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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI`I

HONOLULU CIVIL BEAT INC., Plaintiff, vs. FEDERAL BUREAU OF INVESTIGATION, Defendant.	CIV. NO. 23-CV-216 SOM-WRP PLAINTIFF'S COUNTER-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT FEDERAL BUREAU OF INVESTIGATION'S MOTION FOR SUMMARY JUDGMENT [DKT. 67] JUDGE: Hon. Shanlyn A. S. Park HEARING DATE: FEB. 20, 2025 HEARING TIME: 10:00 A.M. TRIAL: April 1, 2025

PLAINTIFF'S COUNTER-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT FEDERAL BUREAU OF INVESTIGATION'S MOTION FOR SUMMARY JUDGMENT [DKT. 67]

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This Freedom of Information Act, 5 U.S.C. § 552 (FOIA), case concerns the refusal of Defendant Federal Bureau of Investigation (FBI) to *redact* any of its investigations that resulted in convictions of former State legislators Representative Ty J.K. Cullen (Cullen) and Senator Jamie Kalani English (English). Plaintiff Honolulu Civil Beat (Civil Beat) requested records expecting that truly confidential information would be redacted. But the FBI disclosed nothing.

Cullen and English corrupted Hawaii's legislative process. Through "Person A"—Milton Choy (Choy)—the FBI participated in a process that manipulated the Legislature for money. But the FBI argues the public can *never* learn about its investigations and how the FBI decided that Hawai`i would not invest in cesspool conversion technologies. As a simple matter of public accountability, that position is wrong. Disclosing redacted records will help the public understand how the FBI exercised its police powers. The FBI overreaches by withholding everything.

Civil Beat opposes the FBI's summary judgment motion and counter moves for summary judgment on the *categorical* claims to withhold all records. The FBI might later justify targeted redactions, but the current record cannot resolve such concerns because the FBI hid everything. Thus, Civil Beat respectfully requests that the Court reject categorical withholding and deny the FBI's blanket motion on

its affirmative defenses. *E.g.*, *ACLU Found. v. U.S. Dep't of Justice*, 418 F. Supp. 3d 466, 471 (N.D. Cal. 2019) (FOIA exemptions are "an affirmative defense").

This motion is made following the conference of counsel pursuant to LR7.8 that took place on December 13, 2024.

I. STATEMENT OF FACTS

A. Key Individuals

1. Cullen

Elected to the State House in 2010, Cullen started serving in 2017 as Finance Committee vice-chair. Additional Material Facts (AMF) #1. The FBI arrested Cullen on October 8, 2021. He was charged with honest services wire fraud on February 8, 2022, resigning that day. AMF#2. Cullen pleaded guilty on February 15. Judge Susan Oki Mollway imposed a 24-month sentence on April 6, 2023 (later reduced to 19 months). The Bureau of Prisons released Cullen as of April 30, 2024. AMF#3.

2. English

Elected to the State Senate in 2000, English started serving in 2014 as Senate Majority Leader. AMF#4. The FBI arrested English on January 14, 2021; he resigned May 2021. He was charged with honest services wire fraud on February 8, 2022. AMF#5. English pleaded guilty on February 15. Judge

Mollway imposed a 40-month sentence on July 5, 2022 (later reduced to 32 months). The Bureau of Prisons released English as of March 26, 2024. AMF#6.

3. Choy

Choy had a wastewater services company. AMF#7. He bribed Cullen and English while cooperating with the FBI. AMF#8; *see* Black Decl. Ex. 4 ("[U.S. Attorney Clare] Connors acknowledged Thursday that Choy is in fact 'Person A.'"); *id.* Ex. 6 at 7 (AUSA), 13-14 (Choy referencing cooperation "with the FBI for years"), 19 (Judge Derrick K. Watson referencing Choy's payments to Cullen and English). Choy died June 22, 2024. AMF#9.

B. Cesspools in Hawai`i

Cesspools are a long-standing public concern in Hawai`i. AMF#10.

> Hawai'i has nearly 88,000 cesspools that put 53 million gallons of raw sewage into the State's groundwater and surface waters every day. Cesspools are an antiquated technology for disposal of untreated sewage that have the potential to pollute groundwater. The State relies on groundwater for over 90% of its drinking water. Cesspools also present a risk of illness to island residents and a significant harm to streams and coastal resources, including coral reefs.

Hawai`i Dep't of Health (DOH), *Report to Legislature Relating to Cesspools and Prioritization for Replacement* at 3 (Dec. 2017), *at* https://health.hawaii.gov/opppd/files/2017/12/Act-125-HB1244-HD1-SD3-CD1-29th-Legislature-Cesspool-Report.pdf.

