IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HONOLULU CIVIL BEAT INC., Plaintiff, vs. FEDERAL BUREAU OF INVESTIGATION, Defendant.	CIVIL NO. 23-00216 SASP-WRP DEFENDANT FEDERAL BUREAU OF INVESTIGATION'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

DEFENDANT FEDERAL BUREAU OF INVESTIGATION'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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In this Freedom of Information Act ("FOIA") case, Plaintiff Honolulu Civil Beat, Inc. ("Civil Beat") seeks the investigative files of former State Representative Ty J.K. Cullen ("Cullen") and former State Senator Jamie Kalani English ("English") that resulted in their respective arrests, charges, guilty pleas, and sentencing for honest services wire fraud.

Cullen admitted that he accepted bribery payments on eight separate occasions in exchange for providing legislative assistance to the briber's company and was then sentenced to two years in federal prison. *See https://www.justice.gov/usao-hi/pr/former-hawaii-state-representative-sentenced-24-months-federal-prison*. English received a three-and-a-half-year sentence in federal prison in addition to a $100,000 fine after he pled guilty to accepting bribes in exchange for assisting a Hawaii businessperson. https://justice.gov/usao-hi/pr/former-hawaii-senate-majority-leader-sentenced-40-months-federal-prison.

Not satisfied with the publicly available court records and press releases, Civil Beat requested their entire investigative files from the Federal Bureau of Investigation ("FBI"). The FBI initially (and properly) withheld production of the requested records pursuant to 5 U.S.C. § 552 (b)(6), 7(A), and (C), which exempt documents that would interfere with an on-going investigation and documents that would implicate a third person's privacy rights. It now further appropriately withholds documents under Exemptions (b)(3), which excludes from production

documents protected by another statue, Exemption (b)(5), which protects privileged information, (b)(7)(D), which protects confidential sources, and (b)(7)(E) which protects investigative techniques.

I. BACKGROUND

Civil Beat submitted a FOIA request to the FBI on February 25, 2022, seeking "all investigative reports and materials maintained by the FBI relating to criminal charges brought against Ty J.K. Cullen in criminal case number 1:22-cr-0013 SOM, district of Hawaii," specifically: "documents and reports that may have been gathered or produced between September 1, 2014 and February 15, 2022." CSF #1. The FBI denied the request on March 8 under Exemptions 6 and 7(C) because the request implicated third person's privacy rights without demonstrating how the public interest outweighed such rights. CSF #2. Civil Beat appealed the denial on March 25. CSF # 3. That appeal was denied on July 20. CSF # 4.

Beginning on December 20, 2022, Civil Beat went through the same exercise for English, requesting "all investigative reports and materials maintained by the FBI relating to criminal charges brought against Jamie Kalani English in criminal case number 1:22-cr-0012 SOM, district of Hawaii," specifically: "documents and reports that may have been gathered or produced between September 1, 2014 and February 15, 2022." CSF # 5. The FBI denied the request

on December 27, again citing to Exemptions 6 and 7(C). CSF # 6. Civil Beat appealed. CSF # 7. The FBI denied the appeal on January 10, 2023. CSF # 8.

Civil Beat filed its lawsuit on May 15, 2023. ECF No. 1. In its Rule 26(f) Report and Scheduling Conference Statements, the FBI identified Exemption 7(A) as another basis for withholding records. ECF Nos. 14 and 16. It now adds Exemptions 3, 5, and 7(D) and (E). On November 1, 2024, the FBI informed Civil Beat that it identified 267 pages of segregable, public source information, would produce the non-duplicative documents, and would withhold documents under the applicable exemptions. CSF # 9.

II. FOIA FRAMEWORK

FOIA requires federal agencies to make their records available to the public upon request. 5 U.S.C. §552(a)(3). But agencies may redact or withhold information that falls within one of nine enumerated exemptions. 5 U.S.C. §552(b). Thus, FOIA reflects a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *John Doe Agency v. John Doe Corp.,* 493 U.S. 146, 152 (1989). "The purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed. *Shannahan v. I.R.S.*, 672 F.3d 1142, 1148 (9th Cir. 2012) (quoting *John Doe Agency*, 493 U.S. at 152). Congress has recognized, however, that public

disclosure is not always in the public's interest. *CIA v. Sims,* 471 U.S. 159, 166-67 (1985). Accordingly, "FOIA represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." *Ctr. for Nat. Sec. Stud. v. U.S. Dep't of Just.*, 331 F.3d 918, 925 (D.C. Cir. 2003). The agency may only withhold information it if "reasonably foresees that disclosure would harm an interest protected by the exemption" or if disclosure is prohibited by law. 5 U.S.C. §552(a)(8)(A)(i); *Reporters Committee for Freedom of the Press v. Fed Bureau of Investigation,* 3 F.4th 350, 357-58 (D.C. Cir. 2021).

