

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3 ELECTRONIC FRONTIER FOUNDATION)

4 Plaintiff,)

5 v.)

Civil A. No. 4:CV-10-04892

6 UNITED STATES DEPARTMENT OF JUSTICE,)
7 ET AL)

8 Defendants.)
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10 **FOURTH DECLARATION OF DAVID M. HARDY**

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12 I, David M. Hardy, declare as follows:

13 (1) I am currently the Section Chief of the Record/Information Dissemination Section
14 ("RIDS"), Records Management Division ("RMD"), formerly at Federal Bureau of Investigation
15 Headquarters ("FBIHQ") in Washington, D.C., and currently relocated to Winchester, Virginia.
16 This declaration supplements my First Declaration of January 25, 2011 submitted to provide the
17 Court and Plaintiff with an explanation of the FBI's recording-keeping system, how a FOIA
18 request is processed in RIDS, and the procedures used to expeditiously search for, collect, and
19 process records potentially responsive to both of Plaintiff's requests; my Second Declaration of
20 February 29, 2012 submitted in support of the FBI's Motion for Summary Judgment and to
21 provide the Court and Plaintiff with the FBI's justification for the withholding of information
22 from its FOIA/PA releases, in accordance with Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973),
23 pursuant to FOIA Exemptions 1, 2, 3, 4, 5, 6, 7(C), 7(A), 7(D) and 7(E); and my Third
24 Declaration of February 2, 2012 submitted in support of the Drug Enforcement Agency's
25 ("DEA") Motion for Summary Judgment, defending assertion therein of Exemption (b)(1) on a
26 one-page DEA document submitted to the FBI for consultation.

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2 (2) I have reviewed and have become familiar with Plaintiff's Cross Motion for
3 Summary Judgment and Opposition to Defendant's Motion for Summary Judgment dated March
4 29, 2012. This declaration addresses certain issues raised therein and provides the Court and
5 Plaintiff with (1) a further elaboration of the process used by the FBI to define the scope of
6 material potentially responsive to Plaintiff's request,¹ (2) a further elaboration of the FBI's
7 justification for its assertion of Exemption 4 for a Rand Corporation proposed contract with the
8 FBI, *See* Bates pages EFF/Lynch 877 - 916,² and (3) a further elaboration of the FBI's
9 justification for its assertion of Exemption (b)(5) for an internal draft of a summary of testimony
10 compiled in order to prepare the Director for an appearance before the Senate Select Intelligence
11 Committee, *See* Bates pages EFF/Lynch 347-60; for an internal FBI Office of Congressional
12 Affairs summary note of a 2006 meeting with a Senate Judiciary Committee staff member, *See*
13 Bates pages EFF/Lynch 308; and internal meeting notes from, and presentations given at, an FBI
14 sponsored Law Enforcement Executive Forum where various local, state and federal law
15 enforcement partners were invited by the FBI to attend and serve as consultants to the FBI, *See*
16 Bates pages EFF/Lynch 1241-1323. In addition, (4) I will further clarify the withholding of a 3-
17 page document mislabeled on the deleted page insert as "definitions on topics," *See* Bates pages
18 EFF/Lynch 329-331.

19 (3) Plaintiff informed the FBI in its Cross Motion and Opposition that several
20 documents referred to the Department of Justice ("DOJ") FOIA Office on May 31, 2011, for
21 direct response to plaintiff, were never received from DOJ. The FBI contacted the DOJ FOIA
22 Office (part of the "Justice Management Division"), which was unable to confirm receipt from
23 the FBI of the referred documents. The FBI immediately provided new copies of the documents

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25 ¹ *See* ¶¶ 24-27 of First Hardy declaration for additional details on how a FOIA request is
processed in RIDS.

26 ² *See* Exhibit N, Second Hardy Declaration, for Bates pages EFF/Lynch 1 - EFF/Lynch
27 1573.

