

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LEONARD PELTIER,

Plaintiff,

v.

DECISION AND ORDER
03-CV-905S

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

I. INTRODUCTION

In this action, Plaintiff Leonard Peltier challenges Defendant Federal Bureau of Investigation's ("FBI") response to his request for release of records pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). Plaintiff believes that full disclosure of the requested records will reveal exculpatory evidence, and ultimately lead to his release from the federal penitentiary in Leavenworth, Kansas, where he is serving consecutive life sentences for murdering two FBI agents.

Presently before this Court is Defendant's Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.¹ For the following reasons, the motion will be granted in part and denied in part.

¹In support of its motion, Defendant filed a memorandum of law, a Rule 56 Statement of Undisputed Facts, the Second Declaration of David M. Hardy, with exhibits, a reply memorandum of law and the Third Declaration of David M. Hardy, with attached exhibit. In opposition, Plaintiff filed a memorandum of law and a Statement of Undisputed Facts.

II. BACKGROUND

A. Underlying Facts²

In 1975, the Pine Ridge Indian Reservation in South Dakota was embroiled in conflict between traditional elders, who sought independence from Bureau of Indian Affairs (BIA) managers, and Native Americans supportive of the BIA power structure. The conflict became violent, and the traditional elders sought protection from members of the American Indian Movement (AIM). Mr. Peltier and other AIM activists arrived at Pine Ridge to defend reservation traditionalists.

On June 26, 1975, FBI agents Jack Coler and Ronald Williams entered the Pine Ridge Reservation with an arrest warrant for four men charged with armed robbery and assault with a deadly weapon. The two officers began following a van carrying several men. The van came to a stop when it neared the Jumping Bull Compound, and the officers stopped at a distance behind it. A firefight erupted between the agents and the men in the van and expanded to include others. The group firing on the agents was comprised chiefly of AIM activists. Agents Coler and Williams were wounded in the gun battle and then killed by shots taken at point-blank range with a high-velocity, small-caliber firearm. The murder weapon was subsequently determined to be an AR-15 linked to Mr. Peltier.

The government originally indicted four men for the officers' murders. Two were acquitted, charges were dropped against a third, and Mr. Peltier was convicted on two

²Given the limited focus of these proceedings, neither party submitted a full background of the facts underlying this case. Consequently, this background section is taken verbatim from Peltier v. Booker, a decision by the Tenth Circuit Court of Appeals affirming the denial of Plaintiff's Petition for Writ of Habeas Corpus. 348 F.3d 888, 889-90 (10th Cir. 2003), cert. denied, 124 S.Ct. 2053 (2004).

counts of first degree murder in federal district court in North Dakota. In June 1977, that court sentenced Mr. Peltier to two consecutive life terms for these crimes.

Two years later, Mr. Peltier escaped from prison. He and his fellow escapees fired shots at prison staff in the course of their breakout. While a fugitive, Mr. Peltier reportedly committed armed robbery. Authorities apprehended Mr. Peltier in Oregon shortly after his escape. He was in possession of a semi-automatic rifle matching spent cartridges at the scene of the escape. Mr. Peltier was convicted in federal district court in California of escape and possession of a firearm and sentenced to a seven-year consecutive term.

B. Plaintiff's FOIA Request

On November 1, 2002, Plaintiff's counsel sent a letter to Defendant's Buffalo Field Office requesting all documents pertaining to Leonard Peltier. (Defendant's Rule 56 Statement of Undisputed Facts ("Defendant's Statement"), ¶ 2.) Thirteen days later, Plaintiff's counsel was notified that Defendant conducted a search of the manual and automated indices of the Central Records System ("CRS") and the Electronic Surveillance Indices ("ELSUR") maintained in the Buffalo Field Office, and that responsive materials were located. (Defendant's Statement, ¶ 3.) Defendant further advised Plaintiff's counsel that due to the voluminous nature of the responsive materials, they would be referred to FBI Headquarters for processing. (Defendant's Statement, ¶ 3.)

Because Plaintiff had not received responsive documents from Defendant in what he considered to be a timely manner, Plaintiff's counsel filed an appeal with the Department of Justice's Office of Information and Privacy ("OIP") on April 1, 2003. (Plaintiff's Rule 56 Statement of Undisputed Facts, ¶¶ 1, 2; Defendant's Statement, ¶ 4.)

By letter dated May 19, 2003, OIP informed Plaintiff's counsel that it could not act until there was an initial determination by the agency, but that he could consider the letter a denial of his appeal and proceed to federal court. (Defendant's Statement, ¶ 5.)

C. Procedural History

Plaintiff filed the instant action on December 2, 2003. Defendant filed its Answer on December 31, 2003.

On or about March 16, 2004, Defendant sent Plaintiff a determination letter advising him that his request had been processed. (Defendant's Statement, ¶ 13.) Of the 812 pages of documents that were responsive to Plaintiff's request, Defendant released 614 pages in their entireties, released 183 pages with redactions, and withheld 15 pages in their entireties. (Defendant's Statement, ¶ 13 n. 3; Second Hardy Decl., ¶ 20.) Classification determinations were made by David M. Hardy, Section Chief of the Record/Information Dissemination Section, Records Management Division, FBI. (Defendant's Statement, ¶ 15.)

On July 13, 2004, Defendant filed the instant Motion for Summary Judgment, along with its Vaughn index.³ The Vaughn index (comprised of the Second and Third Hardy Declarations) explains Defendant's withholding of responsive information pursuant to the exemptions in 5 U.S.C. §§ 552(b)(1), (b)(2), (b)(3), (b)(7)(C) & (b)(7)(D).⁴ After full briefing on Defendant's motion, this Court heard oral argument on September 13, 2004, and

³Arising out of the litigation in Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), a Vaughn index is an affidavit or series of affidavits explaining the agency's treatment of the plaintiff's FOIA request and detailing the agency's claimed exemptions. See Halpern v. Federal Bureau of Investigation, 181 F.3d 279, 291 (2d Cir. 1999).

⁴Unless otherwise noted herein, all section cites are to Title 5 of the United States Code.

reserved decision at that time.

III. DISCUSSION

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56 provides that summary judgment is warranted where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A "genuine issue" exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed. 2d 202 (1986). A fact is "material" if it "might affect the outcome of the suit under governing law." Id.

In deciding a motion for summary judgment, the evidence and the inferences drawn from the evidence must be "viewed in the light most favorable to the party opposing the motion." Addickes v. S.H. Kress and Co., 398 U.S. 144, 158-59, 90 S.Ct.1598, 1609, 26 L.Ed.2d 142 (1970). "Only when reasonable minds could not differ as to the import of evidence is summary judgment proper." Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991). The function of the court is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249.

B. The FOIA

Under the FOIA, "every federal agency is required . . . to make its records 'promptly available to any person' upon receipt of a reasonably articulated request." Phillips v.

