

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

ELECTRONIC FRONTIER	)	
FOUNDATION,	)	
	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 17-cv-1039
v.	)	
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
	)	
	)	

**DEFENDANT’S MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF ITS RENEWED MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

This matter arises from a Freedom of Information Act (“FOIA”) request by Plaintiff Electronic Frontier Foundation, concerning confidential human sources (“CHSs”) of the FBI at Best Buy facilities. Following the first round of briefing here, the Court held that the FBI could not refuse to confirm or deny the existence of records concerning such CHSs that have not been publicly acknowledged. Accordingly, the FBI has disclosed that it maintains one or more records concerning one or more CHSs, who are or were employed by Best Buy, apart from those who have been publicly acknowledged. But the FBI can go no further. That is, disclosure of the content or even the volume of such records would inherently reveal the extent of the FBI’s CHS operations at Best Buy facilities, putting the agency’s law enforcement activities at significant risk.<sup>1</sup> While Plaintiff may wish to uncover all information related to these FBI activities, disclosure of this material is not required by the FOIA. To the contrary, FOIA Exemption 7(E) permits the FBI to withhold information where there is even a chance that disclosure would create a risk of circumvention of the law. That standard is certainly met in this case, and the FBI properly withheld the records concerning undisclosed CHSs under FOIA Exemption 7(E).

In addition, pursuant to this Court’s prior decision, the FBI re-processed the informant files of the four CHSs publicly identified in a criminal prosecution, along with certain other records, and appropriately withheld certain information therein under Exemptions 5, 6, 7(A), 7(C), 7(D), and 7(E). Finally, the FBI appropriately withheld pages of an FBI guidebook concerning the use of confidential informants, pursuant to Exemption 7(E). As a consequence,

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<sup>1</sup> This brief uses different descriptors to refer to the record or records at issue. Generally the term “records” is used to make the brief more readable, but no such descriptor constitutes any disclosure by the FBI as to the number or nature of the record or records at issue.

this Court should conclude that the Exemptions asserted by the FBI were proper, and grant judgment to the FBI.

### **BACKGROUND**

On February 2, 2017, Plaintiff submitted a FOIA request to the FBI, seeking:

1. All internal memoranda or other documentation regarding the use of informants and/or CHSs at any Best Buy facility;
2. All internal memoranda or other documentation regarding FBI training of Best Buy personnel in the detection and location of child pornography, or other material, on computers brought to Best Buy repair;
3. All recruiting material from the FBI directed to Best Buy personnel; and
4. All memoranda, guidance, directives, or policy statements concerning the use of informants and/or CHSs at any computer repair facilities in the United States.

Compl. at 2, ECF No. 1. The details of the FBI's response were recounted in the first round of briefing here, and so the FBI sets forth here only those background facts relevant to the instant motion.

The FBI asserted that it could neither confirm nor deny the existence of certain records responsive to Plaintiff's request, because doing so could reasonably create a risk of circumvention of the law. *See* Def's First Mot. For Summ. J. at 14-15, ECF No. 13-2. This *Glomar* response was limited, however, and the FBI did search for records concerning CHSs that had been officially acknowledged by the agency in the course of the prosecution of Mark Rettenmaier (hereinafter "*Rettenmaier* litigation"). *Id.* at 7-10. The FBI located and processed such documents that were responsive to Item One of Plaintiffs' request, seeking all materials related to CHSs at Best Buy facilities. *Id.* at 23. Of these records, the FBI categorically withheld the eight informant files of those informants acknowledged in the *Rettenmaier* litigation. In addition, the FBI confirmed that, as it had disclosed in the *Rettenmaier* litigation, there were no

training documents or recruiting material from 2008 to 2012 from the Louisville Field Office, and which would be responsive to Items Two and Three of Plaintiffs' Request. *Id.* at 10-11. Finally, the FBI issued a *Glomar* response to Item Four of Plaintiffs' request, seeking guidance, directives, or policy statements concerning the use of CHSs at any computer repair facility. *Id.* at 11-12. The FBI released to Plaintiff 14 pages in full, 151 pages in part, and withheld 78 pages in full. *Id.* at 23.

In the course of summary judgment briefing before this Court, Plaintiff narrowed its challenges to only a "few specific applications of a handful of exemptions." *Elec. Frontier Found. v. DOJ ("EFF")*, 384 F. Supp. 3d 1, 9 (D.D.C. 2019). In its decision, the Court granted in part and denied in part the FBI's motion for summary judgment. First, the Court held that the FBI "satisfied its burden to justify the individual redactions it made to the processed documents[,] specifically rejecting Plaintiffs' challenge to the FBI's application of Exemption 7(E) within the documents processed for release. *Id.* at 13. The Court next deferred ruling as to whether the FBI had properly redacted the name of an individual convicted of a crime based on evidence obtained from the Brooks, Kentucky Best Buy facility. *Id.* at 16. The Court then disagreed with the FBI's categorical withholding of the informant files of those four informants who had been publicly identified in the *Rettenmaier* litigation.<sup>2</sup> However, the Court held that the FBI had appropriately preserved exemptions which protected portions of those files, but held that further briefing was required to determine whether those exemptions were properly applied. *Id.* at 17. Finally, the Court overruled the FBI's partial *Glomar* response to the remainder of Plaintiffs' request, finding that "disclosing the mere existence—as opposed to the number or

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<sup>2</sup> Plaintiff declined to challenge the withholding of the four informant files for those informants who were not identified in the *Rettenmaier* litigation. *See id.* at 16.

type—of any documents would reveal little, if any, information about the nature or frequency of the FBI’s use of computer technician informants beyond what the FBI has already disclosed.”

*Id.* at 12.

