

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF YORK

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RADAR ONLINE LLC and JAMES :
ROBERSON, :
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Plaintiffs, :
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-v- : 17 Civ. 3956 (PGG)
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FEDERAL BUREAU OF INVESTIGATIONS, :
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Defendant. :
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**MEMORANDUM OF LAW IN SUPPORT OF THE FEDERAL BUREAU OF
INVESTIGATION'S MOTION FOR SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT

Radar Online LLC and James Robertson, a senior editor for Radar Online (collectively “Radar Online”) seeks records at the core of the criminal prosecution of Jeffrey Epstein, prior to his passing, and the current prosecution of Ghisaille Maxwell. Congress did not intend the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, to interfere with pending criminal prosecutions. To make sure this would not happen, Congress expressly exempted records that could reasonably be expected to interfere with law enforcement proceedings from public disclosure under FOIA. *See* 5 U.S.C. § 552(b)(7)(A). Many of the records sought by the Radar Online fall at the heart of this exemption, and the FBI has withheld them individually, prior to Epstein’s arrest, and categorically, after Epstein’s arrest.

Other FOIA exemptions also justify the FBI’s withholding of records in response to the FOIA request. The FBI correctly withheld records specifically exempted from disclosure by statute. *See* 5 U.S.C. § 552(b)(5). The FBI properly withheld information reflecting its predecisional deliberations and related matters. *See* 5 U.S.C. § 552(b)(5). In addition, the FBI properly withheld information where disclosure clearly would, and/or could reasonably be expected to, result in an unwarranted invasion of privacy of third parties, including names and other information of individuals who were of investigative interest to the FBI, government employees, victims, and third parties. *See* 5 U.S.C. § 552(b)(6), (7)(C). Records that would disclose the identity or information provided by a confidential source was also properly withheld by the FBI. *See* 5 U.S.C. § 552(b)(7)(D). The personal information of government employees and third parties are also protected because its disclosure could place those employees at risk of harm. *See* 5 U.S.C. § 552(b)(7)(F). Finally, some of the withheld records are protected by an additional FOIA exemption because their disclosure would reveal law enforcement techniques or procedures. *See* 5

U.S.C. § 552(b)(7)(E).

FBI has logically and plausibly established that its search was adequate and its withholdings under each of these FOIA exemptions were proper. Accordingly, the Court should grant summary judgment in FBI's favor.

BACKGROUND

I. Criminal Proceedings Against Jeffrey Epstein

On July 2, 2019, the United States Attorney's Office for the Southern District of New York ("USAO-SDNY") charged Jeffrey Epstein with one count of conspiracy to commit sex trafficking and one count of sex trafficking. *See* Indictment, Dkt. No. 2, *United States v. Epstein*, No. 19-cr-490 (RMB) (S.D.N.Y.). Epstein was arrested on July 6, 2019, and thereafter incarcerated at the Metropolitan Correctional Center ("MCC") until his death. *see* Docket Entry Nos. 5, 32 and 44, *United States v. Epstein*, No. 19-cr-490 (RMB) (S.D.N.Y.).

II. The Radar Online's FOIA Request and This Action

On April 20, 2017, Radar Online submitted a FOIA requests to the FBI collectively seeking "all documents relating to the FBI's investigation and prosecution of financier Jeffrey Epstein, who plead guilty to one count of felony solicitation of prostitution in August 2006. Dkt. No. 12-2, Ex. B; *see* Declaration of Michael G. Seidel, dated June ___, 2021 ("Seidel Decl.") ¶ 6, Ex. A. By letter dated April 28, 2017, the FBI acknowledged receipt of Plaintiff's FOIA request, and that because Plaintiff had requested information on one or more third party individuals, the FBI would neither confirm nor deny the existence of such records pursuant to FOIA Exemptions 6, 7(c), 5 U.S.C. § 552(b)(6) and (b)(7)(C), as that could constitute an invasion of personal privacy. Seidel Decl. ¶ 7, Ex. B. The FBI also informed Plaintiff's counsel that it was closing Plaintiffs' request. *Id.*

On May 25, 2017, Plaintiff Radar Online filed a complaint, and on August 28, 2017, Plaintiffs filed an amended complaint. ECF Nos. 1, 12. On October 2, 2017, the Court ordered the FBI to process 500 pages per month. ECF No. 16, 17. On October 5, 2017, the parties stipulated that the FBI's search obligations would be limited to records in the following files maintained by the FBI: (a) the Main file, which contains documents relating to general investigatory activity, such as interview forms and accomplishment reports, (b) the 1A file, which contains various items relating to the main file, such as interview notes, subpoena results, documents provided by sources and personal documents relating to third parties; (c) the subfile FF, which contains files relating to general forfeiture matters. ECF No. 17.

The FBI processed the records before Epstein's July 6, 2019 arrest in a different manner from those processed after Epstein's arrest. *See* Docket Entry No. 5, *United States v. Epstein*, No. 19-cr-490 (RMB) (S.D.N.Y.). From October 2017, through June 2019, the FBI made regular production of responsive records with appropriate redactions. Seidel Decl. ¶¶ 9-29. During this time period, the FBI processed 11,525 pages. It produced 181 pages in full and 1,051 pages with partial redactions. Seidel Decl. ----. The FBI withheld 10,107 pages based on FOIA Exemptions 3, 5, 6, 7(A), 7(C), 7(D), 7(E). Seidel Decl. ¶¶ 49-__. During this time, it did not categorically assert Exemption 7(A), but it did assert this exemption on applicable records or parts of records that were withheld before it completed processing all of the records requested in the FOIA request. In other words, Exemption 7(A) is not included in the face of the documents that were processed prior to July 2019, but the Exemption is noted on the Vaughn Index. Seidel Decl. ¶ 48, Ex. EE.

