UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHELSEA MANNING a/k/a
BRADLEY E. MANNING,

Plaintiff,

v. Case No. 1:15-CV-01654-APM

U.S. DEPARTMENT OF JUSTICE and the
FEDERAL BUREAU OF INVESTIGATION,

Defendants.

**PLAINTIFF'S REPLY IN SUPPORT OF
HER CROSS MOTION FOR SUMMARY JUDGMENT**

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Plaintiff Chelsea Manning respectfully replies in support of her Cross Motion for Summary Judgment and requests that the Court deny the Federal Bureau of Investigation's (FBI) Motion for Summary Judgment. Instead of complying with the requirements of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), in responding to Ms. Manning's records request, and in addition to claiming a functional, but still impermissible, blanket exemption, the FBI did not perform the segregability analysis required by law. It did not do so upon receiving and processing Ms. Manning's request, and it did not do so upon initiation of this litigation. The FBI has demonstrated that it has operated from a presumption of nondisclosure, and its belated attempt to comply with the provisions of FOIA is insufficient to meet its burden to justify its decision to withhold every portion of every requested record. Based on the FBI's sustained misconstruction of the policies and application of FOIA and its vacillating reliance on its review of actual documents and its "background" knowledge of certain case files, Ms. Manning respectfully requests that this Court conduct an *in camera* review and complete the analysis that the FBI has been unwilling to perform.

I. INTRODUCTION

In its Reply in Support of Motion for Summary Judgment and Opposition to Plaintiff's Cross-Motion for Summary Judgment (Reply and Response), Doc. 16, the FBI continues to support its complete and categorical withholding of all records responsive to Ms. Manning's FOIA request and purports to "provide further clarity," through the Second Declaration of David M. Hardy (Second Hardy Declaration), Doc. 16-1, regarding issues that it contends Ms. Manning "misunderstand[s]." Doc. 16 at 6. The FBI's effort fails because the agency has muddied the water on those issues relevant to

whether the responsive records are, as the agency claims, exempt in their entirety under 5 U.S.C. § 552(b)(7)(A). To the extent that it has provided any factual clarification, those "clarified" issues weigh against summary judgment in the FBI's favor.

First, the FBI has made clear that Ms. Manning herself is *not* the target of any pending law enforcement investigation. Doc. 16 at 6, 9-10 ("[T]he FBI's ongoing investigation is focused on any civilian involvement in Manning's leak of classified records published on Wikileaks, and not on an investigation of Manning herself."); *see also* Doc. 16-1, ¶ 6; Doc. 16-2 at 2. The FBI acknowledges that Ms. Manning has already been convicted for her role in the Wikileaks disclosures. *See* Doc. 16 at 10. Consequently, any prospective proceedings will be in prosecution of those civilians involved in the document leaks. Doc. 16 at 6, 9; Doc. 16-1, ¶ 6; Doc. 16-2 at 2.

Second, the FBI clarified that it did not conduct *any* review of the requested records to determine whether any portions were reasonably segregable before denying Ms. Manning's request completely and claims to have done so only *after* Ms. Manning filed suit in the present case. Doc. 16 at 9-10; Doc. 16-1, ¶¶ 8-9. Rather than conducting the document review required by 5 U.S.C. § 552(b), the FBI instead based its initial and complete withholding of records on its previous determination of the non-segregability of *other* records, requested in another case but existing within the same investigative file. Doc. 16 at 9-10; Doc. 16-1, ¶¶ 8-9. This clarification confirms only that the FBI has functioned from an impermissible presumption of nondisclosure and that, to the extent that the agency conducted any segregability review, it did so as a result of Ms. Manning's lawsuit.

Apart from these two points of clarity, which do not weigh in favor of the FBI's request for summary judgment, the FBI has raised more questions than provided answers. With regard to its purported review of documents to make a determination of segregability, the FBI has offered *no* information regarding who conducted the review, when that person or persons did this review, and, critically, *how* that person or persons conducted the review. *See* Doc. 16-1, ¶¶ 9-10. The FBI does not represent that it ever conducted either a page-by-page or line-by-line segregability review of records. *Id.* However, a page-by-page review is the only means by which the agency could conceivably comply with 5 U.S.C. § 552(b)(7), and release "[a]ny reasonably segregable *portion* of a record." (emphasis added). The FBI's coy description of its purported review, the facts of which are accessible *only* to the FBI, seeks to shift the agency's burden onto Ms. Manning to somehow prove that the responsive records—the number and nature of which are known only to the FBI—do in fact contain reasonably segregable portions. Such is, rightfully, not Ms. Manning's burden. *Boehm v. F.B.I.*, 948 F. Supp. 2d 9, 38 (D.D.C. 2013) ("The government bears the burden of demonstrating that no reasonably segregable material exists in the withheld documents."). This dearth of factual support, as explained below, not only demonstrates that the Second Hardy Declaration is inadequate as a matter of law to enable the Court to enter its segregability finding, but it also necessitates an *in camera* review to determine whether any portions of documents pertain solely to Ms. Manning and whether those portions are reasonably segregable from any exempt materials.