III. LEGAL STANDARD

A principal purpose of summary judgment is to identify and dispose of factually unsupported claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). Summary judgment is appropriate when the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). In considering a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Betz v. Trainer Wortham & Co.*, 519 F.3d 863, 865, 867 (9th Cir. 2008). Summary judgment is proper if the non-

moving party fails to produce any evidence, or sufficient evidence, on any element of a claim on which he will bear the burden of proof at trial. *Celotex Corp.*, 477 U.S. at 322, 325; *Maffei v. N. Ins. Co. of New York*, 12 F.3d 892, 899 (9th Cir. 1993). The bare existence of a "scintilla" of evidence in support of the non-moving party's position is not sufficient. *Anderson*, 477 U.S. at 252.

FOIA cases are appropriately resolved on motions for summary judgment. *Sandy v. Exec. Off. for United.States.Att'ys,* 170 F.Supp. 3d 186, 188 (D.D.C. 2016). And indeed the "vast majority of FOIA cases can be resolved on summary judgment." *Brayton v. Off. of the U.S. Trade Representative*, 641 F.3d 521, 527 (D.C. Cir. 2011). "A court may rely solely on government affidavits so long as the affiants are knowledgeable about the information sought and the affidavits are detailed enough to allow the court to make an independent assessment of the government's claim." *Lane v. Dep't of Interior*, 523 F.3d 1128, 1135 (9th Cir. 2008) (internal citations and quotations omitted). Moreover, summary judgment may be granted based on affidavits if they contain reasonable specificity of detail rather than conclusory statements, and if they are not contracted by evidence in the record or evidence of the agency's bad faith. *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1200 (D.C. Cir. 1991). The affidavits must include an index that identifies the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed

exemption and must be detailed enough for the [] court to make a *de novo* assessment of the government's claim of exemption." *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 989 (9th Cir. 2009)(internal citations and quotations omitted)

While the FBI has the burden of showing that the requested documents are exempt from disclosure, it does not need to describe its objections in such detail as to compromise the secrecy of its investigation. *Lewis v. I.R.S.*, 823 F.2d 375, 378 (9th Cir. 1987). The agency's bar is not high: "ultimately, an agency's justification for involving a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Wolf v. C.I.A.*, 473 F.3d 370, 374–75 (D.C. Cir. 2007). Courts give agency declarations "a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *SafeCard Services, Inc.*, 926 F.2d at 1200 (internal citations and quotations omitted).

IV. THE FBI CONDUCTED AN ADEQUATE SEARCH FOR RESPONSIVE RECORDS

FOIA requires the FBI to "demonstrate that it has conducted a search reasonably calculated to uncover all relevant documents." *Hamdan v. U.S. Dep't of Just.*, 797 F.3d 759, 770 (9th Cir. 2015) (internal citations and quotations omitted). The FBI meets its burden on summary judgment as to the adequacy of its search by supplying "reasonably detailed, nonconclusory affidavits submitted in good faith." *Id.*

The FBI searched its Central Records System (consisting of its applicant, investigative, intelligence, personnel, administrative, and general files compiled and maintained by the FBI) and its Sentinel System (its case management system) using the following terms: Ty Cullen and Jamie English, from September 1, 2014, through February 22, 2022, which is what Civil Beat requested. CSF # 10 The FBI's index establishes the results of the search and the reasons for withholding documents that the search generated. *Id.*

V. THE FBI PROPERLY WITHHELD DOCUMENTS UNDER 5 U.S.C. § 552(b)(6) WHICH PROTECTS THE PERSONAL INFORMTION OF THIRD PARTIES