C. Choy's Bribes to Introduce and then Kill Cesspool Legislation.

Choy had a history of bribes to Cullen and English, separately. By 2019, Choy was cooperating with the FBI and recording his conversations with Cullen and English. AMF#8, AMF#12. Choy bribed English for the draft report of a cesspool working group. AMF#11. And he bribed Cullen for anticipated legislative assistance. AMF#11.

In January 2020, Choy bribed Cullen and English to support bills funding tests of cesspool conversion technologies—Senate Bill 2380 and House Bill 1859. AMF#13. S.B. 2380 did not progress. AMF#14.

But H.B. 1859 did. Twenty-five representatives introduced H.B. 1859; it passed the House unanimously. DOH, Hawai`i County Council, Honolulu Board of Water Supply, Honolulu Department of Environmental Services, environmental organizations (Hawai`i Reef & Ocean Coalition, Ulupono Initiative, Surfrider Oahu, Elemental Excelerator, and WAI: Wastewater Alternatives & Innovations), Environmental Caucus of the Democratic Party of Hawai`i, and several individuals supported the bill. None opposed it. AMF#14.

In March 2020, notwithstanding the broad community support, Choy—under FBI supervision—bribed Cullen and English to "kill" H.B. 1859. AMF#15; AMF#16; *see English*, 22-CR-12 Dkt. 1 at PageID#:40-43 ("ENGLISH: It's easy to kill bills"). Choy confirmed with English in April and June that the Senate

would not consider H.B. 1859. AMF#16. The Senate did not consider H.B. 1859 further. AMF#17.

Choy also bribed Cullen and English in 2021. AMF#18.

D. The Criminal Charges Become a Focus of Public Concern.

After the Government charged Cullen and English, concern about legislative corruption dominated the public sphere and continues to drive public policy discussions. News media covered the prosecutions and community efforts to address the loss of trust in government. AMF#21.

As Judge Mollway observed, Cullen's and English's conduct as elected officials severely impacted public confidence in government. AMF#19; *e.g.*, Black Decl. Ex. 10 at 26 ("You were a state government employee, a legislator, chosen by people who trusted you to work on their behalf. This was a grievous breach of public trust on your part."); Ex. 11 at 27 ("That is terrible for the people of Hawaii, for the purpose of instilling trust in public officials."). Alluding to Cullen and English, Judge Watson remarked when sentencing Choy: "There is no dilemma as to the harm that Mr. Choy's conduct has caused to our public institutions, to the loss of trust that the public has in its officials, some of whom were elected to hold office and represent the very same people that they stole from and that they cheated." Black Decl. Ex. 6 at 19. English's attorney aptly summarized: "The defense not only admits the conduct, Your Honor, but

acknowledges the significance of this case. Accepting money betrays the public trust. Accepting money corrupts the legislative process. Accepting money undermines the confidence of our democratic institution." *Id.* Ex. 11 at 14.

To restore trust in government, the House established the Commission to Improve Standards of Conduct (Foley Commission). AMF#20. The House recognized that "the strength and stability of our democratic government rely on the public's trust in the government's institutions and officers to act with prudence, integrity, and good, ethical judgment." Black Decl. Ex. 12.

The Foley Commission's interim report led to some changes. Black Decl. Ex. 14 at 3. The final report had 31 recommendations. *Id.* at 12-19 ("The Commission understands that the public's trust and belief in the integrity of state and county governments have been shaken and can no longer be taken for granted but rather earned and regained over time.").

The Legislature passed two-thirds of those proposals in 2023. *Final Update! Civil Beat's Bill Tracker for Anti-Corruption and Accountability Proposals*, Honolulu Civil Beat (July 12, 2023).[1] Cullen and English's conduct and the reform proposals continue to be a source of public debate and concern. AMF#20.

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[1] Legislative details can be "accurately and readily determined" on the Legislature's website capitol.hawaii.gov. HRE 201(b).

Civil Beat made a request for each investigation. The FBI released nothing. After a belated review during this litigation, it released only public records from the prosecutions. AMF#22.

II. FOIA STANDARDS

"FOIA recognizes that 'an informed citizenry [is] vital to the functioning of a democratic society.'" *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 770 (9th Cir. 2015). "The FOIA's 'core purpose' is to inform citizens about 'what their government is up to.'" *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 687 (9th Cir. 2012). "[D]isclosure, not secrecy, is the dominant objective of the Act." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Thus, FOIA's disclosure provisions are interpreted "broadly." *Lion Raisins Inc. v. U.S. Dep't of Agric.*, 354 F.3d 1072, 1079 (9th Cir. 2004).

FOIA exemptions "must be narrowly construed." *Id.* "An agency may withhold only that information to which the exemption applies, and so must provide all 'reasonably segregable' portions of that record to the requester." *Yonemoto*, 686 F.3d at 688; *accord Stolt-Nielsen Transp. Group Ltd. v. United States*, 534 F.3d 728, 733-34 (D.C. Cir. 2008) ("Indeed, '[t]he focus of FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material.'").

