FOIA Exemptions which were segregable from portions of the records that could be released without triggering foreseeable harm to any interest protected by the relevant FOIA exemptions. *Id*. at 8-9. With regard to the information that was WIF, DOJ further explains that additional segregation of the intertwined material would only yield sentence fragments devoid of "infomational content." *Id*. at 9. An additional 12 pages that are sealed pursuant to a United States Court order were WIF, *id*., and 76 pages were withheld because they are duplicates of other pages already produced. *Id*. In opposing summary judgment, Plaintiff argues that of the 444 pages WIF, the FBI failed to provide "justifications for nondisclosure with reasonably specific details" as required to support withholding in full 356 pages of the 773 pages responsive to the FBI's FOIA Request. Plaintiff's Memorandum at 2-4 (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C.Cir. 1981).

Insofar as Plaintiff urges the court to "conduct an *in camera* review of the pages withheld inf full to determine whether or not there are any segregable portions," Plaintiff's Memorandum at 4, Congress left it in the Court's discretion to determine whether or not to undertake *in camera* review. *Military Audit Project,* 418 F.Supp. at

879. Further, where the Government's affidavits on their face indicate the documents withheld logically fall within the claimed exemptions and there is no doubt as to the requested agency's good faith, the court should restrain its discretion to order *in camera* review. *Lead Industries Ass'n, Inc. v. Occupational Safety and Health Administration,* 610 F.2d 70, 87-88 (2d Cir. 1979). In the instant case, no *in camera* review is required because the Seidel Declaration and the Seidel Reply Declaration objectively verify the FBI's asserted decision to deny disclosing documents and portions of documents pertaining to investigations of domestic terrorism.

In particular, Seidel avers the FBI identified 773 pages responsive to the FBI FOIA Request, of which 49 were RIF, 280 RIP, and 444 WIF. Seidel Declaration ¶ 110. Seidel explains that the redactions to the 280 records RIP, and 356 of the documents WIF avoids triggering foreseeable harm to one or more interests protected by the FOIA exemptions. *Id*. ¶ 110.b and c. Seidel further explains that additional 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." *Id*. ¶ 110.c. The FBI also asserts 12 pages were WIF because they were deemed to be sealed pursuant to a United States Court Order, *id*.,[5] and that 76 pages were duplicates of pages elsewhere produced and were withheld in accordance with the FBI's standard practice not to process duplicate pages. *Id*.

"Disclosable information cannot be easily separated from that which is exempt without compromising the secret nature of the information." *Doherty v. United States Dep't of Justice*, 775 F.2d 49, 52–53 (2d Cir. 1985). As such, "that there may be some

[5] *See* Facts, *supra*, at 10.

nonexempt matter in documents which are predominantly exempt does not require the district court to undertake the burdensome task of analyzing" withheld documents *in camera*. *Id*. (citing *Lead Industries,* 610 F.2d at 88. *See also Weissman v. CIA,* 565 F.2d 692, 697–98 (D.C.Cir.1977)).

Here, the Seidel Declaration and the Seidel Reply Declaration provide an objective verification in support of the FBI's decision to deny disclosure of documents containing intelligence information and material pertaining thereto, as the FBI asserts. In particular, Plaintiff has not come forward with any basis calling into question Seidel's explanation that the non-exempt information found on the pages that were RIP or WIF is "so intertwined with exempt material" 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." As such, there is no reason to put aside the good faith presumption afforded the FBI's explanation provided by Seidel. *See Ramaci v. Fed. Bureau of Investigation*, 2021 WL 4896277, at * 10 (S.D.N.Y. Oct. 20, 2021) (holding FOIA plaintiff, by failing to counter affidavit by Seidel that further segregability would yield only sentence fragments that provided no information, also failed to overcome the presumption of good faith afforded to such affidavit); *Mermerlstein v. U.S. Dep't of Justice, Fed. Bureau of Investigation*, 2021 WL 3455314, at *17 (E.D.N.Y. Aug. 4, 2021) (same). As such, in camera review of these materials is not required.

Summary judgment should be GRANTED on FBI's Motion pertaining to the segregation of information withheld, either in full or in part.