FOIA Exemption 6 exempts disclosure of information contained in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." 5 U.S.C. §552(b)(6). The United States Supreme Court has interpreted this exemption broadly, making clear that the statutory language encompasses any "information which applies to a particular individual." *U.S. Dep't of State v. Washington Post Co.,* 456 U.S. 595, 602 (1982); *Forest Serv. Emps. for Env't Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1024 (9th Cir. 2008). For example, names of agency personnel may be withheld. *Id.* Exemption 6 protects an "unwarranted invasion of personal privacy, not any invasion. So, to determine whether a record is properly withheld, we must balance the privacy interest protected by the exemptions against the public interest

in government openness that would be served by disclosure." *Lahr*, 569 F.3d at 973. Thus, the Ninth Circuit employs a two-step balancing test: first, it evaluates whether the personal privacy interest at stake is nontrivial or more than de minimis and second, if the agency succeeds in that showing, the requester must show that the public interest sought to be advanced is a significant one and that information sought will advance it. *Cameranesi v. United States Dep't of Def.*, 856 F.3d 626, 636–37 (9th Cir. 2017) (internal citations and quotations omitted).

A. The Individuals Maintain a Nontrivial Privacy Interest

Disclosure that would subject individuals to embarrassment, harassment, or mistreatment constitutes nontrivial invasions of privacy. *Id.* at 638; *Civ. Beat L. Ctr. for the Pub. Int., Inc. v. Centers for Disease Control & Prevention*, 929 F.3d 1079, 1091–92 (9th Cir. 2019). The Court relies on an agency's reasonable assessment that disclosure "*would* subject [the affected individuals] to *possible* embarrassment and retaliatory action." *Cameranesi*, 856 F.3d at 639 (quoting *U.S. Dep't of State v. Ray,* 502 U.S. 164, 176 n.12) (1991) (emphasis in original). The potential for unwarranted contact by third parties, including media entities like Civil Beat, remains a valid concern for protection. *Lahr*, 569 F.3d at 975–76; *Civil Beat Law Center for the Public Interest, Inc.*, 929 F.3d at 1092. These principles apply to both witnesses and FBI agents who may be named in the investigative files. *Lahr*, 569 F.3d at 977. Here – the privacy interests of Cullen, English, the

FBI agents and staff, non-FBI agents and staff, persons of interest, witnesses, people who were merely mentioned, sources, and commercial institution personnel all have valid privacy interests. CSF # 12. While an agent or investigator's privacy interest may be reduced when there are doubts about his or her integrity, there is no such evidence here. *Id.*

B. The Individual's Rights to Privacy Outweigh Any Public Interest in Disclosure

This step requires a two-factor analysis: first, whether the public interest sought to be advances is a significant one, and second, whether the requested information is likely to advance that interest. *Cameranesi*, 856 F.3d at 639. Thus, Civil Beat must demonstrate that the interest served by disclosure "is a significant one, an interest more specific than having the information for its own sake and that the disclosure is likely to advance that interest." *Lahr*, 569 F.3d at 974 (internal citations and quotations omitted).

"Information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct is not the type of information to which FOIA permits access." *Forest Serv. Emps. for Env't Ethics,* 524 F.3d at 1025 (internal citations and quotations omitted). To overcome the individual's clearly warranted interest in privacy and compel the production of the documents, the "information must appreciably further the public's right to monitor the agency's action." *Id.* at 1027. The FBI has

determined that the public interest does not outweigh the individuals' right to be free from embarrassment, harassment, or mistreatment. CSF # 12.

VI. THE FBI PROPERLY WITHHELD DOCUMENTS UNDER 5 U.S.C. § 552(b)(7)(A) WHICH PROTECTS INVESTIGATIVE RECORDS OF AN ONGOING LAW ENFORCMENT PROCEEDING

The FBI properly withheld the investigative files of Cullen and English under FOIA Exemption 7(A) which prohibits disclosure that "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552 (b)(7)(A); *Shannahan*, 672 F.3d at 1146. This exemption reflects "Congress's recognition that law enforcement agencies have legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it comes time to present their case." *Citizens for Resp. & Ethics in Wash ("CREW"). v. U.S. Dep't of Just.,* 746 F.3d 1082, 1096 (D.C. Cir. 2014) (cleaned up). Releasing information prematurely could allow for coercion or witness intimidation. *Shannahan*, 672 F.3d at 1150.