In response to the Court’s Memorandum and Order, the parties agreed on the next steps in this action. That is, the FBI determined that it would no longer assert a *Glomar* response as to any part of Plaintiffs’ FOIA request. Joint Status Report at 1, ECF No. 25. The FBI further agreed to re-examine the responsive documents containing the name of a convicted individual. *Id.* at 2. Third, the FBI agreed that it would no longer categorically withhold the four informant files of those informants publicly named in the *Rettenmaier* litigation, and would re-process those files and release any segregable, non-exempt records therein. *Id.*

Following this agreement, the FBI conducted supplemental searches for documents responsive to each part of Plaintiffs’ request. On Part One of Plaintiffs’ request, concerning all memoranda and documentation concerning any informant at any Best Buy facility, the FBI disclosed to Plaintiff that the agency located one or more documents concerning one or more CHSs who had not been publicly acknowledged. *See* Third Declaration of David Hardy (“Hardy Decl.”) ¶ 61. However, the FBI determined that it could not disclose the contents or number of the documents at issue, without risking circumvention of the law. *Id.* ¶¶ 63-64. Also as to Part One of Plaintiff’s request, concerning the four informant files for those informants which had been publicly identified in the *Rettenmaier* litigation (for which Plaintiff challenged the FBI’s prior categorical withholding), the FBI re-processed these files, along with certain records located through the FBI’s supplemental searches, which discussed CHSs at Best Buy facilities generally, without reference to a specific CHS. *Id.* ¶ 11. The FBI then processed and produced these documents on a rolling basis, eventually processing 454 pages of such records. *Id.* The

FBI produced 13 pages in part, and withheld 441 pages in full, relying on Exemptions 5, 6, 7(C), 7(D) and 7(E), to redact certain material therein. *Id.*; *see also id.* ¶ 15.

The FBI also conducted supplemental searches but located no documents concerning training or recruiting material directed to Best Buy employees, as sought in Items Two and Three of Plaintiff's request. *Id.* ¶ 12.

Concerning Item Four of the request, seeking memoranda, guidance, directives, or policy statements on the use of informants at any computer repair facility, the FBI processed 10 pages of responsive records, and those pages were all withheld in full under Exemption 7(E), and in part under Exemptions 6 and 7(C). *Id.* ¶¶ 13, 58-59.

Finally, regarding the name of the convicted individual redacted under Exemptions 6 and 7(C) in the previously released documents, the FBI determined, in its discretion, to release the individual's name on those pages which had previously had the name redacted. *Id.* ¶ 8.

Following the end of the FBI's production, Plaintiff agreed not to challenge the adequacy of the agency's supplemental searches. Moreover, Plaintiff agreed that the documents produced via the supplemental searches had all been compiled for law enforcement purposes, the threshold requirement to invoke Exemption 7.

### **LEGAL STANDARD**

“FOIA cases are typically and appropriately decided on motions for summary judgment.” *Dean v. DOJ*, 87 F. Supp. 3d 318, 320 (D.D.C. 2015) (citation omitted); *accord Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 527 (D.C. Cir. 2011) (“[T]he vast majority of FOIA cases can be resolved on summary judgment[.]”). Summary judgment is warranted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “A fact is ‘material’ if

it is capable of affecting the substantive outcome of the litigation.” *Bartko v. DOJ*, 167 F. Supp. 3d 55, 61 (D.D.C. 2016) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). “[A] dispute is ‘genuine’ if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Bartko*, 167 F. Supp. 3d at 61-62. In responding to the motion, the nonmovant attempting to show that a fact is genuinely disputed must “cit[e] to particular parts of materials in the record,” *i.e.* evidentiary submissions, or show that the materials cited by the movant “do not establish the absence . . . of a genuine dispute[.]” Fed. R. Civ. P. 56(c)(1)(A)-(B).

A court reviews an agency’s response to a FOIA request *de novo*. 5 U.S.C. § 552(a)(4)(B). Generally, “[t]he defendant in a FOIA case must show that its search for responsive records was adequate, that any exemptions claimed actually apply, and that any reasonably segregable non-exempt parts of records have been disclosed after redaction of exempt information.” *Light v. DOJ*, 968 F. Supp. 2d 11, 23 (D.D.C. 2013). A court may award summary judgment in a FOIA action solely on the basis of information provided by the agency through declarations when they are “not controverted by either contrary evidence in the record nor by evidence of agency bad faith.” *Bartko*, 167 F. Supp. 3d at 62 (quoting *Larson v. Dep’t of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)). This is because “[s]uch affidavits or declarations ‘are accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents.’” *Id.* (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)).

## ARGUMENT

There are three general groups of documents that remain at issue. The first category is the documents concerning one or more CHSs, employed by Best Buy, but who have not been publicly acknowledged. Such materials have been withheld in full pursuant to Exemption 7(E). The second category of materials are the informant files for the four informants identified in the *Rettenmaier* litigation, and certain records which concerned CHSs generally, without reference to a specific CHS, responsive to Item One of Plaintiff's Request. Certain of these records have been withheld in full and part pursuant to Exemptions 5, 6, 7(C), 7(D) and 7(E). The third category of materials are the ten pages of records from a FBI Source Guidance Manual withheld in full, responsive to Item Four of Plaintiffs' Request. These pages have been withheld in full pursuant to Exemption 7(E), and in part pursuant to Exemptions 6 and 7(C). These different categories of documents are addressed in turn.

### **I. The FBI Properly Withheld the Documents Concerning One or More CHSs Not Publicly Acknowledged**

The Court previously held that the FBI had to disclose whether there were documents concerning CHSs that had not been publicly acknowledged in the *Rettenmaier* litigation. However, the Court's holding was predicated on the fact that "disclosing the mere existence—as opposed to the number or type—of any documents would reveal little, if any, information about the nature or frequency of the FBI's use of computer technician informants beyond what the FBI has already disclosed." *EFF*, 384 F. Supp. 3d at 12 (emphasis added). The Court specifically foreshadowed that it might be appropriate for the FBI to admit the existence of documents but provide less than full disclosure about the number or content of those documents. *Id.*

Following the Court's opinion, the FBI disclosed to Plaintiff that it had located one or more documents concerning one or more CHSs, employed by Best Buy, other than those

acknowledged in the *Rettenmaier* litigation. Hardy Decl. ¶ 9. But the agency has withheld such documents pursuant to Exemption 7(E), and moreover, has determined that any description of the volume of responsive records would risk the very harms which Exemption 7(E) is designed to protect against. *Id.*

Documents concerning unacknowledged confidential informants are among the most sensitive in the FBI's possession. Hardy Decl. ¶ 62. This is because they involve human proxies for law enforcement whose effectiveness and safety depend heavily on their ability to coexist with criminal elements without detection. *Id.* Accordingly, information concerning CHSs is generally kept confidential for the obvious reason that CHSs, and the FBI's related law enforcement efforts, could be harmed if potential criminals knew details related to the FBI's undercover operations. *Id.* Plaintiff's FOIA request is aimed squarely at such sensitive operations, as it seeks to uncover the extent to which the FBI has utilized CHSs employed at Best Buy facilities. Pursuant to this Court's order, the FBI has disclosed that it has one or more documents concerning one or more CHSs, employed by Best Buy, and who have not previously been acknowledged publicly. But the FBI is limited in the additional information it can provide about this law enforcement technique.