After Epstein's arrest, the FBI confirmed that the additional release of responsive material could negatively impact the pending prosecution and ongoing enforcement

proceedings. Seidel Decl. ¶ 30 fn. 5. Thus, from August 2019 through January 31, 2020, the FBI continued to process at least 500 pages a month, and during this time period, the FBI asserted Exemption 7(A) categorically and released 46 documents. Seidel Decl. ¶¶ 67-79. Seidel Decl. ¶¶ 31-36, 67-79. To inform Plaintiff of the basis for its withholding of records, the FBI provided a letter each month stating the minimum number of records that it processed, and the exemptions that applied to those records. Seidel Decl. ____.

The FBI has created a Vaugh Index relating to the documents that were processed prior to Epstein’s arrest, as well as those records that were released in part after his arrest. Seidel Decl. Ex. EE. The documents that the FBI processed and withheld after Epstein’s arrest are not identified by bates numbers. Rather, the FBI informed Radar Online in regular letters to Plaintiff that in addition to Exemption 7(A), it was withholding the records in full or in part based on FOIA Exemptions 3, 5, 6, 7(A), 7(C), 7(D), and 7(E). Seidel Decl. ¶¶ ____.

These documents are not delineated in the Vaughn Index, as that would reveal the number of pages being withheld categorically, and doing so could cause the harms protected by Exemption 7(A). Seidel Decl. ____.

ARGUMENT

I. FOIA and the Summary Judgment Standard

FOIA generally requires federal agencies to make documents and other material “available to the public,” *see* 5 U.S.C. § 552(a), but specifically exempts nine categories of information from that requirement, *see id.* § 552(b). Congress adopted this structure “to reach a workable balance between the right of the public to know and the need of the [g]overnment to keep information in confidence.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989)(quoting H.R. Rep. No. 89-147 at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418,

2423)). The nine FOIA exemptions reflect Congress's determination that "public disclosure is not always in the public interest." *CIA v. Sims*, 471 U.S. 159, 166–67 (1985).

Summary judgment is warranted in a FOIA case if the agency submits declarations that (1) supply "facts indicating that the agency has conducted a thorough search" and (2) give "reasonably detailed explanations why any withheld documents fall within an exemption." *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). The agency's declaration is "accorded a presumption of good faith," and discovery is "unnecessary if the agency's submissions are adequate on their face." *Id.* (internal quotation marks omitted); *accord Wilner v. NSA*, 592 F.3d 60, 69 (2d Cir. 2009). An agency's justification for asserting an exemption "is sufficient if it appears logical and plausible." *Am. Civil Liberties Union v. United States Dep't of Def.*, 901 F.3d 125, 133 (2d Cir. 2018), *as amended* (Aug. 22, 2018). Accordingly, "the government's burden is a light one." *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 624 (D.C. Cir. 2011).¹

II. The FBI Conducted an Adequate Search for Responsive Records

"If an agency demonstrates that it has conducted a reasonable search for relevant documents, it has fulfilled its obligations under FOIA and is entitled to summary judgment on this issue." *Garcia v. U.S. Dep't of Justice*, 181 F. Supp. 2d 356, 366 (S.D.N.Y. 2002). The agency must demonstrate that its search was "reasonably calculated to discover the requested documents." *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 328 (D.C. Cir. 1991). An agency's search may be reasonable even if it does not return every responsive document. *See Adamowicz v. I.R.S.*, 552 F. Supp. 2d 355, 361 (S.D.N.Y. 2008). An agency must only search

¹ Because an agency declaration can satisfy the government's burden on a motion for summary judgment, "Local Civil Rule 56.1 statements are not required." *N.Y. Times v. Dep't of Justice*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012); *Ferguson v. FBI*, No. 89 Civ. 5071 (RPP), 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995), *aff'd*, 83 F.3d 41 (2d Cir. 1996).

those “files likely to contain responsive materials (if such records exist).” *Oglesby v. U.S. Army*, 920 F.2d 57,68 (D.C. Cir. 1990). Where an agency’s declaration demonstrates that it has conducted a reasonable search, “the FOIA requester can rebut the agency’s affidavit only by showing that the agency’s search was not made in good faith.” *Maynard v. C.I.A.*, 986 F.2d 547, 560 (1st Cir. 1993).

The FBI’s declaration detailing the manner in which the indexes its files and general case management system demonstrates that its search was reasonable and adequate. Seidel Decl. ¶¶ 37-47. The FBI undertook thorough and complete searches for documents responsive to the Radar Online’s requests. Thus, the Court should deem the FBI’s search as sufficient.

III. FBI Properly Withheld Responsive Records and Information Pursuant to FOIA Exemption 7(A)

As indicated in the index submitted by the FBI, *see* Seidel Decl. _____, all of the records the FBI that fall within the scope of FOIA Exemption 7(A), were properly withheld in full or in part.² Exemption 7(A), 5 U.S.C. § 552 (b)(7)(A), exempts from disclosure “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings.” “To fit within Exemption 7(A), the government must show that (1) a law enforcement proceeding is pending or prospective and (2) release of the information could reasonably be expected to cause some articulable harm.” *Amnesty Int’l USA v. CIA*, 728 F. Supp. 2d 479, 525 (S.D.N.Y. 2010) (internal quotation marks omitted). The term “enforcement proceedings” as used in Exemption 7(A) encompasses criminal and civil

² For those records or parts of records withheld in full pursuant to Exemption 7(A), the Court need not reach the applicability of other exemptions if it concludes that FBI’s withholdings under Exemption 7(A) were proper.

proceedings, and proceedings must be either pending or reasonably foreseeable at the time of the withholding. *See, e.g., Kay v. F.C.C.*, 976 F. Supp. 23, 37-38 (D.D.C. 1997) (citing *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1978)).

