IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JASON LEOPOLD,

BUZZFEED, INC.,

Plaintiffs,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

Civil Action No. 1:18-cv-2567-BAH

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7(h), Defendant Federal Bureau of Investigation respectfully moves for summary judgment on all claims in this case. This motion is supported by the accompanying Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment; the Statement of Material Facts as to Which There is No Genuine Dispute; and the Declaration of David M. Hardy. A proposed Order is also attached.

Dated: October 25, 2019

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This Freedom of Information Act ("FOIA") case arises from four FOIA requests that the Federal Bureau of Investigation ("FBI") received from Plaintiffs Jason Leopold and Buzzfeed, Inc., in October, 2018. Those requests sought two categories of information. First, Plaintiffs sought information related to the supplemental background investigation of then-Judge Brett Kavanaugh[1] that the White House Counsel's Office solicited from the FBI on behalf of the President after allegations of misconduct emerged against Judge Kavanaugh. Second, Plaintiffs asked for information related to any tips the FBI received from the public regarding those allegations. In other words, Plaintiffs cast a wide net in looking for information about the President's and the FBI's response to concerns expressed about Judge Kavanaugh's then-pending nomination to the Supreme Court.

The FBI has carefully reviewed the records responsive to Plaintiffs' FOIA requests. The supplemental background investigation file consists of information solicited and relied upon by the President and his advisors to aid and inform a constitutional matter of presidential decision-making: nominating a Supreme Court Justice. As such, that file is squarely exempt from disclosure by the presidential communications privilege, and the FBI has therefore properly withheld it in full pursuant to FOIA Exemption (b)(5). Additionally, the FBI determined that portions of the supplemental background investigation file, as well as portions of the submissions to the FBI tip line, are protected from disclosure under FOIA Exemptions (b)(6) and (b)(7). The FBI further withheld portions of the tip-line submissions pursuant to FOIA Exemption (b)(3).

[1]Because the FBI's supplemental background investigation took place before Justice Kavanaugh's nomination to the Supreme Court was confirmed, the Justice is referred to herein as Judge Kavanaugh.

As demonstrated in this brief and in the attached declaration of David M. Hardy, the FBI's application of the FOIA exemptions was correct, and it is therefore entitled to summary judgment.

BACKGROUND

I. Procedural History

Plaintiffs submitted the four FOIA requests at issue in this case to the FBI in October, 2018. *See* Decl. of David M. Hardy ("Hardy Decl.") ¶¶ 5, 7, 9, 11; *see also* Defendant's Statement of Material Facts as to Which There is No Genuine Dispute ("Def. SOF") ¶ 1, 4, 7, 10. Those requests sought the following categories of records:

- A copy of the final report sent to the White House and the Senate Judiciary Committee on either October 3 or October 4, 2018, on Supreme Court nominee Brett Kavanaugh.

- All interview notes; investigative notes; FD-302s relating or referring to the FBI investigation into allegations leveled against Judge Kavanaugh.

- All submissions—including paper submissions—to the FBI tip line, FBI web portal, and emails to FBI Headquarters relating or referring to Supreme Court nominee Brett Kavanaugh, allegations leveled against him referring to sexual assault, his character, his drinking, Georgetown Prep, his years as a high school student and college student, requests by individuals to be interviewed by the FBI.

- All correspondence between the FBI and any individual who submitted a tip about Judge Kavanaugh to the FBI through the web portal, emails and/or tip line.

- All records, which includes but is not limited to emails, memos and letters, between FBI personnel who mentioned or referred to these submissions as part of the investigation into his background as the bureau was instructed to undertake by the White House and Senate Judiciary Committee.

- All correspondence between the FBI and the Department of Justice relating or referring to the FBI's investigation into any allegations leveled against Brett Kavanaugh by his accusers.

Hardy Decl. ¶¶ 5, 7, 9, 11; Def. SOF ¶¶ 1, 4, 7, 10.

Plaintiffs filed this suit on November 7, 2018, and subsequently amended their Complaint on December 7, 2018.[2] Hardy Decl. ¶ 13; Def. SOF ¶¶ 12, 13. The FBI answered the Amended Complaint on January 30, 2019. Answer, ECF No. 14. Beginning in May, 2019, in accordance with the parties' agreed-upon schedule, the FBI made monthly rolling productions of responsive, non-exempt material to Plaintiffs. Hardy Decl. ¶¶ 14-17; Def. SOF ¶¶ 14-17; *see also* Joint Status Report of Mar. 15, 2019 ¶ 3, ECF No. 18. Each monthly production consisted of records of tips received by the FBI and ranged from 482 pages to 517 pages released in full or in part, with certain information withheld pursuant to FOIA Exemptions (b)(3), (b)(6), (b)(7)(A), (b)(7)(C), and (b)(7)(E). Hardy Decl. ¶¶ 14-17; Def. SOF ¶¶ 14-17. These records were also published to the FBI's online FOIA Library, The Vault, because they had been requested three or more times. Def. SOF ¶ 18; s*ee also* 5 U.S.C. § 552(a)(2) (requiring agencies to "make available for public inspection in an electronic format" records that "have been requested 3 or more times"); FBI Records: The Vault, https://vault.fbi.gov/ (last visited Oct. 24, 2019).

The FBI made its final production to Plaintiffs on August 7, 2019, at which point the FBI had released a total of 2,029 pages of tip records to Plaintiffs. *See* Hardy Decl. ¶¶ 4, 17, 38, 101; Def. SOF ¶ 17, 21; Joint Status Report of Aug. 21, 2019 ¶ 3, ECF No. 21 ("Aug. 21, 2019 JSR"). In a cover letter accompanying that production, the FBI notified Plaintiffs that the supplemental background investigation file on Judge Kavanaugh was being withheld in full pursuant to FOIA Exemption (b)(5)—specifically, the presidential communications privilege—and that portions of

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[2]The subject of the initial Complaint was an October 4, 2018, FOIA request by Plaintiffs, which the FBI had assigned FOIPA Request No. 1418186-000. *See* Compl. ¶¶ 6-7. That request is identical to FOIPA Request No. 1418863-000. *Compare id.* ¶ 7, *with* Am. Compl. ¶ 7. The Amended Complaint does not raise any allegations as to FOIPA Request No. 1418186-000.

that file were also being withheld pursuant to FOIA Exemptions (b)(6), (b)(7)(C), (b)(7)(D), and (b)(7)(E). Hardy Decl. ¶ 17; Def. SOF ¶ 19.

On August 19, 2019, the parties conferred, and Plaintiffs agreed not to seek additional tip records, since the FBI had agreed to continue publishing those records on a monthly basis to The Vault. Hardy Decl. ¶ 18; Def. SOF ¶ 20; Aug. 21, 2019 JSR ¶ 5. With the FBI's productions complete, the parties proposed—and the Court adopted—a schedule for cross-motions for summary judgment. Hardy Decl. ¶ 18; Aug. 21, 2019 JSR ¶ 6.

II. The FBI's Role in Performing Background Investigations of Presidential Nominees

Article II, Section II of the United States Constitution gives the President the power and duty to nominate, and with the "Advice and Consent of the Senate" appoint, Supreme Court Justices. *See* U.S. Const. art. II, § 2. To assist the President with this constitutional decision-making responsibility, the Department of Justice ("DOJ") entered into a revised Memorandum of Understanding ("MOU") with the White House in 2010 addressing, among other topics, the FBI's role in performing background investigations of judicial nominees. *See Memorandum of Understanding Between the Department of Justice and the President of the United States Regarding Name Checks and Background Investigations Conducted by the Federal Bureau of Investigation*, March 2010 ("2010 MOU") (attached as Exhibit V); *see also* Hardy Decl. ¶¶ 52-54.

The 2010 MOU provides that "[t]he FBI will conduct . . . background investigations at the request of the President or his designated representative, for applicants, employees, or any other persons who will perform services for, or receive an award or recognition from, the President." 2010 MOU ¶ 2(a). FBI background investigations range in scope and content. For instance, the period of time covered in a "full-field" background investigation may vary from the last five years ("Level 4") to the years between the present and the subject's 18th birthday ("Level 1"), depending

on the President's request. *Id.* ¶ 2(a) at n.3. A background investigation may also consist of a "limited inquiry," which includes "follow-up inquiries conducted to resolve particular issues/questions" and may supplement an existing full-field background investigation. *Id.* Such follow-up inquiries do not require an updated written request so long as the nominee's confirmation is still pending. *Id.* ¶ 3(d).

Once a background investigation is complete, "[t]he FBI will furnish summary memoranda, investigative reports or supporting materials . . . containing the results of its investigation[] to the President or his designated representative." *Id.* ¶ 4(e). The purpose of the investigation, the 2010 MOU explains, is to aid and inform the President in his determination of a person's suitability for a certain position, and the President's ultimate decision whether (or not) to move forward with a particular nomination or appointment. *See id.* ¶ 2(b).

The 2010 MOU also addresses the restrictions on access to background investigative reports. It states: "The President or his designated representative will ensure that access to FBI reports is restricted to persons directly involved in ensuring the safety and security of the President or in determining an Appointee's suitability for employment, appointment, recognition or trustworthiness for access to sensitive or classified information." *Id.* ¶ 5(a). Access is thus limited to individuals with "a legitimate need to know the information for the proper performance of official responsibilities." *Id.* And recipients are prohibited from disseminating a report "except in accordance with procedures agreed to by the President or his designated representative and the Director of the FBI or the Director's designated representative." *Id.* ¶ 5(b).