Exemption 7(E) allows agencies to protect "law enforcement records [which]... would disclose techniques and procedures 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). As the Court properly recognized, Exemption 7(E) safeguards "confidential details of . . . program[s]" if only their "general contours [are] publicly known." *EFF*, 384 F. Supp. 3d at 10 (quoting *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1112 (D.C. Cir. 2007) (alterations in original)). Exemption 7(E) "sets a relatively low bar for the agency to justify

withholding.” *Id.* (quoting *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011)). “Rather than requiring a highly specific burden of showing how the law will be circumvented, exemption 7(E) only requires that the agency demonstrate logically how the release of the requested information might create a risk of circumvention of the law.” *Id.* (quoting *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1194 (D.C. Cir. 2009)). The exemption “looks not just for circumvention of the law, but for a risk of circumvention; not just for an actual or certain risk of circumvention, but for an expected risk; not just for an undeniably or universally expected risk, but for a reasonably expected risk; and not just for certitude of a reasonably expected risk, but for the chance of a reasonably expected risk.” *Id.*

Plaintiff has conceded that the records at issue were compiled for law enforcement purposes, satisfying the first requirement of Exemption 7(E). Next, there can be no plausible dispute that these documents relate to law enforcement techniques and procedures, namely the utilization of unacknowledged CHSs employed by Best Buy, details of which have not been made public. Hardy Decl. ¶ 61. All that remains is for the agency to show that disclosure of the records, or information about the volume of the records, would create a chance of a reasonably expected risk of circumvention of the law.

The FBI properly determined that it cannot provide information about the number of such records, or pages of records, or a specific list of the responsive records, which would indicate the volume, without creating a risk of circumvention of the law. Hardy Decl. ¶ 64. Disclosing this information would necessarily reveal the scope of the FBI’s use of CHSs at Best Buy facilities, which is nonpublic, sensitive information that can readily be used by criminals to circumvent the law and, in turn, severely damage the effectiveness of the FBI’s CHS program. *Id.* ¶ 64. For example, if the FBI revealed that there were 10,000 pages of responsive records, this would

necessarily reveal that the FBI has extensive relationships with CHSs employed by Best Buy. *Id.*

¶ 65. Armed with this information, criminals would refrain from conducting business at Best Buy, or would distance themselves from associates who happen to be Best Buy employees, to evade FBI investigative scrutiny. *Id.* On the other hand, if the FBI revealed that there is only one or a small number of responsive records, this would necessarily reveal a very limited use by the FBI of CHSs at Best Buy facilities. *Id.* ¶ 66. Criminals would reasonably use this information to circumvent the law by frequenting Best Buy, or associating with employees of Best Buy, with minimal fear of FBI investigative scrutiny. *Id.* For these reasons, information concerning the volume of responsive records here is protected from disclosure by Exemption 7(E).

While the FBI cannot disclose any information about the volume of these responsive records without revealing information protected by Exemption 7(E), it can describe the nature of the records sufficient to demonstrate that they are properly withheld in full under Exemption 7(E). Hardy Decl. ¶ 67. The Hardy Declaration explains that the withheld records are similar to the records processed for the four informants identified in the *Rettenmaier* litigation and consist of the following types of documents. *Id.* First, CHS maintenance documents consist of records used to open, validate, vet, evaluate, maintain, and close FBI CHSs. Second, CHS identification documents consist of records relevant to a CHS's identity, such as photographs of drivers' licenses and photographs of the CHSs. Third, CHS payment documents are used to document FBI payments to CHSs. Fourth, both CHS reporting documents and documentation provided by CHSs constitute the CHS-provided information to the FBI that may later be used as testimony or evidence in court proceedings or trials. Fifth, documents implementing sensitive investigative techniques are utilized to implement specific, sensitive, investigative techniques. Sixth and

finally, communications regarding the use of CHSs consist of communication documentation discussing relevant investigative matters and the use of FBI CHSs. *Id.*

The Hardy Declaration explains that many of these documents, such as payment documents and those implementing sensitive investigative techniques, are protected in full from disclosure under Exemption 7(E), because they directly concern non-public law enforcement techniques and procedures, details of which have not been made public. *See infra* § II.E; Hardy Decl. ¶ 68. Disclosure of such information, such as those involving techniques and procedures involving CHS recruitment, utilization, and payment, would create a reasonable risk of circumvention of the law, particularly as applied to unacknowledged CHSs. *Id.* Moreover, as the Hardy Declaration makes clear, specific information in these documents is also individually exempt under Exemption 7(E). Hardy Decl. ¶ 68. “Namely, any information related to the localities the FBI has or has not recruited or utilized a CHS, the timeframe of the CHS(s) operation, the types of crimes on which the additional CHS(s) provided information, along with other sensitive details of CHS operations, would risk circumvention of the law.” *Id.* This information would allow criminals to structure their behavior to avoid detection or disruption by the FBI through the use of such CHSs. *Id.*

Similarly, the Hardy Declaration explains that, given the standardized nature of these CHS files, any nonexempt records or portions of records must also be protected under Exemption 7(E) because producing them in the aggregate would again reveal the scope of the FBI’s use of CHSs at Best Buy facilities, with the potential for circumvention of the law described above. Hardy Decl. ¶ 68; *see also Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978) (“[B]its and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.”); *Edmonds v. DOJ*, 405 F.