The agency bears the burden of proving that an exemption applies. 5 U.S.C. § 552(a)(4)(B). Courts "determine the matter de novo." *Id.* Courts do not defer to agency determinations that information is protected from disclosure. *Carlson v. U.S. Postal Serv.*, 504 F.3d 1123, 1127 (9th Cir. 2007) ("Given the court's responsibility to ensure that agencies do not interpret the exemptions too broadly, deference appears inappropriate in the FOIA context.").

III. THE FBI FAILED TO PROVIDE AN ADEQUATE FACTUAL BASIS FOR WITHHOLDING.

The FBI has provided lengthy, but conclusory affidavits with boilerplate that fails to justify withholding. This Court's review starts with whether there is an adequate factual basis for withholding. *E.g.*, *Hamdan*, 797 F.3d at 769. Agencies must submit detailed public affidavits that provide "a particularized explanation of why each document falls within the claimed exemption." *Yonemoto*, 686 F.3d at 688. "Unless the agency discloses 'as much information as possible without thwarting the [claimed] exemption's purpose,' the adversarial process is unnecessarily compromised." *Wiener v. FBI*, 943 F.2d 972, 979 (9th Cir. 1991) (citation omitted); *accord Transgender Law Ctr. v. Immigration & Customs Enf't*, 33 F.4th 1186, 1196 (9th Cir. 2022). The affidavits must "afford the requester an opportunity to intelligently advocate release of the withheld documents and to afford the court an opportunity to intelligently judge the contest." *Wiener*, 943 F.2d at 979. "The affidavits must not be conclusory." *Pac. Fisheries Inc. v.*

United States, 539 F.3d 1143, 1148 (9th Cir. 2008); *Stolt-Nielsen*, 534 F.3d at 734 (agency's "conclusion on a matter of law is not sufficient support for a court to conclude that the self-serving conclusion is the correct one"); *King v. U.S. Dep't of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987) ("affidavits cannot support summary judgment . . . if they are too vague or sweeping").

Affidavits must address not only the factual basis for a claimed exemption, but also segregability. *Hamdan*, 797 F.3d at 779-81; *Pac. Fisheries*, 539 F.3d at 1149-50. The court must have an independent basis to "make a specific finding that no information contained in each document or substantial portion of a document withheld is segregable." *Wiener*, 943 F.2d at 988.

Here, "[t]hese 'boilerplate' explanations were drawn from a 'master' response filed by the FBI for many FOIA requests. No effort is made to tailor the explanation to the specific document withheld." *Id.* at 978-79.

> Without revealing any facts about the documents' contents, the Agencies have merely asserted their conclusion that the document is exempt, employing general language associated with [an exemption]. But the entries provide no salient information by which the district court can independently assess the asserted privilege. To find such superficial entries to be sufficient would permit the Agencies to evade judicial review because the district court and we are entirely dependent upon the Agencies' assertions that the documents were appropriately withheld.

Rein v. U.S. Patent & Trademark Off., 553 F.3d 353, 369 (4th Cir. 2009).

"The explanations offered are precisely the sort of 'categorical descriptions of redacted material coupled with categorical indication of anticipated consequences of disclosure' the D.C. Circuit properly rejected in *King* as 'clearly inadequate.'" *Wiener*, 943 F.2d at 979. The FBI's index does not describe documents beyond a Form number or other generic category and whether it concerns Cullen or English. There are no dates or any other information about the content of any document that would permit independent assessment whether the exemptions apply. Dkt. 68-14; Black Decl. ¶¶ 20-28.

The FBI can use categories, but those categories must be functional and provide sufficient information for response. Here, the FBI effectively provided only one category—evidentiary/investigative materials—that it claimed covered virtually all documents other than purely administrative records or public court records. Dkt. 68-1 at PageID.437-41; *Bevis v. Dep't of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986) (without sufficient information, "categories would be no more than smaller versions of the 'blanket exemptions' disapproved by Congress").

> [I]t is one thing to say that a particular type of document—e.g., a "rap sheet"—is categorically a "law enforcement document" and quite another to say "we withheld a group of law enforcement documents." In this case, the ambiguity in the type of documents withheld and the information contained therein makes it impossible to determine whether the individuals named in the documents have a viable privacy interest.

Batton v. Evers, 598 F.3d 169, 181 (5th Cir. 2010); *Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep't of State*, 818 F. Supp. 1291, 1296 (N.D. Cal. 1992) ("The 9th Circuit has followed other circuits in rejecting the 'categorical' approach of listing the 'types of harms' that generally result when a 'type' of information is disclosed.").

The FBI has failed to provide sufficient factual basis for withholding and lacks any explanation to justify denying pubic access to the entirety of its investigative files without any segregation. In light of the FBI's deficient index, attached to counsel's declaration is simple discovery, pursuant to Fed. R. Civ. P. 56(d) and this Court's order (Dkt. 60 at PageID.356 ¶ B), necessary to clarify the FBI's claims. Black Decl. ¶¶ 20-28 & Ex. 15.

