UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY and CHARLIE SAVAGE,

Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

14 Civ. 03776 (AT)(SN)

**MEMORANDUM AND ORDER**

ANALISA TORRES, District Judge:

Plaintiffs, the New York Times Company and Charlie Savage, bring this action challenging Defendant, the United States Department of Justice's, nondisclosure of information requested by Plaintiffs pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). The parties cross-move for summary judgment. For the reasons stated below, Defendant's motion is GRANTED, and Plaintiffs' motion is DENIED.

## BACKGROUND

### I. The Joint Inspector General Report

As part of the nation's counter-terrorism efforts following the September 11, 2001 attacks, President George W. Bush authorized the National Security Agency ("NSA") to conduct a classified electronic communications surveillance program within the United States. *See* Decl. of David E. McCraw ("McCraw Decl.") Ex. G ("Joint IG Report Vol. I") at 1 (filed with the Court)[1]; Decl. of David M. Hardy ("Hardy Decl.") ¶ 5, ECF No. 41. The NSA operated the surveillance program, referred to as the "President's Surveillance Program" ("PSP") or

[1] Plaintiffs filed with the Court hard copies of the complete versions of the government reports produced in response to their FOIA requests. *See* ECF No. 28; McGraw Decl. Exs. G–O. Plaintiffs electronically filed excerpts from the reports that contain the withheld information they are challenging or to which they otherwise cite in their submissions. *See* ECF Nos. 28, 32. Included in the electronic filing is a key that indexes the excerpted pages with the corresponding pages in the full reports. *See* ECF No. 32. The Court refers to the page numbers of the full reports in its opinion; the corresponding pages of the excerpted reports can be found by looking at this key.

"STELLARWIND," pursuant to regularly renewed presidential authorizations and then, after several years, pursuant to various orders issued by the Foreign Intelligence Surveillance Court ("FISC"). *See* Hardy Decl. ¶ 5; Joint IG Report Vol. I at 1. Through this program, the NSA intercepted the content of international telephone and internet communications and collected, analyzed, and shared with other intelligence agencies metadata from those communications, tracing connections between and among various phone numbers and internet addresses. Joint IG Report Vol. I at 1.

In 2008, Congress enacted the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 ("FAA") to, *inter alia*, require the inspectors general of various intelligence agencies to conduct a comprehensive review of the PSP. *See* Pub. L. No. 110-261, § 301, 122 Stat. 2436, 2471-73 (2008) (codified in scattered sections of 50 U.S.C. and 18 U.S.C.); Joint IG Report Vol. I at 1-2. These agencies included the Department of Justice ("DOJ"), Central Intelligence Agency ("CIA"), Federal Bureau of Investigation ("FBI"), Department of Defense ("DOD"), NSA, and Office of the Director of National Intelligence ("ODNI"). McCraw Decl. ¶ 2, ECF No. 31. The agencies issued a report (the "Joint IG Report") at the conclusion of that review.[2] Joint IG Report Vol. I at 1-2. As directed by the FAA, the report discusses the inception and implementation of the PSP, internal assessments of the PSP's legality, the program's transition from operating pursuant to executive orders to operating under the authority of the FISC, and the impact of the PSP on counter-terrorism efforts. *See generally id.*; FAA § 301(b).

[2] A copy of the report prepared for public consumption is available at https://oig.justice.gov/special/s0907.pdf. The online version of the report is not identical to that submitted by Plaintiffs, however, and the Court will consider the submitted report when assessing the parties' motions.

The Joint IG Report was produced in three volumes. Volume I contains the joint report of the inspectors general of the DOD, DOJ, CIA, NSA, and ODNI. *See generally* Joint IG Report Vol. I. Volume II contains the independent review of the PSP by the inspectors general of the DOD, NSA, and Central Security Service,[3] and the CIA and ODNI inspectors general's respective reviews of each agency's participation in the PSP. *See generally* McCraw Decl. Ex. H ("Joint IG Report Vol. II") (filed with the Court). Volume III contains the DOJ OIG's review of that agency's involvement with the PSP. *See generally* McCraw Decl. Ex. I ("Joint IG Report Vol. III") (filed with the Court).

II. The DOJ Office of Inspector General Reports

Relevant to the parties' motions are six additional reports produced by the DOJ Office of the Inspector General ("OIG") reviewing other intelligence-gathering programs implemented by the federal government following the September 11, 2001 attacks. The reports, and the programs they discuss, are briefly described below.

The first report, titled "A Review of the Federal Bureau of Investigation's Use of National Security Letters," was released in March 2007. *See* McCraw Decl. Ex. M ("NSL Report I") (filed with the Court). Various statutes authorize the FBI to obtain personal information from telephone companies, financial institutions, internet service providers, and consumer credit agencies by issuing to those entities documents called national security letters ("NSLs"). *Id.* at viii. Through the USA PATRIOT Improvement and Reauthorization Act of 2005 (the "Reauthorization Act"), Congress directed the DOJ OIG to review the "effectiveness and use" of NSLs. Pub. L. No. 109-177, § 119, 120 Stat. 192, 219-21 (2006); NSL Report I at viii. Specifically, the law required the DOJ OIG to assess whether the FBI had used NSLs

[3] The Central Security Service is an agency within the DOD that conducts surveillance and cryptological activities.

improperly, the value of information obtained from NSLs, and how any information collected was managed and utilized. NSL Report I at viii-ix. This report describes the DOJ OIG's findings regarding the use of NSLs from 2003 to 2005. *Id.* at viii.

The second report, titled "A Review of the Federal Bureau of Investigation's Use of Section 215 Orders for Business Records," was released in March 2007. *See* McCraw Decl. Ex. J ("Section 215 Report I") (filed with the Court). Section 215 of the Patriot Act[4] authorized the FBI to petition the FISC for orders permitting the seizure of "tangible things" like books, documents, and other items from businesses and organizations if the items were relevant to counter-terrorism investigations or other intelligence activities. *See* Section 215 Report I at i (Exec. Summ.). In the Reauthorization Act, Congress directed the DOJ OIG to review the FBI's activities pursuant to Section 215, specifically, to catalogue and assess the requests made by the FBI, the FISC's responses to those requests, the agency's procedures governing the making of these requests, and the manner in which information obtained from the requests was used. *See* Reauthorization Act § 106A; Section 215 Report I at vii-viii (Exec. Summ.). This report addresses data from 2002 through 2004. Section 215 Report I at i (Exec. Summ.).