Immigration & Customs Enforcement, No. 03 Civ. 1721, 2005 WL 351101, at *3 (S.D.N.Y. Feb. 14, 2005) (quoting 5 U.S.C. § 552(a)(3)). The Act embodies Congress's desire that an open government allow for "an informed citizenry' to hold the governors accountable to the governed." Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 478 (2d Cir. 1999) (internal quotations and citations omitted); Phillips, 2005 WL 351101, at *3 ("FOIA reflects a strong Congressional policy of requiring full public disclosure of documents and records maintained by federal agencies."). To that end, the FOIA requires the fullest possible public disclosure of government-kept records, but at the same time maintains the confidentiality of some information based on narrowly tailored exemptions intended to protect certain interests. At issue here are four such exemptions: the national security exemption, § 552(b)(1) ("Exemption 1"); the grand jury materials exemption, § 552(b)(3) ("Exemption 3"); the law enforcement exemption for personal privacy, § 552(b)(7)(C) ("Exemption 7(C)"); and the law enforcement exemption for confidential source identification and information, § 552(b)(7)(D) ("Exemption 7(D)"). These contested exemptions will be discussed in further detail below.

Federal courts are required to conduct *de novo* review of an agency's decision to withhold requested records. Massey v. FBI, 3 F.3d 620, 622 (2d Cir. 1993). To succeed on a summary judgment motion, the agency must show "(1) that its search [for responsive records] was adequate, and (2) that any information withheld falls within an exception to FOIA." Kennedy v. United States Dep't of Justice, 03-CV-6077, 2004 WL 2284691, at *2 (W.D.N.Y. 2004) (citing Carney v. U.S. Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994)).

To carry this burden, the defending agency may rely on a Vaughn index, which

consists of “affidavits to the court that describe with reasonable specificity the nature of the documents at issue and the justification for nondisclosure; the description provided in the affidavits must show that the information logically falls within the claimed exemption.” Lesar v. United States Dep’t of Justice, 636 F.2d 472, 481 (D.C. Cir. 1980); see also Halpern v. Federal Bureau of Investigation, 181 F.3d 279, 291 (2d Cir. 1999) (citing Lesar).

The function of the Vaughn index is three-fold: “(1) it forces the government to analyze carefully any material withheld, (2) it enables the trial court to fulfill its duty of ruling on the applicability of the exemption, and (3) it enables the adversary system to operate by giving the requester as much information as possible, on the basis of which he can present his case to the trial court.” Halpern, 181 F.3d at 291 (quoting Keys v. United States Dep’t of Justice, 830 F.2d 337, 349 (D.C. Cir. 1987)).

Agency affidavits, including the Vaughn index, are presumed to have been made in good faith. See Carney, 19 F.3d at 812. “If the agency’s submissions are facially adequate, summary judgment is warranted unless the plaintiff can make a showing of bad faith on the part of the agency or present evidence that the exemptions claimed by the agency should not apply.” Garcia v. United States Dep’t of Justice, Office of Info. & Privacy, 181 F.Supp.2d 356, 366 (S.D.N.Y. 2002)(citing Carney, 19 F.3d at 812; Triestman v. United States Dep’t of Justice, DEA, 878 F.Supp. 667, 672 (S.D.N.Y. 1995).

C. Analysis

1. Adequacy of Search for Responsive Documents

In response to a request for records under the FOIA, agencies are required to

conduct a search “reasonably designed to identify and locate responsive documents,” but need not “take extraordinary measures to find the requested records.” Kennedy, 2004 WL 2284691, at *2 (citing Garcia, 181 F.Supp.2d at 368). If an agency sufficiently demonstrates that it has conducted a reasonable search for responsive documents, it has fulfilled its obligations under the FOIA. See Garcia, 181 F.Supp.2d at 366 (citing Weisberg v. United States Dep’t of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). The agency can meet its burden of showing a good faith search by supplying affidavits from appropriate officials setting forth facts indicating that a thorough search was conducted. See Rabin v. United States Dep’t of State, 980 F.Supp. 116, 120 (E.D.N.Y. 1997). Such affidavits are entitled to a presumption of good faith. See Carney, 19 F.3d at 812.

The Vaughn index in this case was prepared by David M. Hardy, Section Chief of the Record/Information Dissemination Section, Records Management Division, FBI. (Second Hardy Decl., ¶¶ 1-6.) Therein, Hardy states that in response to Plaintiff’s FOIA request, Defendant initiated a search of its Buffalo Field Office’s general indices to identify all potentially responsive files. (Second Hardy Decl., ¶ 18.) These indices include the CRS and the ELSUR. (Second Hardy Decl., ¶¶ 5, 8-18.) Hardy explains at length the content, organization and manner of access of the indices. (Second Hardy Decl., ¶¶ 8-18.) Automated and manual searches of these indices resulted in the identification of 812 pages with responsive information. (Second Hardy Decl., ¶ 5.)

Plaintiff does not challenge the sufficiency of Defendant’s search, and this Court finds that the Vaughn index adequately demonstrates that Defendant met its search requirements under the FOIA. See Garcia, 181 F.Supp.2d at 366.

2. Defendant's Claimed Exemptions

When exemptions are claimed by the agency and challenged by the requesting party, the exemptions are to be "narrowly construed since 'disclosure, not secrecy, is the dominant objective of the Act.'" Kennedy v. United States Dep't of Justice, No. 03-CV-6077, 2004 WL 2284691, at *2 (W.D.N.Y. Oct. 8, 2004) (quoting Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976)). However, when responsive records fall within any of the applicable exemptions, they need not be disclosed. See FLRA v. United States Dep't of Veterans Affairs, 958 F.2d 503, 508 (2d Cir. 1992).

Except for in one instance discussed below, Plaintiff does not challenge the procedures used to classify and categorize the withheld information or the reasonableness of Defendant's segregation of pages where redactions have been made. The primary issue before this Court is therefore whether Defendant has met its burden of establishing that the withheld information fits within the parameters of each claimed exemption.

In this case, Defendant withheld certain records or portions of records pursuant to the following FOIA exemptions:

- Exemption 1: Permitting the exemption of records that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."⁵
- Exemption 2: Permitting the exemption of records "related solely to the internal personnel rules and practices of an agency."⁶

⁵§ 552(b)(1).

⁶§ 552(b)(2).

- Exemption 3: Permitting the exemption of records that are “specifically exempted from disclosure by statute (other than section 552b of this title), provided such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.”⁷
- Exemption 7 (C) & (D): Permitting the exemption of “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, [and] (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source.”⁸

(Second Hardy Decl., ¶ 19.)

As stated above, the pages responsive to Plaintiff’s FOIA request number 812.⁹ Of these 812 pages, 614 pages were released to Plaintiff in their entireties, 183 pages were released with redactions, and 15 pages were withheld in their entireties. (Second Hardy Decl., ¶ 20.) Exhibit A to the Vaughn index contains the 812 pages consecutively

⁷§ 552(b)(3).

⁸§§ 552(b)(7)(C) & (D).