The government's burden to establish the applicability of Exemption 7(A) is not high; the government need only show that "disclosure of particular kinds of investigatory records . . . would generally interfere with enforcement proceedings." *Robbins Tire*, 437 U.S. at 236 (quotation marks omitted); *Radcliffe v. IRS*, 536 F. Supp. 2d 423, 437 (S.D.N.Y. 2008). The government need only demonstrate a "rational link" between the requested public disclosure and interference with the government's ongoing or prospective investigations or proceedings. *See Crooker v. Bureau of Alcohol, Tobacco, and Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986); *New York Times Co. v. Dep't of Justice*, No. 14 Civ. 03776 (AT) (SN), 2016 WL 5946711, at *7 (S.D.N.Y. Aug. 18, 2016) ("*NY Times*"). Moreover, Exemption 7(A) permits the categorical withholding of records. *See Robbins Tire*, 437 U.S. at 236. In contrast to some other exemptions,

the government is not required to make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding. Rather, federal courts may make generic determinations that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings.

Radcliffe, 536 F. Supp. 2d at 437 (quoting *Barney v. I.R.S.*, 618 F.2d 1268, 1273 (8th Cir.1980)).

"Exemption 7(A) . . . is designed to block the disclosure of information that will genuinely harm the government's case in an enforcement proceeding or impede an investigation." *North v.*

Walsh, 881 F.2d 1088, 1097 (D.C. Cir. 1989) (R.B. Ginsburg, J.).³

A. The Records Were Compiled for Law Enforcement Purposes

³ Exemption 7(A) also protects records that, if released, could interfere with post-trial criminal proceedings, such as an appeal. *See, e.g., Kidder v. FBI*, 517 F. Supp. 2d 17, 27-28 (D. D.C. 2007); *Kansi v. U.S. Dep't of Justice*, 11 F. Supp. 2d 42, 44 (D. D.C. 1998).

As a threshold matter, all of the records withheld by FBI pursuant to Exemption 7(A) were “compiled for law enforcement purposes,” and thus satisfy the threshold requirement of Exemption 7. 5 U.S.C. § 552(b)(7). The government has the burden of proving that records were compiled for law enforcement purposes, *see Ferguson v. FBI*, 957 F.2d 1059, 1070 (2d Cir. 1992). Here, pursuant to 28 U.S.C. § 0.85, 533 and 534, and Executive Order 12,333 as implemented by the Attorney General’s Guidelines for Domestic FBI Operations (AGG-DOM), the FBI is the primary investigative agency of the federal government with the authority and responsibility to investigate all violations of federal law not exclusively assigned to another agency, to conduct investigations and activities to protect the United States. Seidel Decl. ¶ 66.

Records qualify as “compiled for law enforcement purposes” if they “relate to anything that can fairly be characterized as an enforcement proceeding.” *Shapiro v. U.S. Dep’t of Justice*, 37 F. Supp. 3d 7, 29 (D.D.C. 2014) (quotation marks omitted). The Tenth Circuit has adopted a “per se rule” that “for an agency like the FBI, whose primary function is law enforcement, all records and information it compiles are in furtherance of its law enforcement function.” *Jordan v. U.S. Dep’t of Justice*, 668 F.3d 1188, 1193-97 (10th Cir. 2011) (characterizing case law from the First, Second, Sixth, and Eighth Circuits as adopting a “per se rule” that all records of law enforcement agencies are compiled for law enforcement purposes) (citing, *inter alia*, *Williams v. F.B.I.*, 730 F.2d 882, 883-86 (2d Cir. 1984) (noting that “[t]hroughout the debate on the 1974 amendments, Congress assumed that all investigatory records of the FBI were compiled for a law enforcement purpose”)); *but see Jordan*, 668 F.3d at 1193-94 (noting that an alternative approach, a “rational nexus test” has been adopted by the Third, Ninth, and D.C. Circuits). In *Human Rights Watch v. FBI*, No. 13-CV-7360 (JPO), 2015 WL 5459713 (S.D.N.Y. Sept. 16, 2015), Judge Oetken concluded that *Williams* did not require the per se rule, did not adopt the Tenth Circuit’s per se rule for FBI records, and followed a “practical approach,” observing that

“[t]he ordinary understanding of the term [law enforcement] includes proactive steps designed to prevent criminal activity and maintain security.” *Id.* at *5 (quotation marks and ellipses omitted); *see also* Opinion and Order, Dkt. No. 59, *Gonzalez v. ICE*, No. 19-cv-2911 (JGK) (S.D.N.Y. July 29, 2020), slip op. at 27-28 (requiring a “rational nexus” between withheld records and an agency’s law enforcement duties).

As the Tenth Circuit recognized in *Jordan*, documents created by FBI are compiled for law enforcement purposes because “[t]he FBI is an integral component of a comprehensive federal law enforcement system” and because statutory amendments to FOIA have preserved the broad scope of Exemption 7’s language. *Jordan*, 668 F.3d at 1195; *see id.* at 1196-97 (discussing amendments to Exemption 7); *see also Williams*, 730 F.2d at 884-85 (discussing amendments to Exemption 7). But even applying a “practical approach” or “rational nexus” standard, the withheld records readily qualify as “compiled for law enforcement purposes.” *Human Rights Watch v. FBI*, 2015 WL 5459713 at *5. As explained in the Seidel Declaration, the withheld records were compiled in furtherance of the FBI’s investigation of criminal child prostitution involving Epstein. Seldes Decl. ____.

