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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

MICHAEL F. SCHULTZ.,

Plaintiff,

vs.

**FEDERAL BUREAU OF INVESTIGATION,
DRUG ENFORCEMENT
ADMINISTRATION, UNITED STATES
MARSHALS SERVICE and DEPARTMENT
OF JUSTICE,**

Defendants.

1:05-cv-0180 AWI GSA

**MEMORANDUM OPINION AND
ORDER ON MOTION OF
DEFENDANT FBI FOR SUMMARY
JUDGMENT**

Doc. #'s 138 & 148

This is an action by plaintiff Michael F. Schultz (“Plaintiff”) pursuant to the Freedom of Information Act (“FOIA”) 5 U.S.C. § 552 and the Privacy Act, 5 U.S.C. § 552a, against defendants Federal Bureau of Investigation (“FBI”) the Drug Enforcement Administration (“DEA”), the United States Marshals Service and the Department of Justice. At this point in the proceedings, FBI is the sole remaining Defendant and Plaintiff’s claim pursuant to FOIA is the only remaining claim. Currently before the court is the motion of FBI for summary judgment as to Plaintiff’s FOIA claim. For the reasons that follow, FBI’s motion for summary judgment will be granted. The court will also deny as moot Plaintiff’s motion to amend at Document Number 148. Subject matter jurisdiction exists pursuant to 28 U.S.C. § 1331. Venue is proper in this court.

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PROCEDURAL HISTORY

Plaintiff's original complaint was filed on February 9, 2005, and was amended on July 6, 2005. All Defendant parties moved for summary judgment on July 13, 2007. There followed a long series of extensions of time to file various briefs and a stay of proceedings imposed upon motion of Plaintiff. Following the lifting of the stay, Defendants re-noticed their motion for summary judgment on August 29, 2008. The court issued a memorandum opinion and order on July 22, 2010, (the "July 22 Order") granting in part and denying in part Defendants' motions for summary judgment. Doc. # 86. The court's July 22 Order granted summary judgment as to Plaintiff's claims under the Privacy Act as to all Defendants, but denied summary judgment as to Plaintiff's claims under FOIA upon finding that Defendants had failed to provide sufficient particularized information to allow the court to determine the applicability of exemptions to the general duty of federal agencies under FOIA to provide the documents requested. See Doc. # 86 at 35:14-36:2.

Defendants' next motion for summary judgment was filed on September 13, 2010. Doc. # 89. In their September 13 Motion, Defendants asserted their contention that Department of Justice ("DOJ") is the only proper party defendant in this case and that the constituent agencies FBI, DEA and U.S. Marshals Service should be dismissed. Defendants also reasserted their contention that their "Glomar"¹ responses to Plaintiff's FOIA requests were appropriate. On July 2, 2012, the court issued a memorandum opinion and order denying the motion for dismissal of FBI, DEA and U.S. Marshals Service and ordering Defendants to file a further dispositive motion in light of the recent Ninth Circuit decision in Pickard v. Dep't of Justice, 653 F.3d 782 (9th Cir. 2011). Doc. # 111.

Defendants filed their next motion for summary judgment on October 26, 2012. Doc. # 114. The legal theory advanced by Defendants in their October 26 Motion was that the

¹ The "Glomar" response is the term applied to a response by a governmental agency that "neither confirms nor denies" the existence of records responsive to a FOIA request. See Phillippi v. CIA, 546 F.2d 1009, 1011 (D.C. Cir. 1967) (upholding the refusal of defendant CIA to confirm or deny the existence of a ship called the *Glomar Explorer*).

1 Defendant agencies were not required to provide documents responsive to Plaintiff's FOIA
2 request or to provide a Vaughn index showing the reasons for the withholding because the
3 documents requested were subject to categorical exclusion based on the nature of the documents
4 themselves. See generally, Doc. # 114 at 12-15. Defendant DEA argued in the alternative that it
5 had no obligation to continue to identify documents responsive to Plaintiff's FOIA request
6 because Plaintiff had failed to pay or promise to pay the statutory search and processing fee. On
7 October 29, 2014, the court issued an order denying summary judgment as to DEA and FBI
8 finding that categorical exemptions could not be applied based on the information and
9 representations then before the court. See Doc. # 129 at 11:20-26. The court correspondingly
10 granted Plaintiff's motion to compel production of Vaughn indexes by Defendants. The court
11 inadvertently did not address DEA's alternative ground for its motion for summary judgment in
12 its October 29 Order. Defendant DEA moved for reconsideration of the court's order denying
13 summary judgment as to it on December 10, 2014. DEA's motion for reconsideration was
14 granted by the court order dated September 29, 2015. Currently, the only claim remaining in this
15 action at this point is Plaintiff's FOIA claim against FBI.

