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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 REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT [ECF NO. 67]; CERTIFICATE OF SERVICE TRIAL DATE: APRIL 1, 2025 HEARING DATE: FEBRUARY 20, 2025

DEFENDANT FEDERAL BUREAU OF INVESTIGATION'S REPLY
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT [ECF NO. 67]

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I. Introduction

Civil Beat presents a scattershot and general Counter-Motion for Summary Judgment and Opposition to Defendant Federal Bureau of Investigation's Motion for Summary Judgment ("Opposition") that does not overcome the FBI's straightforward arguments supporting its Motion for Summary Judgment ("Motion"). The Freedom of Information Act ("FOIA") is a federal statute passed by Congress and signed into law by the President. Congress and the President established within the statute that while the public has the right to information, the public also has the right to be free from crime, and individuals have the right to privacy, thus exempting from disclosure such information that would infringe on those rights. The FBI cannot ignore those exemptions.

Yet, Civil Beat's Opposition is based on arguments that ask the FBI and the Court to do just that (ignore the law) and provide information to the public that federal law protects from disclosure. Its spurious and hyperbolic arguments are unsupported by the law and the facts of this case. For example, on the first page of its Opposition, Civil Beat claims – without any evidence – that the "FBI participated in a process that manipulated the Legislature for money." This conspiratorial allegation is baseless. In the next sentence, Civil Beat misrepresents the FBI's position when it states: "the FBI argues the public can *never* learn about its investigations and how the FBI decided that Hawaii would not invest in

cesspool conversion technology." (Emphasis in original). That is neither the law, nor has the FBI *ever* argued as much. The FOIA does not preclude all disclosure for all eternity; it precludes disclosure under specific circumstances, which exist here. Until the FBI's ongoing criminal investigation concludes (it will not last for all eternity), the statute protects the disclosure of records to the public. And then Civil Beat asserts that redactions may be appropriate, but the current record is insufficient because FBI "hid everything." The FBI does not hide records. The FBI assigned 3 to 4 people for weeks to review and index the records at issue in this case. *See* FBI Status Reports, ECF Nos. 55, 56, 59, 61, 62, 64, 65, and 66. It thereafter completed its review on a document-by-document basis and provided a 35-page *Vaughn* index, that was explained in the FBI's 68-page declaration, as demanded by Civil Beat in its Opposition to FBI's request to perform a bifurcated, categorical review. *See* ECF No. 49 and Seidel Declaration (ECF No 68-1) and Exhibit M thereto. Civil Beat's retort is the FBI should disclose to the public the records that federal law exempts from disclosure.

In its Opposition at pages 2-6, Further Concise Statement of Facts, and Declaration of Brian Black, Civil Beat provides a new summary of facts which did not appear in any of its correspondence with the FBI, the Complaint, meet and confers, or prior pleadings. More troubling is how these new facts are in no way relevant or material to this litigation. They lack any probative value in establishing

that the public interest in the FBI's enforcement proceedings outweighs the privacy rights of the individuals identified in the records or the investigative security interests at issue. Further, the FBI has no way of verifying most of the conclusions drawn therefrom. While Civil Beat's exhibits demonstrate the obvious – that the public may be interested in reporting about the State of Hawaii's public corruption and the legislative response to it – that interest is different from this Court ordering the FBI to disclose the FBI's investigative records related to enforcement proceedings of public corruption.

II. **The Court Should Afford Deference to the FBI's Declarations**

Civil Beat generally argues that declarations may not be conclusory, and it is entitled to more or different information than what the FBI's declarations contain. *See* Opposition, pp. 8, 9, 10, 11. While Civil Beat may not be satisfied with the FBI's detailed explanations concerning the withheld records, the courts provide deference to agency declarations in explaining why its withholdings are proper. *See Am. C.L. Union of N. California v. Fed. Bureau of Investigation*, 881 F.3d 776, 779 (9th Cir. 2018)(affording special deference to the FBI in Exemption 7 determinations); *Citizens for Resp. & Ethics in Washington ("CREW") v. U.S. Dep't of Just.*, 746 F.3d 1082, 1098 (D.C. Cir. 2014) (cleaned up)(court gives deference to the FBI's "predictive judgment of the harm that will result from disclosure of information); *Schaerr v. United States Dep't of Just.*, 69 F.4th 924,