To establish the applicability of Exemption 7(A), the FBI must make a two-prong showing: (1) the records were compiled for law enforcement purposes; and (2) disclosure could reasonably be expected to interfere with enforcement proceedings that are pending or reasonably anticipated. *Lewis*, 823 F.2d at 379. *CREW,* 746 F.3d at 1096. Courts generally assume that criminal law enforcement agency records were for law enforcement purposes because government agencies

typically go about their intended business, thus courts apply a "more deferential attitude toward their claims of law enforcement purpose." *Pratt v. Webster*, 673 F.2d 408, 418–419 (D.C. Cir. 1982) (internal citations and quotations omitted).

The FBI easily satisfies both prongs.

A. The Investigative Files Were Compiled for Law Enforcement Purposes

First, the requested records were compiled by the FBI – an undoubted law enforcement agency. CSF #11 "[L]aw enforcement agencies such as the FBI should be accorded special deference in an Exemption 7 determination." *Am. C.L. Union of N. California v. Fed. Bureau of Investigation*, 881 F.3d 776, 779 (9th Cir. 2018)(quoting *Binion v. U.S. Dep't of Just.*, 695 F.2d 1189, 1193 (9th Cir. 1983)).

The FBI only needs to show a rational nexus between the investigation and one of its law enforcement purposes to satisfy Exemption 7. *Blackwell v. F.B.I.*, 646 F.3d 37, 40 (D.C. Cir. 2011). The requested records were generated in the course of its public corruption criminal investigation into Cullen and English, making them indisputably law enforcement records. CSF #11 Because the records were created and populated to document the FBI's investigation into the federal crime of public corruption, the first prong of the Exemption 7(A) test is satisfied.

B. Disclosure of the Investigative Files Could Reasonably be Expected to Interfere with Pending Law Enforcement Proceedings

The FBI is "not required to make a specific factual showing with respect to each withheld document that disclosure would *actually interfere* with a particular enforcement proceeding." *Lewis*, 823 F.2d at 380 (emphasis in original). Instead, it need only generally show that "disclosure of its investigatory records would interfere with its enforcement proceedings. *Id.* 7(A) protects the disclosure of potential witnesses in an ongoing or contemplated enforcement proceedings. *Polynesian Cultural Ctr., Inc. v. N.L.R.B.*, 600 F.2d 1327, 1329 (9th Cir. 1979).

The investigation into public corruption is on-going. CSF #13. The FBI cannot explain its invocation of Exemption 7(A) on a document-by-document basis, because doing so would itself reveal information that would interfere with the investigation and enforcement proceedings; but instead, it is sufficient to group documents into distinctive categories, and explain how disclosure would interfere with the ongoing investigation. CSF # 14; *Bevis v. Dep't of State,* 801 F.2d 1386, 1389 (D.C. Cir. 1986). The FBI accordingly assigned the following three categories: evidentiary/investigative materials, administrative materials, and public source materials – if the documents fit into the first two categories, they were withheld. CSF # 14

Finally, the FBI may establish interference with ongoing investigation by showing that the release of records would reveal the scope, direction, and nature of the investigation. *Kay v. FCC,* 976 F.Supp. 23 38 (D.D.C. 1997), *aff'd* 172 F.3d 919 (D.C. Cir. 1998). In construing the FBI's declaration, the court gives "deference to [its] predictive judgment of the harm that will result from disclosure of the information." *CREW,* 746 F.3d at 1098. Examples of protected information include the identities of potential witnesses, content of the government's evidence, documents relating to cooperation with other agencies, trial strategy, and the focus and scope of the investigation. *Id.; Farahi v. Fed. Bureau of Investigation*, 643 F. Supp. 3d 158, 171–72 (D.D.C. 2022); *Owens v. U.S. Dep't of Just.*, No. CIV.A. 04-1701 (JDB), 2007 WL 778980, at *8 (D.D.C. Mar. 9, 2007); *Manning v. U.S. Dep't of Just.*, 234 F. Supp. 3d 26, 36 (D.D.C. 2017). Here, disclosure of English and Cullen's investigative files would provide targets, witnesses, and third parties with non-public information about the investigations' focus, scope, direction, and strategy, which could reasonably lead to the concealing or fabrication of evidence, interference with witnesses and sources and other methods thwarting the investigation. CSF #15.