B. Adequacy of Search

As to the adequacy of Defendant's search for documents responsive to Plaintiff's FOIA Request, "[t]o secure summary judgment in a FOIA case, the defending agency must show through reasonably detailed affidavits or declarations that it conducted an adequate search and that any withheld documents fall within a FOIA exception." *Adamowicz v. I.R.S.*, 402 Fed.Appx. 648, 650 (2d Cir. 2010) (citing *Carney*, 19 F.3d at 812). *See Hodge v. F.B.I.*, 703 F.3d 575, 579 (D.C. Cir. 2013) ("In general, the adequacy of a search is 'determined not by the fruits of the search, but by the appropriateness of [its] methods.'" (quoting *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003))). Such affidavits are accorded "'a presumption of good faith,'" *id*. (quoting *Wilner v. NSA*, 592 F.3d 60, 69 (2d Cir. 2009)), "which 'cannot be rebutted by purely speculative claims about the evidence and discoverability of other documents.'" *Id*. (quoting *Grand Cent. P'Ship, Inc.*, 166 F.3d at 489. Significantly, "[a]n affidavit from an agency employee responsible for supervising a FOIA search is all that is needed to satisfy Rule 56(e); there is no need for the agency to supply affidavits from each individual who participated in the actual search." *Carney*, 19 F.3d at 814. Nor does the fact that additional records responsive to a FOIA request are not located and produced until after the plaintiff commences a FOIA action render the initial search insufficient. *Hodge*, 703 F.3d at 580 ("it does not matter than an agency's *initial* search failed to uncover certain responsive documents so long as subsequent searches captured them" (italics in original)). Furthermore, "the law demands only a 'relatively detailed and nonconclusory' affidavit or declaration." *Adamowicz*, 402 Fed.Appx. at 650-51 (quoting *Grand Cent. P'Ship, Inc.*, 166 F.3d at 488-89). Here, this standard is

satisfied by the Seidel Declaration and the Seidel Reply Declaration provided by the FBI.

Specifically, Seidel avers that when Plaintiff filed his FBI FOIA Request, Seidel, as RIDS Section Chief, was responsible for managing responses to requests for records and information pursuant to, as relevant here, FOIA as amended by the OPEN Government Act of 2007, the OPEN FOIA Act of 2009, the FOIA Improvement Act of 2016, the Privacy Act of 1974, Executive Order 13,526, Presidential, Attorney General, and FBI policies and procedures, judicial decisions, and Presidential and Congressional directives. Seidel Declaration ¶¶ 2. In such capacity, Seidel is fully familiar with procedures followed by the FBI in responding to FOIA Requests, including the request filed by Plaintiff seeking records related to Scott Crow. *Id*. ¶ 3. Seidel recounts in meticulous detail the steps by which FOIA Requests are processed upon receipt, including Plaintiff's FBI FOIA Request, *id*. ¶¶ 5-29, and addresses the adequacy of the search for records responsive to Plaintiff's FBI FOIA Request. *Id*. ¶¶ 30-34. According to the FBI, RIDS policy, which was followed in processing Plaintiff's FBI FOIA Request, is to search for and identify "main" files responsive to most FOIPA requests at the administrative stage and, thus, RIDS also conducted a search of the CRS to locate any "reference" material potentially responsive to Plaintiff's FBI FOIA Request. *Id*. ¶ 30. The CRS search was done using the index search methodology including the FBI's automated indices available through Sentinel. *Id*. ¶ 31. Such searches included variations of Crow's names as per Plaintiff's FBI FOIA Request resulting in the FBI identifying 773 references responsive to the Request. *Id*. ¶ 33. Because of its comprehensive nature and scope, CRS is the principal records system searched for

records responsive to FOIA Requests concerning the FBI, and the Sentinel and ACS indices would also be most likely to locate any electronic surveillance records ("ELSUR") responsive to such request. *Id*. at 29, 33. Seidel further explains that although Plaintiff specifically requested the FBI search other systems or locations for responsive records, including Laboratory Records, the "Bureau Mailing Lists," surveillance databases, because Plaintiff's FBI FOIA Request seeks records pertaining to Crow, who is a subject reasonably expected to be expected to by indexed within the automated indices available in Sentinel, and given the comprehensive nature of the information contained in the CRS, "the CRS is the only FBI system of records where responsive records could reasonably be expected to be found." *Id*. ¶ 34. Significantly, the FBI is not required to search all records systems suggested by Plaintiff. *See 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."). Seidel also emphasizes that "RIDS search policy is grounded on the principle of reasonableness, not mere possibility." *Id*. Nor has Plaintiff provided any information upon which RIDS could reasonably conclude records would reside outside the CRS, *see Hodge*, 703 F.3d at 580 (rejecting FOIA plaintiff's challenge to adequacy of agency's search for records responsive to FOIA request where Plaintiff failed to identify additional searches the requested agency should have conducted and offered no basis for concluding additional documents might exist), and the information found from the CRS search did not indicate any additional records would be located in the other systems Plaintiff identifies. Seidel Declaration ¶ 34. These details provided in the Seidel Declaration, based on his personal knowledge and experience working as RIDS Section Chief when Plaintiff's FBI

FOIA Request was processed, *Carney*, 19 F.3d at 814 (FOIA response requires affidavit from agency employee responsible for FOIA requests), and which is both unrebutted and entitled to a presumption of good faith, *Wilner*, 592 F.3d 69 (properly made and unrebutted affidavit responding to FOIA request entitled to good faith presumption), sufficiently describe a reasonable and thorough search of all databases relevant to Plaintiff's FBI FOIA request, *Grand Cent. P'Ship, Inc.*, 166 F.3d at 488-89 ("the law demands only a 'relatively detailed and nonconclusory' affidavit or declaration"). Accordingly, the undisputed record establishes Plaintiffs performed a reasonable search for information, documents and records responsive to Plaintiff's FOIA request.