16
17 FBI filed notice of production of their Vaughn index on April 10, 2015.² On April 28,
18 2015, Plaintiff filed an objection to FBI's Index based on FBI's claims of categorical exemptions
19 and requested an "Adequate Vaughn Index." FBI's instant motion for summary judgment was
20 filed on May 22, 2015. On June 6, 2015, Plaintiff filed two motions during the pendency of
21 Defendant's motion for summary judgment; the first was to compel production of an Index by
22 former Defendant DEA, and the second was to hold the motion for summary judgment in
23 abeyance until rulings were issued on Plaintiff's motion to compel production of an Index from
24 DEA and a motion for more complete Index by Defendant FBI. Both motions were denied by a
25 court order filed on September 29, 2015.

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28 ² The court either did not receive or misplaced the Vaughn index that was purportedly produced on
April 10, 2015. The court therefore directed re-filing of the index on September 8, 2015, and received
same on September 14, 2015. Hereinafter, the Vaughn index produced on September 8, 2015 is referred
to as the "Index."

1 requested documents were generated, the documents recovered by Defendant FBI that pertain to
2 Ahlo and Olaes were confined to documents generated within the time period of, and in
3 connection with, the investigation of Plaintiff by FBI. See Doc. # 138-2 at 11 (explaining FBI's
4 approach to requests for information on third parties who have not consented to disclosure).
5

6 Defendants allege their search of relevant data bases, subject to the above-mentioned
7 limitations, identified 1,196 pages of documents and one CD pertaining to Ahlo and/or Olaes.
8 Defendants have produced an Index that they contend expresses the applicable exemptions for
9 each document or collection of documents and the contents of the documents that they contend
10 warrant the application of the exemptions. Doc. # 147-2. As Plaintiff has observed, the Index
11 does not address the contents of each page and, in many cases, aggregates a substantial number
12 of documents that are similar (for example multiple completed versions of the same fill-in form)
13 and asserts the same exemptions apply to all similar completed forms. FBI's central contention
14 in its motion for summary judgment is that the information requested through Plaintiff's FIOA
15 requests is subject to categorical exemption pursuant to FOIA exemptions set forth at 5 U.S.C.
16 §§ 552(b)(6), (b)(7)(C), (b)(7)(D), and (b)(7)(E). FBI's current policies regarding the
17 application of these exemptions is explained at pages 12 through 21 of the Declaration of David
18 Hardy, Doc. # 138-2 ("Hardy Dec.").
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21 The only fact alleged by Defendant in this the third motion for summary judgment that
22 has not been either alleged or discussed in previous motions is the fact that neither Ahlo nor
23 Olaes testified for the prosecution at Plaintiff's trial. UMF # 98. Plaintiff called only Olaes as a
24 defense witness. UMF # 99.

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LEGAL STANDARD

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Poller v. Columbia Broadcast System, 368 U.S. 464, 467 (1962); Jung v. FMC Corp., 755 F.2d 708, 710 (9th Cir. 1985); Loehr v. Ventura County Community College Dist., 743 F.2d 1310, 1313 (9th Cir. 1984).

Under summary judgment practice, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Although the party moving for summary judgment always has the initial responsibility of informing the court of the basis for its motion, the nature of the responsibility varies “depending on whether the legal issues are ones on which the movant or the non-movant would bear the burden of proof at trial.” Cecala v. Newman, 532 F.Supp.2d 1118, 1132-1133 (D. Ariz. 2007).

“FOIA Cases typically and appropriately are decided on motions for summary judgment.” *See e.g., Higgins v. U.S. Dep’t of Justice*, 919 F.Supp.2d 131, 139 (D.D.C. 2013) (internal quotations omitted). To obtain summary judgment, a defendant agency must establish that it has conducted an adequate search for responsive records, that each responsive record that it has located either has been produced to the plaintiff or is exempt from disclosure, and that it has not withheld any reasonably segregable information. *See Wiesberg v. Dep’t of Justice*, 627 F.2d 365, 368 (D.C.Cir. 1980); *Elec. Frontier Found. v. U.S. Dep’t of Justice*, 739 F.3d 1, 12 (D.C.Cir. 2014). [S]ummary judgment may be granted on the basis of agency affidavits if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith.” *Halpern v. CIA*, 629 F.2d 144, 148 (D.C.Cir. 1980).