The third report, titled "A Review of the FBI's Use of National Security Letters: Assessment of Corrective Actions and Examinations of NSL Usage in 2006," was released in March 2008. *See* McCraw Decl. Ex. N ("NSL Report II") (filed with the Court). Similar to NSL Report I, this report was issued pursuant to the Reauthorization Act and describes the DOJ OIG's findings regarding the FBI's use of NSLs in 2006. *See id.* at 1. The report also assesses the FBI's response to earlier accounts of the agency's misuse of NSLs. *Id.*

[4] The "Patriot Act" is shorthand for the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

The fourth report, titled "A Review of the FBI's Use of Section 215 Orders for Business Records in 2006," was released in March 2008. *See* McCraw Decl. Ex. K ("Section 215 Report II") (filed with the Court). Similar to Section 215 Report I, this report was issued pursuant to the Reauthorization Act and reviews the FBI's activities pursuant to Section 215 of the Patriot Act, incorporating data from 2006. *See id.* at 1. The report also assesses the agency's procedures for minimizing the retention of business records which the Attorney General was required to adopt by Section 106(g) of the Reauthorization Act. *Id.*

The fifth report, titled "A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records," was released in January 2010. *See* McCraw Decl. Ex. O ("Exigent Letters Report") (filed with the Court). The report recounts the DOJ OIG's investigation into the FBI's use of procedures other than NSLs or other legal process—in other words, procedures that circumvented legal requirements—to obtain the production of telephone records from employees of three communications service providers. *See id.* at 1-7. The report assesses the means by which the FBI initiated telephone record requests, the role of various individuals within and outside of the FBI in implementing and supervising those requests, and the "management failures that led to these improper practices." *See id.*

The final report, titled "A Review of the Federal Bureau of Investigation's Activities Under Section 702 of the Foreign Intelligence Surveillance Act Amendments Act of 2008," was released in September 2012. *See* McCraw Decl. Ex. L ("702 Report") (filed with the Court). Section 702 of the FAA authorizes the FBI to conduct certain foreign surveillance activities after the government's ability to do so under the PSP was curtailed by "rigorous procedural requirements" imposed by the FISC. *See* FAA § 702; 702 Report at ix-xi. This report discusses the findings of the review which the DOJ OIG was required to perform pursuant to the FAA.

*See* 702 Report at x. Specifically, the report reviews the FBI's foreign surveillance activities from September 2008 through early 2010, describing the agency's policies and procedures for acquiring this intelligence and the agency's "routing, retention, purging, minimization, and dissemination" of the intelligence after its acquisition. *See id.* at x, 1-6.

III. The FOIA Requests

On January 31, 2014, Plaintiffs filed a FOIA request with the DOJ OIG, seeking "a copy of the full, currently classified joint IG report on the president's surveillance program that was mandated by Title III of the FISA Amendments Act." McCraw Decl. Ex. A. On February 18, 2014, Plaintiffs filed another request with the DOJ OIG, seeking:

> an updated declassification review and release of all DOJ [O]IG reports issued since Sept. 11, 2001, pertaining to surveillance and data collection, including but not limited to:
>
> 1. The report on FISA Amendments Act 702, announced on Sept. 25, 2012 [702 Report] http://www.justice.gov/oip/press/2012/2012_09_25.pdf
>
> 2. The January 2010 report on the FBI's use of exigent letters and other informal requests for phone records [(Exigent Letters Report)] http://www.justice.gov/oig/special/s1001r.pdf
>
> 3. The March 2008 report on the FBI's use of Section 215 Orders for Business Records in 2006 [Section 215 Report II] http://www.justice.gov/oig/special/s0803a/final/pdf
>
> 4. The March 2008 report on the FBI's use of NSLs (corrective actions) [NSL Report II] http://www.justice.gov/oig/special/s0803b/final.pdf
>
> 5. The March 2007 report on the FBI's use of Section 215 Orders for Business Records [Section 215 Report I] http://www.justice.gov/oig/special/s0703a/final/pdf
>
> 6. The March 2007 report on the FBI's use of NSLs [NSL Report I] http://www.justice.gov/oig/special/s0703b/final/pdf.

McCraw Decl. Ex. D.

On February 10 and 21, 2014, respectively, the DOJ OIG denied Plaintiffs' requests, stating that the reports contained information that was properly classified in the interest of national defense or foreign policy pursuant to an executive order. *See id.* ¶¶ 3, 5a[5]; Exs. B, E (each citing 5 U.S.C. § 552(b)(1)). The DOJ OIG also stated that prior to receiving Plaintiffs' FOIA requests it had asked the ODNI and DOJ to "conduct a declassification review" of the various reports. *Id.* Exs. B, E. On February 24, 2014, Plaintiffs appealed the denial of their requests. *Id.* ¶¶ 4, 6a; Exs. C, F. The DOJ OIG did not decide the appeals within the twenty business days prescribed by FOIA, 5 U.S.C. § 552(a)(6)(a)(ii). *Id.* ¶¶ 5, 7.

Plaintiffs filed this action on May 28, 2014. ECF No. 1. Upon the parties' consent, the Court issued a scheduling order governing the process by which Defendant would review the seven reports requested by Plaintiffs to determine if any withheld information could be declassified and publicly disclosed. *See* McCraw Decl. ¶¶ 9, 10; ECF No. 9. Defendant completed its review in September 2015, declassifying and publicly disclosing significant portions of the reports. Throughout the approximately 2,000 pages produced, however, certain information remains redacted. *See* ECF Nos. 25, 27.

Plaintiffs move for summary judgment, challenging Defendant's nondisclosure of information in twenty-five different places throughout the various reports. McCraw Decl. ¶ 11. Defendant cross-moves for summary judgment, contending that the information Plaintiffs seek is properly withheld pursuant to several of FOIA's enumerated exemptions.

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[5] In the McCraw declaration there are two sets of paragraphs numbered "5" and "6". *See* McCraw Decl. at 2. The Court will refer to the second iteration of each number as "5a" and "6a," respectively.

# DISCUSSION

## I. Legal Standards

### A. Summary Judgment

A moving party is entitled to summary judgment when the record shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Feingold v. New York*, 366 F.3d 138, 148 (2d Cir. 2004). A genuine dispute exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Material facts are those which, under the governing law, may affect the outcome of a case. *Id.* The moving party must establish the absence of a genuine dispute of material fact by citing to particulars in the record. Fed. R. Civ. P. 56(a), (c); *Celotex*, 477 U.S. at 322-25; *Koch v. Town of Brattleboro*, 287 F.3d 162, 165 (2d Cir. 2002). If the movant satisfies this burden, the opposing party must then "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). When deciding the motion, the Court must view the record in the light most favorable to the non-moving party, *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55, 61 (2d Cir. 2002), although speculation and conclusory assertions are insufficient to defeat summary judgment, *see Niagara Mohawk Power Corp. v. Jones Chem. Inc.*, 315 F.3d 171, 175 (2d Cir. 2003).

### B. FOIA

FOIA, enacted to promote honest and open government, "calls for broad disclosure of Government records." *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 111 (2d Cir. 2014) (internal quotation marks and citation omitted). Under FOIA, the government must "disclose

agency records upon request" unless the documents "fall within one of [the law's] enumerated exemptions." *Amnesty Int'l USA v. C.I.A.*, 728 F. Supp. 2d 479, 500 (S.D.N.Y. 2010) (citations omitted). The exemptions should be construed narrowly, but because "public disclosure is not always in the public interest," the exemptions nonetheless merit "meaningful reach and application." *Human Rights Watch v. Dep't of Justice Fed. Bureau of Prisons*, No. 13 Civ. 7360, 2015 WL 5459713, at *3 (S.D.N.Y. Sept. 16, 2015) (citations omitted).