⁹This Court highlights the fact that 812 *pages* were responsive to Plaintiff’s FOIA request, as opposed to 812 *documents*.

numbered from “Peltier-1-Buffalo FO” to “Peltier-812-Buffalo FO.”¹⁰ (Second Hardy Decl., ¶ 20.) Each page containing withheld information is marked with a withholding code that identifies the exemption under which such information is withheld. (Second Hardy Decl., ¶ 20.) For example, a page containing the code “(b)(7)(C)” indicates that information is being withheld pursuant to Exemption 7(C). (Second Hardy Decl., ¶ 20.)

Claimed exemptions are then subcategorized by a numerical designation further clarifying the reason for exemption. (Hardy Decl., ¶ 20.) These subcategories are defined in the Vaughn index at paragraph 23. For example, a page containing the designation “(b)(7)(C)-3” indicates that information is not only being withheld pursuant to Exemption 7(C), but is more specifically being withheld because it contains “Third Party Rap Sheets.” (Second Hardy Decl., ¶¶ 20, 23, 57.) Where there is a redaction within a particular page, the exemption and subcategory is provided next to the redaction. On many pages, more than one exemption is noted for a single redaction.

Plaintiff does not challenge Defendant’s withholding of information pursuant to Exemption 2. (See Second Hardy Decl., ¶¶ 38-49 (explaining the Exemption 2 withholdings); Plaintiff’s Memorandum of Law, p. 8.) However, Plaintiff challenges the majority of Defendant’s withholdings under Exemptions 1, 3, 7(C) and 7(D). This Court turns to those exemptions now.

a. Exemption 1

Exemption 1 is the national security exemption. It exempts records implicating national security from FOIA’s disclosure requirements provided they fall under an

¹⁰For the sake of clarity, this Court will refer to the pages in Exhibit A by their page number only.

Executive Order requiring secrecy for purposes of national defense or foreign policy and are properly classified pursuant to that Executive Order. 5 U.S.C. § 552(b)(1). Defendant is entitled to summary judgment on its Exemption 1 exemptions if it presents “itemized descriptions of the context out of which specific redactions were made,” and if there is no contrary evidence in the record or establishment of bad faith. Halpern, 181 F.3d at 292, 294.

(1) Vaughn Index Classifications and Justifications

Defendant withheld seven pages of documents – pages 450, 453, 454 and 457-460 – in full and in part, pursuant to Exemption 1. It is undisputed that Executive Order 12,958 governing National Classified Security Information is applicable in this case. See EXEC. ORDER No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995). Defendant maintains that it has complied with the Executive Order’s substantive and procedural requirements for the protection of information affecting national security. (Second Hardy Decl., ¶¶ 27-30.) Hardy’s designation of certain information as confidential or secret under the Executive Order was reviewed by the United States Department of Justice’s Department Review Committee (“DRC”) on June 17, 2004. (Second Hardy Decl., ¶ 31.) The DRC concurred with Hardy’s classification determinations and the classification actions taken. (Second Hardy Decl., ¶ 31.)

Hardy determined that two pages containing classified information no longer warranted continued classification pursuant to the Executive Order and he therefore declassified and released that information to Plaintiff. (Second Hardy Decl., ¶ 32 and Exhibit B.) The remaining portions of the classified information, all of which are more than

25 years old and have been determined to have permanent historical value, were withheld because they warrant continued classification as confidential or secret, and are therefore exempt from automatic declassification under the Executive Order. (Second Hardy Decl., ¶ 33.) Hardy and the DRC determined that this material, if released, would reveal information, including foreign government information, that could seriously and demonstrably impair relations between the United States and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities of the United States. (Second Hardy Decl., ¶ 33.)

Hardy identified four subcategories of responsive information that are properly excluded from disclosure under Exemption 1. (Second Hardy Decl., ¶¶ 34-37.) Exemption (b)(1)-1 is asserted to protect secret information that identifies a named intelligence component of a specific foreign government and information provided by that component to the FBI. (Second Hardy Decl., ¶ 34.) Exemption (b)(1)-2 is asserted to protect a secret communication related to an ongoing FBI investigation that was received from a named foreign government intelligence agency. (Second Hardy Decl., ¶ 35.) Exemption (b)(1)-3 is asserted to protect confidential information that identifies by name, an intelligence component of a specific foreign government, an official of the foreign government, and information provided by that component official to the FBI. (Hardy Decl., ¶ 36.) Finally, Exemption (b)(1)-4 is asserted to protect confidential information related to an ongoing FBI investigation received from a foreign intelligence agency and the identity of the foreign government official who provided the information. (Second Hardy Decl., ¶ 37.)

Hardy explains that disclosure of the information withheld under these four

subcategories could (1) reveal the relationship and cooperative endeavors between the foreign government components and the FBI (Second Hardy Decl., ¶¶ 34, 36), (2) violate the FBI's promises of confidentiality and the express understanding that information from these foreign components would not be publicly disclosed (Second Hardy Decl., ¶¶ 34-37), and (3) strain relations between the United States and this foreign government, which could have a chilling effect on the free flow of vital information to the intelligence and law enforcement agencies and could cause serious damage to the national security and the war on transnational terrorism (Second Hardy Decl., ¶¶ 34-37). Moreover, Hardy attests that despite the passage of time, the information withheld under these subcategories remains sensitive and is properly classified as either secret or confidential, and therefore exempt from automatic declassification under the Executive Order. (Second Hardy Decl., ¶¶ 34-37.)

(2) Plaintiff's Challenges

Plaintiff challenges Defendant's Exemption 1 withholdings on three grounds. Plaintiff's first two grounds have no merit. The third, however, is persuasive, and will require this Court to conduct an *in camera* review of pages 450, 453, 454 and 457-460.

Plaintiff first argues that Defendant is withholding information to conceal past violations of the law by the FBI and to avoid embarrassment to the agency in contravention of the Executive Order. This argument coincides with Plaintiff's overriding assertion that the Government in general has always acted in bad faith toward him.

Plaintiff correctly notes that § 1.8 of the Executive Order prohibits the classification of information in order to conceal violations of law and administrative error, or to prevent

agency embarrassment. However, Plaintiff's bald assertion that he "*believes* that defendant *may* have improperly invoked Exemption (b)(1) to conceal misconduct on its part to avoid further embarrassment" is unavailing. (Plaintiff's Memorandum of Law, p. 11.)

In particular, Plaintiff relies on two courts of appeals that have recognized Government misconduct during the investigation and prosecution of Plaintiff's underlying criminal case. For example, the Tenth Circuit recently noted that "[m]uch of the government's behavior at the Pine Ridge Reservation and in its prosecution of Mr. Peltier is to be condemned. The government withheld evidence. It intimidated witnesses. These facts are not disputed." Peltier v. Booker, 348 F.3d 888, 896 (10th Cir. 2003), cert. denied, 124 S.Ct. 2053 (2004). Similarly, the Eighth Circuit has commented that "[t]he use of the affidavits of Myrtle Poor Bear in the extradition proceeding¹¹ was, to say the least, a clear abuse of the investigative process by the FBI. This was conceded by government counsel on the hearing in this court." United States v. Peltier, 585 F.2d 314, 335 n.18 (8th Cir. 1978).