Cobar v. U.S. Dep’t of Justice, 81 F.Supp.3d 64, 71 (D.D.C. 2015).

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DISCUSSION

I. Scope of Disclosure and Reasonable Search for Responsive Documents

For purposes of this action, Plaintiff's requests pursuant to FOIA sought information on persons he acknowledged were paid informants under the employ of Defendant. FOIA provides "that when 'informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of [FOIA], unless the informant's status as an informant has been officially confirmed.' [Citation.]" Cobar v. Dep't of Justice, 953 F.Supp.2d 1, 4 (D.C. 2013) (quoting 5 U.S.C. § 522(c)(2)). However, "[w]here an informant's status has been officially confirmed, a *Glomar* response is unavailable and the agency must acknowledge the *existence* of any responsive records it holds.' [Citation.]" Pickard v. Dep't of Justice, 653 F.3d 782 (9th Cir. 2011) (quoting Boyd v. Criminal Div. of U.S. Dep't of Justice, 475 F.3d 381, 389 (D.C. Cir. 2007) (*italics added*)).

It bears emphasis that section 522(c)(2) establishes an *exclusion* from acknowledgement, not an exemption from disclosure. See Rahim v. FBI, 947 F.Supp.2d 631 (E.D. La. 2013) ("An 'exclusion' is different from an exemption in that the Government need not even acknowledge the existence of excluded information."). Thus, official confirmation of a governmental informant with regard to a particular investigation can be characterized as a partial waiver of only the most extreme of privacy right against disclosure of the *existence* of responsive information. Two considerations flow from this characterization. First, it is clear that official confirmation of an informant has no waiver effect on the right of the government to withhold responsive documents otherwise subject to any applicable *exemption*. See Pickard, 653 F.3d at

1 786. Second, case authority indicates that the scope of waiver resulting from official
2 confirmation is no broader than the involvement of the confidential informant in the
3 investigation that is the object of the requesting party's FOIA inquiry. See id. (observing that
4 waiver of the right of non-acknowledgment under section 552(c)(2) only operates if the
5 requested information matches the information previously disclosed, including the effective time
6 period of the previous disclosure); Rahim 81 F.Supp.2d at 646-647 (observing that an alleged
7 confidential informant is not "officially disclosed" in one case based on the official confirmation
8 of that informant's status in a prior case). This limitation of the application of the concept of
9 waiver to information that the government would otherwise not be required to acknowledge fits
10 with the common sense notion that the government should not be required to lay open all of its
11 dealings with a confidential informant based only on a single instance in which the informant's
12 status is officially confirmed for the limited purpose of a particular prosecution.
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15 The court concludes that Defendant acted lawfully in limiting the search for records
16 pertaining to Olaes and/or Alho to those records that were generated as part of investigation and
17 prosecution of the case against Plaintiff. From a practical perspective, this means that Defendant
18 is obliged to acknowledge the existence of responsive records that contain, for example, the
19 criminal history of either Alho or Olaes that were generated during the investigation and
20 prosecution of Plaintiff's criminal case but not similar documents that may have been generated
21 either before or after the involvement of the two informants in the investigation and prosecution
22 of Plaintiff.
23

24 **II. Exemptions**

25 Defendant has produced an Index of documents that are responsive to Plaintiff's FOIA
26 request and has listed individual documents or groups of documents indicating what exemption
27 or exemptions are being invoked and the contents of the documents that justify reliance on these
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1 exemptions. As noted above, the Index produced by Defendant is organized at the level of the
2 document, not the page. Thus, each set of exemptions that are asserted, are asserted with regard
3 to a document consisting of one to several pages. Further, where Defendant's search recovered
4 multiple documents of the same type, for example memoranda of interviews of confidential
5 sources, the Bates page ranges and the dates of each of the documents are listed separately but
6 the exemptions asserted and the description of the contents justifying the application are set forth
7 only once for that type of document.

8
9 As noted, it is not disputed that Defendants search pursuant to Plaintiff's FOIA request
10 resulted in the collection of 1,196 pages. By the court's estimation, these 1,196 pages comprise
11 approximately 342 individual documents. Defendants contend that each of the approximately
12 342 documents is exempt from disclosure in response to a FOIA request by operation of between
13 two and four statutory exemptions.⁴ The exemptions that are applicable to requests pursuant to
14 FOIA that may be applicable to documents generated as a result of law enforcement activities
15 are found at 5 U.S.C. §§ 552(b)(7). The exemptions that are by far the most commonly invoked
16 by Defendant are the exemption set forth at 5 U.S.C. §§ 552(b)(7)(D) and (C).