VII. THE FBI PROPERLY WITHHELD DOCUMENTS UNDER 5 U.S.C. § 552(b)(7)(C) WHICH PROTECTS INFORMATION COMPILED FOR LAW ENFORCEMENT PURPOSES DISCLOSURE OF WHICH COULD WARRANT AN UNWARRANTED INVATION OF PERSONAL PRIVACY

FOIA Exemption 7(C) marries and expands the protections of Exemptions 6 and 7(A) – it protects law enforcement information, the disclosure of which, "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(7)(C). *Lane*, 523 F.3d at 1137. In assessing an agency's invocation of Exemption 7(C), the Court "must balance the privacy interests that would be compromised by disclosure against the public interest in release of the requested information." *Davis v. U.S. Dep't of Just.*, 968 F.2d 1276, 1281 (D.C. Cir. 1992). "Where law-enforcement records are sought, [] the threatened invasion of privacy need not be as likely as where personnel, medical, or similar files are at issue." *Hunt v. F.B.I.*, 972 F.2d 286, 288 (9th Cir. 1992) (holding that the lewd and personal nature of the allegations warranted protection of the individual's identity). And that the public may be aware of allegations does not lessen a third party's privacy interest, "because notions of privacy in the FOIA exemption context encompass information already revealed to the public." *Lane*, 523 F.3d at 1137. "The FOIA is aimed at subjecting governmental activity to public scrutiny while protecting individual privacy. In evaluating the public interest asserted, [the court considers] that the FOIA's central purpose is to pierce

the veil of administrative secrecy and to open agency action to the light of public scrutiny…The single file sought by [plaintiff] will not shed any light on whether all such FBI investigations are comprehensive or whether [] misconduct by agents is common." *Hunt*, 972 F.2d at 289 (internal citations and quotations omitted).

Civil Beat has yet to articulate the public interest in the disclosure of the requested documents. It may be in exposing negligence into the investigation, or to demonstrate the sweeping nature of corruption. But because any purported interest in disclosure stems from Cullen and English's public figure stature, Civil Beat must provide "more than a bare suspicion of agency misconduct; rather [it] must produce evidence that would warrant a belief by a reasonable person that alleged impropriety occurred." *Lane*, 523 F.3d at 1138.

As discussed above, the FBI is a law enforcement agency, the records were compiled within its scope of investigation, and the individuals referenced in them have a protected privacy interest in preventing disclosure. CSF #s 11, 12. Notably, the FOIA requests sought the entire investigative files of Cullen and English, without carving out records contained therein that mention or pertain to other individuals. CSF #s 1, 5. All these third parties about whom records are requested have a substantial privacy interest in those records not being disclosed because members of the public are likely to draw adverse inferences from the mere fact that an individual is mentioned in the files. *Fitzgibbon v. C.I.A.*, 911 F.2d 755,

767 (D.C. Cir. 1990) ("the mention of an individual's name in a law enforcement file will engender comment and speculation and carries stigmatizing connotation.") Release of names and other personal information about third parties and their activities could cause unsolicited and unnecessary attention and harassment towards those people. In the balancing test, "something, even a modest privacy interest, outweighs nothing every time." *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989).

VIII. THE FBI PROPERLY WITHHELD DOCUMENTS UNDER 5 U.S.C. § 552(b)(7)(D) WHICH PROTECTS CONFIDENTIAL SOURCES

Exemption 7(D) prevents disclosure of records "compiled by criminal law enforcement authorities in the course of a criminal investigation" if producing the records "could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D); *Roth v. U.S. Dep't of Just.*, 642 F.3d 1161, 1184–85 (D.C. Cir. 2011) ("if the FBI's production of criminal investigative records could reasonably be expected to disclose the identity of a confidential source or information furnished by such a source that ends the matter, and the FBI is entitled to withhold the records under Exemption 7(D)")(internal citations and quotations omitted). The Ninth Circuit has held that a source is confidential for purposes of Exemption 7(D) if the source provided information in circumstances from which an assurance of confidentiality could reasonably be inferred. *Pac. Energy Inst., Inc. v. U.S. I.R.S.*, No. 94-36172, 1996 WL 14244 (9th Cir. Jan. 16,

1996) (internal citations and quotations omitted. Exemption 7(D) does not require the balancing of the of public and private interests. *Id.*

The investigative files of both Cullen and English contain confidential source information, which was appropriately withheld. CSF #16.