III. The FBI's Full-Field and Supplemental Background Investigations of Judge Kavanaugh

Consistent with the terms of the 2010 MOU, President Trump designated the White House Counsel to request an initial full-field background investigation of Judge Kavanaugh. Hardy Decl.

¶ 55. Accordingly, on July 10, 2018, the White House Counsel's Office initiated a Level 1 FBI background investigation of Judge Kavanaugh, which the FBI performed. *Id.* That full-field investigation is not the subject of this case. *Id.*

Rather, this case is about the follow-up inquiry that the FBI performed—at the request of the White House Counsel's Office on behalf of the President—after allegations of misconduct against Judge Kavanaugh emerged on or around September, 2018. *Id.* ¶ 56. Specifically, an authorized official within the White House Counsel's Office sent a series of e-mails to the FBI on behalf of the President requesting that the FBI conduct limited inquiries, including interviews with specified individuals to ask questions regarding particular topics and allegations detailed in various materials the White House sent to the FBI. *Id.* ¶¶ 56, 58. The information derived from and related to that follow-up inquiry—referred to herein as the "supplemental background investigation file"—is documented in a 527-page collection of "a series of e-mail communications, e-mail attachments, FD-302s, exhibits, and related administrative documents." *Id.* ¶ 57.

As identified in further detail in the *Vaughn* index (attached as Exhibit U), the supplemental background investigation file consists of: "(1) e-mail communications between FBI agents and the White House official who was authorized to initiate the supplemental inquiry, in which the official requested that the FBI conduct the supplemental background investigation and identified individuals to interview and topics to discuss in the interviews; (2) attachments to the e-mail communications between FBI agents and the White House official, including a media story reporting allegations against Judge Kavanaugh, a copy of Dr. Christine Blasey Ford's written testimony submitted to the Senate Judiciary Committee on September 26, 2018, the transcript of the Senate Judiciary Committee's September 27, 2018, hearing on Judge Kavanaugh's Supreme Court nomination, and letters from third parties to members of the Senate Judiciary Committee;

(3) e-mail communications between FBI agents and third parties (or the third parties' counsel), and internal FBI e-mails, regarding scheduling of interviews and other logistics; (4) FD-302s documenting the FBI's interviews, including a 302 attachment showing private social media messages and text messages that were the subject of interview discussions; (5) FBI agents' hand-written interview notes; (6) fax cover sheets and transaction receipts; and (7) FD-1036 import forms, which are similar to fax cover sheets and are used to import FBI-related documents for which there is no standard webform, such as a Word document, Excel spreadsheet, or PDF, into the FBI's database." *Id.* ¶ 58.

Over the course of its supplemental background investigation, the FBI incrementally faxed the entire supplemental background investigation file—including the e-mail communications that the White House Counsel official initially sent to the FBI soliciting the supplemental background investigation—to the White House Counsel's Office, with the exception of the FBI agents' hand-written interview notes and a small number of administrative note pages. *Id.* ¶ 59. The FBI and White House Counsel's Office have been unable to confirm that those pages were included in the fax transmissions. *Id.* In any event, even if they were not transferred to the White House Counsel's Office along with the rest of the materials, those pages are nonetheless included as part of the supplemental background investigation file because, as discussed below, they reveal privileged information contained in the files that were transmitted. *See infra* Part II.A.

IV. Loaning the Supplemental Background Investigation File to Congress

A separate Memorandum of Understanding, entered into in 2009, governs the loaning of judicial background investigations by the President and his advisors in the White House Counsel's Office to the Senate Judiciary Committee. Hardy Decl. ¶ 60. The 2009 MOU contains numerous

strict confidentiality provisions governing the sharing, access, and return of FBI background investigation reports between the White House and Congress. *Id.*

Here, in accordance with the 2009 MOU, the FD-302s, the referenced images of text messages and social media messages, and the tip-line materials, were loaned to the Senate Judiciary Committee on October 4, 2018, by a White House Counsel's Office attorney acting at the direction of the White House Counsel. *Id.* ¶ 61. The documents were subsequently returned to the DOJ's Office of Legal Policy. *Id.* In loaning this information to the Committee, the White House did not intend to waive any privileges but instead loaned the materials pursuant to the 2009 MOU's strict confidentiality protections in an effort to inform the President's decision to continue with Judge Kavanaugh's nomination, based on feedback the President received from the Committee. *Id.*

LEGAL STANDARD

The FOIA represents 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) (quotation omitted). "Congress recognized, however, that public disclosure is not always in the public interest." *CIA v. Sims*, 471 U.S. 159, 166-67 (1985). Accordingly, in enacting the FOIA, "Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.'" *John Doe Agency*, 493 U.S. at 152 (quoting H.R. Rep. No. 89-1497, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423); *accord Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 925 (D.C. Cir. 2003). To that end, Congress "provided nine specific exemptions under which disclosure could be refused." *FBI v. Abramson*, 456 U.S. 615, 621 (1982).

While these "exemptions are to be narrowly construed," *id.* at 630, courts must still give them "meaningful reach and application," *John Doe Agency*, 493 U.S. at 152.

A motion for summary judgment is the procedural vehicle by which FOIA cases are typically decided. *Dean v. DOJ*, 87 F. Supp. 3d 318, 320 (D.D.C. 2015); *accord Brayton v. Office of U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011) ("[T]he vast majority of FOIA cases can be resolved on summary judgment."). "An agency may be entitled to summary judgment in a FOIA case if it demonstrates that no material facts are in dispute, it has conducted an adequate search for responsive records, and each responsive record that it has located has either been produced to the plaintiff or is exempt from disclosure." *Miller v. DOJ*, 872 F. Supp. 2d 12, 18 (D.D.C. 2012) (citing *Weisberg v. DOJ*, 627 F.2d 365, 368 (D.C. Cir. 1980)). Courts review agency responses to FOIA requests *de novo*. *See* 5 U.S.C. § 552(a)(4)(B).

A court may award summary judgment in a FOIA action solely on the basis of information provided by the agency through declarations that describe "the documents and the justifications for nondisclosure with reasonably specific detail," that "demonstrate that the information withheld logically falls within the claimed exemption[s]," and that are "not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981) (footnote omitted). This is not a high bar: "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Judicial Watch, Inc. v. DOD*, 715 F.3d 937, 941 (D.C. Cir. 2013) (per curiam) (citation omitted).

ARGUMENT

I. The FBI Conducted Adequate Searches for Responsive Records.

An agency is entitled to summary judgment in a FOIA case with respect to the adequacy of its search if the agency shows "that it made a good faith effort to conduct a search for the requested

records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (citations omitted), *superseded by statute on other grounds by* Electronic FOIA Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048. This is "a standard of reasonableness." *Davis v. DOJ*, 460 F.3d 92, 105 (D.C. Cir. 2006) (citation omitted). "[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*." *Weisberg*, 745 F.2d at 1485 (citation omitted) (emphasis added). An agency may establish the adequacy of its search "by providing a reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials . . . were searched." *Reep v. DOJ*, 302 F. Supp. 3d 174, 180 (D.D.C. 2018) (alteration in original) (citation omitted).

Applying these principles, the FBI is entitled to summary judgment with respect to the adequacy of its searches. As detailed in Mr. Hardy's declaration, the FBI conducted six separate searches for records responsive to the various parts of Plaintiffs' FOIA requests. *See* Hardy Decl. ¶¶ 19-36.

First, the FBI searched its Central Records System ("CRS"), which is an extensive records system consisting of multiple categories of files, including background investigation files, that the FBI compiles and maintains as part of its function as a law-enforcement agency. *Id.* ¶ 20. The CRS is the principal records system that the FBI searches to locate information responsive to most FOIA requests, because the CRS is where the FBI indexes information about individuals, organizations, events, and other subjects of investigative interest. *Id.* ¶ 22. In an effort to ensure that it had captured all relevant material, the FBI conducted a CRS index search using two separate systems—the Automated Case Support ("ACS") System, which was FBI's primary electronic

case-management system for accessing CRS records until July, 2012; and Sentinel, which is the FBI's next generation case-management system that replaced ACS. *Id.* ¶¶ 24, 26. FBI used the term "Brett Kavanaugh" to locate responsive records from CRS. *Id.* ¶ 31. As a result, the FBI located the supplemental background investigation file on Judge Kavanaugh. *Id.*

Second, the FBI searched for responsive records within the Criminal Justice Information Services Division ("CJIS"). *Id.* ¶ 32. That office is responsible for, as relevant here, managing, ingesting, and routing public tips submitted to the FBI's Public Access Line ("PAL") and E-Tip, the agency's public online platform where the public can submit tips electronically. *Id.* Tips submitted to both PAL and E-Tip are stored within CJIS's Public Access Line Manager ("PALM") database. *Id.* Accordingly, the FBI conducted a search within the PALM database using the terms "Brett" and "Kavanaugh"— terms that would have caught any tip referencing Judge Kavanaugh, regardless of any other content in the tip—and retrieved all responsive tip records that the agency had received both telephonically and electronically. *Id.*

The FBI's third search went to its Office of Public Affairs ("OPA"), because FBI had deemed it possible that OPA possessed records related to public submissions of information about Judge Kavanaugh or records regarding FBI communications with the public concerning its supplemental background investigation of Judge Kavanaugh. *Id.* ¶ 33. The FBI's search methods—which led the agency to uncover a news article about FBI Director Christopher Wray's Senate testimony regarding the supplemental background investigation—consisted of sharing Plaintiffs' FOIA requests with OPA employees; knowledgeable OPA employees then searched OPA's records using the descriptions of records that Plaintiffs' had provided in their FOIA requests. *Id.*

Fourth, the FBI conducted a search of its Office of Congressional Affairs ("OCA"). *Id.* ¶ 34. OCA is the FBI's primary liaison with Congress. *Id.* As in the OPA search, the FBI shared

Plaintiffs' FOIA requests with OCA, and knowledgeable OCA employees searched the office's records based on the descriptions given in the FOIA requests. *Id.* As a result of this search, OCA located one e-mail record regarding a Senate inquiry into the FBI's supplemental background investigation of Judge Kavanaugh. *Id.*

The fifth search was directed towards the FBI's Office of the Executive Secretariat ("ExecSec"). *Id.* ¶ 35. That office helps ensure that the FBI responds promptly and accurately to inquiries from a variety of correspondents. *Id.* The FBI provided copies of Plaintiffs' FOIA requests to ExecSec, which searched its internal database for any responsive records, based on the descriptions of records provided by Plaintiffs in their requests. *Id.* ExecSec did not locate any responsive records.