17
18 **A. *Exemption 7(D)***

19 Subsection 552(b)(7) lists a total of six exemptions that are applicable to various aspects of
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22 ⁴ In its moving papers, Defendant indicates that by grouping similar documents together where, for
23 example, the same form was filled out each time the same event, such as an interview of a confidential
24 source occurred, Defendant is entitled to the "categorical" application of the claimed exemptions to all of
25 the individual records in the group. At least this is what the court understands by Defendant's use of the
26 term "categorical." The court is leery of the casual use of potentially important but ambiguous terms
27 such as "categorical" without taking some care to be appropriately specific in their use. See Powell v.
28 U.S. Dep't of Justice, 584 F.Supp. 1508, 1525 (N.D. Cal. 1984) (expressing doubt as to government
contentions as to the use of "categorical" exclusions of documents). In the analysis that follows, the court
will affirm Defendant's withholding groups of documents that have been grouped together based on the
fact that each documents contain the same *type* of information (such as information from a confidential
informant), which is exempt from FOIA disclosure under the same statutory exemption – for example,
exemption 7(D). In so doing the court does not intend to endorse any particular notion of "categorically
exempt" information.

1 criminal investigation and prosecution. The exemption found at subsection 7(D) is of particular
2 relevance to Plaintiff's FOIA requests because the exemption is the one most commonly invoked
3 by Defendant, and because it is an exemption that does not require a balancing of the public's
4 interest in the information requested against the privacy interest of the subject of the information.
5 Pursuant subsection 552(b)(7)(D), otherwise responsive documents are exempt from production
6 if they "could reasonably be expected to disclose the identity of a confidential source . . . and, in
7 the case of a record or information compiled by criminal law enforcement authority in the course
8 of a criminal investigation . . . [the] information furnished." Cobar v. U.S. Dep't of Justice, 81
9 F.Supp.3d 64, 71 (D.D.C. 2015) (quoting statute).

11 Among the FOIA exemptions requiring no balancing of privacy interests, "[e]xemption
12 7(D) differs from other FOIA exemptions in that its applicability depends not on the specific
13 factual contents of a particular document; instead, the pertinent question is whether the
14 information at issue was furnished by a 'confidential source' during the course of a legitimate
15 criminal law investigation." Leshar v. U.S. Dep't of Justice, 636 F.2d 472, 492 (D.C. Cir. 1980).
16 Thus, "[e]xemption 7(D) protects two distinct types of information: (1) information that 'could
17 reasonably be expected to disclose the identity of a confidential source'; and (2) [the]
18 'information furnished by a confidential source.'" Cobar, 81 F.Supp.3d at 72. Significantly, the
19 two "prongs" of subsection 7(D) operate independently, and the protection afforded as to the
20 information provided by a confidential source is not lessened if the identity of the confidential
21 source is officially disclosed or is known to the requester. See id. at 73 ("an agency may
22 continue to withhold information from a source has been revealed to the requester or when the
23 requester knows the source's identity").

24 Case authority has repeatedly confirmed that FOIA exemption 7(D) is the primary means by
25 which Congress realized its intention to provide the broadest extent of protection to the
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1 relationship of criminal investigative agencies and the confidential sources upon which they
2 depend. See Irons v. FBI, 880 F.2d 1446, 1451-1452 (1st Cir. 1989) (noting the efforts of
3 Congress in 1974 and 1986 as reflected in the Congressional Record to “broaden the reach of
4 this exemption and to ease considerably a Federal law enforcement agency’s burden in invoking
5 it.”). The Irons court specifically addressed the scope of subsection 7(D) in the situation where
6 the confidential source is disclosed through testimony at trial by addressing the issue of whether
7 the testimony of a confidential informant during a trial *waived* any or all of the protections of
8 exemption 7(D). At the time of the decision in Irons, variations among courts in the judicial
9 application of waiver doctrine to exemption 7(D) resulted in uneven application of the
10 exemption between jurisdictions. See Irons 880 F.2d at 1456-1457 (“the judicial effort to create
11 a ‘waiver’ exemption runs afoul of the statutes ‘intent to provide “workable” rules.’”). After
12 consideration of a representative collection of judicial attempts to apply the concept of “waiver”
13 to the ability of law enforcement agencies to withhold information under exemption 7(D), the
14 Irons court held:

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18 [T]hat public testimony by “confidential sources” cannot “waive” the
19 FBI’s right under the second clause of exemption 7(D) to withhold
20 “information furnished by a confidential source” and not actually revealed
21 in public. For basically similar reasons, the first clause of exemption
22 7(D), protecting information that could reveal “the identity of a
23 confidential source,” is not waived (notwithstanding subsequent public
24 testimony by the source), insofar as disclosure of information not
25 contained in the public testimony could confirm the source’s identity as to
26 some information, or could reveal the source’s identity as the provider of
27 other not-yet-disclosed information. Consequently, the plaintiffs are not
28 entitled to information furnished to the FBI by confidential sources,
beyond what has been actually disclosed in the source’s prior public
testimony.