This Court has no independent knowledge of any bad faith on the Government's part. However, it accepts the truth of the comments and findings of the Tenth and Eighth Circuits. Nevertheless, even assuming that the Government engaged in misconduct during the investigation of the murders and the prosecution of Plaintiff, it does not follow *a fortiori* that the Government continues to act in bad faith twenty-five years later in the processing of Plaintiff's FOIA request. There is simply no evidence whatsoever that

¹¹Plaintiff was arrested in Canada and then extradited to the United States to face trial in the murders of Agents Coler and Williams.

Defendant has acted in bad faith during the course of these proceedings. Plaintiff's speculation to the contrary is simply insufficient to overcome the presumption of good faith due Defendant's supporting affidavits. See Carney, 19 F.3d at 813. In fact, this Court notes that in response to Plaintiff's FOIA request, Hardy actually *declassified* information and released to Plaintiff two pages containing information that was previously exempt for national security purposes under Exemption 1, an act that undermines Plaintiff's bare allegations of bad faith. (Second Hardy Declaration, ¶ 3 & Exhibit B.)

Plaintiff next argues that the Vaughn index fails to adequately state that Defendant complied with §§ 3.4(c) and (d) of the Executive Order (relating to automatic declassification provisions). However, in the supplemental Vaughn index, Hardy explains that Defendant has in fact complied with these procedural mandates by entering a Memorandum of Understanding with the Information Security Oversight Office of the National Archives and Records Administration, thereby exempting itself from the automatic declassification requirements of the Executive Order. (Third Hardy Decl, ¶ 5.) Thus, Defendant has complied with §§ 3.4(c) and (d) of the Executive Order.

Plaintiff's final argument is meritorious. He challenges the specificity of Defendant's Vaughn index. In particular, Plaintiff argues that there is insufficient detail regarding (1) how release of the withheld information would impair relations between the United States and a foreign government, (2) the promises of confidentiality made by the FBI to the foreign government, and (3) the parameters of that foreign government's confidentiality policy. Along with these specific points, this Court finds that on whole, the Vaughn index is inadequate as it relates to the claimed Exemption 1 withholdings.

The Second Circuit has stated in detail what it requires of the Government's Vaughn index when it comes to justifying withholdings pursuant to Exemption 1:

[T]he government, when it invokes Exemption 1, must submit itemized descriptions of the context out of which specific redactions are made. The government may find it useful and efficient to use symbols cross-referencing generalized justifications for certain types of redactions as well . . . but those generalized descriptions must accompany, and not substitute for, particularized descriptions of the context surrounding each of the individual redactions and/or documents.

Halpern, 181 F.3d at 294. The information contained in the Vaughn index must be specific enough to enable the district court to “review the agency’s claimed redactions without having to pull the contextual information out of the redacted documents for itself.” Id. at 294.

In Halpern, the Second Circuit instructed by example in undertaking a detailed review of the Vaughn index in that case. Of particular note, the court found fault with the fact that the index set forth in only “general terms” why information was redacted under a given category, and “gave no contextual description either of the documents subject to redaction or of the specific redactions made to the various documents.” Id. at 293. The court further found fault with the index because it “barely pretend[ed] to apply the terms of [the Executive Order] to the specific facts of the documents at hand.” Id. This lack of specificity was particularly troubling to the court because Exemption 1 was invoked with respect to only 21 of 2400 pages released to the requester. Id.

As an example, the Court considered the following assertion from the Vaughn index:

This information, as it appears in the records sought by

plaintiffs, is specific. Therefore, its disclosure would automatically reveal to a hostile intelligence analyst United States intelligence-gathering capabilities in a particular area, during a specified period of time.

Id. at 301.

The court rebuked this conclusory statement because it “fails to provide the kind of fact-specific justification that either (a) would permit appellant to contest the affidavit in adversarial fashion, or (b) would permit a reviewing court to engage in effective *de novo* review of the FBI’s redactions.” Id. at 293. Thus, the assertions in the affidavit defeated the purpose of the Vaughn index altogether.

In this case, the Exemption 1 portion of the Vaughn index fails to pass muster under Halpern. First, there is no itemization of the individual pages for which an exemption under Exemption 1 is asserted. Halpern requires particularized descriptions of the context of redactions and detailed, non-conclusory justifications for each individual redaction. Id. at 294. That is missing here.

Second, there are no supporting facts whatsoever from which this Court can make a *de novo* determination as to the propriety of the claimed exemption. In this regard, the statements supporting the exemptions are not unlike those in Halpern. Take the following example:

Exemption (b)(1)-2 has been utilized to protect a communication received from a named foreign government intelligence agency and classified “Secret” by that agency. The communication relayed information pertinent to an on-going FBI investigation. The cooperative exchange of intelligence information between this foreign government intelligence component and the FBI was, and continues to be, with the express understanding that their information will

remain classified and not be released to the public. Disclosure of the communication would violate the FBI's promise of confidentiality to the foreign government component. A breach could reasonably be expected to strain relations between the United States and this foreign government, have a chilling effect on the free flow of vital information to the intelligence and law enforcement agencies, and cause serious damage to the national security of the United States and the war on transnational terrorism. This information, which is under the control of the United States Government, remains sensitive despite the passage of time, is properly classified at the "Secret" level, and is exempt from automatic declassification pursuant to E.O. 12,958, as amended, § 3.3(b)(6), and exempt from disclosure pursuant to FOIA Exemption (b)(1)-2.

(Second Hardy Decl., ¶ 35.)

Comparing this example with the example reviewed in Halpern, the full text of which is set out in the margin,¹² it can be seen that there is no meaningful difference. The

¹²The appendix in Halpern sets out the following paragraph:

2. Specific information about, or from, an intelligence activity and/or method, the disclosure of which could reasonably be expected to identify the intelligence gathering capabilities of an intelligence activity and/or method.

The FBI engages in intelligence activities and utilizes intelligence activities and/or methods to fulfill responsibilities imposed upon it by law in the intelligence and counterintelligence field. This information encompasses assessments of intelligence source penetration into particular areas of intelligence interest. The character or degree or source coverage or penetration of targeted hostile intelligence activities and/or use of a particular method in conducting intelligence activities in these records could reasonably be expected to disclose a great deal about the scope of FBI activities, both past and present. This information could reveal a particular area of national security interests, as well as the degree of FBI knowledge of certain activities. This disclosure could reasonably be expected to provide assessment of the impact of the availability or nonavailability of intelligence sources, activities and/or methods targeted against past or present suspected intelligence during a particular period of time. This information, as it appears in the records sought by plaintiffs, is specific. Therefore, its disclosure would automatically reveal to a hostile intelligence analyst United States intelligence-gathering capabilities in a particular area, during a specific period of time.

Halpern, 181 F.3d at 301.

rejected conclusion in Halpern – that “this information . . . is specific [and] [t]herefore . . . would automatically reveal . . . United States intelligence-gathering capabilities” – is akin to the conclusion in this case that “[a] breach could . . . strain relations . . . have a chilling effect on the free flow of vital information . . . and cause serious damage to the national security . . . and the war on transnational terrorism. Id. at 293. No facts are included in the Vaughn affidavit from which this Court could review, for example, the conclusion that the information provided by this foreign government component would violate Defendant’s promise of confidentiality. No facts are included regarding the subject matter of the information, how it relates to an ongoing investigation, or how it falls within the scope of the confidentiality agreement, which is similarly undefined.

