

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

)	
NATIONAL DAY LABORER ORGANIZING)	
NETWORK, <u>et al</u> ,)	
)	
Plaintiffs,)	
)	
v.)	
)	Civil Action No.10-cv-3488 (SAS)
U.S. IMMIGRATION AND CUSTOMS)	
ENFORCEMENT AGENCY, <u>et al</u> ,)	
)	
Defendants.)	
)	

THIRD DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) This declaration supplements, and hereby incorporates, my two prior declarations submitted in this case. The [First] Hardy Declaration, dated November 12, 2010, provided the Court and plaintiffs an explanation of the search for records responsive to plaintiffs’ FOIA request. The Second Hardy Declaration, dated January 26, 2011, provided the Court and plaintiffs with an explanation of the search cut-off date for plaintiffs’ FOIA request.

(2) The purpose of this declaration is to provide the Court and plaintiffs with justifications for the application of FOIA Exemptions 2, 5, 6, 7(C), and 7(E) for pages released on January 17, 2011 in accordance with the Court’s December 17, 2010 Order.

JANUARY 17, 2011 RELEASE OF “OPT-OUT”-RELATED DOCUMENTS

(3) By order dated December 17, 2010, the Court directed the FBI to produce by January 17, 2011 “records relating to the ability of states or localities to decline or limit

participation in Secure Communities, including documents, memoranda, manuals, and communications referencing the technological capacity of ICE and the FBI to honor requests to opt-out, opt-in or limit participation in Secure Communities (“Opt-Out Production”).”

(4) On January 17, 2011, the FBI released approximately 2112 pages to plaintiff on CD-Rom. Each page of the processed documents is Bates-numbered sequentially – SC-FBI-855 through SC-FBI-2856. Of the approximately 2112 pages released, the FBI withheld four pages -- SC-FBI-1862 through SC-FBI-1865 -- in their entirety as they were deemed to be non-responsive to the request. Of the remaining pages, 1454 pages were released in full, and 654 pages were released in part.

(5) The FBI submits this declaration to provide the Court and plaintiffs justifications for the withholding of information in accordance with Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), pursuant to FOIA Exemptions 2, 5, 6, 7(C), and 7(E), 5 U.S.C. §§ 552 (b)(2), (b)(5), (b)(6), (b)(7)(C) and (b)(7)(E). A Vaughn Index containing descriptions of records withheld in full or in part by the FBI pursuant to FOIA exemptions is attached as **Exhibit A**.

FOIA EXEMPTIONS

(6) The categories of exemptions used in the processing of documents are as follows:

SUMMARY OF JUSTIFICATION CATEGORIES	
CATEGORIES	INFORMATION WITHHELD
Category (b)(2)	INTERNAL AGENCY RULES AND PRACTICES
Category (b)(5)	PRIVILEGED INFORMATION
Categories (b)(6) and (b)(7)(C)	CLEARLY UNWARRANTED AND UNWARRANTED INVASION OF PERSONAL PRIVACY
Category (b)(7)(E)	TECHNIQUES AND PROCEDURES

EXEMPTION (b)(2)
INTERNAL AGENCY RULES AND PRACTICES

(7) 5 U.S.C. § 552 (b)(2) exempts from disclosure information “related solely to the internal personnel rules and practices of an agency.”

(8) Exemption 2 (“Low”) protects routine internal administrative matters and functions of the FBI which have no effect on the public at large. Exemption 2 (“High”) protects internal information the disclosure of which would risk circumvention of a legal requirement. The FBI has invoked Exemption 2 (“High”) for three categories of information: internal techniques and procedures; internal telephone and/or facsimile numbers of FBI personnel; and internal e-mail addresses of FBI personnel.

Information Pertaining to Internal Techniques and Procedures

(9) Exemption (b)(2) has been cited in conjunction with Exemption (b)(7)(E) to protect information pertaining to FBI techniques and procedures. The exemption has been applied to material which is non-responsive to the FOIA request; however, because it appears on a spreadsheet, the FBI decided to include the page for continuity. The redacted information pertains to the interoperability of the FBI’s IAFIS system, the Department of Homeland Security’s US-VISIT database, and a foreign government’s database. Specifically it consists of technical details of connectivity of the systems, and is unrelated to the Secure Communities program. To release these details would divulge specific computer techniques to the public, possibly resulting in interference with the system and obstruction of duties. Accordingly, because disclosure of these internal techniques and procedures could impede the FBI’s effectiveness and may risk circumvention of the law, the FBI has properly withheld this information pursuant to Exemption (b)(2).