Id. at 1456-1457.

As a threshold matter, there is no dispute that Olaes and Alho functioned during the time
applicable to Plaintiff’s FOIA request as *confidential* informants. Plaintiff has labeled them as
such and the court has no reason to find otherwise. Also as an initial matter, there is no dispute

1 that Olaes and Alho provided information to FBI in connection with a lawful criminal
2 investigation. Thus, Defendant has satisfied at least the preliminary requirements for application
3 of exemption 7(D). In addition, to the extent that it is Plaintiff's contention that there is some
4 information withheld by Defendant that was actually testified to at trial and therefore not
5 protected by subsection 7(D), Plaintiff has failed to provide any indication of what may have
6 been disclosed through testimony at trial.⁵ The court must therefore presume that nothing other
7 than the names of the confidential informants were officially disclosed. Therefore, the court must
8 conclude that subsection 7(D), when applied to the documents identified by Defendants justifies
9 the withholding of all information except for the names of the two paid confidential informants.
10

11 Examination of Defendant's index of responsive document reveals that Defendants
12 invoke subsection 7(D) to justify the withholding informant-generated information in all but six,
13 or 336, of the 342 responsive documents. Defendant's Index indicates that, of the 336
14 documents that were withheld on pursuant to exemption 7(D), *each* of these documents
15 contained, at minimum, the names and permanent identification numbers or symbols of one or
16 more confidential informants. In addition, of the approximately 336 documents that Defendant
17 withheld pursuant to subdivision 7(D), all but approximately 35 also contain *information* or
18 work product that is described by in the index as being provided, directly or indirectly, by
19 confidential sources. Thus, Defendant argues that all 336 documents were properly withheld
20 because they contained information satisfying the first prong of the exemption criteria – they
21 contain information that could disclose permanent identifying numbers or symbols -- of
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26 ⁵ Elsewhere in his pleadings, Plaintiff alleges that he knows the amount that Olaes was paid and knows
27 Olaes permanent numerical identification designation. There is no indication, however, that either of
28 these "facts" were acknowledged, either officially or unofficially at trial. In any event, possessing such
knowledge, even if it had been disclosed officially, would entitle Plaintiff to no more information than is
already known to him or available through trial transcripts.

1 subsection 7(D), and approximately 320 of those documents were properly withheld because
2 they contained information satisfying both the first and second exemption criteria of subsection
3 7(D).
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5 “The court may grant summary judgement based solely on information provided in an
6 agency’s affidavits or declarations if they are relatively detailed and when they describe ‘the
7 documents and the justifications for non-disclosure with reasonably specific detail, demonstrate
8 that the information withheld logically falls within the claimed exemption, and are not
9 controverted by either contrary evidence in the record nor by evidence of agency bad faith.”
10 Strunk v. U.S. Dep’t of Interior, 752 F.Supp.2d 39, 42-43 (D.D.C. 2010) (quoting Military Audit
11 Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981). Agency affidavits or declarations are
12 accorded a presumption of good faith, which cannot be rebutted by purely speculative claims
13 about the existence and discoverability of other documents. Rahim v. FBI, 947 F.Supp.2d 631,
14 638 (E.D. La. 2013) (internal quotation marks and citation omitted).
15

16 The court finds that Defendant, to the extent it has described documents in the Index as
17 containing the phrase “information provided by a confidential source” or “interviews with a
18 confidential source,” or equivalent description, has described such documents adequately to
19 justifying the withholding of such documents under Exemption “(7)(D). As discussed above,
20 this exclusion is applicable to the majority of documents listed in Defendant’s Index. Further, to
21 the extent Defendants have described responsive documents as containing “confidential source
22 symbol numbers” or the equivalent, the court finds that Exemption 7(D) applies so as to justify
23 the withholding of at least the informant-identifying features of the documents. The court will
24 address the issue of segregability of other information *infra*.
25

26 ***B. Exemptions 6/7C***
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28 Defendants Index invokes the exemptions found at 5 U.S.C. §§ 552(b)(6) and (7)(C). These