The FBI's conclusory assertions are especially troubling because Congress amended FOIA in 2016 to stop agencies from relying on perfunctory statements of harm that might technically permit withholding, but do not reasonably exist in a particular case. *E.g.*, 5 U.S.C. § 552(a)(8)(i)(I); *Reporters Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 369 (D.C. Cir. 2021) ("Agencies cannot rely on mere speculative or abstract fears, or fear of embarrassment to withhold information. Nor may the government meet its burden with generalized assertions."); *Sea Shepherd Legal v. NOAA*, 516 F. Supp. 3d 1217, 1239 (W.D. Wash. 2021) ("In other words, even if an exemption applies, an agency still must release the record if

the disclosure would not reasonably harm an exemption-protected interest."). Here, given all the information already publicly disclosed about these investigations, and considering Choy's death, abstract potential harms—untethered from the actual records—are insufficient to carry the FBI's burden.

IV. PRIVACY DOES NOT JUSTIFY WITHHOLDING ENTIRE INVESTIGATIVE FILES.

Bribery of two state legislators and the FBI meddling in the Hawai`i legislative process are not "private" affairs that can be withheld entirely from the public. The FBI has not released a single report from its files. For every document, the FBI claimed privacy. Redaction would protect legitimate privacy concerns in these police reports. The FBI has not justified withholding everything.

Relevant here, Exemption 7(C) permits withholding information that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). An agency first must demonstrate a non-trivial privacy interest. *Yonemoto*, 686 F.3d at 694. If there is a non-trivial privacy interest, the requester identifies a public interest advanced by disclosure. *NARA v. Favish*, 541 U.S. 157, 172 (2004). Once a public interest is identified, the Court balances the privacy and public interests in disclosure. *Tuffly v. U.S. Dep't of Homeland Security*, 870 F.3d 1086, 1093 (9th Cir. 2017). "[T]he relevant inquiry under the 'FOIA balancing analysis is the extent to which disclosure of the information

sought would she[d] light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to.'" *Id.* at 1094.

First, here, any privacy interest is trivial because information is already public. *E.g.*, *ACLU of N. Cal. v. U.S. Dep't of Justice*, 880 F.3d 473, 491 (9th Cir. 2018) ("The 'logic of FOIA' postulates that an exemption can serve no purpose once information . . . becomes public."); *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) ("materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record"). Individuals already "publicly identified . . . as having been charged, convicted, or otherwise implicated in connection with the public corruption investigation" have a "diminished privacy interest" in the FBI's investigative records. *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 854 F.3d 675, 682 (D.C. Cir. 2017) [*CREW II*]. Cullen, English, and Choy have no privacy interest in the facts publicly recited in the complaints, plea agreements, hearing transcripts, and other public records of Cullen's and English's prosecutions. And given Cullen's and English's convictions and Choy's role—publicly acknowledged by the U.S. Attorney, Judge Watson, and Choy—they have trivial privacy interests at best in the records generally.

Second, although the FBI acknowledged that "privacy concerns are typically obviated once an individual is deceased," the FBI failed to account for Choy's

death.[2] Dkt. 68-1 at PageID.430 ¶ 31; Dkt. 67-1 at PageID.393-94; *e.g.*, *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 33 (D.C. Cir. 1998) ("death clearly matters, as the deceased by definition cannot personally suffer the privacy-related injuries that may plague the living").

Third, privacy concerns for names and identifying information do not justify withholding entire documents.[3] *See* Dkt. 67-1 at PageID.394-95, 400-01; Dkt. 68-1 at PageID.456-62 ¶¶ 76-87. Cases about protecting identifying information concern *redacted* records and whether—after redaction—revealing a person's identity would provide "additional usefulness." *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 978-79 (9th Cir. 2009) ("Lahr already possesses the substance of the eyewitnesses' reports and the FBI agents' thoughts as they are expressed in the released memoranda and emails.").[4] Without redacted records, there is an insufficient factual basis to assess such a privacy claim.

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[2] The FBI did not start its review until after Choy's death. *Compare* AMF#9, *with* Dkt. 39-1 at PageID.186 ¶ 6 (July 10, 2024 declaration that the FBI was starting its review).

[3] The FBI describes identifying information as "dates of birth, places of birth, residences, telephone numbers, social security numbers, and/or singular professional titles." Dkt. 68-1 at PageID.430 n.10.