On summary judgment, the government bears the burden of showing that information withheld in response to a FOIA request is exempt under the statute. *Bloomberg L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 271 (S.D.N.Y. 2009) (citing 5 U.S.C. § 552(a)(4)(B)). This burden can be sustained through the use of "[a]ffidavits or declarations . . . giving reasonably detailed explanations why any withheld documents fall within an exemption." *Wilner v. NSA*, 592 F.3d 60, 69 (2d Cir. 2009); *see also Bloomberg L.P.*, 649 F. Supp. 2d at 271 ("An agency must show with 'reasonable specificity' that withheld information falls within a FOIA exemption; conclusory or speculative assertions in support of an exemption are insufficient." (citation omitted)). All doubts as to the applicability of an exemption must be resolved in favor of disclosure. *N.Y. Times Co.*, 756 F.3d at 112 (internal quotation marks and citation omitted); *Wilner*, 592 F.3d at 69. That said, government affidavits are "accorded a presumption of good faith," and the Court must give substantial weight to an agency's affidavit concerning classified information relating to national security. *N.Y. Times Co.*, 756 F.3d at 112; *see also Wilner*, 592 F.3d at 76 ("[Courts] have consistently deferred to executive affidavits predicting harm to national security." (citation omitted)). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Wilner*, 592 F.3d at 73 (citation omitted). 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). "Summary judgment in favor of the FOIA plaintiff is appropriate when an agency seeks to protect material which, even on the agency's version of the facts, falls outside the proffered exemption." *Bloomberg L.P.*, 649 F. Supp. 2d at 271 (alterations omitted).

C. The FOIA Exemptions

Defendant invokes a number of statutory exemptions to justify withholding information in response to Plaintiffs' FOIA requests.[6] The standards governing the applicability of each exemptions are discussed below.

1. Exemption 1

The government may withhold information under Exemption 1 if the information is "(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) [is] in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Through affidavits, the government must establish "that it complied with proper procedures in classifying materials and that the withheld information falls within the substantive scope" of a particular executive order. *Amnesty Int'l USA*, 728 F. Supp. 2d at 506 (citing *Salisbury v. United States*, 690 F.2d 966, 971-72 (D.C. Cir. 1982)). To prevail on summary judgment, the government's affidavits must "contain sufficient detail to forge the logical connection between the information [withheld]" and Exemption 1. *Id.* (internal quotation marks and citation omitted). That said, because "issues of national security are within the unique purview of the executive branch[]," the government's justifications for

[6] Often, information is withheld under several different exemptions, each, according to Defendant, independently justifying nondisclosure. The government need only demonstrate the applicability of one FOIA exemption to meet its burden. *See Wilner*, 592 F.3d at 72. Therefore, a court may end its analysis when the government sustains its burden as to one exemption, without reaching the question of whether additional exemptions would apply to the withheld information.

classifying information should be accorded deference. *Physicians for Human Rights v. U.S. Dep't of Def.*, 675 F. Supp. 2d 149, 166 (D.D.C. 2009).

Throughout the reports, Defendant contends that information withheld under Exemption 1 is properly classified pursuant to Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009) ("E.O. 13526"). This order allows the classification—and thus nondisclosure—of information if (1) it was classified by "an original classification authority"; (2) it is "owned by, produced by or for, or is under the control of the United States Government"; (3) it belongs to one of the eight protected categories listed in section 1.4 of the order; and (4) an original classification authority determined that "unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and the authority is "able to identify or describe the damage."[7] E.O. 13526 § 1.1. Section 1.4 of E.O. 13526 protects, *inter alia*, information that describes "intelligence activities (including covert action), intelligence sources or methods, or cryptology"; "foreign relations or foreign activities of the United States, including confidential sources"; and "vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security." Information may not be classified, however, to "conceal violations of law, inefficiency, or administrative error"; "prevent embarrassment" to an agency or government official; or if it "does not require protection in the interest of national security." *Id.* § 1.7.

[7] Plaintiffs do not appear to dispute that Defendant has satisfied its burden of establishing that withheld material has been classified by an original classification authority or that it is owned by, produced for, or under the control of the government. *See* Sherman Decl. ¶¶ 2, 15; Hardy Decl. ¶¶ 2, 18. Accordingly, the Court need only determine whether the government has established that the withheld information pertains to one of the categories listed in E.O. 13526 §§ 1.1(3), 1.4, and has adequately described the harm that may result from the information's disclosure, *id.* § 1.1(4).

2. Exemption 3

Under FOIA Exemption 3, the government is permitted to withhold information that is "specifically exempted from disclosure by [a] statute" that requires certain information to be withheld or that establishes criteria for the withholding of information. 5 U.S.C. § 552(b)(3). Determining the applicability of this exemption "depends less on the detailed factual contents of specific documents" than with other FOIA exemptions. *Amnesty Int'l USA*, 728 F. Supp. 2d at 500-01 (citation omitted). Rather, to sustain its burden the government "need only show that the statute claimed is one . . . contemplated by Exemption 3 and that the withheld material falls within the statute." *Id.* (citation omitted).

Defendant invokes three statutes to justify nondisclosure under Exemption 3: 15 U.S.C. § 3605, which exempts from disclosure "the organization or any function of the [NSA], or any information with respect to the activities thereof"; 15 U.S.C. § 3024(i)(1), which directs the director of national intelligence to "protect intelligence sources and methods from unauthorized disclosure" and to "establish and implement guidelines for the intelligence community"—which includes the FBI and other agencies involved in this litigation—regarding the classification and dissemination of sensitive information; and 18 U.S.C. § 798, which prohibits the unauthorized disclosure of classified information "concerning the communication intelligence activities of the United States" or "obtained by the processes of communication intelligence from the communications of any foreign government." Decl. of David J. Sherman ("Sherman Decl.") ¶¶ 19-21, ECF No. 42. Each of these laws qualifies as an exemption statute under Exemption 3. *See Elec. Frontier Found. v. Dep't of Justice*, 141 F. Supp. 3d 51, 58 n.8 (D.D.C. 2015). Therefore, the Court's remaining task is not to "closely scrutinize the contents" of a document withheld under Exemption 3, but to determine whether the information withheld by the

government "meet[s] the exemption statute's criteria for nondisclosure." *N.Y. Times Co. v. U.S. Dep't of Justice*, 915 F. Supp. 2d 508, 538-39 (S.D.N.Y. 2013), *rev'd in part on other grounds*, 756 F.3d 100.

3. Exemption 5

FOIA Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "Stated simply," covered documents include those "which would not be obtainable by a private litigant in an action against the agency under normal discovery rules (*e.g.*, attorney-client, work-product, executive privilege)." *Tigue v. U.S. Dep't of Justice*, 312 F.3d 70, 76 (2d Cir. 2002) (internal quotation marks and citation omitted). This exemption is "based on the policy of protecting the decision making processes of government agencies," and protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Brennan Ctr. for Justice at NYU Sch. of Law v. U.S. Dep't of Justice*, 697 F.3d 184, 194 (2d Cir. 2012) (internal quotation marks and citation omitted). Relevant here, "[a]n inter- or intra-agency document may be withheld pursuant to [Exemption 5] if it is: (1) predecisional, *i.e.*, prepared in order to assist an agency decisionmaker in arriving at his decision, and (2) deliberative, *i.e.*, actually . . . related to the process by which policies are formulated." *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 356 (S.D.N.Y. 2005) (internal quotation marks omitted); *see also Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) ("The privilege protects recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." (internal quotation marks and citation omitted)); *Amnesty Int'l USA*, 728