Supp. 2d 23, 32 (D.D.C. 2005) (finding that disclosure of information, in the aggregate, could “prove useful for identifying information gathering methods . . . though each piece existing in its discrete informational orbital would lack valence”). For example, if each responsive file includes certain admonishments provided to CHSs, including certain nonexempt information, producing that information from each file would reveal how many unacknowledged CHSs, employed by Best Buy, the FBI is using or has used. *See also Shapiro v. DOJ*, 239 F. Supp. 3d 100, 118 (D.D.C. 2017) (explaining that “aggregate information about the number of files or documents . . . may shed considerable light on the overall resources that a particular office of the FBI has devoted, or is devoting, to investigating related crimes”). Accordingly, all such records at issue are properly withheld pursuant to Exemption 7(E).

As noted above, the FBI need not show that circumvention of the law would result from disclosure of the documents at issue, or from disclosing the volume of such documents. Nor must the FBI even show that disclosure would create a reasonably expected risk of circumvention of the law. Rather, the FBI need only demonstrate that there is a *chance* that disclosure would create a reasonably expected risk of circumvention of the law. *See Mayer Brown*, 562 F.3d at 1194. Here, there can be little question that disclosure of documents concerning undisclosed confidential human sources, or the number of such documents, would create a chance of a reasonably expected risk of circumvention of the law. *Accord James Madison Project v. DOJ*, 208 F. Supp. 3d 265, 286 (D.D.C. 2016) (upholding “no number, no list” response, because the “volume of records sought . . . ‘could indicate the level of importance associated with a particular issue,’ and, thus, something of the protected attorney work product”).

If the Court agrees that the documents are properly withheld in full under Exemption 7(E), that is the end of this issue, and the Court need go no further. However, the FBI maintains

that portions of the documents at issue are exempt from disclosure pursuant to several other FOIA Exemptions, specifically Exemptions 1, 3, 6, 7(C), 7(D), 7(E), and 7(F). Hardy Decl. ¶ 70. The FBI cannot set forth publicly the reasons why portions of the underlying documents are appropriately exempt, without revealing certain of the content of the records at issue, information that is exempt pursuant to Exemption 7(E), as set forth above. If the Court requires additional information regarding the records at issue, or justifications concerning the underlying Exemptions asserted, the FBI can provide additional information in an *in camera, ex parte* filing.

*Id.*

## **II. The FBI Properly Withheld Materials from the Four Identified Informant Files, and from Other Records, Responsive to Item One of Plaintiffs' Request**

The second category of materials at issue here concerns the four informant files of those informants that were identified in the *Rettenmaier* litigation, and certain records which discussed CHSs at Best Buy facilities generally.

This Court previously held that the FBI had not justified categorically withholding the informant files, and requested supplemental briefing as to whether the FBI could properly withhold portions of them. *EFF*, 384 F. Supp. 3d at 19. In response to the Court's opinion, the FBI re-processed the informant files at issue, and located and processed a small number of records concerning CHSs at Best Buy facilities generally, without any reference to a specific CHS, totaling 454 pages. Hardy Decl. ¶ 11. The FBI produced 13 pages in part, and withheld 441 pages in full, relying on Exemptions 5, 6, 7(A), 7(C), 7(D) and 7(E), to redact certain material therein. *Id.* The FBI also conducted a segregability analysis to ensure the production of all non-exempt portions of the documents. *Id.* ¶ 14.

Much of the material withheld under these exemptions is similar to the withholdings which the FBI asserted in the first round of briefing, which Plaintiffs declined to challenge or

which this Court found appropriately justified. Out of an abundance of caution, however, the FBI sets forth all types of material withheld and why all withholdings were appropriately justified.

**A. Exemption 5- Deliberative Process Privilege**

First, the FBI appropriately withheld two pages of email communications between FBI personnel, pursuant to Exemption 5. *Id.* ¶ 21. This exemption protects from disclosure “inter-agency or intra-agency memorandums or letters that would not be available by law to a party . . . in litigation with the agency[.]” 5 U.S.C. § 552(b)(5). Thus, as a threshold matter, to invoke this exemption, a record must be of the type intended to be covered by the phrase “inter-agency or intra-agency memorandums.” *Id.*; see also *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001) (stating that the “source [of the withheld information] must be a Government agency”).

Among the privileges encompassed by Exemption 5 is the deliberative process privilege. *Klamath Water Users*, 532 U.S. at 8. The deliberative process privilege applies to “decisionmaking of executive officials generally,” and protects documents containing deliberations that are part of the process by which government decisions are formulated. *In re Sealed Case*, 121 F.3d 729, 735, 745 (D.C. Cir. 1997). The purpose of the privilege is to “prevent injury to the quality of agency decisions” by “encourag[ing] frank discussion of policy matters, prevent[ing] premature disclosure of proposed policies, and avoid[ing] public confusion that may result from disclosure of rationales that were not ultimately grounds for agency action.” *Thelen v. DOJ*, 169 F. Supp. 3d 128, 138 (D.D.C. 2016) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975)) (citing *Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982)).

To come within the scope of the deliberative process privilege, a document must be both pre-decisional and deliberative. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is pre-decisional if “it was generated before the adoption of an agency policy.” *Id.* “To show that a document is predecisional, the agency need not identify a specific final agency decision; it is sufficient to establish ‘what deliberative process is involved, and the role played by the document[] at issue in the course of that process.’” *Heggestad v. DOJ*, 182 F. Supp. 2d 1, 7 (D.D.C. 2000) (quoting *Coastal States*, 617 F.2d at 868). A document is deliberative if “it reflects the give-and-take of the consultative process.” *Coastal States*, 617 F.2d at 866. Stated differently, the document “must be ‘a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.’” *Heggestad*, 182 F. Supp. 2d at 7 (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1143–44 (D.C. Cir. 1975)). The privilege therefore applies broadly to “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Coastal States*, 617 F.2d at 866. Moreover, Exemption 5 applies if “disclosure of even purely factual material would reveal an agency’s decision-making process.” *Russell*, 682 F.2d at 1048.