B. Disclosure of the Records Would Interfere with Pending Criminal Proceedings

“The principal purpose of Exemption 7(A) is to prevent disclosures which might prematurely reveal the government’s cases in court, its evidence and strategies, or the nature, scope, direction, and focus of its investigations, and thereby enable suspects to establish defenses or fraudulent alibis or to destroy or alter evidence.” *Maydak v. U.S. Dept. of Justice*, 218 F.3d 760 (D. Cir. 2000). Here, release of the records would interfere with enforcement proceedings by revealing the FBI’s investigative interests, the scope and focus of the FBI’s investigation, the physical or documentary evidence, witness and source statements and

administrative materials, all of which impact pending enforcement proceedings and allow criminals to thwart the FBI's investigation. Seidel Decl. ____.

Additionally, disclosure of the records withheld under Exemption 7(A) would interfere with the pending prosecution against Ghislaine Maxwell, as logically and plausibly explained in the declaration of [REDACTED], who is an Assistant United States Attorney for the Southern District of New York and one of the lead prosecutors in this matter. [REDACTED] Decl. ¶¶ 1, 9-10, 13-32. The withheld records include possible exhibits at the *Maxwell* trial, information about which numerous witnesses are expected to testify, and information and documents authored by potential trial witnesses. *See id.* ¶¶ 14-25. Premature disclosure of these records or the information contained therein could reasonably be expected to influence witnesses' potential testimony at trial, allow witnesses to alter their testimony to conform to other evidence, and/or influence potential juror's perceptions of witness testimony or evidence. *See id.; W. Journalism Ctr. v. Office of Indep. Counsel*, 926 F. Supp. 189, 192 (D. D.C.1996) (Exemption 7(A) applies where "[w]itnesses with access to such information could easily alter, conform or construct their testimony depending upon the information disclosed"). Moreover, disclosure of the records could allow third parties or the media to interfere with the pending proceedings by harassing or intimidating witnesses and/or presenting information to counter facts put forth in the record. This is more than sufficient "to trace a rational link between the nature of the document and the alleged likely interference." *NY Times*, 2016 WL 5946711, at *7.

The [REDACTED] Declaration's categorical descriptions of the withheld records, and how their premature disclosure under FOIA is reasonably likely to interfere with pending criminal prosecutions satisfies FBI's burden to justify its withholdings under Exemption 7(A). [REDACTED] Decl. ____ . The Supreme Court has instructed that federal courts may make "generic

determinations” “that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings.” *Robbins Tire*, 437 U.S. at 236 (quotation marks omitted). The particular kind of enforcement proceeding at issue here are among the most sensitive—pending federal criminal prosecutions. And the [REDACTED] Declaration logically and plausibly explains how the particular kinds of records at issue could “generally” be expected to interfere with enforcement proceedings. See [REDACTED] Decl. ¶¶ _____. The categories of records include interview forms and notes, and federal grand jury subpoenas and subpoenaed information. [REDACTED] Decl. _____. They also include other investigative and enforcement documents including documents provided by state and local law enforcement agencies, communications between the FBI and other government agencies, communications within the FBI, envelopes used to organize and store documents and other evidentiary documents, bulky exhibit cover sheets, transmittal forms, letters routing slips, and internet printouts. [REDACTED] Decl. _____. It is entirely rational, logical and plausible that, as articulated by the lead prosecutor of both the *Epstein* and *Maxwell* prosecutions that each of these categories and subcategories of documents could improperly influence witnesses and jurors. Under the approach ratified by the Supreme Court in *Robbins Tire*, FBI properly withheld these records under Exemption 7(A).

C. The FBI’s Application of Exemption 7(A) Was Timely

It is well-established law that a basic requirement of FOIA is that the “agency must identify the specific statutory exemptions relied upon, and do so at least by the time of the [initial] district court proceedings.” *Curcio v. FBI*, No. 89-0941, 1990 WL 179605, *3 (D. D.C. Nov. 2, 1990). Here, the FBI withheld all records pursuant to Exemption 7(A) during the time it was processing records and completing its *Vaughn* Index. While the FBI did not apply

Exemption 7(A) on the face of the documents that it released prior to Epstein's arrest, it became clear to the FBI that the exemption was available after Epstein's arrest and it then asserted it. As the FBI made the determination that Exemption 7(A) was applicable to some of the records while it was continuing to process documents pursuant to the Court's scheduling order, its assertion of this exemption was timely. In doing so, the FBI asserted Exemption 7(A) to individual records that were processed prior to Epstein's arrest by delineating them on the *Vaughn* Index, and asserted Exemption 7(A) categorically to records processed that were processed after Epstein's arrest. Seidel Decl. _____. The FBI's assertion of the Exemption 7(A) was during the stage of the district court proceeding that was to be used by the FBI for this exact purpose – to process the records and to create a Vaughn Index. ECF No _____. As the FBI did not wait to raise this exemption during an entirely different stage of the litigation, the exemption was timely raised. *Compare Ryan v. Department of Justice*, 617 F.2d 781, 792 (D.C. Cir. 1980) (warning of the “danger of permitting the Government to raise its FOIA exemption claims one at a time, at different stages of a district court proceeding”).