1 two exemptions enable an agency to withhold information where the disclosure of the
2 information would unreasonably intrude on the personal privacy of the subject of the
3 information. Exemption (b)(6) prevents disclosure of such disclosure “would constitute a *clearly*
4 unwarranted invasion of personal privacy.” *Id.* (italics added). Exemption (b)(7)(C) prevents
5 disclosure of records “compiled for law enforcement purposes” where the production of such
6 records would “constitute an unwarranted invasion of personal privacy.” *Id.* Because the
7 exemption under subsection (b)(6) is more restricted than under subsection (b)(7)(C), and
8 because it is not disputed that the information sought and withheld was compiled for law
9 enforcement purposes; the court need only consider whether the requested material was properly
10 withheld pursuant to exemption (7)(C) since any information withheld because it would cause an
11 unwarranted invasion even if it does not qualify for withholding under subsection (b)(6). *See*
12 Roth v. U.S. Dep’t of Justice, 642 F.3d 1161, 1173 (D.C. Cir. 2001) (applying standard
13 appropriate to exemption (b)(7)(C) where government claimed exemptions under both (b)(7)(C)
14 and (b)(6)).

17 “Where the privacy concerns addressed by Exemption 7(C) are present, the exemption
18 requires the person requesting the information to establish a sufficient reason for the disclosure.”
19 Nat’l Archives & Records Adm. V. Favish, 541 U.S. 157, 172 (2004) (“Favish”). “To determine
20 whether disclosure ‘could reasonably be expected to constitute an unwarranted invasion of
21 personal privacy’ for purposes of Exemption 7(C), we must ‘balance the privacy interests that
22 would be compromise by disclosure against the *public* interest in release of the requested
23 information.’ [Citation].” Roth, 642 F.3d at 1174 (quoting Davis v. Dep’t of Justice, 968 F.2d
24 1276, 1281 (D.C. Cir. 1992)) (italics added). Where, as here, the requesting party has a personal
25 stake in the information requested that “personal stake in the release of information is
26 ‘irrelevant’ to the balancing of public and third-party privacy interests required by Exemption
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1 7(C).”⁶ Id. at 1177. “[N]ot only the targets of law-enforcement investigations, but also
2 ‘witnesses, informants, and . . . investigating agents’ have a ‘substantial interest’ in insuring that
3 their relationship to the investigation ‘remains secret.’ [Citation]” Roth, 642 F.3d at 1174
4 (quoting Davis, 968 F.2d at 1276). There the subjects of Plaintiff’s FOIA request – Ahlo and
5 Olaes – have substantial privacy interests to protect. In determining whether the public’ interest
6 is sufficient to overcome the subject’s privacy interests, the court must ask whether: (1) “‘The
7 public interest sought to be advanced is a significant one, an interest more specific than having
8 the information for its own sake,’ and (2) whether the information [sought] ‘is likely to advance
9 that interest.’ [Citation.]” Id. at 1175 (quoting Favish, 541 U.S.at 172 (2004)).

11 In prior orders, the court has speculated that a public interest could arise from the
12 government’s failure to comply with the requirement for disclosure of exculpatory evidence as
13 established by Brady v. Maryland, 373 U.S. 83, 87 (1963). In Roth the appellate court
14 considered whether there was a significant public interest in the possible commission of a Brady
15 violation or of the conviction of a person who was actually not guilty. The Roth court found that
16 both concerns give rise to a public interest, but that the interest is broader with regard to the
17 possibility of wrongful conviction in a capital murder case. See Roth 642 F.3d at 1176
18 (contrasting the two public interests).

19 The court’s prior speculation that a Brady issue could arise from the facts of this case was
20 based to a significant extent on the court’s supposition that Olaes and/or Ahlo had testified for
21 the government during the government’s case in chief. Plaintiff’s admission that only Olaes
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26 ⁶ In Powell v. U.S. Dep’t of Justice, 584 F.Supp. (N.D. Cal. 1984), the district court cited case
27 authority for the application of FOIA exemption 6, which included consideration of the plaintiff’s interest
28 in disclosure. The district court then went on to analyze the application of exemption 7(C) without
restating the standard. A review of the court’s decision does not indicate that the court used the plaintiff’s
interest in disclosure as a factor in the balancing test where exemption 7(C) is at issue. This court will
follow Roth.