The FBI's sixth and final search went to the agency's Security Division ("SecD"), which is responsible for providing timely, accurate, and comprehensive background investigations on individuals nominated for Presidential appointments, including nominees to the Supreme Court. *Id.* ¶ 36. Indeed, SecD created and compiled the supplemental background investigation file on Judge Kavanaugh which, as explained above, the FBI located in the CRS. *Id.* The FBI ordinarily does not perform additional searches of SecD once it has located an investigative file in the CRS, but it took this extra step in this case in an abundance of caution to ensure that it had located all responsive records. *Id.* In response to the FBI's inquiry, SecD confirmed that all information compiled by SecD during its supplemental background investigation of Judge Kavanaugh was maintained in the supplemental background investigation file located in the CRS. *Id.*

By taking the steps described above, the FBI employed a reasonable and adequate search of every location where responsive records could reasonably be expected to be maintained. And the

agency had no reason to believe that responsive records were likely to be maintained elsewhere. The FBI is therefore entitled to summary judgment on its searches. *See Oglesby*, 920 F.2d at 68.

II. The FBI Properly Withheld in Full the Supplemental Background Investigation File Under Exemption (b)(5).

Plaintiffs' FOIA requests sought records concerning the supplemental background investigation that the White House solicited and received from the FBI and relied upon to aid and inform the President's decision whether to continue Judge Kavanaugh's nomination to the Supreme Court. Because those records fall squarely within the presidential communications privilege, the FBI appropriately withheld this material in full pursuant to FOIA Exemption (b)(5), at the direction of the White House Counsel's Office as relayed by the Department of Justice.

A. *The Supplemental Background Investigation File is Protected from Disclosure by the Presidential Communications Privilege.*

Exemption (b)(5) protects "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). The exemption ensures that plaintiffs cannot obtain through FOIA records that would be "normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (footnote omitted). The exemption thus "incorporates the traditional privileges that the Government could assert in civil litigation against a private litigant—including the presidential communications privilege." *See Loving v. DOD*, 550 F.3d 32, 37 (D.C. Cir. 2008).

The presidential communications privilege is a "presumptive privilege for Presidential communications," *United States v. Nixon*, 418 U.S. 683, 708 (1974), intended to "preserve[] the President's ability to obtain candid and informed opinions from his advisors and to make decisions confidentially," *Loving*, 550 F.3d at 37. *See also Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1113 (D.C. Cir. 2004) (describing the privilege as "fundamental to the operation of Government and

inextricably rooted in the separation of powers under the Constitution" (citation omitted)). The privilege thus protects "'communications directly involving and documents actually viewed by the President,'" *Loving*, 550 F.3d at 37 (alterations in original) (quoting *Judicial Watch*, 365 F.3d at 1114), as well as "communications authored or solicited and received by those members of an immediate White House advisor's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate," *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997). Accordingly, the privilege shields in its entirety "the President's personal decision-making process," including the gathering of information by White House staff that is relevant to that process, even when that information is not conveyed directly to the President himself. *See Judicial Watch*, 365 F.3d at 1118.

The D.C. Circuit has applied the presidential communications privilege in cases involving communications to the President or his close advisors in aid of a decision to be made by the President. *See Judicial Watch, Inc. v. DOD*, 913 F.3d 1106, 1113-14 (D.C. Cir. 2019) (memos that memorialized advice to the President and advisors related to potential military strike on Osama Bin Laden were protected by the presidential communications privilege); *In re Sealed Case*, 121 F.3d at 746-47 (protecting a report prepared by White House Counsel to advise the President whether to take executive action against the Secretary of Agriculture); *Judicial Watch*, 365 F.3d at 1116, 1123-24 (privilege does not apply to internal DOJ pardon documents but does apply to DOJ communications to the White House if they were solicited and received by the President or his immediate advisors in the Office of the President); *Loving*, 550 F.3d at 37 (protecting Army memoranda sent to the President, advising on his review of a soldier's capital sentence, and noting that the privilege exists to protect the President's "ability to obtain candid and informed opinions from his advisors and to make decisions confidentially" (citation omitted)).

In the FOIA context, agencies can assert Exemption (b)(5) over material covered by the presidential communications privilege without an invocation of the privilege by the President. *See Elec. Privacy Info. Ctr. v. DOJ*, 320 F. Supp. 3d 110, 117 & n.5 (D.D.C. 2018); *Elec. Privacy Info. Ctr. v. DOJ*, 584 F. Supp. 2d 65, 80 (D.D.C. 2008). "[U]nlike the deliberative process privilege," which is also protected by Exemption (b)(5), "the presidential communications privilege applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones," thus no segregability analysis is required. *In re Sealed Case*, 121 F.3d at 745; *see also Judicial Watch*, 913 F.3d at 1113 ("[B]ecause the presidential communications privilege applies to the totality of the five memoranda that Judicial Watch requests . . . the question of segregability of non-exempt material is therefore not presented."). And "[a]lthough the presidential communications privilege is a qualified privilege" in the civil discovery context, "subject to an adequate showing of need, FOIA requests cannot overcome the privilege because 'the particular purpose for which a FOIA plaintiff seeks information is not relevant in determining whether FOIA requires disclosure.'" *Judicial Watch*, 913 F.3d at 1112 (quoting *Loving*, 550 F.3d at 40). Thus, if an agency has sufficiently justified the assertion of the presidential communications privilege over the withheld information, it is entitled to summary judgment on the lawfulness of that withholding.

The nature of the information contained in the supplemental background investigation file places it at the core of the protections afforded by the presidential communications privilege. As attested to in Mr. Hardy's declaration, the supplemental background investigation was solicited by an authorized official within the White House Counsel's Office through a series of e-mails to the FBI on behalf of the President (e-mails which are themselves part of the supplemental background investigation file). Hardy Decl. ¶¶ 56-58. Specifically, the White House official requested that the

FBI conduct a series of limited supplemental inquiries, including interviews with specified individuals to ask questions regarding particular topics and allegations detailed in various materials the White House sent to the FBI. *Id.* ¶ 58. That request, as well as the FBI's activities in performing the supplemental background investigation, are documented in the supplemental background investigation file. *Id.* The particular contents of that file are summarized in Mr. Hardy's Declaration and identified line-by-line in the *Vaughn* index. *See id.*; Exh. U at 44-59.

Over the course of the supplemental background investigation, the FBI incrementally transferred the contents of the supplemental background investigation file—with minimal potential exceptions discussed below—via fax to the White House Counsel's Office. Hardy Decl. ¶ 59. The White House Counsel's Office has confirmed this fact, *see id.*, and in any event many of the pages in the file are on their face "authored or solicited and received" by the White House Counsel's Office. *See In re Sealed Case*, 121 F.3d at 752. For instance, the e-mails between FBI agents and the White House official, in which the official requested the supplemental background investigation and identified individuals to interview as well as interview topics, plainly constitute information authored and solicited by the White House. *See* Hardy Decl. ¶¶ 58-59. Further, fax cover sheets in the file expressly show that other documents also included in the file, such as the FD-302s and attached images of private social media messages and text messages, were transferred to the White House Counsel's Office. *Id.* ¶ 59.

The only potential exceptions, which the FBI and White House Counsel's Office have been unable to confirm were included in the transfers to the White House, are the FBI agents' hand-written interview notes and a small number of administrative note pages. *Id.* Assuming those pages were not included among the materials transmitted to the White House Counsel's Office, they are nonetheless protected by the presidential communications privilege because the

information contained in those pages reveals privileged information contained in the files that were transmitted. These files thus "memorialize actual communications with the President or his staff [and] are not merely internal agency communications[.]" *Citizens for Responsibility & Ethics in Wash. v. DHS*, 2008 WL 2872183 (D.D.C. July 22, 2008); *see also id.* ("Courts in this district have also found that the privilege extends to internal agency documents that memorialize privileged communications between the agency and President or immediate White House advisers."); *Prop. of the People, Inc. v. OMB*, 330 F. Supp. 3d 373, 387 (D.D.C. 2018) (same).