Finally, the FBI's brief and supplemental declaration leave unresolved whether any public source materials exist within the responsive record. Although the FBI argues in its

Reply and Response that the supplemental declaration confirms "there is no public source information regarding Ms. Manning located in the records responsive to [Ms.] Manning's request," Doc. 16 at 15, the declaration itself says nothing so conclusive. Rather, the Second Hardy Declaration states cryptically that, "although the FBI considered whether there was any public source information that could be released to plaintiff, it concluded that in this instance, there was not. Specifically, the FBI did not locate any public source information about plaintiff's arrest, prosecution, or conviction in the file." Doc. 16-1, ¶ 10(c). Mr. Hardy *did not* unequivocally state that the FBI records lacked any public source materials related to Ms. Manning, but only that the FBI determined that there was no public source material *that could be released*. *See id.* The FBI's declaration remains unclear and, again, requires an *in camera* review.

In addition to their failure to provide essential factual details, both the FBI's Reply Brief and the Second Hardy Declaration themselves "evince[e] several misunderstandings," *see* Doc. 16 at 6, not only of Ms. Manning's factual assertions and legal arguments, but also of the agency's statutory burden. The FBI continues to demonstrate its belief, contrary to FOIA's statutory language and its construing case law, that any records found within a pending investigative file are exempt from disclosure under 5 U.S.C. § 552(b)(7)(A). *See, e.g.*, Doc. 16 at 10 n.2; Doc. 16-1, ¶ 8 n.2. The agency is similarly incorrect in its assumption that belated compliance with FOIA, spurred by Ms. Manning's lawsuit, is sufficient to meet its burden. *See* Doc. 16-1, ¶¶ 8-9. The FBI's Reply and Response does little more than to demonstrate that it operated in this case from a presumption of nondisclosure and has failed to provide the facts to support such a presumption.

II. ARGUMENT

a. The FBI continues to rely on the exemption of files, rather than records, demonstrating its categorical noncompliance with FOIA.

The FBI magnifies its fundamental misunderstanding of FOIA and its own statutory burden in categorically and uniformly withholding requested records by repeatedly conflating requested *records* with those *files* in which they are kept. *See, e.g.*, Doc. 16 at 10 n.2; Doc. 16-1, ¶ 8 n.2. This focus on files, as opposed to records, has been a pervasive undercurrent to the FBI's claimed exemption from the start. *See, e.g.*, Doc. 12-7 at 2 (The FBI first justified its complete and categorical denial of Ms. Manning's request by explaining that the "material [Ms. Manning] requested is located in an investigative file which is exempt from disclosure pursuant to 5 U.S.C. § 552(b)(7)(A)"). The FBI, however, may not "refuse to disclose any record compiled in anticipation of enforcement action merely because the record has found its way into an investigative file." *Campbell v. Dep't of Health & Human Servs.*, 682 F.2d 256, 263 (D.C. Cir. 1982). In contrast, in the context of Exemption 7(A), "Congress plainly mandated a focus upon records, not files." *Id.* at 262.

This misunderstanding of a fundamental tenet of FOIA is particularly apparent in the FBI's repeated reliance on the court's holdings in *Elec. Privacy Info. Ctr. v. Dep't of Justice Criminal Div.* (*EPIC*), 82 F. Supp. 3d 307 (D.D.C. 2015). In its Response, the FBI again relies on the inapposite facts that form the basis of *EPIC*, and glosses over the fact that the plaintiff in that matter requested records *entirely different*[1] from those requested

[1] Unlike Ms. Manning, who requested records primarily about *herself* and secondarily about civilian co-conspirators, Doc. 12-4 at 3, EPIC did not request records regarding Ms. Manning. Instead, it requested records concerning any civilians being targeted for surveillance as a result of their support of Wikileaks. *EPIC*, 82 F. Supp. 3d at 312. While

in the present case. *See* Doc. 16 at 10. At the crux of the FBI's argument is its contention that,

> [d]espite Manning's claims to the contrary,[2] the FBI's search for records responsive to her request confirmed that "[t]he investigative files containing records responsive to the first part of plaintiff's request (for records about herself) were the same files located and processed by the FBI in response to the FOIA request at issue in *EPIC v. DOJ*."