929 (D.C. Cir. 2023)("We review the agency's response *de novo*, affording 'substantial weight to an agency's affidavit.'"; *McDonnell v. United States*, 4 F.3d 1227, 1241 (3d Cir. 1993)(because the agency alone typically possesses knowledge of the precise content of records withheld in FOIA matters, the requester and the court must rely upon its representations for an understanding of the material sought to be protected)(internal quotations omitted).

Civil Beat claims it is entitled to formal discovery because the FBI's *Vaughn* index is insufficient and it attached its propounded interrogatories, which ask two questions: (1) identify each document responsive to the Cullen Request that the FBI withheld; and (2) identify each document responsive to the English Request that the FBI withheld. Opposition, at p. 11 and Exhibit 15 thereto. The FBI's *Vaughn* index (its Exhibit M) provides that exact information. For good measure, also see the FBI's 68-page Seidel Declaration.

Indeed, the FBI painstakingly went through each FOIA Exemption that applies here in the Seidel and Nohara Declarations, in addition to the *Vaughn* index contained in Exhibit M. Civil Beat does not address those FOIA Exemptions. Instead, it makes the blanket assertion the FBI Declarations are too conclusory, and the categories used by the *Vaughn* index are not functional enough for Civil Beat's satisfaction. Opposition, pp. 8-11. The categories of records included are (1) Evidentiary/Investigative; (2) Administrative; and (3) Public Records. Those three

functional categories accurately encompass the records at issue here. Civil Beat complains, however, that the substantive information about the records must be provided. That misses the point. The statute and the caselaw precedent require the FBI to protect its investigative information from disclosure to the public when doing so would violate individuals' privacy rights, or interfere with an ongoing criminal investigation, or endanger undercover informants, just as examples. Congress and the President decided that information should not be released to the public.

III. No Reasonably Segregable, Non-Exempt Information Exists

Throughout its Opposition, Civil Beat argues that the FBI must produce redacted versions of the withheld records. *See* Opposition, pp. 1, 10, 12, 14, 16, 21, 24, 25, 26, 27. As the FBI previously explained, it cannot (and is not required to) produce records it properly withholds under the statue, even in redacted form. *See* Motion, pp. 22-23.

Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). To rebut that presumption, a requester must provide the Court some concrete basis to find that the presumption should not be afforded. *Flyers Rts. Educ. Fund, Inc. v. Fed. Aviation Admin.*, 71 F.4th 1051, 1058 (D.C. Cir. 2023). In addition, an agency is not required to

"commit significant time and resources to the separation of disjointed words, phrases or even sentences which taken separately or together have minimal or no information content." *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 261, n.55 (D.C. Cir. 1977). Despite this straightforward standard, Civil Beat offers zero basis to argue that the FBI must comb through the withheld records and provide redactions, notwithstanding the FBI's two declarations that clearly set forth the reason such redactions are nonsensical. *See* Seidel Dec. at ¶¶ 128-130, ECF#68-1, PageID.482-83; Nohara Dec. at ¶¶ 10-14, ECF#68-13, PageID.528-30.

IV. <u>The FBI Properly Withheld Records Under 5 U.S.C. § 552 (b)(6)</u>

Civil Beat does not contest the FBI's arguments set forth in its Motion at pages 7-10 that Exemption (b)(6) allows the FBI to withhold records that would constitute an unwarranted invasion of personal privacy if disclosed to the public. The Motion should therefore be granted as to Exemption 6 based on the reasons set forth in the Motion, and because the basis is unopposed.