This Court reads Halpern as requiring at least minimal statements of fact supporting such conclusory allegations in a Vaughn index as it relates to Exemption 1 withholdings. General assertions as to the content of withheld information and conclusory statements justifying withholding are insufficient to carry the Government’s burden. This is because without conducting an *in camera* inspection of the documents at issue, courts are left with no way of determining whether the information is properly exempt from disclosure under the FOIA.

Indeed, the FOIA specifically provides for *in camera* review by the district court if necessary. See 5 U.S.C. § 552(a)(4)(B). The Second Circuit has adopted a restrained approach to *in camera* review. For example, *in camera* review may be appropriate “where the record show[s] the reasons for withholding [are] vague or where the claims to withhold

[are] too sweeping or suggestive of bad faith, or where it might be possible that the agency ha[s] exempted whole documents simply because there [is] some exempt material in them.” Halpern, 181 F.3d at 292. This, however, is the exception, not the rule. See Local 3, Int’l Bhd. of Elec. Workers, 845 F.2d 1177, 1180 (2d Cir. 1988) (“*In camera* review is considered the exception, not the rule, and the propriety of such review is a matter entrusted to the district court’s discretion.”); Kennedy, 2004 WL 2284691, at *4.

“When a government agent can attest in a sworn affidavit that the redactions are necessary, and elaborate on the reasons for the redactions with sufficient specificity, the district court should be able to rule on the appropriateness of the redactions without conducting an *in camera* review of the redacted materials.” Halpern, 181 F.3d at 287. In this case, this Court is unable to make the required itemized rulings on the appropriateness of each of Defendant’s redactions without conducting an *in camera* review of the redacted materials or otherwise obtaining additional factual information related to the Exemption 1 withholdings. See Halpern, 181 F.3d at 294, 295 (requiring “itemized findings, ideally with respect to specific documents or redactions” and noting that without itemized rulings, *de novo* review of the district court’s decision is virtually impossible). In reaching this conclusion, this Court is mindful that *in camera* review is particularly frowned upon in the context of Exemption 1 withholdings because “[f]ew judges have the skill or experience to weigh the repercussions of disclosure of intelligence information.” Weissman v. CIA, 565 F.2d at 697. However, Defendant’s insufficient Vaughn index leaves this Court with no choice but to conduct further review. The proper course of action will be discussed with the attorneys, and may involve the filing of a supplemental Vaughn

affidavit, review of an *in camera, ex parte* declaration, or traditional *in camera* review.¹³ As such, it may never become necessary for this Court to engage in any national security determinations. Because this Court finds that Defendant has failed to carry its burden of demonstrating that the information falls within Exemption 1, Defendant's request for summary judgment on its Exemption 1 claims will be denied.

b. Exemption 3

Exemption 3 allows for the withholding of information that is specifically exempted from disclosure by statute, provided that the statute requires and establishes particular criteria for such withholding. See 5 U.S.C. § 553(b)(3). Here, Defendant contends that Rule 6(e) of the Federal Rules of Criminal Procedure acts to exempt information related to the grand jury process.

(1) Vaughn Index Classifications and Justifications

Defendant asserts that Exemption 3 has been invoked to protect only information that explicitly discloses matters occurring before the federal grand jury. (Second Hardy Decl., ¶ 51.) For example, federal grand jury subpoenas, the names and identifying information of individuals subpoenaed to testify before the grand jury, information identifying specific records subpoenaed by the grand jury, and the dates the grand jury was in session were withheld under Exemption 3. (Second Hardy Decl., ¶ 51.)

¹³This Court notes that in response to Plaintiff's argument regarding the lack of specificity in the Vaughn index, Defendant stated that the provision of further information would risk revealing the information it was trying to protect. (Third Hardy Decl., ¶ 6.) Defendant further stated that if this Court found its submission inadequate, it would provide further details in an *in camera, ex parte* declaration or arrange for *in camera* review of the documents at issue. (Third Hardy Decl., ¶ 6 n. 6.)

(2) Plaintiff's Challenges

Relying on the Second Circuit's decision in United States v. Interstate Dress Carriers, Inc., 280 F.2d 52 (2d Cir. 1960), Plaintiff challenges Defendant's Exemption 3 withholdings on the ground that Defendant has failed to adequately state how the inner workings of the grand jury would be implicated by disclosure of the requested records. This argument is without merit.

It is well-settled that Rule 6(e) is a statute requiring withholding under Exemption 3. See Garcia, 181 F.Supp.2d at 378 ("Fed. R. Crim. P. 6 (e) represents such a [withholding] statute and thus, documents related to the grand jury process are exempt from disclosure under Exemption 3."); Local 32B-32J, Serv. Employees Int'l Union, AFL-CIO v. GSA, No. 97 Civ. 8509, 1998 WL 726000, at *6 (S.D.N.Y. Oct. 15, 1998) ("It is well established that [Rule 6(e)], which imposes a general requirement of secrecy for information relating to the grand jury process, qualifies as an Exemption 3 withholding statute."). Here Defendant is withholding federal grand jury subpoenas, the names of witnesses subpoenaed to testify, and information identifying specific records subpoenaed by the grand jury, all of which are properly withheld pursuant to Exemption 3.

Plaintiff's reliance on Interstate Dress is misplaced. First and foremost, Interstate Dress is not a FOIA case. It is a case involving the Interstate Commerce Commission's efforts to inspect records that were under the control of a grand jury. In permitting the Commission to review the records, the court concluded that the Commission's review "will in no way impinge upon the secrecy of the grand jury's deliberations" because the Commission was not seeking "to learn what use the grand jury has made of [the] records."

Interstate Dress, 280 F.2d at 54.

Second, Interstate Dress significantly predates the case law holding that Rule 6 (e) is an Exemption 3 withholding statute under the FOIA. See, e.g., Garcia, 181 F.Supp.2d at 378; Local 32B-32J, 1998 WL 726000, at *6.

Finally, even assuming that Interstate Dress applied, it is clear that Plaintiff wants the withheld information for the exact purpose that Interstate Dress would prohibit: to learn how the grand jury used the information relative to his case in the hope of discovering information that could lead to his vindication and release from prison. As such, even under Interstate Dress, Plaintiff's challenge fails. Accordingly, this Court finds that Defendant has properly applied Exemption 3.

c. Exemption 7(C)

Exemption 7(C) exempts from disclosure any records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. See 5 U.S.C. § 552(b)(7)(C).