Summary judgment regarding the adequacy of the FBI's search in response to Plaintiff's FOIA Request should be GRANTED with regard to the FBI's Motion.

C. FOIA Exemptions

The balance of Plaintiff's arguments regarding the Records Releases are predicated on the so-called "FOIA Exemptions" set forth in 5 U.S.C. § 552(b) as the basis for redacting information from responsive documents or withholding their release altogether and "whether the agency has sustained its burden of demonstrating that the documents requested are . . . exempt from disclosure." *Pub. Inv'rs Arbitration Bar Ass'n v. SEC*, 771 F.3d 1, 3 (D.C. Cir. 2014) (quoting *ACLU v. Dep't of Justice*, 655 F.3d 1, 5 (D.C. Cir. 2011)). In particular, information responsive to Plaintiff's FOIA Request was withheld pursuant to 5 U.S.C. § 552(b)(3) ("Exemption 3), (6) (Exemption 6), and 7(C) ("Exemption 7(C)"), 7(D) ("Exemption 7(D)"), and 7(E) ("Exemption 7(E)"), and the court addresses the arguments raised with regard to each of these asserted exemptions.

(1) Exemption 3

The *Vaughn* Index lists 51 records withheld pursuant to Exemption 3. Dkt. 34-1 at 35-43. According to the DOJ, "[t]he information withheld from disclosure consists of the identities and phone numbers of the individuals targeted by the pen register and/or individuals whose information was collected due to their contacting the target of the pen register, and information gathered by the device." FBI Memorandum at 10-11 (citing Seidel Declaration ¶¶ 40-41).[6] Plaintiff argues the FBI has not met its burden of proof to claim exemption under Exemption 3 for pen register information because nothing in the Seidel Declaration establishes whether the FBI took steps to ascertain whether the court order authorizing the pen register for the Western District of Texas has been unsealed. Plaintiff's Response at 5.

As relevant here, Exemption 3 protects from disclosure information that is

> (3) specifically exempted from disclosure by statute . . . if that statute –
> (A)(i) requires that the matters by withheld from the public in such a manner as to leave no discretion on the issue; or
> (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and
> (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.[7]

5 U.S.C. § 552(b)(3).

The Pen Register Act, 18 U.S.C. § 3123(d) specifically provides

---

[6] The FBI also withheld pursuant to Exemption 3 information pertaining to the arrest and adjudication of a juvenile's criminal acts pursuant to the Juvenile Justice and Delinquency Act, Seidel Declaration ¶ 42, information obtained through the Bank Security Act during the course of its criminal investigative activities, *id*. ¶¶ 43-46, information for which the FBI determined that intelligence sources and methods would be revealed in violation of the National Security Act, *id*. ¶¶ 47-50, as well as information under Title III consisting of the identities of the individuals targeted for interception through wiretap, and information obtained via the Title III wiretap. *Id*. ¶¶ 51-52.
. Plaintiff does not challenge the FBI's withholding of such information and, accordingly, the court does not address whether the information was properly withheld.

[7] Because the Pen Register Act was enacted prior to the enactment of the OPEN FOIA Act of 2009, 5 U.S.C. § 552(b)(3)(B) does not apply.

> An order authorizing or approving the installation and use of a pen register or a trap and trace device shall direct that--
> (1) the order be sealed until otherwise ordered by the court; and
> (2) the person owning or leasing the line or other facility to which the pen register or a trap and trace device is attached or applied, or who is obligated by the order to provide assistance to the applicant, not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber, or to any other person, unless or until otherwise ordered by the court.

18 U.S.C.A. § 3123(d).

By its terms, the Pen Register Act provides for sealing a pen register order itself, but "not sealing of any and all information the order may contain even if appearing in other documents." *Labow v. United States Dep't of Justice*, 831 F.3d 523, 528 (D.C. Cir. 2016) ("*Labow II*") (citing 18 U.S.C. § 3132(d)(1)). "Although the statute additionally bars disclosures by certain private parties about the existence of a pen register order, in the absence of a court order allowing disclosure, . . . that limitation does not apply to the government." *Id*. (citing § 3123(d)(2)). As such, "Exemption 3 of FOIA, as regards the Pen Register Act, primarily authorizes the government to withhold a responsive pen register order itself, not all information that may be contained in or associated with a pen register order." *Id*.

Insofar as Plaintiff maintains the FBI has not ever attempted to ascertain whether the pen register court order has been unsealed, in further support of summary judgment, the DOJ provides the Seidel Reply Declaration in which Seidel specifies that,

> On February 5, 2021, RIDS contacted the clerk's office for the Western District of Texas, Austin Division, where the pen register and trap and trace order was issued, and confirmed with the clerk's office that the magistrate case, containing that order, remains sealed. Accordingly, since such information is specifically exempted pursuant to 18 U.S.C. § 3123(d), the FBI properly asserted FOIA Exemption 3 to withhold this information from disclosure.