IV. FBI Properly Withheld Responsive Records and Information Under Additional Exemptions⁴

A. The FBI Properly Withheld Information Pursuant to FOIA Exemption 3

FOIA Exemption 3 applies to records “specifically exempted from disclosure by

⁴ After Epstein's arrest, the FBI did not identify the withheld documents by bates numbers, but rather issued letters to Plaintiff stating that it was withholding records pursuant to exemptions 3, 5, 6, 7(A), 7(C), 7(D), and 7(E). These documents are not described on the Vaughn Index because that would reveal the number of pages being withheld categorically, and therefore, they are not being specifically discussed in this briefing. However, the FBI maintains that these exemptions apply to records being withheld both before and after Epstein's arrest, and the FBI is not waiving the applicability of those exemptions. Should the Court find that Exemption 7(A) does not apply, the FBI will provide a Vaughn Index bates numbering all of the responsive records and delineating the applicable exemptions, if necessary.

statute,” provided that the statute “requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue.” 5 U.S.C. § 552(b)(3). In evaluating an agency’s invocation of FOIA Exemption 3, courts must consider whether the statute identified by the agency is a statute of exemption as contemplated by Exemption 3, and second, whether the withheld material satisfies the criteria of the exemption statute. *CIA v. Sims*, 471 U.S. 159, 167 (1985). Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute’s coverage. *Ass’n of Retired R.R. Workers v. U.S. R.R. Retirement Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987).

In invoking Exemption 3, the FBI relies on three statutes that preclude disclosure of the documents sought by Radar Online. First, the Child Victims’ and Child Witnesses’ Rights Act, 18 U.S.C. § 3509, “qualifies as an Exemption 3 withholding statute,” *Rodriguez v. U.S. Dep’t of Army*, 31 F. Supp. 3d 218, 237 (D.D.C. 2014), and prohibits disclosure of “the name or any other information concerning a child” victim of crime, 18 U.S.C. § 3509(d)(1)(A)(i). This statute justifies the FBI’s withholding of information relating to minor children victims and witnesses as part of the child prostitution investigation of Epstein. Seidel Decl. _____.

Second, the FBI’s withholding of the grand jury materials plainly falls under Rule 6(e)’s shield of Rule 6(e)’s shield of “matters occurring before the grand jury.” Fed. R. Crim. P. 6(e). Rule 6(e) is treated as a statute for purposes of Exemption 3 “because the Congress has enacted it into positive law.” *Murphy v. Exec. Office for U.S. Attorneys*, 789 F.3d 204, 206 (D.C. Cir. 2015); see *Local 32B–32J, Serv. Emps. Int’l Union, AFL–CIO v. GSA*, 1998 WL 726000, at *6 (S.D.N.Y. October 15, 1998) (“It is well established that [Fed. R. Crim. P. 6(e)], which imposes

a general requirement of secrecy for information relating to the grand jury process, qualifies as an Exemption 3 withholding statute.”). “The purpose of grand jury secrecy, as enshrined in Rule 6(e), is to ensure the proper functioning of the grand jury system.” *N.Y. Times v. USDOJ*, 235 F. Supp. 2d 522, 530 (S.D.N.Y. 2017). Rule 6(e)’s grand jury shield protects “the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.” *Sec. and Exch. Comm’n v. Dresser Indus.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980) (en banc).

Here, the FBI properly withheld the grand jury subpoenas. *Lopez v. Dep’t of Justice*, 393 F.3d 1345, 1350 (D.C. Cir. 2005) (“All grand jury subpoenas . . . fall within FOIA’s third exemption.”). The records relating the grand jury materials are also deserving of protection under Rule 6(e)—they reveal the names of recipients of federal grand jury subpoenas; information that identifies specific records subpoenaed by a federal grand jury; and copies of specific records provided pursuant to federal grand jury subpoenas, and release of these records would reveal the inner workings of the grand jury. *Seidel Decl.* _____. *See Peltier v. FBI*, 218 Fed. App’x 30, 32 (2d Cir. 2007) (affirming withholding of grand jury subpoenas, materials and information, and dates of grand jury testimony under Rule 6(e)).

Third, the FBI’s reliance on the Juvenile Justice and Delinquency Act, 18 U.S.C. § 5038, is also appropriate under Exemption 3. The Juvenile Justice and Delinquency Act, 18 U.S.C. § 5038, protects from disclosure all information and records relating to any juvenile delinquency proceeding, unless the release is necessary to meet certain circumstances described within the statute. Here, the FBI withheld records that contain arrest information and criminal history of third party juveniles, which falls within the information protected from disclosure by the Juvenile Justice and Delinquency Act. *Seidel Decl.* _____.

B. FBI Properly Withheld Information Pursuant to FOIA Exemption 5

Exemption 5 of FOIA, 5 U.S.C. § 552(b)(5), exempts from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency.” 5 U.S.C. § 552(b)(5). Exemption 5 encompasses the “‘deliberative process’ or ‘executive’ privilege, which protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions.” *Hopkins v. U.S. Dep’t of Housing and Urban Dev.*, 929 F.2d 81, 84 (2d Cir. 1991). Information in an agency record must satisfy two criteria to qualify for the deliberative process privilege: it “must be both ‘predecisional’ and ‘deliberative.’” *Grand Cent. P’ship v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (quoting *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975)).

A document is “predecisional” when it is “prepared in order to assist an agency decisionmaker in arriving at his decision.” *Grumman*, 421 U.S. at 184. While a document is predecisional if it “precedes, in temporal sequence, the ‘decision’ to which it relates,” *Grand Cent. P’ship*, 166 F.3d at 482, the government need not “identify a specific decision” made by the agency to establish the predecisional nature of a particular record. *NLRB v. Sears, Roebuck*, 421 U.S. 132, 151 n.18 (1975); *accord Tigue v. U.S. Dep’t of Justice*, 312 F.3d 70, 80 (2d Cir. 2002). Rather, so long as the document “was prepared to assist [agency] decisionmaking on a specific issue,” it is predecisional. *Id.*

“A document is ‘deliberative’ when it is actually . . . related to the process by which policies are formulated.” *Grand Cent. P’ship*, 166 F.3d at 482 (internal quotation marks omitted; alteration in original). In determining whether a document is deliberative, courts inquire as to whether it “formed an important, if not essential, link in [the agency’s] consultative process,” reflects the opinions of the author rather than the policy of the agency, or might “reflect

inaccurately upon or prematurely disclose the views of [the agency].” *Grand Cent. P’ship*, 166 F.3d at 483-485.