[4] *Accord, e.g.*, *U.S. Dep't of State v. Ray*, 502 U.S. 164, 178 (1991); *Tuffly*, 870 F.3d at 1094-95; *Cameranesi v. U.S. Dep't of Defense*, 856 F.3d 626, 645 (9th Cir. 2017); *Forest Serv. Emp. For Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1027 (9th Cir. 2008); *Lane v. Dep't of the Interior*, 523 F.3d 1128, 1132 (9th Cir. 2008); *Fitzgibbon v. CIA*, 911 F.2d 755, 768 (D.C. Cir. 1990); *cf. Nat'l Ass'n of*

Fourth, the FBI misstates the "public interest" standard by arguing that Civil Beat must submit evidence—beyond mere "suspicion"—of agency misconduct. Dkt. 67-1 at PageID.400. Agency misconduct is not a necessary element of public interest. *E.g.*, *Tuffly*, 870 F.3d at 1094-95; *Cameranesi*, 856 F.3d at 640 n.17. The two cases cited by the FBI focused on misconduct because the requested records were disciplinary investigations of agency employees. *Hunt v. FBI*, 972 F.2d 286, 287 (9th Cir. 1992); *Lane*, 523 F.3d at 1132.

Here, at its most basic level, the public interest is in disclosure of information that would shed light on the FBI performing its statutory duty to investigate corruption.

> Disclosure of the FD-302s and investigative materials could shed light on how the FBI and the DOJ handle the investigation and prosecution of crimes that undermine the very foundation of our government. . . . Disclosure of the records would likely reveal much about the diligence of the FBI's investigation . . . .

Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice, 746 F.3d 1082, 1093 (D.C. Cir. 2014) [*CREW I*].

Moreover, there is significant public interest in the FBI's decision to meddle in the Hawai`i legislative process. "'[M]atters of substantive law enforcement policy . . . are properly the subject of public concern,' whether or not the policy in

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Retired Fed. Emp. v. Horner, 879 F.2d 873, 874 (D.C. 1989) (request solely for "names and addresses of retired or disabled federal employees").

question is lawful." *ACLU v. U.S. Dep't of Justice*, 655 F.3d 1, 14 (D.C. Cir. 2011). The FBI already had evidence of Choy bribing Cullen and English. But the FBI allowed Choy to bribe the legislators to introduce and then kill popular legislation on a matter of significant public concern—the environmental impact of cesspools. The FBI also allowed Cullen and English to continue serving as legislators after arresting them. The requested records would inform how the FBI became so involved in the state legislative process.

Lastly, the ongoing attention focused on Cullen's and English's conduct demonstrates public interest. *ACLU*, 655 F.3d at 12-13 (public interest because issue "has received widespread media attention" and disclosure would inform "ongoing public policy discussion"). Nearly three years after the charges, Cullen and English remain a focus for government reform, and those reform discussions would be informed if the public better understood the two investigations.

These three categories of public interest are each a sufficient independent basis to require more careful balancing and redacted disclosure.

> [T]he DOJ does not seek to withhold only the identities of private citizens; it seeks to withhold every responsive document *in toto*. Although *SafeCard* may authorize the redaction of the names and identifying information of private citizens mentioned in law enforcement files, it does not permit an agency "to exempt from disclosure *all* of the material in an investigatory record solely on the grounds that the record includes some information which identifies a private citizen or provides that person's name and address."

CREW I, 746 F.3d at 1094.

Categorical withholding is "appropriate only if 'a case fits into a genus in which the balance *characteristically* tips in one direction.'" *Id.* at 1095. Given the public interests here, the balance is not one-sided, and categorical withholding is improper. *Id.*; *see also Ctr. for Investigative Reporting v. U.S. Dep't of Justice*, No. 21-CV-9613-SK, 2023 U.S. Dist. LEXIS 90977, at *17-23 (N.D. Cal. Mar. 1, 2023) ("Defendants cannot demonstrate a categorical unwarranted invasion of Cienfuegos' personal privacy."). Civil Beat is entitled to summary judgment on the FBI's *categorical* claim that Cullen and English's privacy outweigh the public interests in disclosure and justify withholding all documents *in their entirety*.

V. THE RECORDS DO NOT CONCERN "PENDING" PROCEEDINGS.

Cullen and English have been charged, pleaded guilty, been sentenced, served their time, and been released from prison. Civil Beat only requested records concerning those criminal charges. *E.g.*, Dkt. 68-2 at PageID.486 ("relating to the criminal charges brought against Ty J.K. Cullen in criminal case number 1:22-cr-0013-SOM"); Dkt. 68-7 at PageID.503 ("relating to the criminal charges brought against Jamie Kalani English in criminal case number 1:22-cr-0012-SOM"). But the FBI asserts that all of the requested records are categorically exempt because disclosure "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

The FBI must prove (1) "the criminal investigation remains ongoing" and (2) "release of the Reports would jeopardize that investigation." *E.g.*, *Lion Raisins Inc. v. U.S. Dep't of Agric.*, 231 Fed. Appx. 565, 566 (9th Cir. 2007). Congress intended to "prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigatory files than he would otherwise have . . .[, but] material cannot be and ought not be exempt merely because it can be categorized as an investigatory file compiled for law enforcement purposes." *NLRB v. Tire & Rubber Co.*, 437 U.S. 214, 227 (1978).