F. Supp. 2d at 515-16 (describing further the standard for information to qualify for nondisclosure under Exemption 5).

4. Exemption 7(E)

Under FOIA Exemption 7(E), the government can withhold information, "compiled for law enforcement purposes," that "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." 5 U.S.C. § 552(b)(7)(E). Information is compiled for law enforcement purposes where the "withheld record has a rational nexus to the agency's law-enforcement duties, including the prevention of terrorism and unlawful immigration." *Bishop v. U.S. Dep't of Homeland Sec.*, 45 F. Supp. 3d 380, 387 (S.D.N.Y. 2014) (citation omitted). This means that, in short, "all records of investigations compiled by the FBI are for law enforcement purposes." *Halpern v. FBI*, 181 F.3d 279, 296 (2d Cir. 1999). Once this "threshold requirement is satisfied, a court must determine if either of Exemption 7(E)'s two alternative clauses applies." *Bishop*, 45 F. Supp. 3d at 387 (internal quotation marks and citation omitted). Information discloses "techniques and procedures" if it "refers to how law enforcement officials go about investigating a crime." *Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec.*, 626 F.3d 678, 682 (2d Cir. 2010). "The term 'guidelines'—meaning . . . 'an indication or outline of future policy or conduct'—generally refers . . . to resource allocation." *Id.* (citing the dictionary).

5. Exemption 7(A)

Under FOIA Exemption 7(A), the government may withhold information, "compiled for law enforcement purposes," if the production of the information "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). This exemption

"prevent[s] harm to the government's case in court by not allowing litigants earlier or greater access to agency investigatory files than they would otherwise have." *Conti v. U.S. Dep't of Homeland Sec.*, No. 12 Civ. 5827, 2014 WL 1274517, at *22 (S.D.N.Y. Mar. 24, 2014). Sustaining its burden requires the government to 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." *Azmy v. U.S. Dep't of Def.*, 562 F. Supp. 2d 590, 605 (S.D.N.Y. 2008). Ultimately, the government must "allow[] the court to trace a rational link between the nature of the document and the alleged likely interference." *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 940 (D.C. Cir. 2003).

II. Plaintiffs' Challenges

A. Plaintiffs' Original Challenges

Plaintiffs move for summary judgment to compel disclosure of information withheld in twenty-five different areas of the reports. In their memorandum, Plaintiffs categorize the information and argue, in general terms, why each category of information may not be exempt from disclosure under FOIA. In response, Defendant's memorandum and attached affidavits provide, with specificity, exhaustive arguments supporting the non-disclosure of each area of withheld information. In reply, Plaintiffs contest the government's arguments as to only seven areas of withheld information. This alone may warrant ruling for Defendant with regard to the eighteen challenges unaddressed by Plaintiffs. *See, e.g.*, *Estate of AbdulJaami v. U.S. Dep't of State*, No. 14 Civ. 7902, 2016 WL 94140, at *7 (S.D.N.Y. Jan. 7, 2016) (collecting cases in which summary judgment was granted for the government when the plaintiff failed to "challenge [the] agency's justifications for withholding certain information" (citing, *inter alia*, *Augustus v. McHugh*, 870 F. Supp. 2d 167, 171-73 (D.D.C. 2012)). Additionally, although Plaintiffs claim

to maintain each of their twenty-five original challenges, they request that the Court review the remaining challenges only upon a finding in favor of Plaintiffs with regard to the seven challenges detailed in their reply memorandum. *See* Pl. Reply Mem. 2, ECF No. 49. As discussed below, Plaintiffs' motion is DENIED with respect those seven challenges. Accordingly, the Court finds that Plaintiffs have waived the eighteen remaining challenges, and Plaintiffs' motion is DENIED, and Defendant's GRANTED, with respect to those eighteen challenges.[8]

B. The Remaining Challenges

1. Tables of Information about Section 215 Applications

In Section 215 Report I, Plaintiffs challenge the withholding of data about applications for the seizure of business records made pursuant to Section 215, including the number of U.S. and non-U.S. persons referenced in Section 215 Orders for the years 2004 and 2005, *see* Section 215 Report at 19; the types of business records requested in Section 215 orders, *see id.* at 20-21, 24; and the FBI field offices from which Section 215 requests originated in 2004 and 2005, *see id.* at 22, 25. Some information contained in the tables populating this portion of the report is disclosed, including, for example, the total number of Section 215 requests submitted to the FISC during the relevant years, *see id.* at 17, 19; the number of U.S. and non-U.S. persons referenced in Section 215 orders for the years 2002 and 2003, *id.* at 19; and the types of investigations for which Section 215 requests were made, *id.* at 22. Defendant contends that data about the types of business records requested pursuant to Section 215 is exempt from disclosure

[8] Specifically, Plaintiffs' challenges fail as to the information withheld in Joint IG Report Vol. I at 53-54, 65-68, 12-16, 36-50; Joint IG Report Vol. II at 99-102, 123 and surrounding pages, and 165; Joint IG Report Vol. III at 25-42, 104-17, 122-33, 142-48, 158-86, 315-24, 333-59, and 402-03; Section 215 Report II at 15-21; 702 Report at xiv-xxxviii, 71 and surrounding pages, and 150-51; Exigent Letters Report at 61-64 and 75-78; NSL Report I at 65 and 101; and NSL Report II at 119-21.

under Exemption 7(E), *see id.* at 21, and that the rest of the withheld information is exempt under Exemptions 1, 3, and 7(E).

As for the information withheld under Exemption 1, Defendant argues that disclosure would reveal important details about the frequency with which the FBI relies on Section 215 in its investigations, the types of materials or information sought in those investigations, and the regions in which those investigations are occurring. *See* Hardy Decl. ¶¶ 55-58, 111. According to Defendant, this information might aid individuals or entities in predicting whether they are targeted by FBI investigations, causing them to destroy, or avoid creating, the type of business records that the FBI might seek, or to avoid operating in a region in which the FBI is more active. *Id.* In other words, the government states that disclosing the redacted information "could reasonably be expected to prompt terrorists and other adversaries to alter their behavior, destroy records, or change their associations, thwarting the FBI's investigative efforts and causing serious harm to national security." Second Decl. of David M. Hardy ("2d Hardy Decl.") ¶ 5, ECF No. 57. These explanations are not merely conclusory, but instead demonstrate, with "reasonably specific detail," "the logical connection between information [withheld] and [Exemption 1]." *Amnesty Int'l USA*, 728 F. Supp. 2d at 507; *see also N.Y. Times Co. v. U.S. Dep't of Justice*, 872 F. Supp. 2d 309, 316 (S.D.N.Y. 2012) (crediting the government's claims that the disclosure of the "manner and means by which the . . . Government" employs Section 215 orders "could enable America's adversaries to develop means to degrade and evade" intelligence activities).

Plaintiffs' arguments otherwise are unavailing. Plaintiffs contend that the information here is improperly withheld because it reflects agency wrongdoing, citing a Second Circuit decision holding that the FBI's bulk data collection activities—conducted via Section 215

requests—exceeded statutory authorizations. *See ACLU v. Clapper*, 785 F.3d 787, 821 (2d Cir. 2015). Information may not be classified for the purpose of concealing wrongdoing. *See* E.O. 13526 § 1.7. There is no indication, however, that simply "because some of the [FBI]'s techniques are illegal [or were mistakes], the [FBI] therefore classified the documents to conceal the alleged illegality [or mistake]." *Amnesty Int'l USA*, 728 F. Supp. 2d at 510.