As the Hardy Declaration explains, the only information withheld pursuant to the Deliberative Process Privilege here is contained within a two-page intra-agency email chain dated September 29, 2010, between a Supervisor Special Agent (“SSA”) and a subordinate Special Agent (“SA”) of the FBI’s Louisville Field Office (“LSFO”), together leading several investigations into child pornography crimes. Hardy Decl. ¶ 21. The FBI withheld a discussion between these personnel about ways to convince the FBI Intelligence Directorate (“DI”) not to close a CHS the LSFO believed was providing substantive assistance for child pornography

cases the LSFO was handling. *Id.* Accordingly, this material is both pre-decisional, coming before any decision as to whether to close a certain CHS, and deliberative, because the relevant parties were deliberating about strategies for obtaining a particular decision on this matter. *Id.* This material is accordingly properly withheld under Exemption 5.

**B. Exemption 7(A)- Ongoing Investigations**

Next, the FBI withheld pursuant to Exemption 7(A) file numbers of pending investigations and investigative leads forwarded from LSFO to other FBI field offices seeking further inquiry by those offices for potential opening of investigations. *Id.* ¶ 25. Exemption 7(A) allows agencies to withhold “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings[.]” 5 U.S.C. § 552(b)(7)(A).

“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.’” *CREW v. DOJ*, 746 F.3d 1082, 1096 (D.C. Cir. 2014) (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)). “Exemption 7(A) does not require a presently pending ‘enforcement proceeding.’ Rather . . . it is sufficient that the government’s . . . investigation is likely to lead to such proceedings.” *Ctr. for Nat. Sec. Studies v. DOJ*, 331 F.3d 918, 926 (D.C. Cir. 2003).

Mr. Hardy explains that the investigative leads at issue led to the opening of investigations concerning potential crimes related to child pornography, and these investigations are currently ongoing. Hardy Decl. ¶ 25. The investigations have not been revealed to the public, and future enforcement proceedings are likely. *Id.* The release of the file numbers and investigative leads pertaining to pending investigative activities could result not only in the acknowledgment of the existence of the investigations, but also in the identification of suspects; and/or it could provide investigative subjects an idea as to what and how the FBI gathered evidence of their wrongdoing and allow them to destroy or tamper with potential evidence. *Id.* ¶ 26. Thus, the FBI properly withheld the file numbers and leads pursuant to Exemption 7(A). *See, e.g., Shapiro v. CIA*, 247 F. Supp. 3d 53, 65 (D.D.C. 2017) (holding that where redacted material, including “file numbers,” “could expose potential leads and/or suspects the FBI identified” withholding information was proper under Exemption 7(A)”) (citation omitted); *Hammouda v. U.S. Dep't of Justice Office of Info. Policy*, 920 F. Supp. 2d 16, 24 (D.D.C. 2013) (upholding use of Exemption 7(A) to redact “information from, and the file numbers of, pending FBI investigations into the criminal activities of various third parties”) (citation omitted).

### **C. Exemptions 6 and 7(C)- Invasion of Personal Privacy**

Next, the FBI redacted pursuant to Exemptions 6 and 7(C) the names or identifying information of: (1) FBI special agents and professional staff, (2) third parties of investigative interest, (3) third party victims, (4) non-FBI federal government personnel, (5) third parties merely mentioned in the documents, and (6) identifying information of third parties who provided information to the FBI. Hardy Decl. ¶¶ 30-35.

Exemption 6 protects “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). Exemption 7(C) protects “records or information compiled for law enforcement purposes” when disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” *Id.* § 552(b)(7)(C). While similar, Exemption 7(C) is thus “broader” than the standard for withholding under Exemption 6. *DOJ v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 756 (1989).

The FBI properly applied exemptions 6 and 7(C) to the withheld information. Indeed, the D.C. Circuit has held “categorically that, unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 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. Plaintiff has put forward no evidence or any allegation of illegal activity, such that the identifying information of private individuals in categories (2), (3), and (5) was properly withheld.

As to government personnel, they “have a privacy interest in protecting their own identities because disclosure could subject them to annoyance, embarrassment, and harassment in the conduct of their official and private lives.” *Marshall v. FBI*, 802 F. Supp. 2d 125, 134 (D.D.C. 2011). Plaintiff cannot plausibly argue that the identities of law enforcement personnel here would “shed[] light on an agency’s performance of its statutory duties,” as required to overcome a withholding pursuant to Exemption 7(C). *Negley v. FBI*, 825 F. Supp. 2d 63, 72 (D.D.C. 2011). Accordingly, the FBI properly withheld the identifying information of law enforcement personnel in categories (1) and (4) above. *See, e.g., McGehee v. DOJ*, 800 F. Supp. 2d 220, 233 (D.D.C. 2011) (upholding 7(C) withholdings by the FBI to protect “names and/or identifying information of: 1) Third Parties Merely Mentioned . . . 3) FBI Agents and Support

Personnel . . . 5) Local and/or State Government Employees . . . 6) Third Parties of Investigative Interest”).

Finally, persons in category (6) – third parties who provided information to the FBI – concerns the four informants publicly identified in the *Rettnemaier* litigation. While their names were not withheld under Exemption 6 or 7(C), the agency withheld personal identifying information of these four individuals such as social security numbers, dates of birth, home and/or work phone numbers, home and/or work addresses, criminal background investigation information and/or records, payment records, personal email addresses, family and personal relationship information. Hardy Decl. ¶ 35. It is beyond dispute that the publicly identified CHSs hold substantial privacy interests in such sensitive information. *See Shurtleff v. EPA*, 991 F. Supp. 2d 1, 18 (D.D.C. 2013) (finding a “substantial privacy interest at stake” in the context of email addresses, in light of the potential “burden of unsolicited emails and harassment”). In addition, any public interest in the FBI’s use of CHSs at computer repair facilities would not be furthered by this disclosure of highly personal information. For these reasons, the FBI properly applied Exemptions 6 and 7(C) to the withheld information at issue.

#### **D. Exemption 7(D)- CHS Information**

The FBI also withheld information in the four informant files pursuant to Exemption 7(D), specifically: information and identifying data provided by CHSs under express assurances of confidentiality, confidential human source file numbers, and confidential human source symbol numbers. Hardy Decl. ¶¶ 38-39.