The information contained in the supplemental background investigation file was relied upon by the White House in order to assist the President in performing his constitutional duty of nominating a Supreme Court Justice. Hardy Decl. ¶ 62. That duty is set forth in Article II Section 2 of the Constitution, which states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court." U.S. Const. art. II, § 2. All background investigations of the President's nominees, judicial or otherwise, are created for the purpose of assisting close advisors to the President—and ultimately the President himself—as he carries out this significant constitutional duty. *Id.* ¶ 52. Indeed, the President could have relied upon the information contained in Judge Kavanaugh's supplemental background investigation file to withdraw Judge Kavanaugh's nomination at any time, if the President believed such a measure was warranted. Of course, the President did not withdraw Judge Kavanaugh's nomination, meaning that disclosing the file would reveal information that the President and his advisors relied upon in the President's decision to move forward with Judge Kavanaugh's nomination. In short, the file was requested on behalf of, and provided to, the President to assist him in a fundamental constitutional matter of presidential decision-making: whether to continue with the nomination of Judge Kavanaugh to the Supreme Court. *See id.* ¶ 62. Moreover, disclosure would inhibit the

President's ability to engage in effective communications and decision-making because it would interfere with his ability to seek and obtain candid information regarding judicial nominations, which is precisely the harms that the presidential communications privilege is intended to prevent. *Id.*; *see also Loving*, 550 F.3d at 37.

For these reasons, the supplemental background investigation file is protected by the presidential communications privilege, and the FBI is therefore entitled to summary judgment on its decision to withhold that file in full.

B. *Loaning the Supplemental Background Investigation File to Congress Did Not Waive The Privilege.*

The Exemption (b)(5) privilege that applies to the supplemental background investigation file was not waived when the White House loaned the file to members of Congress. That is because "disclosure to Congress [does] not waive Exemption 5 protection" for materials that are otherwise exempt. *Rockwell Int'l Corp. v. DOJ*, 235 F.3d 598, 605 (D.C. Cir. 2001).

The D.C. Circuit established this rule regarding waiver in *Murphy v. Department of Army*, 613 F.2d 1151 (D.C. Cir. 1979). There, the court held that the Army did not waive Exemption (b)(5) when it disclosed to a congressman a memorandum that was subject to the deliberative process privilege. *Id.* at 1154-55. Such disclosure, the court reasoned, "could not have had th[e] consequence" of waiving Exemption (b)(5) because in drafting FOIA, Congress "carve[d] out for itself a special right of access to privileged information not shared by others." *Id.* at 1155-56 (citing now 5 U.S.C. § 552(d), which provides that FOIA "is not authority to withhold information from Congress"). It made no difference that the disclosure was not to Congress as an entity, to a congressional committee, or even to a committee chairman. *Id.* at 1156-57. Rather, disclosure in any of those contexts, as well as to an individual congressman, does not waive an agency's invocation of Exemption (b)(5). *Id.* If the rule were otherwise, agencies would become

significantly "more cautious in furnishing sensitive information to the legislative branch[,] a development at odds with public policy which encourages broad congressional access to governmental information." *Id.* at 1156. Thus the court held that "to the extent that Congress has reserved to itself . . . the right to receive information not available to the general public, and actually does receive such information pursuant to that section (whether in the form of documents or otherwise), no waiver occurs of the privileges and exemptions which are available to the executive branch under the FOIA with respect to the public at large." *Id.* And, while *Murphy* dealt specifically with the deliberative process privilege under Exemption (b)(5), not the presidential communications privilege, the court nonetheless stated: "If release to a congressional body of a document exempt from disclosure under the FOIA does not amount to a waiver of the governmental privilege, it makes conceptually no difference whether the underlying exemption provision relates to law enforcement, to the government's internal deliberative processes, or to some other privileged activity." *Id.* at 1157.

Several decades later, the D.C. Circuit reaffirmed *Murphy* in *Rockwell*, 235 F.3d at 604. The *Rockwell* court confirmed the breadth of the holding in *Murphy*, highlighting that the Army's memorandum in that case was subject to Exemption (b)(5) even though the agency "had made '[n]o specific request' and the congressman no specific promise to keep the document confidential." 235 F.3d at 604 (alteration in original) (citation omitted); *see also Heggestad v. DOJ*, 182 F. Supp. 2d 1, 13 D.D.C. 2000) ("[T]his Circuit has explicitly held that a document otherwise covered by the deliberative process privilege does not lose this status merely because it was disclosed to a member of Congress without an explicit warning of its confidential status." (citation omitted)).

Here, as in *Murphy*, the decision to loan the information in the supplemental background investigation file to a member (or members) of Congress does not invalidate the FBI's assertion of

Exemption (b)(5). Holding otherwise would interrupt the inter-branch accommodation process because it would deter the Executive Branch from disclosing information to Congress relevant to its investigations. *See generally United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977) ("[E]ach branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation."). As the *Murphy* court emphasized, the FOIA is structured to avoid particularly that result. *See* 613 F.2d at 1156. Thus, under these circumstances, and absent any indication that the FBI or the White House actually "intend[ed] to waive . . . confidentiality," this Court should "find no Exemption 5 waiver." *Rockwell*, 235 F.3d at 604.

III. The FBI Properly Withheld Information Under Exemptions (b)(3), (b)(6), and (b)(7).

Independent from and in addition to the invocation of Exemption (b)(5) to withhold in full the supplemental background investigation file, the FBI has determined that some portions of that file, and some portions of the tip records, are protected from disclosure under Exemptions (b)(6), and (b)(7), and that some portions of the tip records are further protected under Exemption (b)(3). Because Mr. Hardy's declaration sets forth logical and plausible justifications for invoking each of these exemptions, the Court should grant summary judgment for the FBI. *See, e.g.*, *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007) ("Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." (citation omitted)).

A. *The FBI Properly Withheld Information Protected By Statute Under Exemption (b)(3).*

Exemption (b)(3) protects records that are "specifically exempted from disclosure by [another] statute," so long as the relevant statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3); *see*

ACLU v. DOD, 628 F.3d 612, 617-18 (D.C. Cir. 2011) (Exemption (b)(3) "incorporate[es] the protections of other shield statutes"). The purpose of this exemption is "to assure that Congress, not the agency, makes the basic nondisclosure decision." *Ass'n of Retired R.R. Workers v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987). Thus, the agency "need only show that the statute claimed is one of exemption as contemplated by Exemption (b)(3) and that the withheld material falls within the statute." *Larson v. Dep't of State*, 565 F.3d 857, 868 (D.C. Cir. 2009).

The information withheld by the FBI pursuant to Exemption (b)(3) pertains to intelligence sources and methods and is thus prohibited from disclosure by the National Security Act of 1947, 50 U.S.C. § 3024(i)(1). It is "well-accepted that Section 102(A)(i)(1) of the National Security Act of 1947 is a withholding statute for purposes of Exemption (b)(3)." *Brick v. DOJ*, 358 F. Supp. 3d 37, 47-48 (D.D.C. 2019). Section 102(A) of that statute, as amended, requires the Director of National Intelligence ("DNI") to "protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). "The DNI has delegated enforcement of this National Security Act mandate to the heads of the 17 agencies that constitute the Intelligence Community, and the FBI is one of those delegees." *Brick*, 358 F. Supp. 3d at 47 (citation omitted).

The FBI asserted Exemption (b)(3) to protect information regarding follow-up research that the FBI conducted on a third party—not Judge Kavanaugh—who was identified in the responsive tip records. Hardy Decl. ¶ 43. In conducting this research, the FBI located information, which it recorded within the tip records, related to the FBI's intelligence-gathering initiatives, including national security investigation file numbers. *Id.* ¶ 47. Revealing this information would thus reveal the existing national security investigations, which is key information about the FBI's intelligence sources and methods. *Id.* Thus, because disclosing this information would violate the

plain Congressional mandate set forth in the National Security Act, the FBI properly withheld the material under Exemption (b)(3).

B. *The FBI Properly Withheld Information Under Exemption (b)(7).*

Exemption (b)(7) protects from disclosure "records or information compiled for law enforcement purposes," the disclosure of which could reasonably be expected to cause particular harms. 5 U.S.C. § 552(b)(7). The exemption is broken down into six parts: (b)(7)(A) through (b)(7)(F). *See id.* In this case, the FBI withheld information under Exemptions (b)(7)(A), (b)(7)(D), and (b)(7)(E), as well as (b)(7)(C) (together with Exemption (b)(6), which is discussed below in Part III(C)).

1. The Records Were Compiled for Law Enforcement Purposes.

As a threshold matter, "[t]o fall within any of the exemptions under the umbrella of Exemption (b)(7), a record must have been 'compiled for law enforcement purposes.'" *Pub. Emps. for Envtl. Resp. v. Int'l Boundary & Water Comm'n.*, 740 F.3d 195, 202-03 (D.C. Cir. 2014). Both the supplemental background investigation file and the tip-line records qualify.

"To determine whether records are compiled for law enforcement purposes, [the D.C. Circuit] has long emphasized that the focus is on how and under what circumstances the requested files were compiled and whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding." *Clemente v. FBI*, 867 F.3d 111, 119 (D.C. Cir. 2017) (citation omitted). This is not a burdensome exercise. Documents are "compiled for law enforcement purposes" if they were, for example, "created to prevent crime and keep people safe," *Elec. Privacy Info. Ctr. v. DHS*, 777 F.3d 518, 523 (D.C. Cir. 2015), "deter illegal activity and ensure national security," *Sack v. DOD*, 823 F.3d 687, 694 (D.C. Cir. 2016), or otherwise show a "rational nexus between the investigation and one of the agency's law enforcement duties and a connection between

an individual or incident and a possible security risk or violation of federal law," *Blackwell v. FBI*, 646 F.3d 37, 40 (D.C. Cir. 2011) (quoting *Campbell v. DOJ*, 164 F.3d 20, 32 (D.C. Cir. 1998)).