For the first element, the FBI acknowledges it has nothing pending against Cullen or English. *E.g.*, Dkt. 68-13 at PageID.526 ¶ 5 ("records concerning [Cullen and English] pertain to the continuing investigation of corruption *of other public officials*" (emphasis added)). But the FBI cannot define an "investigation" so broadly that it incorporates other targets with no relationship other than similar crimes. *Compare, e.g.*, Black Decl. Ex. 4 ("'I don't want to say we're ever done,' Connors said. 'We're always investigating.'"), *with NLRB*, 437 U.S. at 230 ("congressional concern in its amendment of Exemption 7 was to make clear that the Exemption did not endlessly protect material simply because it was in an investigatory file"). Here, there is no alliance of public officials conspiring with each other to take bribes. *See Boyd v. Crim. Div. of the U.S. Dep't of Justice*, 475 F.3d 381, 386 (D.C. Cir. 2007) (pending investigation related because targets

"'related [to], controlled [by], or influenced' by Boyd"); *Demartino v. FBI*, 577 F. Supp. 2d 178, 182-83 (D.D.C. 2008) (related pending investigation because "multi-subject investigation of the Columbo crime family and the attempted murder of Joseph Campanella"). These proceedings are discrete, and no investigations remain ongoing as it concerns the requested records of Cullen and English.[5]

As to the second element, the FBI claims that disclosure of the Cullen and English investigation files will "either alert ['suspects and persons of interest'] to efforts directed towards them and/or would allow them to analyze pertinent information about the investigation." *E.g.*, Dkt. 68-13 at PageID.529-30. But the scope and nature of the investigations into Cullen and English are well known; the FBI cannot rely on generic assertions of harm. *CREW I*, 746 F.3d at 1099 ("Thus, assuming some individuals do remain under investigation, the relevant question is whether any of the responsive records, which are primarily about DeLay, would disclose anything relevant to the investigation of *those* individuals."); *accord Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1114 (D.C. Cir. 2007) ("it is not sufficient for an agency merely to state that disclosure would reveal the focus of an

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[5] Cullen cooperated with the FBI after his arrest. *E.g.*, Black Decl. Ex. 10 at 14-15. But that is not the subject of Civil Beat's request. Because its index does not include dates, however, the FBI made it impossible to distinguish the closed prosecution from any ongoing investigation. *Rein*, 553 F.3d at 366 n.21 ("in many situations the date of the document may be a critical factor" for an index).

investigation; it must rather demonstrate *how* disclosure would reveal that focus."); *Bevis*, 801 F.2d at 1390 (agency "must explain to the court how the release of each category would interfere with enforcement proceedings").

The FBI relies on functional categories. Dkt. 68-1 at PageID.435-40 ¶¶ 40-41. But it never explains how the risk of disclosure differs between the categories and document types. *CREW I*, 746 F.3d at 1099 ("although the DOJ identifies two distinct categories of documents—FD-302s and investigative materials—it never explains how the specific risks entailed in premature disclosure of one category of document might differ from risk of disclosure of the other."); *KXTV, LLC v. U.S. Citizenship & Immigr. Servs.*, No. 2:19-CV-415-JAM-CKD, 2020 U.S. Dist. LEXIS 39494, at *14-16 (E.D. Cal. Mar. 6, 2020) ("Without more information as to why the types of investigatory records listed in Officer Fuentes' declarations would interfere with the ongoing investigation, the Court cannot independently assess whether Exemption 7(A) was justifiably asserted."). Moreover, the FBI's descriptions are insufficient to "trace a rational link between the nature of the document and the alleged likely interference." *Compare Bevis*, 801 F.2d at 1390 (categories "identified only as 'teletypes,' or 'airtels,' or 'letters' . . . provide no basis for a judicial assessment of the FBI's assertions that release of the documents so categorized would interfere with enforcement proceedings"), *with* Dkt. 68-1 at PageID.437-40 (identifying document types such as "emails," "electronic

communications," "memoranda and letters correspondence," "memorandums," "video," "photographs").

The FBI's pending investigation claim reduces to an improper assertion that the entirety of the Cullen and English files are confidential simply because they are investigation files. *NLRB*, 437 U.S. at 236 ("Exemption 7 was designed to eliminate 'blanket exemptions' for Government records simply because they were found in investigatory files compiled for law enforcement purposes.").

> [A]ll of the affidavits repeat the government's dominant assertion that disclosure of the documents could aid Lilly or other potential targets in determining the scope, direction, and focus of the investigation. . . . The government makes that claim but, consonant with the style it has adopted for its other assertions of interference with the investigation, it offers not even a slim bill of particulars.