V. <u>The FBI Properly Withheld Records under 5 U.S.C. § 552 (b)(7)(A)</u>

The FBI explained at pages 10-14 in its Motion how the release of the requested records would interfere with enforcement proceedings, and thus they are exempted from disclosure under 5 U.S.C. § 552 (b)(7)(A). The FBI notes Civil Beat chose to use "pending" to title its section responding to this Exemption. Opposition, p. 17. (Quotations in the original). That word does not exist in the

statute. FOIA Exemption 7(A) provides that records may be withheld if their disclosure "could reasonably be expected to interfere with enforcement proceedings." Possibly, Civil Beat is implying the FBI's investigation into the alleged public corruption is not an enforcement proceeding, or the two FBI declarations do not establish that investigation is "pending," or that because the investigations into two individuals resulted in sentencing, there are no longer enforcement proceedings. It is not clear. But as the FBI's Motion already explained, the Cullen and English files contain information related to enforcement proceedings. Seidel Dec. ¶¶ 35-42, ECF#68-1, PageID.433-41; Nohara Dec. ¶¶ 9-14, ECF#68-13, PageID.527-30. For obvious reasons, the FBI has not publicly disclosed who it is investigating, who its sources are, what investigative techniques it is using, et cetera. *Id.* Congress and the President decided that information should not be released to the public.

Moreover, the FBI is not claiming the records are "confidential" as alleged by Civil Beat. Opposition, p. 21. Civil Beat is nebulous about what "confidential" means. The records are exempt from disclosure because the federal statute protects "information that could reasonably be expected to interfere with enforcement proceedings." Further still, the records are not exempt because they are "investigative," as Civil Beat alleges. The FBI is the United States's primary federal investigative agency; most of its records are "investigative." The records at

issue are exempt from disclosure because disclosing them could reasonably be expected to interfere with enforcement proceedings.

VI. The FBI Properly Withheld Records Under 5 U.S.C. § 552 (b)(7)(C)

At pages 14-16 of its Motion, the FBI explained why it properly withheld records because they constitute enforcement information, the disclosure of which could reasonably be expected to constitute an unwarranted invasion of personal privacy as exempted by b(7)(C). Civil Beat responds with bizarre claims that bribery and the "FBI meddling in the Hawai'i legislative process are not 'private' affairs" and that "redaction[s] would protect legitimate privacy concerns in these police reports." Opposition, p. 12. These claims fail.

First, the FBI does not claim that bribery is a private affair. Rather, individuals named in the records have a privacy interest that must be protected under federal law. *See* Seidel Dec. at ¶¶ 29, 76-87, ECF#68-1, PageID.429, 456-62.

Second, the FBI has no idea what is meant by its "meddling in the Hawaii legislative process." So, nothing further need be said on the matter.

Third, Civil Beat fails to define what it considers to be a "legitimate" privacy concern or why the privacy concerns noted in the federal statute are not legitimate. The statute governs.

Fourth, the records do not contain only police reports. The pertinent privacy interests protected by federal law extend to all the records.

Civil Beat's allegations are insufficient to overcome summary judgment. "An agency is entitled to summary judgment if its affidavits are reasonably specific and are not substantially called into question by contradictory evidence." *Schaerr*, 69 F.4th at 928. Civil Beat offers neither a challenge the Seidel Declaration nor contradictory evidence to supports its "meddling" allegation.

Interestingly, in its Opposition at page 13, Civil Beat claims that three individuals have *no* privacy interest based on Civil Beat's prior publishing information about the court proceedings involving those three individuals. Civil Beat ignores, however, that the FBI's investigative files concerning those individuals have *not* been made public and may contain information different from what was released in open court; information that is protected from public disclosure under federal law. *See* Seidel Dec. ¶ 32, ECF#68-1, PageID.431. Civil Beat also ignores the attendant privacy interests of *other* individuals who may be mentioned in the same FBI investigative files, including individuals who simply may be third parties who were, for example, interviewed by the FBI. Seidel Dec. ¶¶ 29-34; 76-87, ECF#68-1, PageID.429-33, 456-62; Nohara Dec. ¶¶ 9-13, ECF#68-13, PageID.527-29.