Exemption 7(D) allows for the protection of records or information compiled for law enforcement purposes when disclosure “could reasonably be expected to disclose the identity of a confidential source” or “information furnished by a confidential source.” 5 U.S.C. § 552

(b)(7)(D). As noted above, because these files concern FBI confidential sources, by their very nature they were “compiled for law enforcement purposes.” *Id.* § 552(b)(7).

“[A] source is confidential within the meaning of Exemption 7(D) if the source provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred.” *Boyd v. Criminal Div. of U.S. Dep’t of Justice*, 475 F.3d 381, 389 (D.C. Cir. 2007) (citation omitted). As the Hardy Declaration demonstrates, confidential human sources, such as the four at issue here, provided information under an express assurance of confidentiality, as demonstrated by the FBI’s use of a “source symbol numbers” and “source file numbers” used to further obscure their identifies in certain files. Hardy Decl. ¶¶ 37, 43-44. As a result, “these individuals are considered to be confidential sources since they furnished information only with the understanding that their identities and the information provided will not be released outside the FBI.” *Id.* ¶ 37. The CHSs at issue here thus constitute “confidential” sources, as that term is understood pursuant to Exemption 7(D).

As the FBI previously explained, it protected the identifying data of the sources such as social security numbers, dates of birth, home and work phone numbers and addresses, source symbol and file numbers, and information provided by individuals who assisted in the child pornography investigations documented in the records at issue. *Id.* ¶¶ 41-44. Each of the CHSs referenced in the responsive records were provided an express assurance of confidentiality, as demonstrated by the FBI’s provision of “source symbol numbers,” *see id.* ¶ 37, to further obscure their identities. In the processed records, the FBI documented receipt of information from these CHSs by notating each of their identities by a specific confidential symbol source number. All CHSs protected here were provided a source symbol number, and so each constituted a “confidential source” within the meaning of Exemption 7(D). *Id.* The file

numbers, identifying data, and information provided by the confidential sources is thus squarely protected by Exemption 7(D).

As the FBI previously explained, it is of no moment that these four CHSs were identified in the course of the *Rettenmaier* investigation. Even where the Government discloses the identity of a confidential source, for instance by having the source provide public testimony, the protections of Exemption 7(D) are not waived. *See, e.g., Parker v. DOJ*, 934 F.2d 375, 380-81 (D.C. Cir. 1991) (explaining that the statute “says nothing at all about waiver,” and “reject[ing Plaintiff’s] claim that the FBI waived its Exemption 7(D) protection” by having an informant testify publically); *Borda v. DOJ*, 245 F. Supp. 3d 52, 61 (D.D.C. 2017) (“It is. . . well settled that confidentiality is not lost merely because a source becomes a government witness.”) (citation omitted); *Bullock v. FBI*, 577 F. Supp. 2d 75, 80 (D.D.C. 2008) (“Exemption 7(D) applies even when the source’s identity is no longer a secret.”).

In any event, here the FBI withheld information provided by these CHSs in the context of criminal investigations, and which has not been previously disclosed. Hardy Decl. ¶¶ 38, 41. Disclosing the specifics of the non-public information the CHSs provided would allow the accused and/or convicted individuals on whom these CHSs provided information to know the identities of the individuals that enabled law enforcement to investigate and/or prosecute them for commission of crimes. *Id.* ¶ 41. Revealing this information would allow these criminals to potentially seek revenge, harass, or otherwise contact these CHSs. *Id.*

Accordingly, there can be no plausible dispute that the FBI appropriately withheld non-public information provided by the four CHSs at issue. *See Clemente v. FBI*, 741 F. Supp. 2d 64, 87 (D.D.C. 2010) (upholding 7(D) withholding of “information provided by source symbol numbered informants,” and that of “[i]nformants to whom no source code was assigned but who

supplied information to the FBI”) (citation omitted). And the FBI also acted properly in withholding the identifying information, source file numbers and source symbol numbers of these CHSs. *See Amuso v. DOJ*, 600 F. Supp. 2d 78, 99 (D.D.C. 2009) (identities and information provided by symbol numbered sources were properly withheld under Exemption 7(D)).

### **E. Exemption 7(E)- Circumvention of the Law**

The FBI also properly applied Exemption 7(E) to the records in the four informant files. Specifically, the FBI withheld: (1) sensitive file and sub-file names and numbers, (2) non-public investigative techniques and procedures of the FBI’s informant program, and (3) internal FBI phone numbers, email or IP addresses, or Intranet/Web addresses, (4) internal search slips and computer-generated search results, (5) collection methodology and analysis techniques, (6) identities and locations of FBI or Joint Units, Squads and Divisions, and (7) database identifiers, printouts and search results. Hardy Decl. ¶¶ 48-57. These various items are addressed in turn.

#### **1. Sensitive File Names and Numbers**

First, sensitive file names and numbers were withheld because “[a]pplying a mosaic analysis, suspects could use these numbers . . . in conjunction with other information known about other individuals and/or techniques, to change their pattern of activity to avoid detection, apprehension, or create alibis for suspected activities[.]” *Id.* ¶ 48. The Supreme Court has noted that “bits and pieces of data ‘may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself.’” *CIA v. Sims*, 471 U.S. 159, 178 (1985) (citation omitted). Accordingly, the FBI properly withheld file numbers and names concerning FBI operations because their disclosure could reasonably risk circumvention of the law. *See Poitras v. DHS*, 303 F. Supp. 3d. 136, 159 (D.D.C. 2018) (upholding FBI use of Exemption 7(E))

to withhold “sensitive case file numbers” where “[a]pplying a mosaic analysis, suspects could use these numbers . . . to avoid detection, apprehension, or create alibis”); *Shapiro*, 247 F. Supp. 3d at 72 (upholding FBI reliance on a “‘mosaic’ argument to justify its redactions,” and concluding “that the FBI has passed the ‘low bar’ imposed by 7(E)”).