Campbell v. Dep't of Health & Human Servs., 682 F.2d 256, 260 (D.C. Cir. 1982).

Civil Beat is entitled to summary judgment on the FBI's *categorical* claim that disclosing *any* information from the requested Cullen and English records would interfere with any investigation of other public officials for corruption.[6]

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[6] Redaction may be appropriate. For example, if a document summarized the $5,000 bribe of Cullen on September 4, 2019, and a bribe of another public official currently under investigation, the FBI may be able to justify redacting information about the other bribe. But there is no basis to redact the Cullen bribe and thus no basis for categorical withholding of everything.

VI. NATIONAL SECURITY ACT DOES NOT JUSTIFY CATEGORICAL WITHHOLDING.

The FBI marked virtually all records as "intelligence sources and methods" under the National Security Act, 50 U.S.C. § 3024(i)(1), stating only that disclosure would "reveal intelligence sources and methods." Dkt. 68-1 at PageID.448. The FBI's bare assertion is insufficient. *E.g.*, *Wiener*, 943 F.2d at 981 & n.15 ("The discussion in the affidavits of withholdings based on the exemption from disclosure of information related to intelligence activities and methods is particularly scanty."); *accord Halpern v. FBI*, 181 F.3d 279, 292-94 (2d Cir. 1999); *Bay Area*, 818 F. Supp. at 1298; *Elec. Frontier Found. v. CIA*, No. 09-C-3351 SBA, 2013 U.S. Dist. LEXIS 142146, at *30-35 (N.D. Cal. Sept. 30, 2013); *ACLU of Wash. v. U.S. Dep't of Justice*, No. 09-C-642 RSL, 2011 U.S. Dist. LEXIS 26047, at *8-11 (W.D. Wash. Mar. 10, 2011) ("The FBI has, in effect, parroted the language of the Executive Order (in the disjunctive) and declared that the redacted information falls within one or more of the categories covered by the order. This categorical approach is 'clearly inadequate.'"). Civil Beat is entitled to summary judgment on the FBI's *categorical* National Security Act claim.

VII. CONFIDENTIAL SOURCES DO NOT JUSTIFY WITHHOLDING ENTIRE FILES.

There is no presumption that FBI sources are confidential. *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 178 (1993) ("Congress did not expressly create a

blanket exemption for the FBI; the language that it adopted requires every agency to establish that a confidential source furnished the information sought to be withheld under Exemption 7(D).").[7] Beyond boilerplate about confidential sources generally and unspecified "evidence" in the files, Dkt. 68-1 at PageID.462-68, the FBI says nothing about this specific case and the confidentiality of sources here, except to note a single "Confidential Human Source" who provided information "that Mr. English and Mr. Cullen received these personal benefits, such as cash, in exchange for influencing their official actions as legislators." Dkt. 68-13 at PageID.527. As expressly acknowledged by the U.S. Attorney, Judge Watson, and Choy, that source is Choy. *Dow Jones & Co. v. Dep't of Justice*, 917 F.2d 571, 577 (D.C. Cir. 1990) ("if the exact information given to the FBI has already become public, and the fact that the informant gave the same information to the FBI is also public, there would be no grounds to withhold."). The FBI submitted no evidence that Choy is a "confidential" source—implied or express. *E.g.*, *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 986 (9th Cir. 1985) ("no reasonable expectation of confidentiality" when formal proceedings anticipated). It also did not submit any evidence that all the information in the requested records

[7] 5 U.S.C. § 552(b)(7)(D) permits an agency to withhold information that "could reasonably be expected to disclose the identity of a confidential source" or "information furnished by a confidential source."

was "furnished" by Choy. And the FBI did not consider the foreseeable harm of disclosure in light of Choy's death. Civil Beat is entitled to summary judgment on the FBI's *categorical* Exemption 7(D) claim.

VIII. THE FBI OVERSTATES CONFIDENTIALITY UNDER THE PEN REGISTER ACT AND GRAND JURY SECRECY.

The FBI claims the Pen Register Act, 18 U.S.C. § 3123, and grand jury secrecy, Fed. R. Crim. P. 6(e), require confidentiality for court records and any information derived from those proceedings (*e.g.*, documents obtained in response to a grand jury subpoena). Dkt. 68-1 at PageID.442-45. That overstates the scope of confidentiality under those laws. *Labow v. U.S. Dep't of Justice*, 831 F.3d 523, 528-30 (D.C. Cir. 2016) ("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. . . . The mere fact the documents were subpoenaed fails to justify withholding under Rule 6(e)."). Without redacted records or more information, Civil Beat is entitled to summary judgment on the *categorical* confidentiality claims, and further resolution is premature.