IX. THE FBI PROPERLY WITHHELD DOCUMENTS UNDER 7(E) WHICH PROTECTS INVESTIGATIVE TECHNIQUES

FOIA Exemption (b)(7)(E) protects the production of the following:

> law enforcement records [which]…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 7(E) only exempts investigative techniques not generally known to the public, but if a document describes a specific *means* ... rather than an application of deploying a particular investigative technique, the record is exempt from disclosure under FOIA; for example, records that provide a detailed, technical analysis of the techniques and procedures used to conduct law enforcement investigations may properly be withheld under Exemption 7(E)." *Am. C.L. Union of N. California v. United States Dep't of Just.*, 880 F.3d 473, 491 (9th Cir. 2018) (internal citations and quotations omitted, emphasis in original).

The FBI appropriately withheld sensitive investigative file numbers, identities and locations of FBI units, squads, and divisions, internal contact

information such as fax and phone numbers and email addresses, collection and analysis of information, focus of the specific investigation, database information and search results, surveillance techniques, investigative code names, undercover operations, source reporting documents, and monetary payments. CSF # 17.

X. EXEMPTION 3 PROTECTS FROM DISCLSOURE INFORMATION OTHERWISE PROTECTED BY ANOTHER STATUTE

Exemption 3 protects records exempt from disclosure pursuant to a separate statute. 5 U.S.C. § 552(b)(3). *Civil Beat Law Center for the Public Interest, Inc.*, 929 F.3d at 1084; *Hamdan*, 797 F.3d at 775. The Court employes a two-step inquiry in deciding Exemption 3 questions: first, whether the statute identified by the agency is a statute of exemption within the meaning of Exemption 3, and second, whether the withheld records satisfy the criteria of the exemption statute. *Id.* at 776. The FBI appropriately withheld documents under four such statutes.

First, "[R]equests for documents related to grand jury investigations implicate FOIA's third exemption, because Rule 6(e) of the Federal Rules of Criminal Procedure prohibits government attorneys and others from 'disclosing a matter occurring before the grand jury.'" *Proctor v. Nat'l Archives & Recs. Admin.*, 331 F.R.D. 508, 512 (N.D. Cal. 2019)(citing to *Lopez v. Dep't of Just.*, 393 F.3d 1345, 1349 (D.C. Cir. 2005)). The requested files contain such protected information, which the FBI withheld. CSF # 18.

Second, the Pen Register Act protects from disclosure information pertaining to certain court "order(s) authorizing or approving the installation and use of a pen register or a trap and trace device" and information pertaining to "the existence of the pen register or trap and trace device or the existence of the investigation." 18 U.S.C. § 3123(d). Specifically, the statute requires that a pen register order "be sealed until otherwise ordered by the court." *Labow v. U.S. Dep't of Just.*, 278 F. Supp. 3d 431, 440 (D.D.C. 2017) (citing 18 U.S.C. § 3123(d)). "Congress specifically recognized the dangers of disclosing information contained in a pen register order in such a manner that doing so would undermine the very purpose for the secrecy of the order, and Congress expects such disclosure to be, in certain instances, punished as contempt of court." *Id.* at 441. "[I]nformation 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. *Id.* The FBI appropriately withheld such information, including the identities and phone numbers of the individuals targeted by the pen registers and/or individuals whose information was collected due to their contact with the target, the location of the devices, information gathered by the device, and related court documents. CSF # 19.

Third, the National Security Act of 1947, 50 U.S.C. § 3024(i)(1) protects intelligence sources and methods from disclosure under Exemption 3. *Hunt v.*

C.I.A., 981 F.2d 1116, 1118 (9th Cir. 1992) (citing to *CIA v. Sims*, 471 U.S. 159 (1985). The FBI determined that intelligence sources and methods exist in the two requested files, and therefore withheld them. CSF # 20.

And fourth, the Bank Secrecy Act provides that with respect to reports submitted to the Treasury thereunder, 'a report and records of reports are exempt from disclosure under section 552 of title 5, and may not be disclosed under any State, local, tribal, or territorial 'freedom of information', 'open government', or similar law." *Ctr. for Investigative Reporting v. United States Dep't of Treasury*, No. 19-CV-08181-JCS, 2021 WL 229309, at *4 (N.D. Cal. Jan. 22, 2021) (citing to 31 U.S.C. § 5319); *Ortiz v. United States Dep't of Just.*, 67 F. Supp. 3d 109, 118 (D.D.C. 2014)(document properly withheld under Exemption 3 because it is derived from reports generated pursuant to the BSA, and the Act deems such reports exempt from disclosure under the FOIA). The FBI identified documents in the investigative files that were provided from the Financial Crimes Enforcement Network within the Department of Treasury, in response to BSA's reporting obligations and withheld them accordingly. CSF # 21.