As the D.C. Circuit has repeatedly held, "[b]ackground investigations conducted to assess an applicant's qualification, such as . . . clearance and investigatory processes, inherently relate to law enforcement." *Morley v. CIA*, 508 F.3d 1108, 1128-29 (D.C. Cir. 2007) (citation omitted); *see also Mittleman v. OPM*, 76 F.3d 1240, 1243 (D.C. Cir. 1996) (per curiam) (records compiled for the purpose of conducting background investigations on individuals seeking government employment satisfy Exemption (b)(7)'s threshold requirement of being compiled for law enforcement purposes); *Sheridan v. OPM*, 278 F. Supp. 3d 11, 20-21 (D.D.C. 2017) (same); *Henderson v. ODNI*, 151 F. Supp. 3d 170, 176 (D.D.C. 2016) (same); *Miller v. United States*, 630 F. Supp. 347, 349 (E.D.N.Y. 1986) (same). Mr. Hardy's declaration explains that the FBI created the supplemental background investigation file in response to solicitations from the White House Counsel's Office for a follow-up inquiry regarding Judge Kavanaugh, pursuant to the 2010 MOU. Hardy Decl. ¶¶ 56, 65. These materials are plainly part of a background investigation and thus are inherently "compiled for law enforcement purposes" within the meaning of Exemption (b)(7).

The tip-line records were similarly "compiled for law enforcement purposes." Pursuant to 28 U.S.C. §§ 533 and 534, Executive Order No. 12333, as implemented by the Attorney General's Guidelines for Domestic Operations, and 28 C.F.R. § 0.85, the FBI is the primary investigative agency of the federal government. Hardy Decl. ¶ 64. One way the FBI carries out its investigatory role is through its tip line, which functions as a vehicle for the public to aid and inform the FBI's enforcement of laws, should the FBI find evidence of criminal behavior as a result of a tip. *Id.* ¶ 66. The relevant tip records in this case—which relate to, among other topics, allegations of

possible criminal conduct—were thus compiled pursuant to the FBI's investigatory authority in order to help the FBI "prevent crime and keep people safe." *See Elec. Priv. Info.*, 777 F.3d at 156.

2. The FBI Properly Withheld Information Concerning Pending Enforcement Proceedings Under Exemption (b)(7)(A).

Exemption (b)(7)(A) protects records or information "compiled for law enforcement purposes" when disclosure "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). As the D.C. Circuit has explained, "Exemption 7(A) reflects the Congress's recognition that 'law enforcement agencies ha[ve] 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 Responsibility & Ethics in Wash. v. DOJ*, 746 F.3d 1082, 1096 (D.C. Cir. 2014) ("*CREW*") (alterations in original) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978)). "To justify withholding, [an agency] must therefore demonstrate that 'disclosure (1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or reasonably anticipated.'" *Id.* (quoting *Mapother v. DOJ*, 3 F.3d 1533, 1540 (D.C. Cir. 1993)). The latter two prongs of this analysis typically may be satisfied by pointing to a pending investigation or proceeding. *See id.* at 1098.

The FBI withheld pursuant to Exemption (b)(7)(A) discrete information contained within tips that the FBI evaluated and determined to be a credible threat, which resulted in the initiation of current, ongoing investigative efforts. Hardy Decl. ¶ 69. Disclosing this information would thus reveal the existence of otherwise unknown investigations and proceedings. *Id.* Moreover, the FBI determined that disclosing this information would reveal the government's investigations to the subjects of those investigations, which could permit the subjects to attempt to thwart the investigation by, for instance, tampering with witnesses and evidence. *Id.* As such, revealing this information would risk undermining ongoing investigations, and the FBI therefore properly

withheld this information under Exemption (b)(7)(A). *See Cable News Network, Inc. v. FBI*, 298 F. Supp. 3d 124, 130 (D.D.C. 2018), *appeal dismissed*, No. 18-5041, 2018 WL 4619108 (D.C. Cir. July 5, 2018) (the FBI properly withheld records under Exemption (b)(7)(A) that "would highlight particular activities, interactions, and individuals," which could assist subjects or targets of the investigation in shaping their testimony).

3. The FBI Properly Withheld Information Concerning the Identities of Confidential Sources Under Exemption (b)(7)(D).

Exemption (b)(7)(D) permits the withholding of information in law enforcement records, the release of which "could reasonably be expected to disclose the identity of a confidential source . . . and, in the case of a record or information compiled . . . in the course of a criminal investigation or . . . national security intelligence investigation, information furnished by a confidential source." 5 U.S.C. § 552(b)(7)(D). This exemption requires no balancing of public and private interests. *See Dow Jones & Co. v. DOJ*, 917 F.2d 571, 575-76 (D.C. Cir. 1990). If the agency "can demonstrate that the information was provided in confidence," then "the source will be deemed a confidential one, and both the identity of the source and the information he or she provided will be immune from FOIA disclosure." *Id.* This exemption applies to protect the identity of a source if an agency establishes that a source has provided information under either an express or implied promise of confidentiality. *See Williams v. FBI*, 69 F.3d 1155, 1159 (D.C. Cir. 1995).

Here, the FBI protected from disclosure the names and identifying information about, and information provided by, third parties to the FBI during the course of the supplemental background investigation of Judge Kavanaugh under express assurances of confidentiality. Hardy Decl. ¶ 90. These individuals "provided specific and detailed information that is singular in nature," and they "specifically requested that their identities not be revealed." *Id.* Disclosing these individuals' names and personally identifying information would hinder the FBI's ability to provide credible

assurances of confidentiality, which it must do in order to obtain relevant and accurate information. *Id.* This information was therefore properly protected under Exemption (b)(7)(D). *See Dow Jones*, 917 F.2d at 575-76.[3]

4. The FBI Properly Withheld Information Concerning Investigative Techniques and Procedures Under Exemption (b)(7)(E).

Exemption (b)(7)(E) authorizes withholding of information compiled for law enforcement purposes if release of the information "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). Congress intended that Exemption (b)(7)(E) protect techniques and procedures used in all manner of investigations after crimes or other incidents have occurred. *See Henderson v. Office of the Dir. of Nat'l Intelligence*, 151 F. Supp. 3d 170, 176 (D.D.C. 2016) (citing 132 Cong. Rec. H9466 (daily ed. Oct. 8, 1986)). As relevant here, Exemption (b)(7)(E) protects information about non-public details regarding commonly known procedures if the disclosure of such details could nullify or reduce their effectiveness. *See, e.g.*, *Barnard v. DHS*, 598 F. Supp. 2d 1, 23 (D.D.C. 2009).

"There is some disagreement in the courts as to the proper reading of Exemption 7(E)"—specifically, whether the "risk circumvention of the law" requirement that "clearly applies to records containing guidelines . . . also applies to records containing 'techniques and procedures.'" *Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice*, 160 F. Supp. 3d 226, 241–42

[3]To the extent Plaintiffs claim that any sources waived their confidential status by providing information to the public, they are incorrect. Even assuming that the FBI protected the identities of individuals who have spoken publicly about these matters (which the FBI neither confirms nor denies), "public testimony by 'confidential sources' does not waive the [government's] right to invoke Exemption 7(D) to withhold the identity of a confidential source." *Cobar v. DOJ*, 81 F. Supp. 3d 64, 72-73 (D.D.C. 2015); *see also Borda v. DOJ*, 245 F. Supp. 3d 52, 61 (D.D.C. 2017).

(D.D.C. 2016) (quoting 5 U.S.C. § 552(b)(7)(E)). Even if the requirement does apply, "Exemption 7(E) 'sets a relatively low bar for the agency to justify withholding.'" *Associated Press v. FBI*, 265 F. Supp. 3d 82, 99 (D.D.C. 2017) (quoting *Blackwell*, 646 F.3d at 41). The agency need not make a "highly specific . . . showing" of risk of circumvention of the law, but only "demonstrate logically how the release of the requested information might create" such a risk. *Blackwell*, 646 F.3d at 42 (quoting *Mayer Brown, LLP v. IRS*, 562 F.3d 1190, 1194 (D.C. Cir. 2009)).

The information the FBI withheld pursuant to Exemption (b)(7)(E) falls into four categories: (1) FBI secure fax numbers, internal e-mail addresses, non-public web addresses, and internal e-mail tools; (2) database identifiers and printouts; (3) collection/analysis of information; and (4) sensitive FBI file numbers. Hardy Decl. ¶¶ 94-97.

a. Category (b)(7)(E)-1: FBI secure fax numbers, internal e-mail address, non-public web address, and internal e-mail tools

In this category, the FBI protected secure fax numbers, internal e-mail addresses, non-public web addresses, and internal e-mail tools. *Id.* ¶ 94. By definition, this secure and internal information has not been made well known to the public. *See Shapiro v. DOJ*, 153 F. Supp. 3d 253, 273 (D.D.C. 2016) (Exemption (b)(7)(E) is designed to protect information "not 'already well known to the public") (quoting H.R. Rep. No. 93-1380 at 12 (1975)). And the FBI has identified ways in which releasing this information would risk law enforcement circumvention: "Releasing this information would provide criminals with specific targets for possible cyber-attacks and attacks on FBI secure communications." Hardy Decl. ¶ 94. Specifically, internet hackers could use this information to invade the FBI's Information Technology system by, for instance, gaining unauthorized access to FBI systems and viewing or manipulating sensitive data. *Id.* Because releasing this information would educate criminals about the FBI's use and reliance on secure communications, allowing them to evade the FBI's investigative efforts and circumvent the law,

id., this information is exempt from disclosure under Exemption (b)(7)(E). *See Blackwell v. FBI*, 680 F. Supp. 2d 79, 92 (D.D.C. 2010).