IX. INVESTIGATIVE TECHNIQUES ARE NOT A BASIS FOR WITHHOLDING ENTIRE FILES.

Exemption 7(E) permits an agency to withhold law enforcement "techniques and procedures" when "disclosure could reasonably be expected to risk

circumvention of the law." 5 U.S.C. § 552(b)(7)(E). Agencies may not withhold publicly known techniques. *E.g.*, *Property of the People, Inc. v. Dep't of Justice*, 539 F. Supp. 3d 16, 29 (D.D.C. 2021). And the agency must demonstrate how the specific documents at issue would be used to circumvent the law. *Id.* ("the Court finds nothing that bad actors could make use of"). The FBI only seeks to justify withholding specific information—*e.g.*, file numbers. Dkt. 68-1 at PageID.468-81. Even if the FBI could justify targeted redactions, nothing about withholding pieces of information supports withholding entire documents in the manner that the FBI proposes. Without redacted records to provide context for how broadly the FBI applied Exemption 7(E), Civil Beat is entitled to summary judgment on the *categorical* claim, and further resolution is premature.

X. DISCOVERY PRIVILEGES CLAIMS ARE CONCLUSORY.

Under Exemption 5 for discovery privileges, the FBI offers its conclusory assessments that the privileges apply. Dkt. 67-1 at PageID.406-07; Dkt. 68-1 at PageID.449-55. But without redacted records to provide context or a detailed privilege log, Civil Beat cannot assess the FBI's claims. *E.g.*, *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 20 F.4th 49, 55 (D.C. Cir. 2021) (deliberative process privilege depends on "the individual document and the role it plays in the administrative process"); *United States v. Richey*, 632 F.3d 559, 566-68 (9th Cir. 2011) (describing limited scope of the attorney-client privilege and attorney work

product doctrine). Civil Beat is entitled to summary judgment on the FBI's *categorical* claims to withhold entire documents based on privilege, and further resolution is premature.

XI. THE BANK SECRECY ACT CLAIM IS UNCLEAR.

The FBI asserts the Bank Secrecy Act, 31 U.S.C. § 5319, to withhold one record—described as "FD-1036, Operational Plan." Dkt. 68-14 at PageID.536. That description differs from the FBI's claim that the records are exempt Treasury reports. Dkt. 67-1 at PageID.405. Civil Beat is entitled to summary judgment on the FBI's *categorical* claim to withhold that entire document under the Bank Secrecy Act.

XII. MEANINGFUL REDACTION IS POSSIBLE.

These requests concern 38,597 pages and media. Dkt. 55, 59. Redaction would not leave "only meaningless, disjointed words or phrases." *See* Dkt. 67-1 at PageID.408. The FBI offers: "After review of the documents at issue, the FBI determined that there is no further non-exempt information that can be reasonably segregated and released without revealing exempt information." Dkt. 68-1 at PageID.483. That is insufficient.

Courts must "make a specific finding that no information contained in each document or substantial portion of a document withheld is segregable." *Wiener*, 943 F.2d at 988. Conclusory declarations are insufficient, especially when

everything is withheld. *Hamdan*, 797 F.3d at 780-81 (remanding segregability determination because declarations lacked detail and withholding entire document meant that "the district court did not have the opportunity to observe the DIA's approach to redaction"); *Stolt-Nielsen*, 534 F.3d at 734 (insufficient to declare paralegal "reviewed each page line-by-line to assure himself that he was withholding from disclosure only information exempt pursuant to the Act" because no support "to conclude that the self-serving conclusion is the correct one"); *Pac. Fisheries*, 539 F.3d at 1149-50 (insufficient to say declarant "attempted to make all reasonably segregable non-exempt portions of documents available").

FOIA exemptions are narrowly construed, and all segregable portions must be disclosed. Only then will citizens know "what the Government is up to." "This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." *NARA*, 541 U.S. at 171-72. The FBI's dismissal of segregability flaunts FOIA's purpose. Civil Beat is entitled to summary judgment on the FBI's conclusory assertion that nothing is segregable.

CONCLUSION

Civil Beat respectfully requests that the Court grant its counter-motion for summary judgment on the FBI's categorical exemption claims, deny the FBI's motion for summary judgment, and require the FBI to release *redacted* records.

DATED: Honolulu, Hawai`i, December 20, 2024

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI`I

HONOLULU CIVIL BEAT INC., Plaintiff, vs. FEDERAL BUREAU OF INVESTIGATION, Defendant.	CIV. NO. 23-CV-216 SOM-WRP CERTIFICATE OF COMPLIANCE JUDGE: Hon. Shanlyn A. S. Park TRIAL: April 1, 2025

CERTIFICATE OF COMPLIANCE

I, Robert Brian Black, certify that the foregoing document complies with LR7.4 because it has 6,222 words as calculated by Microsoft Word, in accordance with the inclusions and exclusions specified in LR7.4(d).

DATED: Honolulu, Hawai`i, December 20, 2024

/s/ Robert Brian Black
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