1 testified, and then only as a witness called by the defense in the defense’s case in chief
2 substantially undercuts the proposition that a Brady issue could arise from the facts of this case.
3 Generally, a Brady issue arises where the prosecution seeks conviction based on the testimony of
4 a witness who would be shown unreliable under facts not disclosed by the prosecution, or based
5 on evidence presented at trial that could be controverted by information not disclosed by the
6 prosecution. Neither situation appears to have been the case at Plaintiff’s criminal trial since the
7 prosecution did not rely at all on testimony by either Olaes or Alho. Neither is it alleged by
8 Plaintiff, that information known to the prosecution would have, if disclosed at trial, have
9 undercut or negated any of the facts upon which Plaintiff’s conviction was based.
10

11 “Since the right to the disclosure of material, exculpatory evidence recognized in *Brady*
12 protects a defendant’s right to a fair trial, *see Brady*, 373 U.S. at 87 [. . .], the determination of
13 whether information is ‘material’ for purposes of *Brady* focuses on how the information relates
14 to other information known at the time of trial.” Roth, 642 F.3d at 1175. “The question is not
15 whether the defendant would more likely than not have received a different verdict with the
16 evidence [discoverable through FOIA], but whether in its absence [the defendant] received a fair
17 trial, understood as a trial resulting in a verdict worthy of confidence.” Kyles v. Whitley, 514
18 U.S. 419, 434 (1995).
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21 Plaintiff has consistently maintained that the disclosure of information pertaining to Ahlo
22 and Olaes is important to the satisfaction of the public’s interest in misconduct perpetrated by the
23 FBI branch office in Hawaii. How the allegation of misconduct of FBI agents during an
24 investigation gave rise to a Brady violation in Plaintiff’s case has never been entirely clear. The
25 court has reviewed declarations filed by Plaintiff with his amended complaint, Doc. # 11, and
26 filed with his opposition to Defendant’s motion for summary judgment. Doc. # 78. Interpreting
27 these documents liberally, the court concludes that Plaintiff’s line of reasoning is something
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1 close to the following: Plaintiff avers that his conviction was based, in part, on communications
2 between Plaintiff and Olaes that were intercepted and recorded by FBI agent Maglasang through
3 a wiretap on Olaes telephone. Prior to Plaintiff's criminal trial, Plaintiff's attorney moved to
4 suppress the evidence provided through the wiretap on Olaes telephone pursuant to 18 U.S.C. §§
5 2511 and 2515. Section 2515 prohibits the use of information obtained by a wiretap that is
6 unlawful under § 2511 in any court proceeding. The government opposed the motion to
7 suppress on the ground Olaes had acted under color of law when he cooperated with FBI to tap
8 his telephone and when he instituted communications with Plaintiff which FBI recorded. The
9 government therefore contended that the wiretap was not unlawful pursuant to 18 U.S.C. §
10 2511(2)(d). Plaintiff's trial court accepted the government's argument and denied the motion to
11 suppress.
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14 Plaintiff's primary contention appears to be that, had the defense in his criminal case been
15 forthcoming with information in their possession (and allegedly available pursuant to Plaintiff's
16 FOIA request), the court would have had a basis to find that Olaes was acting at his own
17 direction and for his own purposes and not under color of law, and therefore would have had a
18 basis for granting the motion to suppress the evidence produced by the wiretap. See Doc. # 78 a
19 ¶¶ 39-46. Notwithstanding any technical arguments against Plaintiff's theory for suppression of
20 evidence in his criminal trial, the facts alleged by Plaintiff are not sufficient to state a violation
21 under Brady. As noted above, the withholding of evidence violates the command of Brady only
22 if the evidence that is withheld is both "material" and "exculpatory." The evidence Plaintiff
23 claims was withheld was neither. Plaintiff's motion to suppress at his criminal trial was based
24 on allegations of misconduct as to FBI agent Maglasang and of criminal conduct as to Olaes, but
25 those facts, even if true, do not exculpate Plaintiff. In short, the facts that Plaintiff alleges were
26 withheld in violation of Brady did not undermine Plaintiff's conviction, they merely would have
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1 provided, at most, a slightly more robust argument for suppression of the facts that were the
2 basis of Plaintiff's conviction.

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4 The court has examined each of Plaintiff's affidavits and concludes that nowhere does
5 Plaintiff allege that facts were withheld by the government that would tend to indicate that
6 Plaintiff was actually innocent of the charges against him. Essentially, Plaintiff's argument for
7 Brady violation boils down to an attempt to reargue the motion to suppress that was already
8 considered and rejected by the criminal court. The court concludes that the facts alleged by
9 Plaintiff do not give rise to concerns over a Brady violation.