Separate from the deliberative process privilege, the attorney-client privilege requires “[t]he relationship of attorney and client, a communication by the client relating to the subject matter upon which professional advice is sought, and the confidentiality of the expression for which the protection is claimed.” *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989). “[T]he traditional rationale for the [attorney-client] privilege applies with special force in the government context.” *In re County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007).

Some of the withheld records are protected in full or in part by Exemption 5 and the deliberative process privilege. The FBI withheld records or information pertaining to discussions and information relating to the seizing of Epstein’s assets. Seidel Decl. ¶¶ ____, Ex. 2. The information is predecisional because they were prepared to assist in making decisions relating to seizure of his assets. Seidel Decl. _____. They are deliberative because they bear on FBI’s policies relating to asset forfeitures in conjunction with ongoing criminal proceedings. Seidel Decl. _____.

Third, the draft letters withheld by FBI are predecisional and deliberative because they precede final versions of those letters, and represent iterative versions as FBI determined how best to present the information in question. *See* Seidel Decl. ¶ _____. “It is well-settled that draft documents, by their very nature, are typically predecisional and deliberative. They reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation by their authors or by their superiors.” *Amnesty Int’l USA v. CIA*, 728 F. Supp. 2d 479, 518 (S.D.N.Y. 2010) (quotation marks and brackets omitted); *see ACLU v. DOJ*, 844 F.3d 126, 133 (2d Cir. 2016); *NAACP Legal Def. & Educ. Fund, Inc. v. U.S. Dep’t of Hous. &*

UrbanDev., No. 07 Civ. 3378 (GEL), 2007 WL 4233008, at *11 (S.D.N.Y. Nov. 30, 2007)

(“Draft documents, by their very nature, are typically predecisional and deliberative.”)

Separate from the deliberative process privilege, one set of emails withheld in full under Exemption 5 is protected by the attorney-client privilege, as indicated on the FBI index. This group of emails consists of communications between FBI employees and Assistant United States Attorneys in the Civil Division of the USAO-SDNY, which provided details the AUSA could use in the indictment of Jeffrey Epstein. Seidel Decl. _____. As confidential communications between attorneys and a client for the purpose of obtaining and providing legal advice are privileged and were properly withheld under Exemption 5.

Under the FOIA Improvement Act of 2016, “[a]n agency shall . . . withhold information under [FOIA] only if . . . (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or (II) disclosure is prohibited by law.” 5 U.S.C. § 552(a)(8)(A)(i). The legislative history of this amendment expressly acknowledges that it “does not alter the scope of information that is covered under an exemption.” H.R. Rep. No. 114-391, at 10 (2016). The Seidel Declaration explains how disclosure of the materials withheld under Exemption 5 would harm interests protected by Exemption 5, primarily by hampering the ability of FBI employees to frankly discuss and assess and information to pursue forfeitures. *See* Seidel Decl. ¶ _____. In addition, disclosure of the emails protected by the attorney-client privilege would impair the FBI’s ability to seek out and receive frank and complete advice from legal counsel, which is particularly important for a government agency. *See* Seidel Decl. ¶ _____; *Erie*, 473 F.3d at 419.

C. FBI Properly Withheld Information Pursuant to FOIA Exemptions 6 and 7(C)

FOIA Exemption 6, 5 U.S.C. § 552(b)(6), protects from disclosure “personnel and

medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). The statutory language concerning files “similar” to personnel or medical files encompasses any “information which applies to a particular individual . . . sought from government records.” *U.S. Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). Under Exemption 6, a court considers whether the “public interest in disclosure outweighs the individual privacy concerns.” *Nat’l Assoc. of Homebuilders v. Norton*, 309 F.3d 26, 35 (D.C. Cir. 2002) (internal quotation marks omitted). But the “only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would . . . contribut[e] significantly to public understanding of the operations or activities of the government.” *DOD v. FLRA*, 510 U.S. 487, 495 (1994).

Even more protective of privacy interests, Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), exempts from disclosure records or information compiled for law enforcement purposes where its production “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C). Under Exemption 7(C), a court again “balance[s] the public interest in disclosure against the [privacy] interest.” *Associated Press v. U.S. Dep’t of Defense*, 554 F.3d 274, 284 (2d Cir. 2009). In this analysis, “[t]here is only one relevant public interest, that of opening agency action to the light of public scrutiny.” *Id.* at 284 (quotation marks and brackets omitted). “The [FOIA requester] must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake and . . . must also show the information is likely to advance that interest.” *Id.*

Here, the main category of records implicates the privacy interests of third parties, including the names of third parties who were of investigative interest to the FBI, names of

FBI special agents and victim specialists, names of local law enforcement personnel, names of identifying information regarding third party victims, names of local government personnel, and names of third parties. Seidel Decl. _____. As described in the Vaughn Index, documents that fall within this exemption include witness statements containing intimate details relating to third parties, phone logs, private social media information, photographs, law enforcement records, and flight logs. Seidel Decl. Ex. _____.

All of these individuals have strong privacy interests that are protected by FOIA exemptions. “[A]n individual has a general privacy interest in preventing dissemination of his or her name and home address.” *Federal Labor Relations Auth. v. U.S. Dep’t of Veterans Affairs*, 958 F.2d 503, 510 (2d Cir. 1992). “That privacy interest also extends to third parties who may be mentioned in investigatory files, as well as to witnesses and informants who provided information during the course of an investigation.” *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995).