Doc. 16 at 9 n.2 (quoting Doc. 12-1, ¶ 37 n.11 (second alteration in original)); *see also* Doc. 16-1, ¶ 8 n.2 ("As explained in my first declaration, the FBI was already aware of *which files* were responsive to the latter part of her request and the FBI's search of records specifically indexed in her name revealed *no additional files*.") (emphasis added). Based on its repeated assertions, the FBI appears to reason that, because the requested records coexist in the same file as those records requested in *EPIC*, a case in which the court determined that the FBI did appropriately apply Exemption 7(A), the release of the records Ms. Manning requested would necessarily have the same affect on the Wikileaks investigation as those requested by EPIC. Doc. 16 at 9-10. Ms. Manning, however, has not requested the entire contents of the relevant "file;" nor did *EPIC* hold the contents of the file to exempt in their entirety. *See* 82 F. Supp. 3d at 323 (holding that "Exemption 7(A) applies to the *responsive* documents") (emphasis added). Consequently, the

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some overlap may exist between the *EPIC* records and the second portion of Ms. Manning's request, a fact which remains unknown absent an *in camera* review, there can be no plausible overlap between the records requested by *EPIC* and those requested records regarding Ms. Manning herself.

[2] Ms. Manning never claimed that the records she requested are not in the same file as the records at issue in *EPIC*, but that the case is distinguishable based on the *records* requested. Doc. 14 at 24-25. Ms. Manning argued, and continues to argue, that the *file* in which the records are located is not itself conclusive of whether records and portions of records are exempt from disclosure. *See Campbell*, 682 F.2d at 262.

argument that the requested records must be exempt because other records within the same investigative file were once held to be exempt misses the point entirely.

Unlike Ms. Manning, the plaintiff in *EPIC did not request records about Ms. Manning*. Rather EPIC requested records about those *civilians* who expressed support for WikiLeaks. *EPIC*, 82 F. Supp. 3d at 312. Those civilians, unlike Ms. Manning, who has already been tried and convicted for her role in the 2010 disclosures, may well be the same "civilian[s] involve[ed] in plaintiff's leak of classified records that were published on the Wikileaks website" and therefore, by the FBI's own description, the likely *subjects* of the FBI's still pending investigation. Doc. 16-1, ¶ 6. The *EPIC* court's conclusion in *EPIC* that *those records* "interfere with an active, ongoing law enforcement investigation concerning the unauthorized release of classified materials on the WikiLeaks website," *id.* at 319 n.10, has *no bearing* on whether records *about Ms. Manning* would interfere with that investigation. That this distinction is lost on the FBI goes to the heart of the reason the Court in this matter must review the records *in camera* to draw the distinctions the FBI is unwilling to do on its own.

b. The FBI's purported and belated segregability analysis remains conclusory and requires an *in camera* review of records.

As explained in Ms. Manning's Cross Motion, the FBI's initial declaration of segregability compliance was facially inadequate and insufficient as a matter of law to enable the Court to enter a finding of segregability. Doc. 12-1, ¶ 49; Doc. 14 at 29-31; *see also, e.g., Robbins Geller Rudman & Dowd LLP v. United States Sec. & Exch. Comm'n*, No. 3:14-CV-2197, 2016 WL 51040, at *3 (M.D. Tenn. Jan. 4, 2016) (*Robbins*) (holding that an agency's segregability analysis consisting of the conclusion that that requested information was "exempt pursuant to FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A),

and that there [was] no information that can be segregated and disclosed" was "not facially adequate."). In its Reply and Response, the FBI complained that Ms. Manning's argument regarding segregability "lacks any factual basis." Doc. 16 at 14. This circular and self-serving complaint evinces the FBI's continued misunderstanding of the presumptions and burdens that underpin FOIA.