XI. EXEMPTION 5 PROTECTS PRIVILEGED INFORMATION

Exemption 5 protects from disclosure ""inter-agency" or "intra-agency" memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5

encompasses records "normally privileged in the civil discovery context" such as records that would be protected in litigation by the attorney work-product, attorney-client, and deliberative process privileges. *Am. C.L. Union of N. California*, 880 F.3d at 483 (citing to *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)).

The attorney work-product privilege protects from production the "mental impressions, conclusions, opinions, or legal theories of a party's attorney" that were "prepared in anticipation of litigation or for trial." *Am. C.L. Union of N. California*, 880 F.3d at 483 (citing to Fed. R. Civ. P. 26(b)(3) and *Hickman v. Taylor*, 329 U.S. 495 (1947)). "To qualify for work-product protection, documents must: (1) be 'prepared in anticipation of litigation or for trial' and (2) be prepared 'by or for another party or by or for that other party's representative." *Am. C.L. Union of N. California*, 880 F.3d at 484. The deliberative process privilege shields predecisional and deliberative intra-agency communications from disclosure to allow agencies freely to explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny. *Lahr*, 569 F.3d at 979 (internal citations and quotations omitted).

Based on these three privileges, the FBI withheld correspondence between its employees and the United States Attorney's Office, its employees and its counsel at the Department of Justice, and its employees' handwritten notes,

internal recommendations, memorandums, and analysis of its investigation. CSF # 22.

XII. DISCLOSURE WILL CAUSE FORESEEABLE HARM TO THE PROTECTED INTERESTS

In addition to showing that documents qualify for protection under a particular exemption, FOIA requires that the FBI show it reasonably foresees that disclosure would harm an interest protected by an exemption or disclosure is prohibited by law. 5 U.S.C. §552(a)(8)(A)(i). This "foreseeable harm requirement imposes an independent and meaningful burden on agencies." *Reporters Committee for Freedom of the Press v. F.B.I*, 3 F.4th at 369. The FBI identified obvious, and uncontroversial foreseeable harm that will result to the individuals identified in the records, and the FBI's ability to pursue public corruption investigations in the future. CSF #23.

XIII. NO REASONABLY SEGREGABLE, NON-EXEMP INFORMATION EXISTS

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. 5 U.S.C. § 552(b)(9). Non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions. *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). Although the agency must provide a detailed justification for

non-segregability, it is not required to provide so much detail that the exempt material would be effectively disclosed. *Johnson v. Exec Off of the U.S. Attyns,* 310, F.3d 771, 776 (D. C. Cir. 2002) (internal citations and quotations omitted). It just has to show "with reasonable specificity" that the withheld information cannot be further segregated. *Armstrong v. Exec. Off. of the President*, 97 F.3d 575, 578–79 (D.C. Cir. 1996). The Court may rely on affidavits that show with reasonable specificity why documents withheld cannot be further segregated. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007); *Juarez v. Dep't of Just.*, 518 F.3d 54, 61 (D.C. Cir. 2008). The FBI is not required to commit "significant time and resources to the separation of disjoined words, phrases, or even sentences which taken separately or together have minimal to no information content." *Mead Data Cent. Inc.,* 566 F.2d at 261, n55.

The FBI determined that to the extent there was any non-exempt information in the records, that information was inextricably intertwined with exempt information such that only meaningless, disjointed words or phrases, devoid of any informational context or perhaps the headings of documents or standards forms would end up being released. CSF #24.

XIV. CONCLUSION

The extensive Ninth Circuit and D.C. Circuit precent, declarations of Michael G. Seidel and Aryn G. Nohara, and index of records establish that there is

no genuine issue of material fact that the FBI appropriately withheld documents based on the applicable FOIA Exemptions. Summary Judgment should therefore be entered in the FBI's favor.

DATED: November 4, 2024, at Honolulu, Hawaii.

CLARE E. CONNORS
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By_____
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