Civil Beat argues that it is entitled to the records because it is a watch dog and wants to confirm FBI is performing its "statutory duty to investigate corruption." Opposition, p. 15. Ironically, that is exactly what FBI is doing, and it is trying to protect its investigation from being thwarted by the release of information that would impede its investigation. *See* e.g. Seidel Dec. at ¶¶ 35-42, ECF68-1, PageID.433-41; Nohara Dec. at ¶¶ 9-11, ECF#68-13, PageID.527-29. Its reliance on *Truffly* and *Citizens for Responsibility and Ethics in Washington*, 746 F.3d at 1093 ("*CREW*") is misplaced. In *Truffly*, the Ninth Circuit upheld the district court's award of summary judgment in favor of the Department of Homeland Security, which argued that the identities of non-citizens released from detention were protected privacy interests, and that the Immigration and Customs Enforcement's decision-making process was not a significant public interest requiring disclosure. *Tuffly v. U.S. Dep't of Homeland Sec.*, 870 F.3d 1086, 1096–1097 (9th Cir. 2017)("In determining the significance of the public interest, the 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…This inquiry focuses not on the general public interest in the subject matter of the FOIA request, but on the additional usefulness of the specific information withheld.") *Id.* at 1094 (internal citations and quotations omitted). In

CREW, the criminal investigation had already completed. *CREW* at 1098. In this litigation, the investigation is ongoing. How the FBI investigates public corruption is apparently not what the public is interested in - of interest is the legislators' response to corruption. *See* Civil Beat's AMF #19-22. The FBI's investigative records in its enforcement proceedings would shed no light on the latter.

Finally, Civil Beat makes another bizarre claim – the FBI "allowed" Cullen and English to continue serving as legislators after arresting them. Opposition, p. 16. The Constitution of the State of Hawaii, Section 12, provides that:

> Each house shall be the judge of the elections, returns, and qualifications of its own members and shall have, for misconduct, disorderly behavior, or neglect of duty of any member, power to punish such member by censure, or, upon two-thirds vote of all members to which such house is entitled, by suspension or expulsion of such member.

The State Constitution does not empower the FBI to remove a member of the Hawai'i legislature. Nor is there any discernable nexus between "allowing" duly elected members to serve and this FOIA litigation. Again, any public interest in these matters is potentially about individuals' activities, not how the FBI is investigating their activities. Civil Beat's AMF #19-22.

VII. <u>The FBI Properly Withheld Records Under 5. U.S.C. § 552 (b)(7)(D)</u>

The FBI explained at pages 16-17 of its Motion that some of the information contained in the requested records implicates confidential sources and is therefore exempt under 5 U.S.C. § 552 (b)(7)(D). Civil Beat opposition to that point is its

blanket statement that there is no presumption that sources are confidential. Opposition, p. 22. The law is clear. Confidential sources have the right to protection. *See* Motion, p. 16.

Moreover, Civil Beat assumes – without factual predicate – that there is only one potential individual who may be known (Milton Choy). Opposition, p. 23. For obvious reasons, the FBI does not – nor will it here – discuss how many confidential sources are potentially involved in any particular investigation and, in any event, it properly withholds such information in ongoing investigations, as it is doing here. The FBI has an obligation to protect witnesses and confidential sources from threats, intimidation, and physical harm. Seidel Dec. at ¶¶ 88-99, ECF68-1, PageID.463-68; Nohara Dec. ¶¶ 6, 11, 12, ECF#68-13, PageID.527, 528-29. Civil Beat completely fails to address any of these valid bases for withholding the pertinent records. The FBI is entitled to summary judgment that it properly withheld information concerning confidential sources.