b. Category (b)(7)(E)-2: Database identifiers/printouts

In this category, the FBI protected the identities of sensitive, non-public investigative databases and search results located through queries of those databases performed for official law enforcement purposes. Hardy Decl. ¶ 95. Additionally, this category includes non-public details regarding the FBI's PALM database, including transaction numbers for tips, links between tips, and the FBI's methods for evaluating the investigative relevance of a given tip. *Id.*

This information falls squarely within Exemption (b)(7)(E), as its release "would give criminals insight into the available tools and resources the FBI uses to conduct criminal and national security investigations" and would thus enable the criminals "to discover how they might avoid providing the FBI with key information it could leverage to pursue investigations of their criminal conduct; how they should structure their behavior to avoid triggering investigative scrutiny by the FBI; and how they might gain access to these investigative databases to exploit, destroy, and corrupt the information within these databases." *Id.* Accordingly, the FBI properly withheld this information pursuant to Exemption (b)(7)(E). *See Shapiro*, 893 F.3d at 799-800 (applying Exemption (b)(7)(E) to FBI database searches); *Blackwell*, 646 F.3d at 42 (information that "could enable criminals to employ countermeasures to avoid detection" was properly withheld under Exemption (b)(7)(E) since "[t]hese statements logically explain how the data could help criminals circumvent the law").

c. Category (b)(7)(E)-3: Collection/analysis of information

In this category, the FBI protected the methods it uses to collect and analyze information obtained for investigative purposes. Hardy Decl. ¶ 96. Disclosing this information would reveal

"the identity of methods used in the collection and analysis of information, including how and from where the FBI collects information and the methodologies employed to analyze once collected." *Id.* Such disclosure would "enable criminals to educate themselves about the techniques employed for the collection and analysis of information and therefore allow these individuals to take countermeasures to circumvent the effectiveness of these techniques and to continue to violate the law and engage in intelligence, terrorist, and criminal activities." *Id.*

Courts have upheld agencies' decisions to protect other law enforcement techniques for similar reasons. *See, e.g.*, *Soghoian v. DOJ*, 885 F. Supp. 2d 62, 75 (D.D.C. 2012) (protecting electronic surveillance techniques because release of information showing "what information is collected, how it is collected, and more importantly, when it is not collected" could allow criminals to evade detection); *Lewis-Bey v. DOJ*, 595 F. Supp. 2d 120, 138 (D.D.C. 2009) (protecting details of electronic surveillance techniques, including the "circumstances under which the techniques were used, the specific timing of their use, and the specific location where they were employed," because disclosure of this information "would illustrate the agency's strategy in implementing these specific techniques, and, in turn, could lead to decreased effectiveness in future investigations by allowing potential subjects to anticipate . . . and identify such techniques as they are being employed" (citation omitted)). Thus, to the extent that the FBI must show that disclosure risks circumvention of the law, the FBI has met this "relatively low bar" and this information is protected from disclosure under Exemption (b)(7)(E). *Blackwell*, 646 F.3d at 42.

d. Category (b)(7)(E)(4): Sensitive FBI file numbers

The FBI protected sensitive investigative file numbers, which in their entirety are not known to the public, in this category. Hardy Decl. ¶ 97. The file numbers contain three parts: (1) FBI classification numbers which indicate the types of investigative/intelligence gathering

programs to which a given file pertains; (2) codes that indicate which FBI field office or overseas FBI legal attaché initiated the relevant investigation; and (3) the numbers assigned to the unique investigative initiatives that a given file was created to memorialize. *Id.* ¶¶ 97-99.

As to the first part, "[m]any of the FBI's classification numbers are public, which makes disclosure of this information even more telling," because "[r]elease of known file classification numbers in the context of investigative records would immediately reveal the types of investigations being pursued, and thus the types of investigative techniques and procedures available to FBI investigators, and/or non-public facets of the FBI's investigative strategies." *Id.* ¶ 97. "For example, revealing the FBI has a money laundering investigative file on a subject who was only known to be investigated for crimes related to public corruption, would reveal key non-public information about the FBI's investigative strategies and gathered evidence." *Id.*

As to the second part of the file numbers—office-of-origin codes—disclosing this information would reveal "where and how the FBI detected particular criminal behaviors or national security threats," as well as "key pieces about the FBI's non-public investigations or intelligence/evidence gathering sources and methods." *Id.* ¶ 98. Further, "[r]evealing this information could also risk disclosing unknown FBI investigations or intelligence gathering initiatives, by revealing interests in varying areas of FBI investigative responsibility." *Id.* Disclosure would also reveal important information regarding the FBI's failure to detect certain criminal conduct. *Id.* "For example, a criminal operating out of San Francisco, California with ties to a criminal organization under investigation in the FBI's Seattle Field Office, could request the FBI's Seattle Field Office's investigative file." *Id.* "If the FBI were to reveal all of the originating office codes in the investigative files present in Seattle's file, and there was no indication the FBI ever pursued an investigation in San Francisco, the criminal could reasonably

assume the FBI failed to locate any evidence of their wrongdoing, emboldening them to continue their activities, undeterred." *Id.*

The third part of the file numbers—numbers assigned to unique investigative initiatives—constitutes information that, if disclosed "would provide criminals and foreign adversaries with a tracking mechanism by which they can place particular files/investigations within the context of large FBI investigative efforts." *Id.* ¶ 99. As such, releasing this information would allow criminals to reasonably estimate "how FBI investigations may be interrelated and when, why, and how the FBI pursued different investigative strategies." *Id.* As a result, criminals would have a "means of judging where the FBI allocates its limited investigative resources, how the FBI responds to different investigative circumstances, what the FBI knows and when/how they obtained the knowledge, and if there are knowledge-gaps in the FBI's gathered intelligence." *Id.*

Accordingly, the FBI correctly protected this information pursuant to Exemption (b)(7)(E).

C. *The FBI Properly Withheld Privacy Information Under Exemptions (b)(6) and (b)(7)(C).*

"FOIA Exemptions 6 and 7(C) seek to protect the privacy of individuals identified in certain agency records." *ACLU*, 655 F.3d at 6. Specifically, Exemption (b)(6) protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); *see Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 599-600 (1982) ("[T]he primary concern of Congress in drafting Exemption 6 was to provide for the confidentiality of personal matters.") (citation omitted). For Exemption (b)(6) to apply, the information at issue must be maintained in a government file and be capable of being "identified as applying to a particular individual." *Id.* at 602. Similarly, Exemption (b)(7)(C) authorizes withholding of records compiled for law enforcement purposes if their release "could reasonably be expected to constitute an unwarranted invasion of privacy." 5 U.S.C. § 552(b)(7)(C).

The Supreme Court broadly defined the scope of a person's right to privacy under FOIA Exemption (b)(7)(C) to include "the individual's control of information concerning his or her person." *DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763, 767 (1989).

Exemption (b)(6) authorizes government agencies to withhold records when release "would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § (b)(6), and Exemption (b)(7) authorizes withholding under a lower standard, when release "could reasonably be expected to constitute an unwarranted invasion of personal property," 5 U.S.C. § 552(b)(7). *See also Nat'l Archives Records Admin. v. Favish*, 541 U.S. 157, 165-66 (2004) (discussing the differences between Exemptions (b)(6) and (b)(7)(C)). Accordingly, "Exemption 7(C) is more protective of privacy than Exemption 6 and thus establishes a lower bar for withholding material." *ACLU*, 655 F.3d at 6 (citation omitted). And, because all of the records at issue here were compiled for law enforcement purposes, the Court need only apply the lower (b)(7)(C) analysis. *Beck v. DOJ*, 997 F.2d 1489, 1491 (D.C. Cir. 1993); *Roth v. DOJ*, 642 F.3d 1161, 1173 (D.C. Cir. 2011).

Both Exemptions (b)(6) and (b)(7)(C) "require agencies and reviewing courts to 'balance the privacy interests that would be compromised by disclosure against the public interest in the release of the requested information.'" *Braga v. FBI*, 910 F. Supp. 2d 258, 266 (D.D.C. 2012) (quoting *Beck*, 997 F.2d at 1491). In this context, "[t]he privacy interest at stake belongs to the individual, not the government agency." *Thompson v. DOJ*, 851 F. Supp. 2d 89, 99 (D.D.C. 2012). The D.C. Circuit has repeatedly recognized the "strong interest of individuals, whether they be suspects, witnesses, or investigators, in not being associated unwarrantedly with alleged criminal activity." *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990) (quoting *Dunkelberger v. DOJ*, 906 F.2d 779, 781 (D.C. Cir. 1990)); *see also Roth*, 642 F.3d at 1174 ("As we have long recognized, the mention of an individual's name in a law enforcement file will engender comment and

speculation and carries a stigmatizing connotation." (citation omitted)); *Computer Prof'ls for Soc. Resp. v. U.S. Secret Serv.*, 72 F.3d 897, 904 (D.C. Cir. 1996) (same).

Once a privacy interest has been identified and its magnitude has been assessed, it is balanced against the weight of any recognized public interest that disclosure would serve. *E.g.*, *Roth*, 642 F.3d at 1175. "[T]he only relevant public interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would 'she[d] light on the agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *DOD v. FLRA*, 510 U.S. 487, 497 (1994) (quoting *Reporters Comm.*, 489 U.S. at 775) (second alteration in original). Further, the D.C. Circuit has held "categorically that, unless access to the names . . . of private individuals appearing in files within the ambit of Exemption (b)(7)(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure." *SafeCard Servs.*, 926 F.2d at 1206.