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2 (Bates pages EFF/Lynch 314-27, and EFF/Lynch 727-43) to the Justice Management Division.
3 Upon determining that DOJ's Civil Division was the originator of the material, the Justice
4 Management Division forwarded it to the Civil Division's FOIA/PA office for processing and
5 direct response to plaintiff.³

6 (4) The FBI also determined that several pages were erroneously identified as
7 referred to DOJ FOIA for direct response. Specifically, at the Second Hardy Declaration, Exhibit
8 N, a deleted page insert noted that Bates pages EFF/Lynch 363-66 were referred to DOJ for
9 direct response to the Plaintiff. In fact, they were processed and released in part, but were
10 inadvertently omitted from Exhibit N. They will be provided to plaintiff as part of the FBI's
11 "Reprocessing/Remarking CD."

12 **1. SCOPING OF PLAINTIFF'S FOIA REQUEST**

13 **A. NON-RESPONSIVE RECORDS**

14 (5) To determine whether records located by the search were in fact responsive to
15 Plaintiff's request, the FBI used the procedures described in ¶¶ 24-27 of the First Hardy
16 declaration, and further detailed here and in ¶¶ 6-8, *infra*. The process of determining whether
17 records located in a search are responsive to a FOIA request is known as "scoping." Scoping
18 entails a detailed, page by page, line by line review by a FOIA analyst of the material collected in
19 the search, and who has carefully studied and learned the specific information being sought by
20 the requestor. Material which the FOIA analyst determines is not responsive to the request is
21 deemed to be "out of scope" and, therefore, is not further processed.

22 (6) In scoping "potentially responsive" material, i.e., material collected as a result of
23 the search, the FBI took into account the subject matter of each request and all pertinent
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25 ³ By letter to plaintiff's counsel dated April 12, 2012, the Assistant Director, Logistics
26 Management Services, Facilities and Administrative Services Staff, Justice Management
27 Division, informed plaintiff that, because the material forwarded to it by the FBI originated with
28 the Civil Division, it had been sent there for processing and direct response to plaintiff.

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2 information regarding the subject and the scope of each request.⁴ If the subject matter was not
3 mentioned at all in a potentially responsive record, then the FOIA analyst determined that
4 particular record to be “non responsive” to the request, and it was not processed any further. The
5 records determined to be non responsive are said to be “outside the scope” of the request. A
6 record may be deemed non responsive, because its subject matter is not responsive to the request,
7 or the record was created after the cut-off date of the search, even though the subject matter
8 might be otherwise considered responsive. When the FBI located non responsive information
9 within a responsive record it withheld the non responsive information as outside the scope of
10 plaintiff's FOIA requests, but released in whole or in part, the responsive portion of the record.

11 (7) Plaintiff submitted two separate and distinct FOIA requests. The search for the
12 Cardozo request had a cut-off date of May 21, 2009, and the Lynch search cut-off was September
13 28, 2010. Plaintiff questions the adequacy of the FBI's search on the basis that the FBI
14 determined certain information as being "non-responsive" or "outside the scope." See EFF's
15 Cross-Motion and Opposition at pages 6-7. In particular, Plaintiff challenges FBI's use of
16 "outside the scope" redactions of certain material contained in several slide presentations. See
17 EFF's Cross-Motion and Opposition at page 7 (citing EFF/Lynch 94-97; EFF/Lynch 99-102;
18 EFF/Lynch 108-110; EFF/Lynch 1462-1463). These redactions were used to redact non-
19 responsive material. Specifically, the slides are from an April 2010 presentation, and thus are
20 outside the date-scoping of the separate Cardozo request. The redacted material consisted solely
21 of internal proposals to amend current surveillance law, and is therefore, not responsive to the
22 Lynch request.

23 (8) In addition, Plaintiff challenges FBI's decision to withhold certain pages in full as
24 being outside the scope of Plaintiff's FOIA requests. *See* EFF's Cross-Motion and Opposition at

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26 ⁴ See Exhibit A, First Hardy declaration, for a true and correct copy of the May 21, 2009
27 Cardozo request, and Exhibit K, First Hardy declaration, for a true and correct copy of the
28 September 28, 2010 Lynch request.