Seidel Reply Declaration ¶ 7.

Plaintiff not dispute this averment.

Nevertheless, as used in the Pen Register Act, "the language 'unless otherwise ordered by the court' connotes two related principles," including providing the court with "discretion with respect to an order's unsealing," *Labow v. U.S. Dep't of Justice*, 278 F.Supp.3d 431, 440 (D.D.C. 2017) ("*Labow I*") (citing *Washington & G.R. Co. v. Tobriner,* 147 U.S. 571, 588-89 (1893); *Saunders v. Washington Metropolitan Area Transit Authority,* 505 F.2d 331, 333 (D.C.Cir. 1974) (examining the soundness of the district court's exercise of its discretion pursuant to an 'unless otherwise ordered by the court' provision); *Rector v. Mass. Bonding & Ins. Co.,* 191 F.2d 329, 333 (D.C.Cir. 1951) (noting the effect of a rule including the phrase "unless otherwise ordered by the court" vests discretion in the court.), and "FOIA litigation could, potentially, prompt the Court to exercise its discretion to unseal a given order. *Id*., 278 F.Supp.3d at 440-41. No such undertaking by the court is necessary here, however, because Seidel explains that the documents at issue contain information that, if disclosed, would reveal the existence of use of a pen register, a trap and trace device, or the existence of an investigation involving a pen register or trap and trace device, information that is protected from disclosure by Exemption 3. Seidel Declartion ¶ 40. Significantly, courts have "consistently held that 'information regarding the target of pen registers, and reports generated as a result of the pen registers' is information that 'falls squarely under' the Pen Register Act. *Labow I*, 278 F.Supp.3d at 441 (citing *Brown v. FBI,* 873 F.Supp.2d 388, 401 (D.D.C. 2012)). *See also Shapiro v. Dep't of Justice*, 2020 WL 3615511, at *25 (D.D.C. July 2, 2020) ("if disclosure of the information would be tantamount to revealing the order itself, the information is properly withheld under Exemption 3"),

reconsideration denied, 2020 WL 5970640 (D.D.C. Oct. 8, 2020); *Sennett v. Dep't of Justice*, 962 F. Supp. 2d 270, 283 (D.D.C. 2013) (withholding "information that would reveal the identities and phone numbers of the individuals subject to pen registers" (internal quotation marks omitted)); *Brown v. FBI*, 873 F. Supp. 2d 388, 401 (D.D.C. 2012) (withholding "information regarding the target of pen registers, and reports generated as the result of the pen registers").

Accordingly, FBI's Motion should be GRANTED with regard to information withheld from disclosure pursuant to Exemption 3.

(2) Exemptions 6 and 7(C)

FOIA Exemptions 6 and 7(C) are the asserted reasons for numerous redactions. *Vaughn* Index, *passim*. In support of withholding information pursuant to these two exemptions, the FBI balanced the privacy interests of the individuals mentioned in the relevant records against any public interest in disclosure. FBI Memorandum at 13-14. In opposition, Plaintiff argues he is not interested in the names or identifying information of "third parties merely mentioned or of investigative intent," nor is Plaintiff seeking the identities of FBI support personnel, local law enforcement personnel, non-FBI federal government personnel, or commercial institution personnel; rather, Plaintiff seeks only the names of FBI special agents involved in the investigation of Crow. Plaintiff's Response at 5-6. According to Plaintiff, "Crow's political activism and outspokenness have garnered substantial medial attention," with articles about Crow published in print media including the *Austin Chronicle*, *Mother Jones*, and *The New York Times*. *Id*. at 6. Plaintiff maintains he and Crow intend to continue writing and holding public speaking engagements concerning their experiences of being subjected, because of their political

activism, to FBI and other governmental surveillance and monitoring. *Id*. Plaintiff thus asserts the privacy interests of FBI Special Agents do not outweigh the significant public interest regarding how the FBI conducted its probe of Crow. *Id*.

At the outset, DOJ argues in further support of summary judgment, that Seidel avers that the First Kuzma Affidavit (Dkt. 19) Plaintiff previously filed in accordance with the court's direction, limits Plaintiff's challenges to the FBI's claimed exemptions to Exemptions 6(b), 7(D), 7(E), and withholdings pursuant to a Sealed Court Order. First Kuzma Affidavit ¶ 7. Kuzma specifically avers that "Plaintiff will not challenge the deletion of the names of local law enforcement, FBI, and/or non-FBI federal government personnel made under Exemptions (b)(6) and (b)(7)(C). *Id*. ¶ 10. Plaintiff does not contest these averments, not does Plaintiff attempt to argue such averments are entitled to anything other than their plain meaning. Accordingly, Plaintiff has waived his challenge to the FBI's reliance on Exemptions 6 and 7(C). *See In re Pinnock*, 833 Fed.Appx. 498, 502 (2d Cir. 2020) ("'the conduct of an attorney is imputed to his client,' and a 'party is deemed bound by the acts of his lawyer-agent,' meaning that we generally do not relieve a client of the consequences of the 'mistake or omission of his attorney.'" (quoting *SEC v. McNulty*, 137 F.3d 732, 739 (2d Cir. 1998) (internal quotation marks omitted))).