## **2. Investigative Techniques and Procedures**

The FBI also withheld records in full or in part to protect non-public investigative techniques and procedures of its informant program. Hardy Decl. ¶ 49. This information falls into one or more of four sub-categories: (1) operational directives and strategies for recruitment and utilization of CHSs, (2) approval limitations on utilizing CHSs, (3) confidential funding techniques and strategies, and (4) source recruitment and maintenance techniques. *Id.* These are the same sub-categories of information which the FBI previously withheld from the processed files at issue in the first round of briefing, which the Court upheld. *EFF*, 384 F. Supp. 3d at 14.

First, the operational directives and strategies for recruitment and utilization of CHSs describe FBI procedures, techniques, and strategies for recruitment and utilization of CHSs, and also instruct FBI employees on the proper use of these procedures, techniques, and strategies. First Declaration of David Hardy (“First Hardy Decl.”) ¶ 104, ECF No. 13-3. The release of this sensitive information would reveal how FBI special agents generally utilize CHSs, and how individuals are recruited, trained, paid, and communicate with their handlers. Criminals could clearly use this information to modify their behavior in an attempt to avoid detection. *Id.* ¶ 105; *Fisher v. DOJ*, 772 F. Supp. 7, 12 (D.D.C. 1991) (affirming FBI withholding under Exemption 7(E) where information could inform suspects in certain investigations “about techniques used to aid the FBI”).

Second, information concerning approval limitations on utilizing CHSs governs when CHSs may be recruited and used, and the requirements for approval and oversight of the use of CHSs. First Hardy Decl. ¶ 106. Again, release of this type of information would be harmful to FBI operations, as it “would disclose to criminals which investigative activities involving CHSs are or are not prohibited during certain types of investigations. Criminals could then combine this knowledge with other information to determine whether their activities are likely to be detected by FBI CHSs.” *Id.* ¶ 107.

Third, confidential funding techniques and strategies are the specific techniques and strategies that enable the FBI to pay CHSs for their assistance or reimburse them for expenses incurred related to investigations. *Id.* ¶ 108. Disclosing this category of information “would reveal the spending limits for employing sources, spending accounts utilized, the transmission methods for making payments, specific amounts paid to CHSs, and would reveal the FBI’s strategies and techniques of effectively using its limited resources in this manner.” *Id.* Revealing the amount of money the FBI has paid or plans to pay in order to implement certain investigative techniques would in turn reveal the FBI’s level of focus on certain types of law enforcement or intelligence gathering efforts. *Id.* ¶ 109. This is all valuable information to the criminal seeking to avoid detection by the FBI, and is properly protected by Exemption 7(E). *Id.*; *See Lewis-Bey v. DOJ*, 595 F. Supp. 2d 120, 138 (D.D.C. 2009) (upholding FBI withholding under Exemption 7(E) where disclosure “could aid persons” by revealing how a “confidential informant is able to receive funds”).

Fourth, source recruitment and maintenance techniques identify and describe specific strategies and techniques for recruiting and maintaining effective CHSs. First Hardy Decl. ¶ 110. “For example, revealing this category of information would reveal how FBI SAs identify

potential sources in a current investigative activity of interest, how a source is vetted for reliability, how the information provided by a source is vetted for accuracy, and the maintenance, storage, and indexing into the CRS of records of investigative interest.” *Id.* Release of this sensitive information would similarly would “allow criminals to predict the FBI’s CHS recruitment strategies and gain insight regarding which of their associates might be likely recruitment targets, and whom they should intimidate, coerce, or even eliminate to prevent detection by the FBI’s CHS program.” *Id.* For the reasons set forth above, the FBI appropriately withheld information related to investigative techniques and procedures under Exemption 7(E).

### **3. Information Technology Materials**

As to internal FBI internal phone numbers, email addresses, and IP addresses, disclosure of information related to these technology systems could allow criminals to exploit the FBI’s Information Technology (“IT”) system to gain unauthorized access, to view and manipulate data, or otherwise interfere with the FBI’s non-public intranet protocol. Hardy Decl. ¶ 50. In addition, release of the FBI personnel phone numbers and email addresses could allow criminals to interrupt or interfere with the FBI’s daily investigation work; thereby, impeding sensitive investigations. *Id.* In this manner, release of this information would jeopardize the FBI’s investigative programs, enabling criminals to circumvent the law. *See Poitras*, 303 F. Supp. 3d at 159 (upholding FBI’s use of Exemption 7(E) to withhold “internal, non-public email or IP addresses”); *Shapiro v. DOJ*, 78 F. Supp. 3d 508, 520 (D.D.C. 2015) (upholding FBI’s use of Exemption 7(E) to withhold “internal web addresses and phone numbers”).

#### 4. Search Slips and Printouts

Concerning internal search slips and printouts, “[t]he search slips and printouts protected in part or in full by the FBI are related to vetting potential informants to become a CHS or CHSs receiving an annual review to establish a continued need of the informant.” Hardy Decl. ¶ 52. Specifically, the search slips and printouts contain identifying information and details concerning the FBI’s investigation or review of informants, which would all “provide key insight into the FBI’s source vetting standards.” *Id.* Among other harms, “[p]roviding any such information would also enable those wishing to gain the FBI’s confidence and pose as a potential FBI CHSs the opportunity to judge what information they should manipulate/mask to avoid discovery of their nefarious intentions and ensure the FBI targets them for recruitment.” *Id.* Because release of these search slips and computer printouts could reasonably be expected to risk circumvention of the law, the FBI properly withheld these records pursuant to Exemption 7(E). *See Shapiro v. DOJ*, 239 F. Supp. 3d 100, 114 (D.D.C. 2017) (upholding FBI’s use of Exemption 7(E) to withhold a “limited universe of search slips[,]” where such records would disclose, among other things, “the scope and focus of [the FBI’s] investigative efforts”); *Mezerhane de Schnapp v. USCIS*, 67 F. Supp. 3d 95, 101 (D.D.C. 2014) (upholding use of Exemption 7(E) to withhold database “printouts” where information would “enlighten asylum applicants with criminal backgrounds about what sort of law enforcement information . . . is consulted by USCIS”).