"This inquiry, moreover, should focus not on the general public interest in the subject matter of the FOIA request, but rather on the incremental value of the specific information being withheld." *Schrecker v. DOJ*, 349 F.3d 657, 661 (D.C. Cir. 2003) (citing *King v. DOJ*, 830 F.2d 210, 234 (D.C. Cir. 1987)). "It is a FOIA requester's obligation to articulate a public interest sufficient to outweigh an individual's privacy interest, and the public interest must be significant." *Thompson*, 851 F. Supp. 2d at 99 (citing *Favish*, 541 U.S. at 172).

Here, the FBI withheld information under Exemptions (b)(6) and (b)(7)(C) that falls within five categories: (1) names and identifying information of FBI special agents and professional staff; (2) personal information related to Judge Kavanaugh; (3) names and identifying information of third parties who provided information to the FBI; (4) names and identifying information of third

parties merely mentioned in responsive records; and (5) names and identifying information of non-FBI government personnel. Hardy Decl. ¶¶ 73-86.

1. Category (b)(6)-1 & (b)(7)(C)-1: names and identifying information of FBI special agents and professional staff

The FBI has protected the names and identifying information of FBI special agents and professional staff who were responsible for conducting, supervising, and maintaining the supplemental background investigation of Judge Kavanaugh, and managing and responding to tips received by the FBI that were responsive to Plaintiffs' FOIA requests. *Id.* ¶ 73 (responsibilities included coordinating/completing tasks in support of the FBI's investigative and administrative functions, compiling information, conducting interviews, and/or reporting on the status of the investigation). The FBI concluded that these special agents and professional staff have substantial privacy interests in being free from unnecessary and unofficial questioning regarding their involvement in this high-profile investigation. *Id.* ¶ 74, 77. The FBI also determined that these individuals could become targets of harassing inquiries for information or hostility if their involvement in this investigation were revealed. *Id.* Moreover, the FBI concluded that publicity regarding any particular investigation (whether that publicity was positive or negative) could seriously prejudice those individuals' effectiveness in conducting other investigations. *Id.* These are unquestionably valid privacy interests for the purposes of Exemptions (b)(6) and (b)(7)(C). *See, e.g.*, *Baez v. DOJ*, 647 F.2d 1328, 1339 (D.C. Cir. 1980); *Kurdyukov v. U.S. Coast Guard*, 578 F. Supp. 2d 114, 128 (D.D.C. 2008).

By contrast, there is no public interest in the disclosure of the names and/or identifying information of these special agents and professional staff because this information would not significantly increase the public's understanding of the operations and activities of the FBI. Hardy Decl. ¶¶ 75, 78; *see also Brown v. EPA*, 384 F. Supp. 2d 271, 279 (D.D.C. 2005) ("[T]he D.C.

Circuit has time and again rejected the suggestion that the disclosure of names in government investigative files can somehow provide insight into the workings of the government"). Therefore, the FBI properly withheld these individuals' names and identifying information. *See Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989) (noting that privacy interests always prevail in the Exemption (b)(6) balancing analysis if there is no public interest in disclosure because "something, even a modest privacy interest, outweighs nothing every time").

2. Category (b)(6)-2 & (b)(7)(C)-2: personal information related to Judge Kavanaugh

In this category, the FBI protected from disclosure personal information related to certain unsubstantiated allegations made about Judge Kavanaugh by third parties, other than information related to the allegations leading to the supplemental background investigation, in both the supplemental background investigation file as well as the tip records. Hardy Decl. ¶ 82.

"Information gleaned from a background check is typically considered private information, even if particular subsets of the information have already been disclosed to the public," *Archibald v. DOJ*, 950 F. Supp. 2d 80, 88 (D.D.C. 2013), *aff'd*, No. 13-5190, 2014 WL 590894 (D.C. Cir. Jan. 28, 2014), and the subject of a background investigation has a "weighty" privacy interest in the contents of his investigative file, *Judicial Watch, Inc. v. U.S. Dep't of State*, 282 F. Supp. 3d 36, 44-45 (D.D.C. 2017). *See also CREW*, 746 F. 3d at 1092 (recognizing a subject's "distinct privacy interest in the *contents*" of his investigative file) (citing *Kimberlin v. DOJ*, 139 F.3d 944, 949 (D.C. Cir. 1998)). This is unsurprising, as background investigations generally "require[] an intensely personal set of inquiries into [the subject's] life," including an examination of "psychological conditions, alcohol consumption, [and] sexual behavior." *Judicial Watch*, 282 F. Supp. 3d at 44. Indeed, "it is difficult to contemplate an agency record with a more pronounced privacy interest" than a background investigation that covers these subjects. *Id.*; *see also Wolk v. United States*, No.

04-832, 2005 WL 465382 at *5 (E.D. Pa. Feb. 28, 2005) ("Clearly, an FBI security background investigation of a judicial nominee contains highly sensitive personal information about the nominee.").

Here, the supplemental background investigation was specifically created in response to allegations about alcohol consumption and sexual behavior. Moreover, much of the information requested by Plaintiffs—both in the supplemental background investigation file and the tip records—relates to Judge Kavanaugh's alleged conduct as a teenager and young adult—decades before his distinguished career in public service began—and does not concern the performance of his public duties. Thus, "whatever sacrifices to his privacy [Judge Kavanaugh] has made by taking public office do not, under these circumstances, extend to information that the FBI might have compiled" regarding his youth. *See Archibald*, 950 F. Supp. 2d at 88.

Even if Judge Kavanaugh's role as a government official plays into the Court's analysis, however, his privacy interest in the withheld information does not disappear. *See Quiñon v. FBI*, 86 F.3d 1222, 1230 (D.C. Cir. 1996) ("[W]hile it is true that [g]overnment officials may have a somewhat diminished privacy interest, . . . they do not surrender all rights to personal privacy when they accept a public appointment." (citation omitted)); *Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.*, 656 F.2d 856, 864 (D.C. Cir. 1981) ("This Court has already explicitly rejected the proposition that government officials, by virtue of their positions, forfeit their personal privacy for FOIA purposes." (citing *Baez*, 647 F.2d at 1339). Rather, in cases involving public figures, the degree of intrusion into privacy occasioned by disclosure depends on the character of the information in question. *See Archibald*, 950 F. Supp. 2d at 88 (*quoting Fund for Constitutional Gov't*, 656 F.2d at 865).

Here, both in the supplemental background investigation file and the tip records, the character of the information the FBI protected—which is highly personal and could subject Judge Kavanaugh and others to harassment or embarrassment in their private lives—is unquestionably private. *See Baez*, 647 F.2d at 1339 ("[G]overnment officials have a legitimate interest in preserving the secrecy of matters that conceivably could subject them to annoyance or harassment in either their official or private lives."); *Wolk*, 2005 WL 465382 at *6 ("Because the information contained in Judge Carnes's security background file could subject her to annoyance or harassment in both her official and private lives, she has a clear privacy interest in ensuring that the contents of her security background file are not publicly disseminated."). Indeed, the FBI concluded that disclosure of this information "could reasonably be expected to subject Judge Kavanaugh to further derogatory inferences and criticism," and "cause undue attention and embarrassment to his family." Hardy Decl. ¶ 82.

Having established the weighty privacy interest that Judge Kavanaugh maintains under Exemptions (b)(6) and (b)(7)(C), that interest must in turn be weighed against the public interest, if any, in disclosure. *E.g.*, *Computer Prof'ls for Soc. Resp.*, 72 F.3d at 904. As discussed above, "the only relevant public interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would 'she[d] light on the agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to." *FLRA*, 510 U.S. 487, 497 (1994) (quoting *Reporters Comm.*, 489 U.S. at 775).

Plaintiffs may assert that there is a public interest in learning the factual underpinnings of the allegations regarding Judge Kavanaugh's purported conduct as a youth, yet such information does not relate to a valid public interest under the FOIA. As the D.C. Circuit has made clear, "the relevant public interest is *not* to find out what [the subject of an investigation] himself was

[allegedly] 'up to' but rather how the FBI . . . carried out" its "duties to investigate." *CREW*, 746 F.3d at 1093. And "[a] mere desire to review how [the FBI] is doing its job, coupled with allegations that it is not [doing its job]," on its own "does not create a public interest sufficient to override the privacy interests protected by" the FOIA. *See McCutchen v. DHHS*, 30 F.3d 183, 188 (D.C. Cir. 1994). Indeed, in the context of FOIA requests for FBI background investigations of a judicial nominee, "[g]iven the focus on agency action, the critical public interest inquiry is whether the FBI has engaged in any wrongdoing." *Wolk*, 2005 WL 465382 at *6 (citations omitted). Where, as here, plaintiffs have made no assertions that the government agency conducting an investigation engaged in improper activity, courts have concluded that no public interest would be served by disclosure of Exemption (b)(7)(C) materials. *See id*. (citations omitted).