Similarly, third parties who were of investigative interest to the FBI “have a cognizable privacy interest protected by the FOIA privacy exemptions.” *Perlman v. United States Dep’t of Justice*, 312 F.3d 100, 106 (2d Cir. 2002) (finding that witnesses and third parties to an INS report of investigation “possess strong privacy interests, because being identified as part of a law enforcement investigation could subject them to ‘embarrassment and harassment’”). In fact, the privacy interests of third parties are “perhaps even stronger” because “the material in question demonstrates or suggests that they had at one time been subject to criminal investigation.” *Halpern*, 181 F.3d at 297. Disclosing personal information about these individuals could result in negative professional and social repercussions, and subject them to harassment or embarrassment. Seidel Decl. _____,

It is also well-established that informants and cooperating witnesses have a substantial

interest in insuring that their relationship to an investigation remains secret. *Roth v United States Dep't of Justice*, 642 F. 3d 1161, 1173 (D.C. Cir. 2011). Exposing the identity of these individuals would have a grave impact on FBI investigations, as the FBI has obtained information in confidence, and release of these records will prevent such cooperating individuals from honestly relating pertinent facts on an investigation. Seidel Decl. _____. Additionally, such exposure could lead to the harassment, intimidation, legal or economic detriment or harm of these individuals. Seidel Decl. _____.

Further, government investigative personnel, local law enforcement and other government employees have legitimate privacy interest. *See, e.g., Thompson v. DOJ*, 851 F. Supp. 2d 89, 99 (D. D.C. 2012) (protecting the names of and identifying information about FBI Special Agents and support personnel, third parties with investigative interest to the FBI, third parties merely mentioned in documents related to the FBI's criminal investigation of plaintiff, local law enforcement officers, and third parties interviewed by the FBI during the investigation); *Lasko v. DOJ*, 684 F. Supp. 2d 120, 133 (D. D.C. 2010) (protecting the identities of DEA Special Agents and state and local law enforcement officers), *aff'd per curiam*, No. 10-5068, 2010 WL 3521595, at *1 (D.C. Cir. Sept. 3, 2010); *Richardson v. DOJ*, 730 F.Supp.2d 225, 236 (D. D.C.2010) (“[T]he EOUSA properly [withheld] the identities of and personal information about all the third parties mentioned in the records responsive to plaintiff’s FOIA request, whether or not these third parties are law enforcement officers or support personnel.”). These individuals may be subject to harassment or embarrassment if their identities are disclosed,” and this interest “raises a measurable privacy concern that must be weighed against the public’s interest in disclosure.” *Wood v. FBI*, 432 F. 3d 78, 88 (2d Cir. 2005); *Halpern*, 181 F.3d at 297 (holding that FBI agents and other government employees have an interest against the disclosure of their identities to the extent that disclosure might subject them to embarrassment or harassment in their

official duties or personal lives); *Garcia v. U.S. Dep't of Justice*, 181 F. Supp. 2d 356, 373-74 (S.D.N.Y. 2002) (finding identities of FBI investigators not significantly probative of agency conduct).

Accordingly, the personally identifying information of third parties contained in these Records is protected from disclosure by Exemptions 6 & 7(C).

D. FBI Properly Withheld Records and Information Pursuant to FOIA Exemption 7(D)

Exemption 7(D) of the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), exempts from disclosure agency records “compiled for law enforcement purposes . . . by criminal law enforcement authority in the course of a criminal investigation” if release of those records “could reasonably be expected to disclose” the identity of, or information provided by, a “confidential source.” § 552(b)(7)(D); *see also U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 171 (1993). “[A] source is confidential within the meaning of Exemption 7(D) if the source ‘provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred.’” *United States Dept. of Justice v. Landano*, 508 U.S. 165, 165 (1993). The promised confidentiality can only be waived by the source. *Adamowicz v. IRS*, 402 Fed. App'x 648, 653 (2d Cir. 2010); *see also Ferguson v. FBI*, 957 F.2d 1059, 1068 (2d Cir.1992) (“[W]e reject the idea that subsequent disclosures of the identity of a confidential source . . . requires full disclosure of information provided by such a source.”). Further, the status of the investigation does not change the applicability of this exemption. *Diamond v. FBI*, 707 F.2d 75, 76–77 (2d Cir. 1983) (documents do not lose their 7(D) exemption due to the passage of time).

Here, the FBI withheld the names, identifying information and information they provided under express or implied assurances of confidentiality. Seidel Decl. _____.

These sources are considered to be confidential because they furnish information only with the understanding that their identities and the information they provided will not be divulged outside the FBI. Seidel Decl. _____. Information provided by these sources is singular in nature, and if released, could reveal their identities. Seidel Decl. _____. Revealing such information would dissuade individuals from speaking freely with the FBI. *Id.* In addition, release of these records would have a chilling effect on other witnesses, cause the source harm or retaliation, and hamper law enforcement efforts to detect and prevent criminal activity. Seidel Decl. _____. This is especially so where, as here, the investigation concerns a highly publicized and powerful individual and the intimate personal details of young or vulnerable individuals. Sources providing information to the FBI should be secure in the knowledge that their assistance and their identities will be held in confidence. Seidel Decl. _____. Otherwise, the release would impact one of the FBI's most important means of collecting information and severely hamper law enforcement efforts to detect and apprehend individuals engaged in the violation of federal criminal laws. Seidel Decl. _____. Accordingly, this Court should find that the FBI's assertion of Exemption 7(D) was appropriate.