"The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought may be withheld due to an exemption." *Vaughn v. United States*, 936 F.2d 862, 866 (6th Cir. 1991); *see also Boehm*, 948 F. Supp. 2d at 38 (agency bears the burden of demonstrating that the withheld records do not contain any reasonably segregable material and must "provide a detailed justification and not just conclusory statements to demonstrate that all reasonably segregable material has been released") (quoting *Valfells v. CIA*, 717 F. Supp. 2d 110, 120 (D.D.C. 2010) (internal quotation marks and alteration omitted)). It is the FBI—which has exclusive access to the responsive records—and not Ms. Manning, which bears responsibility for the complete dearth of facts supportive of the FBI's segregability conclusion. *See Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977) (explaining that the "question of segregability is completely dependent on the actual content of the documents themselves and that the requesting party is helpless to counter agency claims that there is no non-exempt and reasonably segregable material within a withheld document"). The FBI cannot seek to shift that burden, as it has done here, "by sweeping, generalized claims of exemption for documents[.]" *Id.*

The facts Mr. Hardy's supplemental declaration added remain inadequate as a matter of law to meet the FBI's burden. First, Mr. Hardy admits that the FBI *did not* conduct a

segregability review prior to categorically and uniformly denying Ms. Manning's records request. Doc. 16-1, ¶ 8. Instead of complying with FOIA's mandate to redact and release "[a]ny reasonably segregable portion of a record," 5 U.S.C. § 552(b), the FBI purportedly based its categorical denial of Ms. Manning's request "on its knowledge of the contents of the responsive investigative *files*[3]" relevant to earlier FOIA requests, including that of *EPIC*. Doc. 16-1, ¶ 8. The FBI asserts that it undertook a segregability review only upon the initiation of litigation and "by the time of [Mr. Hardy's] first declaration." *Id.* ¶ 9; Doc. 16 at 14-15 (explaining that the FBI undertook its segregability review "[o]nce litigation in this case began"). FOIA, however, which requires an agency to operate from a presumption disclosure, *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002), does not permit the FBI to undertake its statutory requirements only upon a citizen's initiation of a lawsuit against it. *See Warren v. Colvin*, 744 F.3d 841, 844-45 (2d Cir. 2014).[4]

[3] Again, the FBI bases its noncompliance with the requirements of FOIA by starting with a presumption of nondisclosure for those records that have found their way into open investigative *files*. *See* Part II(a) *supra*. The FBI's focus on whether certain files are exempt, "regardless of their specific contents," and initial presumption of nondisclosure, "represents a 'quantum of evidence' that overrides the presumption in favor of the agency's segregability determination." *Gatore v. United States Dep't of Homeland Sec.*, No. CV 15-459 (RBW), 2016 WL 1367730, at *4 (D.D.C. Apr. 6, 2016). This evidence, in addition to inconsistencies within the declaration, necessitates an *in camera* review of records. *Id.* at *5.

[4] Even, assuming *arguendo*, that the FBI's belated compliance with the requirements of § 552(b) are adequate, which Ms. Manning contends they are not, the FBI cannot lawfully press a citizen to the point of litigation before it determines to comply with FOIA's statutory requirements. Such compliance spurred only by litigation warrants an award of attorneys' fees for the plaintiff. *See Harvey v. Lynch*, No. CV 14-784 (RDM), 2016 WL 1559129, at *2 (D.D.C. Apr. 18, 2016) (explaining that where litigation causes agency compliance, fees are warranted); *see also Warren*, 744 F.3d at 844-45) (explaining Congress' intent "to prevent federal agencies from denying meritorious FOIA requests, only to voluntarily comply with a request on the eve of trial to avoid liability for litigation costs").

However, even accepting the FBI's assertion of belated compliance as lawful, Mr. Hardy's second declaration still lacks the factual details crucial to render his assertion that the FBI conducted a segregability review required by law anything other than conclusory. Mr. Hardy asserts only that, "by the time of [his] first declaration," the Record/Information Dissemination Section (RIDS) of the FBI "had conducted a document-by-document review of all records containing information responsive to both parts of plaintiff's request to determine whether there was any reasonably segregable non-exempt information that could be released to her." *Id.* ¶ 9. While this assertion dutifully parrots the statutory standard, it lacks critical details to provide the Court with the facts underpinning that purported review.[5] *See Goldstein v. Treasury Inspector Gen. for Tax Admin.*, No. 14-CV-02189 (APM), 2016 WL 1180158, at *9 (D.D.C. Mar. 25, 2016) (rejecting an agency declaration as the basis for summary judgment where it "largely parrot[ed] the elements of [the claimed exemption] and stat[ed] without "detailed justification" but rather in "conclusory" fashion that no responsive documents are segregable).