Plaintiffs also argue that it is illogical to disclose data about the number of Section 215 requests in 2002 and 2003, but redact the same information with regard to 2004 and 2005. *See* 215 Report I at 19. The fact, however, that Defendant distinguishes "seemingly analogous figures"—here, data from 2003–2004, and data from 2004–2005—"evidence[s] [Defendant]'s good faith in deciding that the redacted [information] must remain hidden." *Leopold v. CIA*, 106 F. Supp. 3d 51, 60 (D.D.C. 2015). And Defendant plausibly explains that the withheld information may evidence trends in the FBI's investigative activities, a detail that cannot be gleaned from the disclosure that the FBI made no Section 215 requests in 2003 and 2004. 2d Hardy Decl. ¶ 4.

Finally, although Defendant acknowledges the public's awareness of the FBI's use of Section 215 orders generally, it contends that the information withheld here protects certain details about the extent of the FBI's reliance on Section 215 and how those orders are employed in FBI investigations. "[T]he fact that the government disclosed general information on its [investigation techniques] does not require full disclosure of aspects of the program that remain classified." *Amnesty Int'l USA*, 728 F. Supp. 2d at 509 (citations omitted). Ultimately, "an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Id.* at 510. Such is the case here. Accordingly, Defendant's summary judgment

motion is GRANTED, and Plaintiffs' DENIED, with respect to the information withheld in Section 215 I Report pp. 19, 20, 22-25.

Defendant also meets its burden as to the information withheld solely under Exemption 7(E)—the types of records requested pursuant to Section 215. *See* Section 215 Report I at 21. Because the withheld information "has a rational nexus to the agency's law-enforcement duties," *Bishop*, 45 F. Supp. 3d at 387, and pertains to "how law enforcement officials go about investigating a crime," *Allard K. Lowenstein Int'l Human Rights Project*, 626 F.3d at 682, it is exempt from disclosure under Exemption 7(E). *See, e.g.*, *Bishop*, 45 F. Supp. 3d at 391 (finding that Exemption 7(E) applies, even though law enforcement techniques are generally known, if "the manner and circumstances of the techniques are not generally known, or the disclosure of additional details could reduce their effectiveness"). Accordingly, Defendant's summary judgment motion is GRANTED, and Plaintiffs' DENIED, with respect to the information withheld in Section 215 I Report p. 21.

2. Statistics on the Use of NSLs from 2003 to 2005

In NSL Report I, Plaintiffs challenge the withholding of data about the number of NSLs issued by the FBI between 2003 and 2005, including the number of NSLs requesting consumer credit reports, the number of NSLs requesting financial institution or consumer identifying information, and the number of the FBI's counter-terrorism investigations involving NSLs. *See* NSL Report I at 36-40.[9] Defendant contends that this information is exempt from disclosure under Exemptions 1 and 3.

[9] While the motions were pending, Defendant reprocessed several pages from Plaintiffs' original FOIA request. *See* Second Decl. of David E. McCraw ("2d McCraw Decl.") ¶ 2, ECF No. 50. Defendant unredacted information that was originally withheld on pages 36 and 38 of NSL Report I. Plaintiffs submitted the updated version of those pages, *see* 2d McCraw Decl. Ex. A, to which the Court refers in its analysis here.

Plaintiffs argue that withholding this information is illogical given that similar information is disclosed, including data on the total number of NSLs issued between 2003 and 2005, and information identifying that the majority of NSL requests sought "telephone toll billing records information, subscriber information (telephone or email) or electronic transactional records." *See id.* at 36. Defendant, however, distinguishes the information: the disclosed data describes the nature and number of NSL requests generally, whereas the withheld information reveals the specific number of FBI investigations during the relevant period and the type of information sought in those investigations. *See* 2d Hardy Decl. ¶¶ 7-8. According to Defendant, the number of investigations cannot be deduced from knowing the number of requests for information about telephone and e-mail subscribers because one individual can have multiple telephone numbers or e-mail accounts. *Id.* The number of NSL requests to financial institutions or credit reporting agencies, on the other hand, parallels the number of subjects under investigation. *Id.* Therefore, Defendant withholds information that would allow potential adversaries to track, with specificity, the FBI's level of investigative activity related to certain communication records. Because this distinction is "logical or plausible," and given the deference due to the executive branch on its assessment of national security risks, *see Wilner*, 592 F.3d at 76, Defendant has met its burden justifying nondisclosure. Accordingly, Defendant's motion is GRANTED, and Plaintiffs' DENIED, with respect to the information withheld in NSL Report I pp. 36-40.

3. The Number of Clearances for STELLARWIND

In Joint IG Report Vol. II, Plaintiffs challenge the withholding of the total number of persons cleared for access to information collected pursuant to the PSP. *See* Joint IG Report Vol. II at 165. Defendant argues that this information concerns the NSA's processes for handling

classified information, *see* Sherman Decl. ¶ 67, and that it is exempt from disclosure under Exemption 3.

In justifying the withholding, Defendant invokes 50 U.S.C. § 3605, which protects from disclosure "the organization or any function of the [NSA], or any information with respect to the activities thereof." The NSA was the agency responsible for processing requests for access to information collected from activities conducted under the PSP. Sherman Decl. ¶ 68. Data about the number of persons who received clearances reveals the "scope of NSA's implementation of" the processes by which the agency "handles and protects its classified information," implicating one of the agency's "core function[s] and activit[ies]." *Id.* Although the information Plaintiffs seek may be narrow in scope, Section 3605 "broadly exempts [from disclosure] *any* information pertaining to the agency's 'activities' or 'functions.'" *Elec. Privacy Info. Ctr. v. NSA*, 678 F.3d 926, 933 (D.C. Cir. 2012) (emphasis in original). Accordingly, because Defendant meets its burden of showing that the withheld material is covered by an exemption statute, *Amnesty Int'l USA*, 728 F. Supp. 2d at 500-01, Defendant's motion is GRANTED, and Plaintiffs' DENIED, with respect to the information withheld in Joint OIG Report Vol. II p. 165.

4. List of 13 Consequences of NSL Disclosure

In NSL Report II, Plaintiffs challenge the withholding of the FBI's list of possible adverse consequences that may result from disclosing the existence of an NSL. *See* NSL Report II at 120-21. Under the original statutes authorizing the use of NSLs, the recipient of an NSL was required to avoid disclosing that it had received the letter. *See id.* at 117 (citing statutes). The Reauthorization Act removed this presumption of confidentiality; instead, the FBI may now require a recipient's confidentiality only upon identifying a specific harm that might result from revealing the FBI's request for information. *Id.* at 117-18; Reauthorization Act § 116. FBI

agents must assess whether there is a "genuine need" for non-disclosure of an NSL, and, if non-disclosure is warranted, the agent issuing the NSL must provide a "factual predicate" justifying the confidentiality requirement. NSL Report II at 119-20. To guide agents making these determinations, the FBI's general counsel identified thirteen possible adverse consequences of disclosure for agents to consider when articulating the need for non-disclosure. *Id.* at 120-21.