Alternatively, FOIA Exemption 6 exempts from disclosure "personal 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). To determine 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. U.S. Dep't of Def.*, 554 F.3d 274, 291 (2d Cir. 2009) (citing and quoting *Wood v. F.B.I.,* 432 F.3d 78, 86 (2d Cir. 2005)). "The determination of whether Exemption 6 applies requires balancing an individual's right to privacy against the preservation of FOIA's basic purpose of opening agency action to the light of public scrutiny." *Id*. (citing *Dep't of the Air Force v. Rose,* 425 U.S. 352, 372 (1976) ("Exemption 6 does not protect against disclosure every incidental invasion of privacy—only such disclosures as constitute 'clearly unwarranted' invasions of personal privacy.")). "'Only where a privacy interest is implicated does the public interest for which the information will serve become relevant and require a balancing of the competing interests.'" *Id*. (quoting *Fed. Labor Relations Auth. V. U.S. Dep't of Veterans Affairs*, 958 F.2d 503, 509 (2d Cir. 1992)). To prevail over the public interest in disclosure, "[a]n invasion of more than a *de minimis* privacy interest protected by Exemption 6 must be shown to be 'clearly unwarranted.'" *Id*. "Under Exemption 6, therefore, the government's burden in establishing the required invasion of privacy is heavier than the burden in establishing invasion of privacy under Exemption 7(C)." *Id*. (quoting *United States Dep't of State v. Ray,* 502 U.S. 164, 172 (1991).

FOIA Exemption 7(C) similarly exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . . 5 U.S.C. § 552(b)(7)(C). Exemption 7(C) may be invoked where no public interest would be served by disclosure

of information that implicates privacy interests. *U.S. Dep't of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 775 (1989) ("*RCFP*") (denying disclosure of contents of FBI rap sheet to third party because the disclosure reasonably could be expected to constitute an invasion of personal privacy within the meaning of FOIA's law enforcement exemption). In particular, in *RCFP*, the court determined that although there may be "some public interest in providing interested citizens with answers to their questions" about the subject of the FOIA request, such as deciding whether to offer the subject employment, to rent him a house, or to extend him credit, "that interest falls outside the ambit of the public interest that the FOIA was enacted to serve." *RCFP*, 489 U.S. at 775. "Thus whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny,' rather than on the particular purpose for which the document is being requested." *Id*. (quoting *Rose*, 425 U.S. at 372).

The Second Circuit Court of Appeals recognizes that government investigative personnel may be subject to harassment or embarrassment if their identities are disclosed. *Wood*, 432 F.3d at 78 (citing *Halpern v. FBI,* 181 F.3d 279, 297 (2d Cir.1999) (holding that FBI agents and other government employees have an interest against the disclosure of their identities to the extent that disclosure might subject them to embarrassment or harassment in their official duties or personal lives); and *Massey v. FBI,* 3 F.3d 620, 624 (2d Cir.1993) (same)). Accordingly, "[t]his interest against possible harassment and embarrassment of investigative personnel raises a measurable privacy concern that must be weighed against the public's interest in disclosure." *Id*. When

determining the public's interest in disclosure of a government employee's identity, several factors must be considered "including the employee's rank and whether the information sought sheds light on government activity." *Id*. (citing *Perlman v. U.S. Dep't of Justice*, 312 F.3d 100, 107 (2d Cir. 2002) (applying a five-factor test where the government employee is the subject of an investigation), *vacated*, 541 U.S. 970 (2004), *reaffirmed*, 380 F.3d 110 (2d Cir. 2004)). Although in the instant case, the record does not reveal the rank of the employees whose identity Plaintiff seeks, such information is not likely to add to the public's understanding of how the FBI conducts its investigations especially given that the results of the investigation were disclosed to Plaintiff, albeit in redacted form. *See Vaughn* Index, Dkt. 15-1 at 55. *See Wood*, 432 F.3d at 88-89 (citing *U.S. Dep't of Veteran's Affairs,* 958 F.2d at 512 (disclosure of employee names is not related to informing the public about an agency's actions); *Hopkins v. U.S. Dep't of Housing and Urban Development,* 929 F.2d 81, 88 (2d Cir. 1991) (noting that disclosing the names of individual employees would not illuminate how the Housing and Urban Development Agency enforced the Davis–Bacon Act)).