The FBI fails to identify *who* conducted the segregability review, asserting only that a division of the agency—the Record/Information Dissemination Section of the FBI (RIDS)—did so. Doc. 16-1, ¶ 9. By the FBI's own description, RIDS includes "239 employees who staff a total of ten (10) Federal Bureau of Investigation Headquarters … units and two (2) field operational service center units[.]" *Id.* ¶ 2. The FBI fails to explain whether a person, team, or computer conducted the review, and instead refers Ms.

[5] Moreover, plaintiff questions whether the FBI could *thoroughly* conduct a segrabability review in the short amount of time this litigation has been pending. The FBI should have conducted this review from the day it received and began working on Ms. Manning's request.

Manning and the Court to an entire FBI division. *See id.* ¶ 9. The FBI fails to identify *when* the FBI conducted the review, asserting only that it was done in time for Mr. Hardy's declaration. *See id.* And perhaps most importantly, the FBI fails to explain *how* the review was conduct except to say that it was done "document-by-document." *Id.* This description is inadequate as a matter of law to enable the Court to find that *someone* at the FBI did in fact review, not only each *document*, but "conducted a page-by-page review of all investigative records contained in the requested documents" in order to determine whether "each document, and each page of each document, contained information subject to law enforcement withholding exemptions." *Juarez v. Dep't of Justice*, 518 F.3d 54, 61 (D.C. Cir. 2008); *see also, e.g.*, *Sack v. Cent. Intelligence Agency*, 49 F. Supp. 3d 15, 24 (D.D.C. 2014) (holding that a declaration was sufficiently detailed to demonstrate that the agency conducted an adequate segregability review where it reviewed each document line-by-line).

Perhaps anticipating that Ms. Manning would challenge the factual inadequacy of its second declaration, the FBI incorrectly argues that it is not required to "provide a document-by-document segregability showing, as this would 'eviscerate the policy considerations that have led courts to conclude that the government need not provide such an index to show that its withholding of responsive FOIA documents is justified under Exemption 7(A).'" Doc. 16 at 15 (quoting *Robbins*, No. 3:14-cv-2197, 2016 WL 950995). The FBI both misunderstands and misstates the relevant law. *Robbins*, an unpublished opinion from the District of Minnesota, did not hold that the defendant agency was relieved of demonstrating that it had in fact analyzed the contents of each and every responsive document in order to release the segregable portions therein. It instead

explained that "*[r]equiring the government to provide a Vaughn index* for purposes of its segregability analysis would eviscerate the policy considerations that have led courts to conclude that the government need not provide such an index to show that its withholding of responsive FOIA documents is justified under Exemption 7(A)." *Robbins*, 2016 WL 950995 *9 (emphasis added). This election, however, "*does not* discharge its obligation to consider whether any portion of the records are reasonably segregable." *Id.* (emphasis added). Of course, Ms. Manning has not asked the FBI to produce a *Vaughn* Index, but only to provide the facts that would illuminate *who* conducted the segregability review, *when* that person did so, and *how* that person did so. Such a base level factual showing would hardly "eviscerate" any policy or protected interest the FBI claims to hold.

The FBI also erroneously relies on *Kidder v. FBI*, 517 F. Supp. 2d 17, 32 (D.D.C. 2007), in support of its contention that it need only declare its segregability conclusion rather than provide the facts that would support such a conclusion. *Kidder*, however, is inapposite from the present case because, in *Kidder*, the plaintiff did not argue that the agency's segregabiltiy review, as purported, was inadequate as a matter of law, but rather that the agency declaration regarding its segregability finding was made in bad faith. *Id.* As a consequence, the court did not examine the details of the FBI's *analysis* in that case, but reasoned instead that the plaintiff's "unsupported assertion of bad faith alone is insufficient" to rebut the presumption of good faith afforded to agency declarations. *Id.* It was in this context that the court reasoned the defendant agency's "failure to make a document-by-document segregability determination [to be] of no moment." *Id.* The court did *not* hold that an agency may meet its statutory segregability burden, or enable the Court to enter its mandatory segregability finding, without proving facts sufficient to

establish that *someone* within the agency reviewed every page and every line of the responsive documents to identify and release reasonable segregable material.

III. CONCLUSION

For the reasons stated above and those in Ms. Manning's Cross Motion, Doc. 14, Ms. Manning respectfully requests that the Court deny the FBI's Motion for Summary Judgment, grant Ms. Manning's Cross Motion, and order an *in camera* review of records so that the Court can perform and complete the analysis that the FBI has failed to perform. Ms. Manning respectfully requests that the Court review the records to determine whether they contain any reasonably segregable portions and to order the release thereof.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that on the 6th day of June, 2016, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Amber Fayerberg
Amber Fayerberg