(1) Vaughn Index Classifications and Justifications

Hardy identified four subcategories of information excluded from disclosure under Exemption 7(C). (Second Hardy Decl., ¶¶ 54-58.) Exemption (b)(7)(C)-1 is asserted in conjunction with Exemption (b)(7)(D)-2 to protect the names, identifying data and information provided by individuals who assisted in the investigation of Plaintiff and others with an "express" assurance of confidentiality.¹⁴ (Second Hardy Decl., ¶ 54.) In this

¹⁴As part of the criminal investigation after the death of Agents Coler and Williams, the FBI interviewed several individuals who provided valuable information regarding the activities of Plaintiff and others. (Second Hardy Decl., ¶ 54.)

regard, Hardy asserts that the inclusion of phrases such as “PROTECT,” “protect identity” and “protect by request” in some of the responsive documents is evidence that the particular source was expressly granted confidentiality. (Second Hardy Decl., ¶ 54.)

Hardy declares that information provided by individuals during an interview is one of the most productive investigative tools utilized by law enforcement agencies. (Second Hardy Decl., ¶ 55.) He claims that the largest roadblock in successfully obtaining desired information through an interview is fear by the interviewee that his or her identity will be publicized, thereby exposing the individual to harassment, intimidation or physical harm. (Second Hardy Decl., ¶ 55.) Hardy states that in order to surmount these obstacles, the FBI must assure interviewees that information received from them will be held in the strictest confidence. (Second Hardy Decl., ¶ 55.) In that regard, he asserts that the continued access to persons willing to provide honest information outweighs any benefits derived from releasing the identity of the individuals who provided information in this case. (Second Hardy Decl., ¶ 55.)

Exemption (b)(7)(C)-2 is asserted to protect social security numbers and other identifying information of third-party individuals in whom the FBI or other law enforcement agency had an investigative interest. (Second Hardy Decl., ¶ 55.) Hardy explains that if this information was disclosed, criminals could use it to commit identity theft and could possibly thwart the investigative abilities of law enforcement personnel. (Second Hardy Declaration, ¶ 56.)

Exemption (b)(7)(C)-3 is asserted to protect the rap sheets of third parties, which contain personal and criminal history information. (Second Hardy Decl., ¶ 57.) Hardy

opines that the release of this information could cause undue harassment or embarrassment and would constitute an invasion of personal privacy. (Second Hardy Decl., ¶ 57.) In reaching the decision to withhold this information, the public's interest in disclosure was balanced against the individual's right to privacy, with the latter weighing more heavily. (Second Hardy Decl., ¶ 57.)

Exemption (b)(7)(C)-4 is asserted to withhold the names and identifying information of third parties who were merely mentioned by persons who provided information to the FBI. (Second Hardy Decl., ¶ 58.) Hardy determined that disclosure of this information could cause unsolicited and unnecessary attention to be focused on these individuals or their families, and may cause them to be cast in an unfavorable or negative light. (Second Hardy Decl., ¶ 58.) Thus, once again, the public's interest in disclosure was outweighed by the individuals' right to privacy. (Second Hardy Decl., ¶ 58.)

(2) Plaintiff's Challenges

Plaintiff challenges Defendant's withholdings under Exemption 7 (C) on two points. First, Plaintiff argues that the Exemption 7 (C) withholding is invalid because Defendant did not adequately determine whether the individuals at issue are still living, and because much of the information has been publicly disclosed. Second, Plaintiff argues that the public interest in learning of Defendant's illegal activities and improper investigative techniques outweighs the individuals' right to privacy.

Exemption 7(C) is properly invoked when the invasion of personal privacy outweighs the public's interest in disclosure. See Nat. Archives and Records Admin. v. Favish, 542 U.S. 157, 171-72, 124 S.Ct. 1570, 1580-81, 158 L.Ed.2d 319 (2004). As a

threshold matter, the Government must establish that the information being withheld was “compiled for law enforcement purposes” within the meaning of the statute. See Halpern, 181 F.3d at 296. While Plaintiff maintains that Defendant’s investigation of the Pine Ridge murders was largely illegal, the rule in this Circuit is that the Government need only show that the records were compiled by a law enforcement agency in the course of a criminal investigation. See Ferguson v. FBI, 957 F.2d 1059, 1070 (2d Cir. 1992); Williams v. FBI, 730 F.2d 882, 883-84 (2d Cir. 1984). The legitimacy of the investigation is immaterial. Halpern, 181 F.3d at 296. “[A]ll records of investigations compiled by the FBI are for law enforcement purposes.” Halpern, 181 F.3d at 296. Here, it is uncontested that the records at issue were compiled during the course of an FBI investigation, to wit: the investigation of the Pine Ridge murders. Exemption 7(C) therefore applies.

Plaintiff next contests whether Defendant has sufficiently shown that privacy rights are at issue. In this regard, Plaintiff argues that Defendant has not adequately investigated whether the individuals mentioned in the responsive records are still alive. In addition, Plaintiff argues that at least some of the individuals connected to this case have forfeited their privacy rights through public disclosure.

Defendant asserts that it has taken appropriate steps to ascertain whether the individuals whose identities are being protected are still living. In particular, Defendant reviews documents responsive to FOIA requests for birth dates, and then releases information pertaining to people who would be more than 100 years old at the time of processing. (Third Hardy Decl., ¶ 8.) Defendant relied on this “100 year” rule in this case. (Third Hardy Decl., ¶ 8.) In addition, Defendant relies on its institutional knowledge of

death and the Who Was Who publication that lists notable individuals who are deceased. (Third Hardy Decl., ¶ 9.) Plaintiff offers no legal authority for his argument that Defendant is obligated to conduct a more exhaustive search than what is described above. Accordingly, this Court finds that Defendant made appropriate efforts to ascertain whether the individuals mentioned in the responsive papers were living or deceased. See Schrecker v. Dep't of Justice, 349 F.3d 657, 662-66 (D.C. Cir. 2003).

Plaintiff's argument that some individuals have forfeited their privacy interests through public disclosure is similarly unpersuasive. Plaintiff contends that the identities of many high profile FBI agents and other individuals involved in this case have been published on several websites devoted to Plaintiff's case.¹⁵ However, "[c]onfidentiality interests cannot be waived through prior public disclosure or the passage of time." Halpern, 181 F.3d at 297; cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 767, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) ("[O]ur cases have also recognized the privacy interest inherent in the nondisclosure of certain information even when the information may have been at one time public."). This argument therefore also fails.

Having found that the information was compiled for a law enforcement purpose and involves individuals' personal privacy rights, the next question is whether the public interest in disclosure outweighs the privacy rights such that the information should be released. Favish, 541 U.S. at 171. In this regard, "the person requesting the information

¹⁵See, e.g., www.minneapolis.fbi.gov/peltier.htm, www.noparolepeltier.com, and www.freepeltier.org.

[must] establish a sufficient reason for the disclosure.” Favish, 541 U.S. at 172. To do so, the individual must demonstrate that the public interest sought to be advanced is significant, and then must show that release of the information is likely to advance that interest. See id.