Initially, Plaintiff does not cite any case in support of his assertion that internal government investigations warrant additional scrutiny, and the Supreme Court has held that a presumption of legitimacy attends government actions that may not be overcome on the basis of unsupported allegations. *Wood*, 432 F.3d at 89 (citing *Ray,* 502 U.S. at 179; and *Nat'l Archives & Records Admin. v. Favish,* 541 U.S. 157, 174 (2004) (citing *Ray* and holding, pursuant to Exemption 7(C), "the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred")). Here, Plaintiff references no evidence of

government wrongdoing that the investigators were negligent or biased in the performance of their duties. Moreover, the names of the FBI Special Agents who investigated Crow would not reveal anything about any asserted supposed bias, but such bias in the FBI's investigation would likely be reflected in the actions taken or not taken by the FBI or DOJ. Because the FBI has already revealed the substance of the investigation, knowledge of the names of the specific FBI Special Agents would add little, if anything, to the public's analysis of whether the FBI dealt with Plaintiff in an appropriate manner. Accordingly, the public's interest in the names of the FBI Special Agents involved in investigating Plaintiff is negligible and the investigators' interest in preventing the public disclosure of their identities substantially outweigh disclosure of their identities. Consequently, such disclosure would be a "clearly unwarranted invasion of privacy," supporting the withholding of the information pursuant to Exemption 6 to FOIA.

Summary judgment with regard to information withheld pursuant to FOIA Exemptions 6 and 7(C) should be GRANTED.

(3) Exemption 7(D)

Information was redacted from several serials RIP or WIF pursuant to FOIA Exemption 7(D) which exempts from disclosure

> [R]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source . . . .

5 U.S.C. § 552(b)(7)(D).

According to DOJ, the information redacted pursuant to Exemption 7(D) in response to Plaintiff's request concerns a criminal investigation conducted by the FBI and includes information pertaining to confidential sources. FBI Memorandum at 14. In opposition, Plaintiff argues that despite the FBI's assertion of Exemption 7(D) to withhold the identity of confidential sources, including confidential source file numbers and confidential source symbol numbers,[8] it is undisputed that one Brandon Darby ("Darby"), was an FBI informant who wrote an open letter in December 2008 which was posted on the internet, thus revealing Darby had served as an FBI informant. Plaintiff's Response at 6. Plaintiff continues that the FBI acknowledge Plaintiff was a government informant in a May 21, 2009 press conference, *id*. at 7 and Plaintiff's Exh. A, and Plaintiff's status as an FBI informant has also been revealed in connection with a defamation claim Darby brought against the *New York Times*, *id*. (citing *Darby v. N.Y. Times Co*., 2014 WL 818648 (Texas Ct. App., Amarillo, Feb. 26, 2014)), as well as at the trial of one Michael Guy McKay who was charged in connection with plotting to make firebombs at the 2008 Republican National Convention. *Id*. Plaintiff further maintains Darby and his work as an FBI informant are the focal point of two documentaries. *Id*. According to Plaintiff, "Crow knows Darby and has no doubts that he is one of the confidential sources referenced in the Seidel Declaration." *Id*. As such, Plaintiff asserts the FBI's reliance on Exemption 7(D) to withhold Darby's identity and

[8] Confidential "source file numbers" and "source symbol numbers" refer to administrative tools that facilitate the retrieval of information, responsive to a FOIA request, supplied by a confidential source while further obscuring such source's identity. Seidel Declaration ¶¶ 73-76. Each confidential source file number is unique to a particular confidential source and is used only in documentation relating to that confidential source. *Id*. ¶ 73. When a confidential source reports information to the FBI on a regular basis pursuant to an express assurance of confidentiality, such source is considered a confidential human source ("CHS") to whom the FBI assigns a permanent source symbol number which the FBI then uses when referring to the CHS to obscure the CHS's identity. *Id*. ¶ 75.

the information Darby provided to authorities is without merit. *Id*. at 8. In reply, Seidel avers that upon reviewing Plaintiff's Response, the FBI had RIDS conduct a supplemental review of the records in this action to determine if the FBI withheld the name of, or any information pertaining to, Darby, pursuant to either Exemption 7(D) or 7(E). Seidel Reply Declaration ¶ 9. Seidel further avers that RIDS's supplemental review determined no such redactions were made, and the FBI did not withhold any information concerning Darby such that this challenge is moot. *Id*.

As discussed, Discussion, *supra*, at 14, affidavits submitted by an agency regarding the agency's search for documents responsive to a FOIA request "are accorded a presumption of good faith" so long as such affidavits "are adequate on their face." *Nat. Res. Def. Council, Inc.*, 36 F. Supp.3d at 398. Further, once the agency has met its burden, to show that a claimed exemption should not apply or the summary judgment based on the affidavit is otherwise inappropriate, "the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations, or provide some tangible evidence" contradicting the exemption's application. *Id.* (citations omitted). In the instant case, Plaintiff provides nothing contradicting Seidel's averment that RIDS's supplemental review of the records failed to reveal any redactions were made or any records were withheld by the FBI pertaining to Darby, to whom Plaintiff limited his challenge to the information the FBI withheld pursuant to Exemption 7(D). Accordingly, summary judgment should be GRANTED in favor of DOJ based on its withholding of information pursuant to Exemption 7(D).