VIII. <u>The FBI Properly Withheld Records Under 5 U.S.C. § 552 (b)(7)(E)</u>

The FBI is required to withhold records that would disclose investigative techniques not generally known to the public under 5. U.S.C. § 552 (b)(7)(E). It explained the basis for the application of this Exemption in the Motion at pp. 17-18. Civil Beat's objection is that the FBI may not withhold publicly available information, and it needs to decide for itself, after reviewing the redacted records,

whether the withholding was proper. Opposition, pp. 24-25. The FBI did not withhold publicly available information. Seidel Dec. at ¶¶ 14, 129, ECF#68-1, PageID.422-23, 482. It spent 24 paragraphs explaining why the investigative records were exempted from disclosure. Seidel Dec. at ¶¶ 100-124, ECF#68-1, PageID.468-81. The explanation is not rebutted by Civil Beat. The FBI is entitled to summary judgment that is properly withheld records under 7(E).

IX. <u>The FBI Properly Withheld Records Under 5 U.S.C. § 552(b)(3)</u>

The FBI identified four statutes that independently protect records from disclosure. Motion, pp. 18-20. Civil Beat addressed these statutes out of order and in random places in its Opposition.

First, Civil Beat addressed the third statute – the National Security Act. Opposition, p. 22. Its claim "the FBI's 'bare assertion' that 'disclosure would reveal intelligence sources and methods is insufficient to meet its burden'" ignores the four paragraphs in the Seidel Declaration that explains how the NSA is implemented and how it applies to these records. Seidel Dec. at ¶¶ 55-58, ECF#68-1, PageID.446-48. Civil Beat does not rebut that information.

Next, on page 24 of its Opposition, Civil Beat lumps the first and second statutes – Rule 6 of the Federal Rules of Civil Procedure and the Pen Register Act together and misrepresents FBI's basis for withholding certain records. Civil Beat alleges the FBI categorically withheld confidential records. As reflected in FBI

Exhibit M, the FBI did not categorically withhold such records; the two statutes apply to specific records based on specific criteria. Civil Beat does not rebut the detailed explanation provided by the FBI for the proper withholding. Motion, pp. 18-19 and Seidel Dec. at ¶¶ 45-52, ECF#68-1, PageID.442-45.

Finally, on page 26, Civil Beat concedes the applicability of the Bank Secrecy Act basis is unclear. The records at issue may potentially include financial records that are protected under the Bank Secrecy Act, 31 U.S.C. 5319. While the FBI does not discuss what specific records are part of its investigative file, if such records were part of the investigative file, then they would fall under the protection from disclosure of the Bank Secrecy Act. As such, the FBI would properly withhold them from disclosure.

The FBI is entitled to summary judgment that it properly withheld records pursuant to Exemption 3.

X. <u>The FBI Properly Withheld Records under 5 U.S.C. 552(b)(5)</u>

At pages 20-22 of its Motion, the FBI explained why it withheld privileged information. Civil Beat once again ignores that detailed explanation in its opposition. Opposition, p. 25. Mr. Seidel spent 11 paragraphs explaining the basis for each category of privilege that applies. *See* Seidel Dec. at ¶¶ 63-74, ECF#68-1, PageID.449-55. As the *Vaughn* index shows, the Exemption was not referenced with respect to many of the records and it obviously applies to internal FBI forms,

handwritten notes, memos, evidence logs, administrative forms, investigative reports. *See* Exhibit M.

The FBI is entitled to summary judgment that it properly withheld records pursuant to Exemption (b)(5).

XI. Conclusion

Civil Beat's Opposition to the FBI's Motion is contrary to well-established precedent governing FOIA Exemptions, and it fails to overcome the FBI's various supportive arguments for summary judgment. For the reasons stated in the Motion, and this Reply in Support, the FBI respectfully requests the Court grant summary judgment because it properly withheld the records identified in its *Vaughn* index.

The extensive Ninth Circuit and D.C. Circuit legal precedent, declarations of Michael G. Seidel and Aryn G. Nohara, and the *Vaughn* index of records establish that there is no genuine issue of material fact that the FBI properly withheld records based on the applicable FOIA Exemptions. Summary Judgment should therefore be entered in the FBI's favor.

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DATED: January 22, 2025, at Honolulu, Hawaii.

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I hereby certify that, on this date and by the method of service noted below, a true and correct copy of the foregoing was served on the following at their last known address:

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