Telephone and Facsimile Numbers of FBI Personnel

(10) Exemption (b)(2) (“High”) has been asserted to protect internal telephone and facsimile numbers of FBI personnel. Telephone and fax numbers are used by FBI personnel on a routine daily basis. Release of this information would reveal vulnerable internal information and impede the effective use of the FBI’s telephone system. For example, disclosure of these telephone and facsimile numbers could subject these individuals to harassing telephone calls or facsimiles which could disrupt official business. Accordingly, because disclosure of these internal numbers could impede the FBI’s effectiveness and may risk circumvention of the law, the FBI has properly withheld this information pursuant to Exemption (b)(2).

FBI Employee E-mail Addresses

(11) Exemption (b)(2) has also been asserted to protect secure internal e-mail of FBI personnel. Secure internal e-mail addresses are used by FBI personnel during the daily performance of their jobs. Disclosure of this information would expose the FBI to the possibility that computer-savvy individuals could compromise the effectiveness of the FBI’s internal computer system by devising ways in which to access – and tamper with – the system without detection. Release of this information therefore would reveal vulnerable internal information and impede the effective use of such an internal system. Accordingly, because these internal e-mail addresses are related to the FBI’s internal practices and because disclosure could impede the FBI’s effectiveness, the FBI has properly withheld this information pursuant to Exemption (b)(2).

**EXEMPTION (b)(5)
PRIVILEGED INFORMATION**

(12) Exemption 5 allows the FBI to protect information contained in “inter-agency or

intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” This exemption has been construed to exempt those documents or information normally privileged in the civil discovery context, including, as is the case here, the attorney-client privilege and the deliberative process privilege.

Attorney-Client Privilege

(13) The attorney-client privilege protects confidential communications between an attorney and his client, relating to a legal matter for which the client has sought professional advice. This privilege encompasses any opinions given by an attorney to his client based upon and reflecting those facts, as well as communications between attorneys that reflect client-supplied information. In this case, the FBI has asserted Exemption (b)(5) to protect material covered by the attorney-client privilege. The attorney-client privilege has been appropriately asserted when legal advice of any kind is sought from a professional legal adviser in his or her capacity as such and the communications relating to that purpose are made in confidence by the client. The communications are permanently protected from disclosure by the client or by the legal adviser unless and until the client waives the attorney-client protection. This privilege encompasses confidential communications made to the attorney not only by decision-making personnel but also by lower-echelon employees who possess information relevant to an attorney’s advice-rendering function. Disclosure of the two-way communications between FBI attorneys and their clients would impede the full disclosure of all of the information that relates to the client’s reasons for seeking legal advice, which is necessary if the professional mission is to be accomplished. Exemption (b)(5) has been applied to one page, Bates page FBI-SC-1414.

Specifically, the redacted material consists of a portion of an e-mail dated August 27, 2010, from CJIS counsel to a CJIS employee. In the e-mail counsel provides advice concerning an employee's concern over FBI employee names having been released by a New York state official in a letter to the Northern Manhattan Coalition for Immigrant Rights.

EXEMPTION (b)(7) THRESHOLD

(14) Before an agency can invoke any of the harms enumerated in Exemption (b)(7), it must first demonstrate that the records or information at issue were compiled for law enforcement purposes. Law enforcement agencies such as the FBI must demonstrate that the records at issue are related to the enforcement of federal laws and that the enforcement activity is within the law enforcement duty of that agency.

(15) I have previously discussed the FBI's partnership with DHS/ICE and the U.S. Department of State ("DOS"), within ICE's Secure Communities Program. See [First] Hardy Declaration ¶¶13-18. There is no doubt that the documents contained in this FOIA release fall within the law enforcement duties of the FBI, and that the information readily meets the threshold requirement of Exemption (b)(7). Among the FBI's mission is the duty to enforce the criminal laws of the United States, including those related to violations of immigration law. The remaining inquiries are whether its disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy; and could reveal investigative techniques and procedures.