Alternatively, as Seidel explains, numerous confidential sources report to the FBI on a regular basis, providing information under the FBI's express assurances of confidentiality and thus as "informants" within the common meaning of the term, whereas others provide information pursuant to "implied assurances of confidentiality." Seidel Declaration ¶ 65. Under either set of circumstances, the sources providing the information are considered "confidential" because they provide information only with the understanding that their identities and the information they provide will not be divulged outside the FBI. *Id*.

In this case, four different categories of information were withheld pursuant to Exemption 7(D) including (1) names, identifying information of, and information provided by individuals under expressed assurances of confidentiality pursuant to Exemption 7(D)-1, Seidel Declaration ¶¶ 67-70; (2) foreign government agency information under implied confidentiality pursuant to Exemption 7(D)-2, *id*. ¶¶ 71-72; (3) confidential source file numbers pursuant to Exemption 7(D)-3, *id*. ¶¶ 73-74; and (4) confidential source symbol numbers pursuant to Exemption 7(D)-4. *Id*. ¶¶ 75-76. With regard to each of these four subcategories, Seidel emphasizes the need not to divulge information that could result in harassment or retaliation against the confidential sources by individual investigative subjects for whom they provided information that is critical to the FBI's investigations. Seidel Declaration ¶¶ 67-76. Significantly, Plaintiff again fails to provide anything contradicting Seidel's averments regarding the critical need to withhold such information from disclosure to ensure the FBI continues to have access to information provided by the various confidential sources under express or implied assurances of confidentiality. *Nat. Res. Def. Council, Inc.*, 36 F. Supp.3d at 398.

Accordingly, summary judgment should be GRANTED in favor of DOJ based on its withholding of information pursuant to Exemption 7(D).

(4) Exemption 7(E)

Information in several serials was redacted and withheld from disclosure pursuant to FOIA Exemption 7(E) which exempts

> [R]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (E) 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).

"Exemption (b)(7)(E) covers investigatory records that disclose investigative techniques and procedures not generally known to the public." *Doherty v. U.S. Dep't of Justice*, 77 F.2d 49, 52 & n. 4 (2d Cir. 1985). "The Second Circuit has explained that, as used in Exemption 7(E), a 'technique' is 'a technical method of accomplishing a desired aim' and a 'procedure' is 'a particular way of doing something or going about the accomplishment of something.'" *American Civil Liberties Union Foundation v. Dep't of Homeland Security*, 243 F.Supp.3d 393, 402 (S.D.N.Y. 2017) (quoting *Allard K. Lowenstein Intern. Human Rights Project v. Dep't of Homeland Security*, 626 F.3d 678, 681 (2d Cir. 2010)). "Accordingly, to invoke Exemption 7(E) here, the agency must justify its assertion that its practice . . . at issue in this motion actually shows a 'technique' or 'procedure' and that it is not already known to the public." *Id*. Nevertheless, "[w]hile the government retains the burden of persuasion that the information is not subject to disclosure under FOIA, 'a party who asserts that the material is publicly available carries the burden of production on that issue.'" *Inner City*

Press/Community on the Move v. Board of Governors of the Federal Reserve System, 463 F.3d 239, 245 (2d Cir. 2006) (quoting *Davis v. U.S. Dep't of Justice*, 968 F.2d 1276, 1279 (D.C.Cir. 1992)). Somewhere within either the *Vaughn* Index or the government's affidavit, Defendant must provide, "a sufficiently specific link" between disclosing the particular withheld information and revealing how, and to what extent, the Defendant relies on such information in its investigations. *Island Film, S.A. v. Dep't of the Treasury*, 869 F.Supp.2d 123, 138 (D.D.C. 212). "'[I]t is well-established that 'an agency does not have to release all details concerning law enforcement techniques just because some aspects of them are known to the public.'" *Kuzma v. U.S. Dep't of Justice*, 2016 WL 9446868, at *12 (W.D.N.Y. Apr. 18, 2016) (quoting *Bishop v. U.S. Dep't of Homeland Security*, 45 F.Supp.3d 380, 391 (S.D.N.Y. 2014)). Moreover, "Exemption 7(E) sets a relatively low bar for the agency to justify withholding" and "only requires that the agency demonstrate logically how the release of the requested information might create a risk of circumvention of the law." *Blackwell v. F.B.I.*, 646 F.3d 37, 42 (D.C. Cir. 2011) (internal quotation marks, brackets, and citation omitted).