This Court first notes that it is clear from Plaintiff’s papers that his real interest in seeking disclosure is to gain information to further attack his conviction. (See, e.g. Plaintiff’s Memorandum of Law, p. 2 (“It is plaintiff’s belief that the documents he is seeking access to under FOIA are exculpatory in nature and will ultimately contribute to his vindication and release from prison.”).) He asserts that most, if not all, of the responsive documents are Brady material. (See Plaintiff’s Memorandum of Law, p. 3-4.) There is no public purpose, however, in disclosing information to assist a prisoner challenging his conviction. See Brown v. Federal Bureau of Investigation, 658 F.2d 71, 75-76 (2d Cir. 1981) (“Any benefits accruing to the public by virtue of the possibility that [the plaintiff] may win a new trial are too uncertain, indirect, and remote to mandate an abrogation of” an individual’s privacy rights.); Federick v. United States Dep’t of Justice, 984 F.Supp. 659, 665 (W.D.N.Y. 1997) (collateral challenge to conviction is not a “FOIA-recognized interest”).

To the extent Plaintiff also asserts that the Government’s prior actions in this case warrant release of the requested information to expose illegality within the FBI, this argument also fails. To succeed, Plaintiff must produce evidence that would cause a reasonable person to believe that the FBI acted illegally. See Favish, 541 U.S. at 174 (where “the public interest being asserted is to show that responsible officials acted

negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure”). As stated above, Plaintiff has presented no evidence of any illegality on the part of the FBI.¹⁶ While this Court notes the comments of the Tenth and Eighth Circuits, it is also noted that no court reviewing Plaintiff’s conviction has ever reversed or ordered a new trial. In any event, even assuming Plaintiff could muster some evidence of actual illegality, this Court finds that the privacy interests of the individuals being protected outweighs the public interest.

The Second Circuit has found it appropriate to redact information that, if released, would have disclosed “the identifies of FBI agents, cooperating witnesses and third parties, including cooperating law enforcement officials.” Massey, 3 F.3d at 624. The circuit court explained that law enforcement officials have privacy interests in their own identities so that they can avoid being subjected to “embarrassment and harassment in the conduct of their official duties and personal affairs.” Id. Third parties have an even stronger privacy interest because revelation of their identities could suggest association or involvement in criminal activity or criminal investigation. See Reporters Comm., 489 U.S. at 767.

These privacy interests must be weighed against the countervailing interests in public disclosure of government agency conduct. The public interest in learning the identities of law enforcement personnel is relatively small, particularly where the information provides little insight into the conduct and administration of criminal

¹⁶Plaintiff argues that unredacted portions of pages 75 and 551 suggest that Defendant may have sent confidential sources to interfere in attorney-client relationships. This is, of course, pure speculation. These documents equally support the opposite inference, as there is some indication that the individual (whose identity is redacted) was advised not to become involved in developing any information for Defendant in that manner. (See Second Hardy Decl., Exhibit A, pp. 75, 551.)

investigations. See Halpern, 181 F.3d at 297. Similarly, “there is little or no public interest in having the identities of private parties revealed because that information sheds little or no light on the FBI’s performance.” Id. Accordingly, this Court finds that the protection of personal privacy interests outweighs any public interest in the disclosure of this information. Thus, Defendant’s withholdings are proper under Exemption 7(C).¹⁷

d. Exemption 7(D)

Exemption 7(D) exempts from disclosure any records or information compiled for law enforcement purposes, but only to the extent that the production of such records or information could reasonably be expected to disclose the *identity* of a confidential source, including a State, local or foreign agency or authority or any private institution that furnished information on a confidential basis. See 5 U.S.C. § 552(b)(7)(D). In the case of records or information compiled by a criminal law enforcement agency in the course of a criminal investigation, the *information* provided by a confidential source may also be withheld. Id.

(1) Vaughn Index Classifications and Justifications

Hardy identified seven sub-categories of information that are properly excluded from disclosure under Exemption 7(D). (Second Hardy Decl., ¶¶ 59-72.) Exemption (b)(7)(D)-1 is asserted to protect the identities of, and information received from, individuals who provided information to the FBI during the course of the investigation of Plaintiff’s activities.

¹⁷Although not specifically at issue, this Court notes that the disclosure of Rap Sheets is prohibited. See Reporters Comm., 489 U.S. at 776; Phillips, 2005 WL 351101, at *8 (noting that in Reporters Comm., the Supreme Court “adopted a general prohibition against disclosure of ‘rap sheet’ information based on a ‘categorical balancing’ of individual privacy interests and the public interest in disclosure”).

(Second Hardy Decl., ¶ 62.) These individuals were allegedly interviewed under circumstances from which an assurance of confidentiality may be implied. (Second Hardy Decl., ¶ 62.) Hardy declares that under such circumstances, any information from which the interviewee could possibly be identified is properly withheld to avoid subjecting that individual to undue embarrassment, humiliation, or possible physical harm. (Second Hardy Decl., ¶ 62.)

Exemption (b)(7)(D)-2 is asserted in conjunction with Exemption (b)(7)(C)-1 to withhold information provided by individuals under an “express” assurance of confidentiality, but only to the extent that the information would reveal the identity of the interviewee. (Second Hardy Decl., ¶ 63.) Hardy asserts that during the investigation into the Pine Ridge killings, the FBI expressly guaranteed several different sources that it would use all lawful means to protect their identity from unauthorized disclosures. (Second Hardy Decl., ¶ 63.) In one instance, the FBI ensured a source’s confidentiality by interviewing the source under highly controlled circumstances that the FBI designed to protect the cooperating informant from exposure. (Second Hardy Decl., ¶ 63.) Hardy asserts that phrases in some of the responsive documents such as “PROTECT,” “protect identity” and “protect by request” are evidence that the particular source was expressly granted confidentiality. (Second Hardy Decl., ¶ 63.)

Exemption (b)(7)(D)-3 is asserted in conjunction with (b)(2)-2 to protect source symbol numbers and informant file numbers, which are used to protect the identities of FBI sources. (Second Hardy Decl., ¶ 64.) Plaintiff does not contest this exemption.

Exemption (b)(7)(D)-4 is asserted to protect the names, identifying data and

information provided to the FBI by foreign law enforcement agencies under an “express” assurance of confidentiality. (Second Hardy Declaration, ¶ 68.) Hardy explains that the FBI has many agreements with foreign governments under which security and/or criminal law enforcement information is exchanged. (Second Hardy Declaration, ¶ 68.) The agreements specify the extent of confidentiality requested by the foreign authority, such as confidentiality for both its identity and the information provided, or confidentiality for just the information provided and not its relationship to the FBI. (Second Hardy Declaration, ¶ 68.) In Plaintiff’s case, the FBI has an agreement with foreign law enforcement agencies that expressly forbids dissemination of information it provides to the FBI. (Second Hardy Declaration, ¶ 69.) Hardy advises that if the FBI were to disclose the information that these foreign agencies provided, it could have a chilling effect on the FBI’s relationship with these agencies, as well as other foreign law enforcement agencies that have entered similar non-disclosure agreements with the FBI. (Second Hardy Declaration, ¶ 69.)

Exemption (b)(7)(D)-5 is asserted to protect the names, identifying data and information provided by a member of a state law enforcement agency. (Second Hardy Declaration, ¶ 70.) Hardy contends that this information was provided under an implied understanding of confidentiality, and if this information is disclosed, the FBI’s relationship with this local police department could be severed. (Second Hardy Declaration, ¶ 70.) According to Hardy, any disclosure of identifying information would also result in disastrous, far-reaching consequences for the FBI’s other law enforcement endeavors because it relies on close cooperation with local and state law enforcement agencies. (Second Hardy Declaration, ¶ 70.)