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2 pages 6-7 n. 13 (citing an August 2010 "Intelligence Note," EFF/Lynch 142-145; a April 2010
3 presentation entitled, "Preservation of Lawful Intercepts: Challenges and Potential Solutions,"
4 EFF/Lynch 72-77; a June 2010 presentation entitled, "Closing the National Security ELSUR
5 Gap," EFF/Lynch 812-819, and several pages from other presentations, including a presentation
6 at the April 2010 National District Attorneys Association). Specifically, the documents consisted
7 of: (1) an "Appendix" to the Intelligence Note, which contained results of an FBI survey
8 conducted with non-DOJ law enforcement agencies on how their investigations are impacted
9 because of electronic surveillance gaps and therefore did not relate to DOJ's own problems
10 conducting electronic surveillance, and (2) 2010 presentations containing internal proposals to
11 amend current surveillance law. These document pages were considered non responsive to the
12 Plaintiff's Lynch request, and were also outside the date-scoping period of the Cardozo request.

13 (9) The FBI first conducted its separate searches for responsive records in the FBI's
14 Central Records System ("CRS")⁵ using the subject matter provided by Plaintiff's requests. After
15 RIDS determined that a more individualized inquiry (outside the CRS system) of certain FBI
16 divisions and offices reasonably likely to have potentially responsive records was appropriate
17 RIDS circulated several Electronic Communication ("EC") search requests, which resulted in
18 collection and, ultimately, the processing of responsive material described in the Cardozo Index
19 (Second Hardy, Exhibit O) and Lynch Index (Second Hardy, Exhibit P). Once the records review
20 of the potentially responsive material was completed RIDS determined that some of the records
21 were not responsive to Plaintiff's request because they did not contain a mention of the subject of
22 plaintiff's request and/or were not within the date-scoping period of the requests. These non
23 responsive pages were identified in the deleted page inserts of Exhibit M and N, which were
24 provided in order for the Court and Plaintiff to see the full extent of the of the fruits of the search
25 based on the FBI's detailed review of the material.

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27 ⁵ See ¶¶ 5-10, First Hardy Declaration, for an explanation of the FBI's CRS.

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2 **2. FURTHER EXPLANATION OF THE ASSERTION OF EXEMPTION 4 FOR THE**
3 **RAND CORPORATION CONTRACTUAL DETAILS WITH THE FBI**

4 (10) Exemption 4 of the FOIA protects “trade secrets and commercial or financial
5 information obtained from a corporation or electronic communication service providers [that are]
6 privileged or confidential.” See 5 U.S.C. § 552(b)(4). In this case, Exemption (b)(4) has been
7 asserted to protect proprietary contractual information provided to the FBI by one of its
8 contractors, the Rand Corporation (RAND). RAND submitted a draft contractual proposal to the
9 FBI describing the scope of work that it could perform on behalf of the FBI’s Operational
10 Technology Division (“OTD”) for its “FBI Going Dark Initiative Electronic Surveillance Analyst
11 Project.” RAND’s proposal included holding workshops for FBI personnel to facilitate
12 discussion about defining the “going dark” problem and the issues that needed to be addressed to
13 avoid it; identify and evaluate ways to address the issues; and recommend and endorse a course
14 of action to avoid the problem. The contractual document also contained cost projection analysis
15 associated with implementing the project. See Bates pages EFF/Lynch 877 - 916.

16 (11) RAND considers its proposed contractual documents to be proprietary
17 information and the FBI concurs. As outlined in the proposed contract, RAND states, “This
18 material is considered proprietary to RAND. This data shall not be disclosed outside the
19 Government and shall not be duplicated, used, or disclosed in whole or in part for any purpose
20 other than evaluation, provided that if work is approved as a result of or in connection with the
21 submission of this data, the Government shall have the right to duplicate, use or disclose the data
22 to the extent provided in the contract.” This draft proposal specifically states that RAND expects
23 its information to remain confidential under the restrictions provided in the proposed contract.
24 Disclosure of specific details of RAND’s project proposal and cost analysis would give
25 competitors an unfair advantage over RAND in developing requirements, counter proposals and
26 lower cost analyses that would undermine RAND’s ability to compete for contracts. This
27 disclosure would also discourage companies from seeking to do business with the FBI out of
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2 concern that their proprietary information would become publically available to competitors.
3 Reduced competition for FBI business will likely lead to higher program and project costs due to
4 reduced competition, and will likely lead to fewer highly qualified vendors seeking to do
5 business with the FBI, resulting in its receiving poorer quality products. Exemptions (b)(6) and
6 (b)(7)(C) were also asserted on certain pages to withhold the names of RAND employees.