In the instant case, DOJ argues in support of summary judgment with regard to the information the FBI withheld pursuant to FOIA Exemption 7(E) that that release of such information "would disclose techniques and/or procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosures could reasonably be expected to risk circumvention of the law." FBI Memorandum at 16 (citing Seidel Declaration ¶ 78). DOJ further maintains the specific information the FBI protected under Exemption 7(E) includes "the identity and/or location of the FBI or Joint Units, Squads, and Division,

sensitive file numbers and sub-file names, investigative focus of a specific investigation, information regarding target, date, and scope of surveillance, collection and analysis of information, targets of pen registers/trap and trace devices, tactical information contained in operational plans, database information and search results, monetary payments for investigative techniques, internal FBI secure intranet/web addresses and phone numbers, and types and timing of investigation." *Id*. (citing Seidel Declaration ¶¶ 80-102). In opposition to summary judgment, Plaintiff clarifies that he contests the FBI's invocation of Exemption 7 only to withhold its use of database search results located through non-public databases and monetary payments, asserting with regard to the database searches that the FBI was required to provide an explanation linking disclosure to the risk of circumventing the law, and with regard to monetary payments, that such payments are not the type of investigative techniques warranting the protection of Exemption 7(E). Plaintiff's Response at 8-10. In further support of summary judgment, Seidel details how disclosing non-public database search results and monetary payments would jeopardize or disrupt FBI investigations. Seidel Reply Declaration ¶¶ 10-17.

In particular, with regard to the FBI's non-public database search results, Seidel avers that the FBI withheld the identities of sensitive investigative databases used by the FBI for official law enforcement purposes, and the search results of such databases, and that releasing the identities of the databases or the search results would give criminals insight into the tools and resources available to the FBI to conduct criminal and national security investigations, such as the scope of information stored in the databases, how the FBI uses the databases to support its investigations, what

information is most valuable to the FBI for particular investigations, and the databases' vulnerabilities. Seidel Reply Declaration ¶¶ 10-11. Disclosing search results would also provide criminals with an understanding of the scope of FBI-collected intelligence on particular subjects and expose possible intelligence gaps, which would allow criminals to exploit strengths and weaknesses and avoid detection or disruption by the FBI. *Id*. ¶ 12. Revealing the types of information stored in the databases would reveal what information is most useful to FBI investigators and permit criminals to deploy countermeasures depriving the FBI of useful intelligence or evidence, jeopardizing investigations. *Id*. Further, knowing the names of databases renderings the original sources of the data vulnerable to compromise by providing criminals with insight into the FBI's investigative strategies and the opportunity to corrupt or destroy information stored in the databases. *Id*. ¶ 13. Because the records show the FBI used a variety of non-public databases to support its investigations, disclosing the identities of the databases and results stands to aid criminals, *id*. ¶ 14, such that release of the information relative to the FBI investigative databases would impede the FBI's effectiveness and aid in circumventing valuable investigative techniques. The court finds that DOJ, through the Seidel Reply Declaration, provides a sufficient explanation linking disclosure of the non-public databases and results of searches of such databases to the risk of circumventing the law such that the FBI properly withheld such information pursuant to Exemption 7(E).

With respect to the monetary payments requested by FBI personnel and paid by the FBI to implements particular investigative techniques, Seidel avers the FBI has limited resources it must strategically allocate to effectively pursue the FBI's mission

and that revealing such payments would also reveal the FBI's level of focus on certain types of law enforcement and intelligence gathering efforts, thereby revealing the FBI's strategic allocation of its limited resources and identify the FBI's priorities within the spectrum of illegal activities the FBI investigates. Seidel Reply Affidavit ¶¶ 16-17. Seidel continues that releasing such information would enable criminals to structure their activity so as to manipulate the FBI's ability to focus on its investigative priorities, as well as reveal the FBI's budgetary limitations which may affect its investigations, thereby enabling criminals to circumvent the law. *Id*. ¶ 17. Here, DOJ has met the "low bar" of showing that disclosure of monetary payment information would create *the risk* of circumvention of law such that the monetary payment information was properly withheld under Exemption 7(E). *See Mermerlstein*, 2021 WL 3455314, at *15 (citing *Poitras v. Dep't of Homeland Sec.*, 303 F. Supp. 3d 136, 159 (D.D.C. 2018) (information reflecting monetary payments for investigative techniques were properly withheld under Exemption 7(E)). Accordingly, the court finds the FBI properly withheld information pursuant to Exemption 7(E).

Summary judgment regarding information withheld pursuant to Exemption 7(E) should be GRANTED as to Defendant.

CONCLUSION

Based on the foregoing, DHS's Motion (Dkt. 23) should be GRANTED; ATF's Motion (Dkt. 27) should be GRANTED; FBI's Motion (Dkt. 31) should be GRANTED. The Clerk of Court should be directed to close the file.

Respectfully submitted,

/s/ *Leslie G. Foschio*

LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

DATED: November 22nd, 2021
Buffalo, New York

ORDERED that this Report and Recommendation be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of service of this Report and Recommendation in accordance with the above statute, Rules 72(b), 6(a) and 6(d) of the Federal Rules of Civil Procedure and Local Rule 72.3.

Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order.

Thomas v. Arn, 474 U.S. 140 (1985); *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989); *Wesolek v. Canadair Limited*, 838 F.2d 55 (2d Cir. 1988).

Let the Clerk send a copy of this Report and Recommendation to the attorneys for the Plaintiff and the Defendants.

SO ORDERED.

/s/ *Leslie G. Foschio*

_____

LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

DATED: November 22nd, 2021
Buffalo, New York