Neither the Amended Complaint nor the FOIA requests at issue allege misconduct, much less illegal activity, by the FBI. To the contrary, in explaining the public interest relevant to their FOIA requests, Plaintiffs merely state that, "[s]ince Friday, September 28, 2018, there has been different opinions about what the FBI has been permitted to do as it conducts a background check and investigation against Mr. Kavanaugh." *See, e.g.*, ECF No. 6-1 at 3. Plaintiffs also cite a "Tweet" from Senator Markey in which the Senator claims—without giving any specific facts—that the FBI did not follow-up on "thousands of pages of leads from the tip line" because "the White House only wanted the FBI to go through the motions." ECF No. 6-5 at 2. But unexplained "different opinions" regarding the nature of the supplemental background investigation, coupled with a Senator's social media statement speculating that the FBI could have interviewed additional people had it been so directed by the White House, do not rise to the level of a public interest sufficient to overcome the substantial privacy interests at issue in this case. As explained in another case in which a FOIA requester sought disclosure of an FBI judicial background investigation file:

> Plaintiff indicates that he seeks disclosure of [BI] information about Judge Carnes to determine the adequacy of the FBI's investigation of her . . . . He argues that divulging the requested information would "shed[] light on the extent to which the backgrounds of lifetime appointed federal judges are actually investigated." *These averments are not sufficient to establish a cognizable public interest under Exemption 7(C).*

Wolk, 2005 WL 465382 at *7 (emphasis added). Moreover, under the 2010 MOU, the FBI's role in supplemental background checks is to provide the information solicited by the President. *See* 2010 MOU ¶ 2(a) & 2(a) n.3. Thus, while Plaintiffs may believe that the President could or should have solicited more in his decision-making process, that is not a matter related to how the FBI carried out its investigatory duties in response to the President's request and therefore does not establish a legitimate public interest within the meaning of Exemptions (b)(6) and (b)(7)(C). *See CREW*, 746 F.3d at 1093. In short, whatever "miniscule light on the operations and activities of the FBI" disclosure of this information might shed, the public interest in doing so would not outweigh the heavy privacy interests involved so as to overcome the protections of those exemptions. Hardy Decl. ¶ 82.

In addition to the personal information discussed above, the FBI also protected from disclosure the file number for Judge Kavanaugh's supplemental background investigation, and Judge Kavanaugh's home address. *Id.* ¶¶ 80, 81.

The FBI determined that, because the file number "is singular and pertains specifically to Judge Kavanaugh, it is a personal identifier for him in the FBI's records system." *Id.* As such, any reference to the file number is equivalent to a reference to Judge Kavanaugh's name. *Id.* This raises privacy concerns because, if disclosed, "[t]he file number can be used to track where any information related to the [supplemental background investigation] of Judge Kavanaugh—and thus to Judge Kavanaugh himself—is referenced within FBI records and systems." *Id.* By contrast, revealing the file number would not significantly increase public understanding of the FBI's

performance of its mission and thus the FBI properly determined that there was no public interest sufficient to override the privacy interests and warrant disclosure under Exemptions (b)(6) and (b)(7)(C). *Id.*

With respect to Judge Kavanaugh's home address, for obvious reasons, revealing the home address of a Supreme Court Justice would invade the privacy interests of the Justice and his family. *Id.* ¶ 81. And there is no public interest in Judge Kavanaugh's home address that would increase the public's understanding of the FBI's activities and operations. *Id.* Accordingly, this information was properly protected from disclosure under Exemptions (b)(6) and (b)(7)(C).

3. Category (b)(6)-3 & (b)(7)(C)-3: names and identifying information of third parties who provided information to the FBI

In this category, FBI protected the names and identifying information of individuals who were interviewed or provided information by other means to the FBI during the course of its supplemental background investigation of Judge Kavanaugh, or through tips submitted to the FBI. *Id.* ¶ 83. Unsurprisingly, there are substantial privacy concerns associated with publicly exposing individuals who provide information to the FBI related to an FBI investigation, particularly in high-profile, sensitive investigations such as the supplemental background investigation in this case. *Id.* ¶ 84. Indeed, "[t]he largest obstacle to successfully obtaining such information, through an interview or otherwise, is fear by the individuals providing the information that their identities will be exposed publicly." *Id.* That is because "[s]uch exposure, in conjunction with their cooperation with law enforcement, could lead to harassment, intimidation by investigative subjects or their allies, legal or economic detriment, possible physical harm, or even death." *Id.* Thus, "[i]n order to surmount their fear of reprisal, and the resulting tendency to withhold information, persons who provide such information to the FBI must be confident their names and personally-identifying information will be protected." *Id.*

Balanced against this substantial personal privacy interest, any public interest in disclosing the names and identifying information of these individuals is outweighed. *Id.* Accordingly, this information was properly withheld under Exemptions (b)(6) and (b)(7)(C). *E.g.*, *Schrecker*, 349 F.3d at 661 (the D.C. Circuit has "adopted a categorical rule permitting an agency to withhold information identifying private citizens mentioned in law enforcement records, unless disclosure is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity." (citation omitted)); *see Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1115 (D.C. Cir. 2007).

4. Category (b)(6)-4 & (b)(7)(C)-4: names and identifying information of third parties merely mentioned in responsive records

This category consists of names and identifying information of third parties who were merely mentioned in the records responsive to Plaintiffs' FOIA requests. Hardy Decl. ¶ 85. These "merely mentioned" individuals "were not of investigative interest to the FBI and maintain substantial and legitimate privacy interests in not having their personal information disclosed." *Id.* Specifically, the FBI determined that, because "[d]isclosure of the third parties' names and identifying information in connection with an FBI investigation can carry negative connotations[,]" protecting this information is appropriate in order to avoid "subject[ing] these individuals to possible harassment or criticism and focus[ing] derogatory inferences and suspicion on them." *Id.* Moreover, the FBI "could discern no public interest in disclosure because these individuals would not, by themselves, significantly increase the public's understanding of FBI's operations and activities." *Id.*

As the D.C. Circuit has recognized, "[i]t is surely beyond dispute that the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation." *Fitzgibbon*, 911 F.2d at 767 (citation omitted); *see also Cong. News*

Syndicate v. DOJ, 438 F. Supp. 538, 541 (D.D.C. 1977) (stating that "an individual whose name surfaces in connection with an investigation may, without more, become the subject of rumor and innuendo"). For this reason, courts routinely uphold agencies' decisions to withhold identifying information of third parties merely mentioned in law enforcement records. *See, e.g.*, *Negley v. FBI*, 825 F. Supp. 2d 63, 70–73 (D.D.C. 2011), *aff'd*, No. 2012 WL 1155734 (D.C. Cir. Mar. 28, 2012); *McGehee v. DOJ*, 800 F. Supp. 2d 220, 233–34 (D.D.C. 2011).

Thus, because the significant privacy interest of individuals who are merely mentioned outweighs the minimal, if any, public interest in disclosure, the FBI properly withheld this information under Exemptions (b)(6) and (b)(7)(C). *See Taylor v. DOJ*, 257 F. Supp. 2d 101, 109 (D.D.C. 2003) (protecting from disclosure "[n]ames and/or identifying data concerning third parties merely mentioned" in FBI records).

5. Category (b)(6)-5 & (b)(7)(C)-5: names and identifying information of non-FBI government personnel

In this category, FBI protected the names and identifying information of non-FBI federal government personnel identified in the records responsive to Plaintiffs' requests. Hardy Decl. ¶ 86. As with the FBI special agents and professional staff discussed above, these non-FBI employees have a substantial privacy interest because disclosing their identities "could subject these individuals to unauthorized inquiries about the [supplemental background investigation], or even harassment because of their relationship to it." *Id.* By contrast, identifying the names or other identifying information of these employees would not, standing alone, significantly increase the public's understanding of the FBI's (or the Executive Branch's) operations and activities. *Id.* Thus, just as the FBI was correct to protect the names and identifying information of FBI special agents and professional staff, FBI properly invoked Exemptions (b)(6) and (b)(7)(C) to withhold non-FBI employees' names and identifying information. *See Brown*, 384 F. Supp. 2d at 279.

Accordingly, the FBI is entitled to summary judgment on its decision to protect information from disclosure pursuant to Exemptions (b)(6) and (b)(7)(C).

IV. The FBI Processed and Released All Reasonably Segregable Portions of the Records Responsive to Plaintiffs' Requests for Tips.

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). But an agency need not disclose records in which the nonexempt information remaining is meaningless. *See Nat'l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 220-21 (D.D.C. 2005). "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material." *Sussman*, 494 F.3d at 1117. And a court "may rely on government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated." *Juarez v. DOJ*, 518 F.3d 54, 61 (D.C. Cir. 2008).

Here, the FBI reviewed a total of 2,579 responsive pages and released 23 pages in full and 2,029 pages in part. Hardy Decl. ¶ 101. The FBI also withheld 527 pages in full, pursuant to the FOIA exemptions discussed above or because the pages were duplicates of other records processed in this case. *Id.* The FBI conducted a careful, line-by-line review of each document to identify exempt information and, where reasonably possible, to segregate and release non-exempt information to Plaintiffs. *Id.*

As discussed above, the supplemental background investigation file was withheld in full. Because that file is protected by the presidential communications privilege, no segregability analysis for that file is required. *See In re Sealed Case*, 121 F.3d at 745; *Judicial Watch*, 913 F.3d at 1113.

With respect to records responsive to Plaintiffs' request for tip submissions, the pages that were released with partial redactions reflect a mixture of material that could be, and was, segregated for release, and material that was withheld and release would trigger foreseeable harm to one or more interests protected by the FOIA exemptions. Hardy Decl. ¶ 101(a). And, once all relevant exemptions were applied, the FBI concluded that there was no additional information that could be segregated and released to Plaintiffs, because further segregation risked revealing exempt information, or because further segregation would result in the release of meaningless information, such as random words or sentence fragments with no meaningful content. *Id.* Because there are no facts rebutting the presumption that the FBI complied with its segregability obligations, the FBI is entitled to summary judgment on that issue.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court grant its motion for summary judgment.

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Respectfully submitted,

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