Exemption (b)(7)(D)-6 is asserted to withhold information and/or identifying data concerning source symbol numbers, disclosure of which could reveal a confidential source's identity. (Second Hardy Declaration, ¶ 71.) Plaintiff does not contest this exemption.

Exemption (b)(7)(D)-7 is asserted in conjunction with (b)(2)-3 to protect from disclosure of T-symbol numbers, which are sometimes used instead of permanent source symbol numbers to protect the identities of confidential informants. (Second Hardy Decl., ¶ 72.) Plaintiff does not contest this exemption.

(2) Plaintiff's Challenge

Plaintiff's sole challenge to Defendant's withholdings under Exemption 7 (D) is that the Vaughn index fails to adequately support its claim of express and implied assurances of confidentiality with various sources.

Because the records at issue were compiled by the FBI during the course of a criminal investigation, information relating to both the *identity* of the confidential source and any *information* provided by that source may be exempt from disclosure. See 5 U.S.C. § 552(b)(7)(D). "A source should be deemed confidential if the source furnished information with the understanding that the FBI would not divulge the communication except to the extent the Bureau thought necessary for law enforcement purposes." United States Dep't of Justice v. Landano, 508 U.S. 165, 174, 113 S.Ct. 2014, 124 L.Ed.2d 84 (1993). Disclosure is not required "if the source provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." Halpern, 181 F.3d at 298 (quoting Landano, 508 U.S. at 172)(quotations

omitted).

In the context of express confidentiality agreements, the agency must proffer “probative evidence that a claimed source of information did in fact receive an express promise of confidentiality.” Halpern, 181 F.3d at 298. Proof of express assurances may be presented by

declarations from the agents who extended the express grants of confidentiality, contemporaneous documents from the FBI files reflecting the express grants of confidentiality, evidence of a consistent policy of expressly granting confidentiality to certain designated sources during the relevant time period, or other such evidence that comports with the Federal Rules of Evidence.

Davin v. United States Dep’t of Justice, 60 F.3d 1043, 1061 (3d Cir. 1995). Conclusory allegations as to the existence of express confidentiality agreements will not suffice. See Halpern, 181 F.3d at 299 (rejecting exemption under 7(D) based on express confidentiality where “the Declaration relies on bare assertions that express assurances were given to the sources in question, and that the information received was treated in a confidential manner during and subsequent to its receipt”).

The Government may establish implied confidentiality if it demonstrates that the nature of the crime investigated and the source’s relation to it give rise to an inference that the source provided information with the expectation of confidentiality. See Landano, 508 U.S. at 179. “An inference of confidentiality is typically found where the crime was of a serious or potentially violent nature and the source had a close relationship to the individuals being investigated.” Garcia, 181 F.Supp. at 375. For example, a finding of an implied confidentiality agreement may be appropriate where an informant would not

provide information out of fear of retaliation but for the promise of confidentiality. *Id.* at 179-80. Moreover, local law enforcement authorities are specified in the statute as warranting protection under the exemption. *See* 5 U.S.C. § 552(b)(7)(D); *Halpern*, 181 F.3d at 299.

Importantly, “[u]nder Exemption 7(D), the question is not whether the requested *document* is of the type that the agency usually treats as confidential, but whether the particular *source* spoke with an understanding that the communication would remain confidential.” *Id.* at 172; *Halpern*, 181 F.3d at 300 (“what counts is whether then, at the time the source communicated with the FBI, the source understood that confidentiality would attach”).

This Court finds that Defendant has sufficiently established both express and implied grants of confidentiality. Evidence of express confidentiality is present in the documents themselves, which contain designations such as “PROTECT,” “protect identity” and “protect by request.” (Second Hardy Decl., ¶ 63.) These designations constitute contemporaneous evidence reflecting express grants of confidentiality. *See Neely v. FBI*, 208 F.3d 461, 466 (4th Cir. 2000) (suggesting that documents bearing evidence “on their face” of an express assurance of confidentiality would support withholding).

Thus, implied grant of confidentiality can be found based on “the nature of the crime that was investigated and the source’s relation to it.” *Landano*, 508 U.S. at 180. For example, a finding of implied confidentiality is appropriate with respect to sources who, absent confidentiality, might be worried about retaliation because of the subject matter. *Id.* at 179-80. The *Vaughn* index further indicates that individuals and state law

enforcement agencies provided information to the FBI during the course of the investigation into Plaintiff's activities (Second Hardy Decl., ¶¶ 62, 63, 68, 70), and that some individuals were interviewed under highly-controlled circumstances to ensure confidentiality (Second Hardy Decl., ¶ 63). This Court finds that based on the nature of this crime (the highly publicized slaying of two FBI agents on an Indian reservation) and the sources' contemporaneous relationship to the events, Defendant has adequately demonstrated that an implied assurance of confidentiality exists. See, e.g., Halpern, 181 F.3d at 300 (finding implied assurance of confidentiality for sources providing information about the meatpacking industry between 1933 and 1954); Williams v. FBI, 69 F.3d 1155, 1159 (D.C. Cir. 1995) (per curiam) (confidentiality inferred where crimes investigated were related to conspiracy to overthrow the government and the sources were sufficiently close to the alleged perpetrators); King v. United States Dep't of Justice, 830 F.2d 210, 236 (D.C. Cir. 1987) (approving withholding under Exemption 7 with respect to McCarthy-era documents).

These sources are precisely the type of individuals who reasonably would fear retaliation in the event of disclosure. This is particularly true given the highly charged emotions, ongoing exposure and public attention in this case. In the face of Defendant's arguments and evidence, Plaintiff has offered nothing from which this Court could conclude that either express or implied assurances of confidentiality were withheld from Defendant's sources. In light of these circumstances, it is reasonable to infer the existence of an implied assurance of confidentiality. See Halpern, 181 F.3d at 300.

Accordingly, this Court finds that Defendant's withholding of information pursuant

to Exemption 7(D) is proper.

IV. CONCLUSION

Upon review of the Vaughn index and consideration of the parties' arguments, this Court finds that Defendant has performed an adequate search for records responsive to Plaintiff's request and has carried its burden of establishing that information withheld pursuant to Exemptions 3, 7(C) and 7(D) falls within those exemptions to the FOIA. Consequently, summary judgment in Defendant's favor is granted as to these exemptions. See Carney, 19 F.3d at 812. This Court further finds that Defendant has failed to carry its burden with respect to its Exemption 1 withholdings. Summary Judgment on these exemptions is therefore denied.

V. ORDERS

IT HEREBY IS ORDERED, that Defendant's Motion for Summary Judgment (Docket No. 25) is GRANTED in part and DENIED in part.

SO ORDERED.

Dated: March 31, 2005
Buffalo, New York

/s/William M. Skretny
WILLIAM M. SKRETNY
United States District Judge