Defendant withholds this information pursuant to Exemptions 1 and 3, contending that the information "reference[s] with specificity particular covert investigative techniques and procedures employed by the FBI in coordination with the use of NSLs." 2d Hardy Decl. ¶ 10. Additionally, according to Defendant, revealing the factors that support requiring non-disclosure may allow individuals to modify their behavior to "minimize the likelihood that any NSL directed at their accounts will include a non-disclosure provision." Hardy Decl. ¶ 78.

Although Plaintiffs challenge the reasonableness of Defendant's claims that guidance regarding non-disclosure provisions would be of any concern to would-be terrorists, the Court "should not closely scrutinize the contents" of information withheld under Exemption 3, and instead must only determine whether the information is covered by an exemption statute. *ACLU v. F.B.I.*, No. 11 Civ. 7562, 2015 WL 1566775, at *3 (S.D.N.Y. Mar. 31, 2015) (citation omitted). Defendant relies on 50 U.S.C. § 3024(i), which directs the director of national intelligence to "protect intelligence sources and methods from unauthorized disclosure," and to "establish and implement guidelines for the intelligence community"—which includes the FBI—regarding the classification and dissemination of sensitive information. The FBI's affidavits explain that disclosure of the withheld information would reveal intelligence sources and methods, an assertion to which the Court must accord "substantial weight and due consideration." *Amnesty Int'l USA*, 728 F. Supp. 2d at 503. Indeed, it is plausible that revealing

the adverse consequences of disclosing the existence of a particular investigative tool directed at a particular recipient would reveal the nature and vulnerabilities of FBI intelligence-gathering methods. Because Defendant's description of the redacted information is sufficient to show that the information falls under the withholding statute, it has justified non-disclosure under Exemption 3. Accordingly, Defendant's motion is GRANTED, and Plaintiffs' DENIED, with respect to the information withheld in NSL Report II pp. 120-21.

5. Information about Public Prosecutions and Trials

In each volume of the Joint IG Report, and in NSL Report I, Plaintiffs challenge the withholding of assessments reviewing how information collected pursuant to the PSP contributed to counter-terrorism efforts, including details about particular investigations and specific ways in which PSP intelligence contributed to the success of those investigations. *See* Joint IG Report Vol. I at 65-68; Joint IG Report Vol. II at 99-102; Joint IG Report Vol. III at 315-24; NSL Report I at 65. Plaintiffs contend that the reports here discuss investigations that resulted in public criminal prosecutions, at least some of which featured intelligence gathered pursuant to foreign surveillance programs other than the PSP. *See* Pl. Reply Mem. 9 n.10 (citing articles and testimony). Plaintiffs argue that it is unreasonable to withhold information about public proceedings because they resulted from the use of PSP surveillance intelligence when that intelligence is similar to other information that was publicly disclosed in the course of those proceedings.

Defendant invokes a number of Exemptions through these portions of the reports, but contends that two Exemptions—1 and 3—allow the non-disclosure of all the challenged redactions. The government claims that only surveillance data collected pursuant to the FAA—which mandates the disclosure of information to be used as evidence against a defendant in a

criminal prosecution, *see, e.g.*, 50 U.S.C. § 1806(c)—has been disclosed during public terrorism prosecutions. Although Defendant acknowledges that the redacted information may pertain to proceedings which were public, it maintains that the "contribution of the PSP to individual investigations has never been made public and remains properly classified." Hardy Decl. ¶ 50. To the extent intelligence gathered pursuant to the PSP—which is different from programs under the FAA, *see* Joint IG Report Vol. I at 1 (explaining that the PSP ceased operation by January 2007)—was relevant to any prosecution, it would have been submitted to the court via *ex parte* submissions to protect its confidentiality. *See* Sherman Decl. ¶ 51; Hardy Decl. ¶¶ 50, 52.

According to Defendant, disclosure of this information will reveal, for the first time, the particular investigations and cases in which PSP intelligence was used, alert unaware targets of their surveillance by the government, disclose investigative strategies, and map the ways in which various intelligence agencies—here, the FBI and NSA—work together to combat terrorism. *See* Hardy Decl. ¶¶ 46-53; Sherman Decl. ¶ 52. Because the government offers a logical and plausible basis for determining that the redacted information is properly classified, and that harm to national security may result from its release, non-disclosure is justified under Exemption 1. Even if this were not the case, Defendant meets its burden of showing that the withheld information relates to the function of the NSA, *see* 50 U.S.C. § 3605, concerns the government's communications intelligence activities, *see* 18 U.S.C. § 798, and concerns intelligence sources and methods, *see* 50 U.S.C. § 3024(i)(1), thereby justifying non-disclosure under Exemption 3. *See* Sherman Decl. ¶¶ 53-56; Hardy Decl. ¶¶ 49, 51, 54. Accordingly, Defendant's motion is GRANTED, and Plaintiffs' DENIED, with respect to the information withheld in Joint IG Report Vol. I pp. 65-68, Joint IG Report Vol. II pp. 99-102, Joint IG Report Vol. III pp. 315-24, and NSL Report I p. 65.

6. Three Incidents of FBI Wrongdoing

Here, Plaintiffs challenge the non-disclosure of information related to three incidents in which the DOJ OIG found wrongdoing on the part of the FBI. The Court will address each in turn.

a. Section 215 Report II at 65-74

In Section 215 Report II, Plaintiffs challenge the withholding of a discussion about FBI requests for information that may have exceeded statutory authorization. Section 215 requests may not be used in the course of an investigation premised on a target's protected First Amendment activities. *See* 50 U.S.C. § 1861(a)(1), (a)(2)(B). The report identifies two instances in which the FISC denied a Section 215 request because of First Amendment concerns. Section 215 Report II at 33-34, 65, 68. Following each application's rejection, the FBI issued an NSL to the target based upon the same factual predicate as the rejected Section 215 application, even though the statute authorizing NSLs shares Section 215's proscription of investigations premised on protected First Amendment activities, *see* 12 U.S.C. § 3414(a)(5)(A). Section 215 Report II at 73.

Here, the report begins with a description of the FBI investigation in which the Section 215 requests and NSLs were issued. *See id.* at 65-67. Details of the investigation are entirely redacted. *Id.* Also redacted are portions of ensuing sections describing the Section 215 applications themselves. Although Defendant discloses internal discussions and analysis regarding the legality of the applications, details about the applications' content is withheld. *See id.* at 68-71. Defendant contends that the description of the investigation is exempt from disclosure under, among others, Exemption 7(E), Hardy Decl. ¶ 64, stating that disclosure of "facts pertaining to how the FBI sought to use Section 215 in a particular investigation, including

the background of the investigation and the content of the 215 application . . . , would provide . . . valuable insight into the FBI investigative process," *id.* ¶ 62. Specifically, according to Defendant, the redacted information "disclose[s] the subject of [an FBI] investigation," discusses the FBI's "analytical process for evaluating information . . . and identifying threats," reveals "operational details, including FBI investigative techniques and operational strategy" for international terrorism investigations, and discusses "how the FBI tracks and investigates subjects" and "how the FBI analyzes records obtained in the course of counterterrorism investigations." 2d Hardy Decl. ¶ 13.