#### 5. Collection Methodology and Analysis Techniques

The FBI also withheld information concerning certain collection methodology and analysis techniques pursuant to Exemption 7(E). Hardy Decl. ¶ 53. That is, the FBI withheld information regarding the techniques and procedures the FBI uses to collect and analyze information in connection with child pornography criminal investigations. *Id.* As the Hardy

Declaration explains, “[w]hile certain analytical techniques may be known by the public in a general sense, the technical analysis of these sensitive law enforcement techniques, to include the specifics of how and in what setting they are employed, is not generally known to the public.”

*Id.* Accordingly, the withheld information specifically concerns how and in what setting the FBI uses certain methods used in collecting and analyzing information, including how and from where the FBI collects information, and the methodologies employed to analyze it. *Id.*

Disclosure of this information enable investigative subjects to circumvent similar and currently used techniques and the relative utility of these techniques could be diminished if the actual techniques were released. *Id.* Because disclosure would create a risk of circumvention of the law, this information was appropriately withheld. *See Stephens v. DOJ*, 26 F. Supp. 3d 59, 73 (D.D.C. 2014) (upholding FBI’s use of Exemption 7(E) to withhold certain search procedures, the disclosure of which could allow “individuals to take countermeasures to circumvent FBI’s collection methodology”).

## **6. Location of FBI Units**

The FBI further withheld information concerning the locations of FBI units, including Joint Units, Squads and Divisions. Hardy Decl. ¶ 55. As the Hardy declaration explains, the location of the units conducting certain investigations, not generally known to the public, could reveal the targets, the physical areas of interest of the investigation, and when taken together with the other locations if identified, could establish a pattern or “mosaic” that identification of a single location would not. *Id.* For instance, if the locations are clustered in a particular area, it would allow criminals to determine where geographically the FBI is focusing its investigative resources, and allow them to relocate their criminal activities elsewhere. *Id.* This would disrupt the FBI’s investigative process and deprive the FBI of valuable information. *Id.* In addition,

disclosure as to the location of certain specialized units, squads and/or divisions would reveal the relative resource allocation of the FBI, further risking circumvention of the law, by allowing criminals to determine where their crimes may be more likely to succeed. Accordingly, the FBI properly withheld this information pursuant to Exemption 7(E). *See Poitras*, 303 F. Supp. 3d at 159 (upholding FBI's use of Exemption 7(E) to withhold the "identity or location of FBI or Joint Units, Squads, or Divisions"); *BuzzFeed, Inc. v. DOJ*, 344 F. Supp. 3d 396, 407 (D.D.C. 2018) (upholding FBI *Glomar* response under Exemption 7(E) where disclosure would "provide information on the level of FBI surveillance activity in various locations").

### **7. Database Identifiers and Search Results**

Finally, the FBI withheld database identifiers and search results. That is, the FBI protected the names of databases and database search results located through non-public databases used for official law enforcement purposes by the FBI and/or law enforcement personnel. Hardy Decl. ¶ 56. These non-public databases serve as repositories for investigative data. As described by Mr. Hardy, they are "essentially 'one-stop' shops that allow law enforcement to query information and develop investigative leads from a variety of source data using state-of-the-art analytical tools." *Id.* Disclosure of the information compiled from these search results would reveal the types of investigative data useful to the FBI, whether or not the FBI has detected criminal behavior by the subjects, and how the FBI might exploit this data to thwart the subjects' criminal activities. *See Dutton v. DOJ*, 302 F. Supp. 3d 109, 124 (D.D.C. 2018) (upholding FBI's use of Exemption 7(E) to withhold "database identifiers/printouts"); *Shapiro*, 247 F. Supp. 3d at 70 (upholding FBI's use of Exemption 7(E) to withhold "database identifiers or the format of database entries").

### **III. The FBI Appropriately Withheld Material Responsive to Item Four of Plaintiffs' Request**

The final category of materials at issue here are the ten pages of records, responsive to Item Four of Plaintiffs' Request, seeking policies or guidance material concerning the use of CHSs as computer repair facilities generally. These records were withheld in full under Exemption 7(E). Mr. Hardy explains that these records were all derived from a non-public, internal FBI guide, known as a "Source Guidance Manual," which concerns the recruitment and utilization of CHSs in furtherance of a specific type of FBI law enforcement investigation. *See* Hardy Decl. ¶¶ 49, 58. The responsive records pertain to CHSs at computer repair facilities, as well as other types of facilities. Specifically the withheld material, which has not previously been made public, is comprised of information concerning the FBI's strategies and methodology for identifying, recruiting, and utilizing CHSs in furtherance of a specific type of investigation. *Id.* ¶ 59. Mr. Hardy in fact describes this guide as a "playbook" the FBI uses in determining the potential use of CHSs in a certain type of law enforcement investigation. *Id.* These records therefore plainly concern a law enforcement procedure, as required by Exemption 7(E).

Moreover, disclosure would create a chance of a reasonably expected risk of circumvention of the law. That is, release of the withheld information would enable criminals to learn the FBI's methodology for utilizing CHSs in a particular type of law enforcement investigation. *Id.* This would enable them to preemptively pursue informed, effective countermeasures to thwart the FBI's investigative efforts. *Id.* It would also reveal to criminals the individuals most likely to be targeted by the FBI for CHS recruitment, allowing them to predict who they should avoid to limit investigative scrutiny by the FBI. *Id.*

For these reasons, disclosure of the records at issue would create a chance of a reasonable risk of circumvention of the law, such that the FBI's withholding was proper. *See PHE, Inc. v.*

*DOJ*, 983 F.2d 248, 251 (D.C. Cir. 1993) (upholding FBI’s use of Exemption 7(E) to withhold portions of a FBI manual because “release of FBI guidelines as to what sources of information are available to its agents might encourage violators to tamper with those sources of information and thus inhibit investigative efforts”); *Stein v. DOJ*, 134 F. Supp. 3d 457, 475 (D.D.C. 2015) (upholding FBI’s use of Exemption 7(E) to withhold portions of the “ACS Basic Reference Guide” which explains how to use the FBI’s proprietary digital file storage system).

### CONCLUSION

For all the reasons set forth above, the FBI respectfully requests that the Court grant summary judgment in favor of Defendant on all of Plaintiff’s claims.

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