EXEMPTIONS (b)(6) AND (b)(7)(C)
CLEARLY UNWARRANTED AND UNWARRANTED
INVASION OF PERSONAL PRIVACY¹

(16) 5 U.S.C. § 552 (b)(6) exempts from disclosure “personnel and medical files and similar files when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552 (b)(7)(C) exempts from disclosure:

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 constitute an unwarranted invasion of personal privacy.

(17) When withholding information pursuant to these exemptions, the FBI is required to balance the privacy interests of the names and personally-identifying information of individuals mentioned in these records against any public interest in disclosure. In asserting these exemptions, the FBI examined each item of information to determine the degree and nature of the privacy interest of every individual whose name and/or identifying information appears in these records. The public interest in disclosure of this information is determined by whether the information in question would inform plaintiff and the general public about the FBI’s performance of its mission to enforce federal criminal statutes and protect the national security of the United States and/or how the information would shed light on the FBI’s performance of its

¹ The practice of the FBI is to assert Exemption (b)(6) in conjunction with Exemption (b)(7)(C). Although the balancing test for Exemption (b)(6) uses a “would constitute a clearly unwarranted invasion of personal privacy” standard and the test for Exemption (b)(7)(C) uses the lower standard of “could reasonably be expected to constitute an unwarranted invasion of personal privacy,” the analysis and balancing required by both exemptions is sufficiently similar to warrant a consolidated discussion. The privacy interests are balanced against the public’s interest in disclosure under the analysis of both exemptions.

mandated statutory duties. In each instance where the FBI withheld information, it determined that individual privacy rights outweighed the public interest. The only recognized public interest is that which sheds light on the operations and activities of the federal government. In this case, revelation of the names and/or identifying information of FBI and non-FBI Federal government employees, and state and local government employees in the context of the performance of job duties would in no way shed light on the operations and activities of the FBI. However, such a release could reasonably be expected to cause harassment, and thus constitute a clearly unwarranted and an unwarranted invasion of personal privacy. Therefore, the FBI has concluded that the information should be withheld under Exemptions (b)(6) and (b)(7)(C), and determined that the individuals' privacy interests were not outweighed by any public interest in disclosure. Every effort has been made to release all segregable information contained in these records without invading the privacy interests of these individuals.

EXEMPTION (b)(7)(E)
INVESTIGATIVE TECHNIQUES AND PROCEDURES

(18) 5 U.S.C. § 552 (b)(7)(E) provides for the withholding of:

law enforcement records which 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.

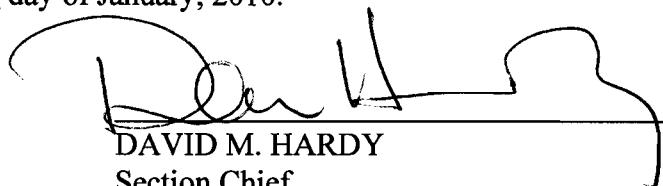
(19) The FBI has asserted Exemption (b)(7)(E) in conjunction with Exemption (b)(2) to protect procedures and techniques used by the FBI. The (b)(7)(E) Exemption has been applied to the same documents to which the (b)(2) Exemption (relating to Techniques and Procedures) was applied. See supra ¶9.

CONCLUSION

(20) The FBI has processed and released all reasonably segregable information from the records responsive to plaintiff's request to the FBI. The remaining information has been withheld pursuant to FOIA Exemptions 2, 5, 6, 7(C), and 7(E), 5 U.S.C. §§ 552 (b)(2), (b)(5), (b)(6), (b)(7)(C), and (b)7(E). The FBI has carefully examined the responsive documents and has determined that the information withheld from plaintiff, if disclosed, could reasonably be expected to reveal internal administrative information; could reveal privileged information; could cause unwarranted and clearly unwarranted invasion of the personal privacy interest of third parties; could interfere with law enforcement proceedings; and could disclose techniques and procedures of law enforcement investigations. Accordingly, the FBI has released all reasonably segregable, non-exempt information to plaintiff in response to its FOIA request. The FBI has carefully examined the responsive documents and has determined that the information withheld from plaintiff, if disclosed, could reasonably be expected to disclose information provided by a confidential sources. Accordingly, all reasonably segregable, non-exempt information has been released to plaintiffs in response to their FOIA request to the FBI.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that **Exhibit A** attached hereto is a true and correct copy.

Executed this 28th day of January, 2010.



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