Plaintiffs first contend that information about the techniques and procedures withheld here is already in the public domain, making non-disclosure inappropriate. *See Conti*, 2014 WL 1274517, at *21. However, although "the government retains the burden of persuasion that information is not subject to disclosure under FOIA, a party who asserts that material is publicly available carries the burden of production on that issue." *Inner City Press/Cmty. on the Move v. Bd. of Governors of Fed. Reserve Sys.*, 463 F.3d 239, 245 (2d Cir. 2006) (internal quotation marks and citation omitted). In their submissions to the Court, Plaintiffs cite news articles that discuss the government's surveillance programs generally, but do not proffer the public sources of specific information that they contend the government refuses to disclose. *See, e.g.*, Pl. Mem. 5, ECF No. 30. And even if there exists in the public domain information about these particular investigations, "an agency does not have to release all details concerning law enforcement techniques just because some aspects of them are known to the public." *ACLU v. U.S. Dep't of Justice*, No. 12 Civ. 7412, 2014 WL 956303, at *7 (S.D.N.Y. Mar. 11, 2014) (citation omitted).

Second, Plaintiffs argue that information about requests for information that implicated First Amendment concerns is not exempt under 7(E) because information may not be withheld to

conceal agency wrongdoing. "[O]nce," however, "the government has demonstrated that the records were compiled in the course of an investigation conducted by a law enforcement agency, the purpose or legitimacy of such executive action are not proper subjects for judicial review." *Halpern*, 181 F.3d at 296. Defendant avers that the redacted information is not withheld to conceal wrongdoing, Hardy Decl. ¶¶ 31-32, a statement which is "accorded a presumption of good faith," *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). Absent evidence of bad faith, it is not then for the Court to determine whether the information discloses "records [which] were compiled in the course of an unwise, meritless or even illegal investigation." *Williams v. FBI*, 730 F.2d 882, 884-85 (2d Cir. 1984). Because Defendant's explanations reasonably indicate that the redacted information is compiled for law enforcement purposes, and would disclose techniques and procedures for law enforcement investigations, non-disclosure is justified under Exemption 7(E).

b. NSL Report I at 83-84

In NSL Report I, Plaintiffs challenge the withholding of information discussing a "possible . . . violation" arising from the FBI's use of an NSL to request information about a former college student's educational records. *See* NSL Report I at 83-84. During the pendency of this action, however, the government determined that this information can be disclosed; it informs the Court that no redactions remain on these pages. *See* Def. Reply Mem. 22, ECF No. 54; 2d Hardy Decl. ¶ 17. Accordingly, the parties' motions with respect to this information are DENIED as moot.

c. Exigent Letters Report at 89-122 and 276-79

In Exigent Letters Report, Plaintiffs challenge the withholding of the assessment of three FBI investigations into media leaks in which the FBI requested the telephone records of news

reporters in violation of federal regulations and department policy. *See* Exigent Letters Report at 89.

Before subpoenaing a reporter's telephone records, an investigator must determine whether such action is warranted by balancing First Amendment concerns with law enforcement interests and taking reasonable steps to obtain the desired information from alternative sources. *See id.* at 89-90; 28 C.F.R. § 50.10(a)(2). A subpoena must be approved by the Attorney General, and in certain circumstances, notice must be given to the targeted reporter before the subpoena can be issued to the third party from which the record will be obtained. *See* Exigent Letters Report at 90; 28 C.F.R. §§ 50.10(c)–(e). The report details three FBI investigations into media leaks of classified information in which the FBI requested—and in two circumstances obtained—news reporters' telephone records or other calling activity information. *See* Exigent Letters Report at 89. The reporters' information was requested or obtained through the use of an exigent letter and without adhering to agency policy or governing regulations. *See id.* Along with providing background on the investigations, the report recounts the decisions to request reporter information, the procedure that was used to make or authorize those requests, the result of those requests, and the OIG's analysis of the requests' legality. *See generally id.* at 90-122, 276-79. Defendant contends that text redacted here is withheld pursuant to, among others, Exemptions 7(A) and 7(E).

Defendant invokes Exemption 7(A) on pp. 91, 95, 99-100, 102, and 277-78 of the report, claiming that the withheld information contains details of an ongoing counter-terrorism investigation that has not been publically disclosed and that is being conducted with the cooperation of a foreign government. *See* Hardy Decl. ¶ 97. According to Defendant, this investigation is expected to "result in law enforcement proceedings." *Id.* ¶ 96. Additionally,

disclosure of the nature of the investigation would "alert subjects and their associates of the investigation," "cause them to take measures to evade FBI scrutiny and destroy evidence," and "chill the FBI's relationship with [the] foreign law enforcement entity" cooperating in the investigation. *Id.* ¶ 97.

Because the withheld information has a "rational nexus to the agency's law-enforcement duties" and was, therefore, compiled for law enforcement purposes, *Bishop*, 45 F. Supp. 3d at 387, and upon release could reasonably "be expected to cause some articulable harm" to pending enforcement proceedings, *Azmy*, 562 F. Supp. 2d at 605, Defendant has satisfied its burden of justifying the information's nondisclosure. *See, e.g.*, *Amnesty Int'l USA*, 728 F. Supp. 2d at 526-27 (holding that the government's explanation that disclosure of withheld information would, *inter alia*, alert subjects of CIA investigations was sufficient to invoke Exemption 7(A)).

The remaining information is validly withheld pursuant to Exemption 7(E). Defendant contends that redacted material contains details that, if released, "would disclose techniques and procedures for . . . national security investigations." Hardy Decl. ¶ 110. Specifically, withheld information includes "operational details [of] investigative methods; the subject and focus of a particular ongoing counterterrorism investigation, including background information about the investigation, methods used in the investigation, and coordination with a foreign entity; the identity of a particular Field Office; and the identities of certain individuals of interest." *Id.* ¶ 81. Additionally, the government redacts "the identities of the FBI Field Office and U.S. Attorney's Office that have program management responsibility for," and details about "the use of a particular investigative technique in," an ongoing investigation. *Id.* ¶ 111. Such explanations are sufficient to establish that the withholdings conceal records compiled for law enforcement purposes that disclose techniques and procedures for law enforcement investigations, and,

therefore, justify nondisclosure. Accordingly, Defendant's motion is GRANTED, and Plaintiffs' DENIED, with respect to the information withheld in Section 215 Report II pp. 65-74 and Exigent Letters Report pp. 89-122, 276-79.

7. Internal Legal Dispute over the PSP

In Joint IG Report Vol. III, Plaintiffs challenge the withholding of information concerning the dispute within the DOJ over the legality of the PSP. *See* Joint IG Report Vol. III at 25-42, 104-17, 122-33, 142-49, 158-80, and 182-86. The report discusses, at length, the memoranda written by OLC Deputy Assistant Attorney General John Yoo assessing the legality of the PSP, *see, e.g.*, *id.* at 23-40; the ensuing debate over Yoo's analysis by various members of the administration, *see, e.g.*, *id.* at 104-08; the eventual reassessment of the PSP's legality, *see, e.g.*, *id.* at 109-17, 158-63; and changes made to the PSP pursuant to various Presidential Authorizations, *see, e.g.*, *id.* at 144-48, 168-80. Defendant contends that information withheld here is exempt from disclosure pursuant to one or all of Exemptions 1, 3, or 5. *See* Decl. of Paul P. Colborn ("Colborn Decl.") ¶¶ 13(a)–(x), 14-23, ECF No. 45.; Second Decl. of David J. Sherman ("2d Sherman Decl.") ¶ 5, ECF No. 56.