7 **3. EXPLANATION FOR FBI'S ASSERTION OF EXEMPTION (b)(5) WITH RESPECT**
8 **TO CERTAIN DOCUMENTS ADDRESSED IN PLAINTIFF'S BRIEF**

9 (12) In its Cross Motion and Opposition at pages 21-24, without providing any
10 evidentiary support, Plaintiff asserts that the FBI has applied the deliberative process privilege to
11 withhold documents reflecting final agency positions as well as draft documents based solely on
12 the fact that the documents are drafts. That is not correct. The FBI has not applied the
13 deliberative process privilege to withhold documents reflecting final agency positions, and it has
14 not applied the deliberative process privilege to any drafts merely because the documents were
15 drafts but, instead, because the substance of the drafts were found to be both predecisional and
16 deliberative. In addition, Plaintiff questions the FBI's use of the deliberative process privilege
17 with regard to three documents, contending that the materials were likely shared outside the
18 Executive Branch: (1) an internal draft of a summary of testimony compiled in order to prepare
19 the FBI Director for an appearance before a closed session of the Senate Select Intelligence
20 Committee, *See* Bates pages EFF/Lynch 347-60; (2) an internal FBI Office of Congressional
21 Affairs ("OCA") staff summary note of a 2006 meeting with a Senate Judiciary Committee staff
22 member, *See* Bates pages EFF/Lynch 308; and (3) internal meeting notes from, and presentations
23 given at, an FBI sponsored Law Enforcement Executive Forum where various local, state and
24 federal law enforcement partners were invited by the FBI to attend and serve as consultants to the
25 FBI, *See* Bates pages EFF/Lynch 1241-1323. These documents will be addressed serially and in
26 detail.
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2 **A. SENATE SELECT INTELLIGENCE COMMITTEE DOCUMENT**

3 (13) The document at Bates pages EFF/Lynch 347-60 is an internal draft of proposed
4 testimony prepared by the OCA for the Director for his review and approval in anticipation of an
5 appearance before a closed session of the Senate Select Intelligence Committee. The Director
6 was expected to discuss the FBI's portion of the President's fiscal year 2011 National
7 Intelligence Program budget request and the FBI's efforts to enhance its intelligence capabilities
8 to protect the homeland. Exemption (b)(5) was asserted in conjunction with Exemption (b)(7)(E)
9 to withhold the document in full, but at times portions of information in these documents were
10 also withheld in conjunction with (b)(1). Publically releasing this internal, partially classified
11 proposed draft testimony would reveal the privileged, internal deliberative process that the FBI
12 was having concerning the proposed enhancement of intelligence gathering capabilities,
13 techniques, and procedures. The draft material was never intended to be produced for public
14 consumption and/or discourse, but rather was used to prepare the Director for his appearance at a
15 closed session of the Senate Select Intelligence Committee.

16 **B. INTERNAL STAFF SUMMARY NOTE**

17 (14) The OCA's internal staff summary note reporting the results of a 2006 meeting
18 between personnel from the OCA, OTD, a DOJ staff attorney, and a staff employee of the Senate
19 Judiciary Committee, were entered into an internal OCA computer database called "OCA,
20 Congressional Contacts." This data base is not available to, or shared with, the public.
21 Exemption (b)(5) was asserted in conjunction with Exemptions (b)(6), and (b)(7)(C) with regard
22 to this entire document. The internal staff briefing summary reflects the views of the author as to
23 what portions of the meeting were relevant and was compiled to assist the FBI in its ongoing
24 deliberations about how to respond to challenges experienced by law enforcement in conducting
25 electronic surveillance.