E. FBI Properly Withheld Records and Information Pursuant to FOIA Exemption 7(E)

Exemption 7(E), 5 U.S.C. § 522 (b)(7)(E), exempts from disclosure law enforcement records where release “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” Exemption 7(E) contains “two alternative clauses,” one covering “techniques and procedures,” and the other addressing “guidelines.” *Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec.*, 626 F.3d 678, 680-81 (2d Cir. 2010).

The first clause of Exemption 7(E) provides categorical protection to information that would disclose law enforcement “techniques and procedures,” without requiring any showing of harm as a result of disclosure. *See id.* at 681; *see also Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009) (“the exemption looks not just for circumvention of the law, but for a risk of circumvention”). While Exemption 7(E) generally covers only “investigatory records that disclose investigative techniques and procedures not generally known to the public,” *Doherty v. U.S. Dep’t of Justice*, 775 F.2d 49, 52 n.4 (2d Cir. 1985), “even commonly known procedures may be protected from disclosure if the disclosure could reduce or nullify their effectiveness,” *Judicial Watch, Inc. v. U.S. Dep’t of Commerce*, 337 F. Supp. 2d 146, 181 (D.D.C. 2004). Exemption 7(E) sets a “low bar for the agency to justify withholding,” *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C.Cir.2011).

As indicated on the FBI index, some of the records withheld by the FBI fall within the scope of Exemption 7(E) because they contain information or discussion of sensitive law enforcement techniques and procedures. Specifically, the FBI withheld records containing sensitive file numbers which will reveal the types of investigative gathering program, the origination of the investigations at issue and investigative initiatives, forms containing investigative accomplishments. Seldel Decl. _____. As explained in the Seidel Declaration, release of these records would disclose the identification of the specific methods used in the collection and analysis of information, including how and from where the FBI collects information and the methodologies employed to analyze it once collected. *Id.* Such disclosures would enable subjects of FBI investigations to circumvent similar currently used techniques and procedures. *Id.* The relative utility of these techniques could be diminished if the actual techniques were released in this matter. *Id.* This in turn would facilitate the accumulation of

information by investigative subjects regarding the circumstances under which the specific techniques were used or requested and the usefulness of the information obtained. *Id.* Release of this type of information would enable criminals to educate themselves about the techniques employed for the collection and analysis of information and therefore allow these individuals to take countermeasures to circumvent the effectiveness of these techniques and to continue to violate the law and engage in intelligence, terrorist, and criminal activities. *Id.*

The FBI also withheld records because they contain sensitive file numbers which will reveal the types of investigative gathering program, the origination of the investigations at issue and investigative initiatives as well as forms containing investigative accomplishments. Seldes Decl. _____. This non-public information used by the FBI and/or law enforcement allows....

Accordingly, FBI properly withheld these records under Exemption 7(E). *See Gonzalez v. USCIS*, 475 F. Supp. 3d 334, 352 (S.D.N.Y. 2020) (affirming withholdings under Exemption 7(E) for identification codes, law enforcement event numbers, law enforcement case numbers and categories, FBI numbers and URLs for internal law enforcement database web addressed); *Rojas-Vega v. Immigration & Customs Enft*, 302 F. Supp. 3d 300, 310-11 (D.D.C. 2018) (affirming use of Exemption 7(E) by ICE to withhold “internal URLs, case numbers, case categories, subject identification numbers, and internal identifying codes and departure statuses.”); *Bishop v. Dep't of Homeland Sec.*, 45 F. Supp. 3d 380, 388-89 (S.D.N.Y. 2014) (affirming use of Exemption 7(E) to withhold codes returned from agency database searches and collecting cases).

V. FBI Has Satisfied Its Duty to Segregate and Release Any Non-Exempt Information

FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this

subsection.” 5 U.S.C. § 552(b). Where, as here, an agency asserts Exemption 7(A) by describing the categories of records it has withheld, the government satisfies this obligation by explaining why those categories of records do not contain reasonably segregable non-exempt information. *See, e.g., Robbins, Geller, Rudman & Dowd, LLP v. United States Sec. & Exch. Comm’n*, No. 3:14-CV-2197, 2016 WL 950995, at *9 (M.D. Tenn. Mar. 12, 2016) (citing examples).

Moreover, nonexempt portions of documents may “be withheld if they are inextricably intertwined with the exempt portions.” *Conti v. U.S. Dep’t of Homeland Sec.*, No. 12 Civ. 5827 (AT), 2014 WL 1274517, at *25 (S.D.N.Y. Mar. 24, 2014) (quotation marks omitted). “The agency is entitled to a presumption that it complied with its obligation to disclose reasonably segregable material.” *Id.*

In the present case, FBI has already produced _____ pages of records, with appropriate redactions, in response to the Radar Online’s FOIA requests. Seldes Decl. ¶ _____. The records withheld in full by FBI do not contain any reasonably segregable non- exempt information. *See* Seldes Decl. ¶¶ _____. With regard to the records withheld in full under Exemption 7(A), the Comey Declaration explains that, to the extent there is non-exempt information contained in the records withheld under Exemption 7(A), that information is intertwined with exempt information and cannot reasonably be segregated without risking interference with the Maxwell prosecutions. Comey Decl. ¶ _____. The public speculation and unfounded theories about Maxwell’s involvement make segregation particularly difficult because the provision of information related to Epstein without complete context risks compounding the unfounded speculation. As to the remaining records withheld in full, either the records are privileged in their entirety (*e.g.*, as attorney-client communications or draft documents) or any non-exempt information in the documents is inextricably intertwined with exempt information, such that segregating any non-exempt

information would be of little to no informational value. *See* Seidel Decl. ¶ 47. Accordingly, FBI has satisfied its obligation to reasonably segregate any non-exempt portions of the records withheld in full.

CONCLUSION

For the foregoing reasons, the Court should grant the government's motion for summary judgment.