Defendant invokes Exemptions 1 and 3 to justify withholding information scattered throughout these sections of the report.[10] Plaintiffs do not dispute that the information was classified pursuant to "the correct technical procedures" or that the information merits classification under E.O. 13526 § 1.4 to the extent the information pertains to "operational details of surveillance." *See* Pl. Reply Mem. 13-14. According to Defendant, withheld are details about: the "technical means by which NSA conducts" surveillance, Sherman Decl. ¶ 30;

[10] Although markings on the redacted report appear to indicate that Exemptions 1 and 3 are invoked coextensively with Exemption 5, Defendant states that in many cases Exemption 1 and 3 pertain independently to a subset of information included within that withheld under Exemption 5. *See* 2d Sherman Decl. ¶ 5.

the identities of, and degrees of participation in the program by, communications service providers, *id.* ¶ 42; information "implicating NSA [surveillance activities] as it relates to specific criminal investigations," *id.* ¶ 50; and the scope of surveillance activities, particularly, how the scope was altered over time in response to evolving DOJ policy regarding the legality of the program, *id.* ¶ 57. As described in further detail in Defendant's affidavits, the release of this information could give potential adversaries access to sensitive details about NSA counter-terrorism techniques, alert targets of NSA surveillance, and reveal the extent of the NSA's capabilities. *See id.* ¶¶ 30-41, 42-49, 50-56, and 57-64. Thus, with respect to this information, there is no dispute to resolve. Accordingly, the withholdings here are proper under Exemptions 1 and 3. *See Elec. Frontier Found.*, 141 F. Supp. 3d at 58 n.8 (finding details about NSA surveillance activities to be exempt from disclosure under Exemption 3).

Defendant invokes Exemption 5 on pp. 25-27, 33-34, 37, 39, 39-40, 104-08, 116, 122-26, 129, 142, 146-48, 158, 159-63, 170-77, 179, and 182-86. The withheld portions describe legal advice and analysis provided to administration officials on "potential policy decisions regarding the PSP" in various OLC memoranda, *see* Colborn Decl. ¶¶ 13(a), (c), (d), (e), (o), (r), (s), (t), (u), and (x); relay interviews of administration officials in which those officials recount internal deliberations preceding the formulation of the OLC's legal advice and analysis of the PSP, *see id.* ¶¶ 13(b), (f), (i), (k), (l), (n), (p), (q), (u), (v), and (w); and summarize oral legal advice or outlines of legal analysis given to administration officials making decisions regarding the implementation of the PSP, *see id.* ¶¶ 13(g), (h), (j), (l), (m), (n), (p), and (v).

Plaintiffs contend that although the legal memoranda discussed in this report contain legal advice and analysis, the content ultimately represents the implemented policy of the administration and, therefore, constitutes the DOJ's "working law," rendering it outside the

scope of Exemption 5. "[E]ven if . . . documents . . . are 'predecisional' and 'deliberative,'" they are not covered by Exemption 5 "(1) when the contents of the document have been adopted, formally or informally, as the agency position on an issue or [are] used by the agency in its dealings with the public, . . . and (2) when the document is more properly characterized as an opinion[ ] [or] interpretation [ ] which embod[ies] the agency's effective law and policy." *Brennan Ctr.*, 697 F.3d at 194-95 (internal quotation marks and citations omitted, and alterations in the original); *see also* 5 U.S.C. § 552(a)(2)(A)–(C) (requiring the disclosure, under FOIA, of "final opinions . . . made in the adjudication of cases," "statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register," and "administrative staff manuals and instructions to staff that affect a member of the public"). In other words, documents may lose coverage under Exemption 5 if they are "express[ly] adopted or incorporate[ed] by reference" in the agency's decisions or policies, or if the documents had "operative effect" and thus constituted the agency's "working law." *Brennan Ctr.*, 697 F.3d at 198. Still covered under Exemption 5 are, for example, "all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975).

In their submissions, Plaintiffs do not dispute that OLC advice, analyses, and deliberations other than those contained in the formal memoranda issued by OLC staff are covered by Exemption 5. Because Defendant's affidavits are sufficient to establish that this information relays "the agency's group thinking in the process of working out its policy and determining what its law shall be," *id.*, Defendant has satisfied its burden and has justified the nondisclosure of information pertaining to internal legal disputes and analysis apart from that contained in OLC memoranda.

Plaintiffs primarily challenge the withholding of memoranda prepared by Yoo and his successors, arguing that they constituted the working law of the administration with regard to PSP surveillance activities. Generally, however, the "OLC [does] not have the authority to establish the 'working law' of the [agency], . . . and its advice 'is not the law of an agency unless the agency adopts it.'" *N.Y. Times Co. v. U.S. Dep't of Justice*, 806 F.3d 682, 687 (2d Cir. 2015) (citing *Elec. Frontier Found. v. U.S. Dep't of Justice*, 739 F.3d 1, 10 (D.C. Cir. 2014)). As described by Defendant and supported by the unredacted portions of the report, the memoranda "describe[d] the legal parameters of what the [agency was] *permitted* to do, [and did] not state or determine the [agency]'s policy." *Elec. Frontier Found.*, 739 F.3d at 10. Therefore, the memoranda do not constitute working law and are exempt from disclosure. And, even were Plaintiffs to argue that the OLC memoranda were incorporated by reference or adopted by the administration as its official policy—which they do not, *see* Pl. Reply Mem. 17 n.16 (distinguishing between the "working law" and "incorporation by reference or adoption" doctrines)—the record contains no evidence that the documents were publicly referenced or adopted by agency decisionmakers such that the memoranda's content could be said to constitute official agency policy. Although the report discusses the influence wielded by Yoo and other OLC staff in the internal debate over the PSP, it does not establish: that the memoranda were consistently referenced by decisionmakers in articulating policy; that the reasoning—and not only the conclusions—contained in the memoranda were adopted; or that the recommendations in the documents were in any way binding on agency decisionmakers. *See Nat'l Council of La Raza*, 411 F.3d at 357-61 (surveying caselaw and identifying circumstances in which a document otherwise subject to the deliberative process privilege is adopted as or incorporated by reference into agency policy). Accordingly, Defendant's motion is GRANTED, and Plaintiffs' DENIED,

with respect to the information withheld in Joint IG Report Vol. III pp. 25-42, 104-17, 122-33, 142-49, 158-80, and 182-86.

C. *In Camera* Review

In FOIA cases, courts should conduct *in camera* review only as a last resort. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). Indeed, *in camera* review should only occur when the court "believes that *in camera* inspection is needed in order to make a responsible *de novo* determination on the claims of exemption." *Ctr. for Auto Safety v. EPA*, 731 F.2d 16, 21 (D.C. Cir. 1984). Because the Court concludes that Defendant has sustained its burden with regarding to its claims of exemption, further *in camera* review is unnecessary.

**CONCLUSION**

For the reasons stated above, Plaintiffs' motion for summary judgment is DENIED, and Defendant's motion is GRANTED. The Clerk of Court is directed to terminate the motions at ECF Nos. 29 and 38 and to close the case.

SO ORDERED.

Dated: August 18, 2016
New York, New York

ANALISA TORRES
United States District Judge