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2 **C. INTERNAL MEETING NOTES AND PRESENTATIONS GIVEN AT LAW**
3 **ENFORCEMENT EXECUTIVE FORUM**

4 (15) The Law Enforcement Executive Forum ("LEEF") was established by the FBI
5 Communications Assistance for Law Enforcement Act Implementation Unit ("CIU") as a way to
6 bring federal, state, and local law enforcement personnel from around the country to the FBI to
7 act as consultants on particular topics of interest to the FBI. Participant expenses, including
8 airfare and travel, are paid for by the CIU. The documents at Bates pages EFF/Lynch 1241-1323,
9 and 1327-1332, are an internal Executive Summary of meeting notes and a copy of internal
10 presentations given at a June 25, 2009 forum, all prepared for the express purposes of facilitating
11 internal discussion and review among the attendees and to enable them to provide feedback on
12 the issues of interest to the FBI for which the meeting was convened. The June 25, 2009
13 discussion topic concerned the FBI's development of a unified electronic surveillance strategy
14 which the invited law enforcement community attendees were asked to review and provide input.
15 Only invited attendees from federal, state, and local law enforcement were in attendance along
16 with FBI staff; the forum was not open to the general public, nor were the internal Executive
17 Summary of meeting notes or the internal presentations made public. Cooperation and the robust
18 exchange of information and ideas within the law enforcement community is essential to
19 developing strong, effective programs across a wide spectrum of law enforcement issues.
20 Exemption (b)(5) was asserted in conjunction with Exemption (b)(7)(E) to withhold these
21 documents and presentations, and at times in conjunction with Exemptions (b)(6), and (b)(7)(C)
22 to withhold parts of these documents. The fact that the FBI presentation is marked "Law
23 Enforcement Sensitive, FBI Approval Before Dissemination" provides a clear indication that
24 these documents were not intended for public consumption and/or discourse.

25 **4. CLARIFICATION**

26 (16) The document at Bates pages EFF/Lynch 329-331 was mislabeled as "definitions
27 on topics." This description implied that these were "definitions" adopted as standards within the
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2 FBI. These were actually "discussion paper articles" used to foster internal discussion in
3 developing future positions on important "topics" within the FBI. These papers were created by
4 issue experts within the FBI as part of the FBI's ongoing deliberations about how to formulate
5 future policy in response to the challenges experienced by law enforcement in conducting
6 electronic surveillance, and are pre-decisional and deliberative for the fact that no standard policy
7 decisions were enacted as of the date-scoping period. Exemptions (b)(5) and (b)(7)(E) were
8 asserted to withhold the document in their entirety.

9 **5. EXEMPTION 7(E)**

10 (17) Plaintiff contends that FBI has invoked Exemption 7(E) to withhold information
11 about law enforcement techniques and procedures that are well known to the general public.
12 EFF's Cross-Motion and Opposition at pages 32-34. That is incorrect. FBI has invoked
13 Exemption 7(E) to withhold detailed information about problems experienced by law
14 enforcement while conducting lawful electronic surveillance, efforts by criminal entities to
15 exploit those vulnerabilities, and counter-measures taken by law enforcement in response. While
16 there have been public reports indicating that the government has had trouble conducting
17 electronic surveillance, it is the FBI's understanding that the specific and detailed information
18 withheld under Exemption 7(E) by the FBI in this case is not widely known to the public. The
19 release of this information would identify and confirm specific problems and vulnerabilities
20 experienced by law enforcement in conducting lawful electronic surveillance and, as a result,
21 would provide criminal entities a roadmap for exploiting these vulnerabilities to further their
22 criminal aims. Because release of this information could reasonably be expected to risk
23 circumvention of the law, it was properly withheld under Exemption 7(E).

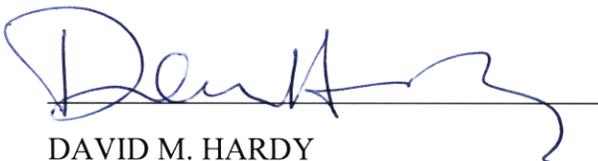
24 **CONCLUSION**

25 (18) The FBI conducted a thorough, good faith review of all the responsive material
26 located in response to both of Plaintiff's FOIA requests, and closely considered the segregability
27 and responsiveness of all the records. The FBI has processed and released all reasonably
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2 segregable information from the records responsive to the Plaintiff's FOIA requests. The FBI
3 has properly asserted Exemptions (b)(4), (b)(5), and b(7)(E) as to those documents which
4 plaintiff has raised concerns in its Cross Motion and Opposition.

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6 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing
7 is true and correct.

8 Executed this 24th day of April, 2011.

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11 DAVID M. HARDY

12 Section Chief
13 Record/Information Dissemination Section
14 Records Management Division
15 Federal Bureau of Investigation
16 Winchester, VA
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