10 Plaintiff argues in the alternative that there exists a public interest that overcomes the privacy
11 interests of Alho and Olaes because the evidence requested would show criminal conduct of
12 Olaes with the consent of the FBI, the intervention by FBI in the mitigating state-imposed
13 penalties against Alho, and would show that both Magalsang and the government's prosecuting
14 attorney made false statements at trial that were prejudicial to Plaintiff. There are two problems
15 with Plaintiff's argument. First, to the extent that Plaintiff alleges that Defendant facilitated
16 Olaes' own drug dealing, or that Defendant ignored instances of Olaes' theft of drugs from
17 Defendant or other misconduct by Olaes, there is no indication such conduct constitutes
18 "misconduct" in any official sense. There is nothing revelatory in the proposition that law
19 enforcement agencies such as DEA or FBI permit or even facilitate lesser criminal conduct in
20 order to investigate and prosecute what they determine to be greater criminal conduct. The same
21 observation applies to Plaintiff's contention that Defendant intervened in Alho's sentence or
22 otherwise obtained favorable treatment for him in exchange for his cooperation as an informant.

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24
25 Second, to the extent Plaintiff contends that the alleged misconduct by AUSA Sorenson or
26 FBI agent Maglasang are matters of public concern sufficient to overcome the privacy
27 protections of Exemption 7(C), Plaintiff's allegations fall far short of what is required to state a
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1 public interest in official misconduct. “We hold that, where there is a privacy interest protected
2 by Exemption 7(C) and the public interest being asserted is to show that responsible officials
3 acted negligently or otherwise improperly in the performance of their duties, the requester must
4 establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must
5 produce *evidence* that would warrant a belief that a reasonable person that the alleged
6 Government impropriety might have occurred.” Favish, 541 U.S. at 174 (italics added).
7 Plaintiff’s allegations that Sorenson made false or prejudicial statements at Plaintiff’s trial or that
8 Maglasang somehow unlawfully conspired to obtain Olaes’ cooperation or that she caused
9 Plaintiff’s financial information to be misrepresented to the jury are all bare allegations with no
10 offer of evidence. ““In the absence to the contrary, courts presume that [Government agents]
11 have properly discharged their official duties.’ [Citation.]” Id. (quoting United States v.
12 Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926).

15 “Only when the FOIA requester has produced evidence sufficient to satisfy this standard
16 will there exist a counterweight on the FOIA scale for the court to balance against the cognizable
17 privacy interests in the requested records.” Id. at 175. Plaintiff has failed to show there is any
18 concern of a Brady violation and Plaintiff has presented no evidence of official misconduct
19 beyond bare allegations of misconduct. Plaintiff has therefore failed to show that there exists
20 any public interest in the records he requested. Because there is no showing of public interest,
21 the privacy interest protected by Exemption 7(C) remain paramount.

23 ***C. Other Exemptions***

24 In addition to Exemptions 7(D) and 6/7(C), Defendants listed Exemptions 7(E) and 7(F) as
25 being appropriate reasons for the withholding of some of the responsive documents. Exemption
26 7(E) applies to “records or information compiled for law enforcement purposes” where
27 disclosure would reveal “techniques and procedures for law enforcement investigations or
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1 prosecutions, or . . . guidelines for law enforcement investigations or prosecutions if such
2 disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. §
3 552(b)(7)(E). Exemption 7(F) protects from disclosure information which, if disclosed, could
4 reasonably be expected to result in physical harm to any person. The court has examined
5 Defendant’s Index and concludes that there are no documents listed for which exemption under
6 either 7(E) or 7(F) are claimed where exemption under Exemption 7(C) is not also claimed.
7 Since the court has determined that Exemption 7(C) applies because the public has no
8 discernable interest in the information requested, it follows that the application of exemption
9 7(C) to all documents for which that exemption is claimed will necessarily exclude all
10 documents or information that would be subject to exclusion under Exemption 7(F).
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12
13 That said, the court does take note of Defendant’s observation that the methamphetamine
14 importation and sales operation in which Plaintiff was convicted of being a central figure
15 included individuals and a culture that was and is not opposed to the use of deadly force for the
16 purpose of discouraging cooperation with law enforcement. Thus, although the court need not
17 analyze the applicability of Exemption 7(F) to documents for which that exemption is claimed,
18 the court may look to the purpose of that exemption, the protection of third parties, in making its
19 decision as to the weight of the privacy interests of Alho, Oales and other third party individuals
20 whose private information may be at risk of disclosure.
21

22 **III. Segregability**

23 A review of the documents listed in Defendant’s Index shows that either or both
24 Exemptions 7(D) or 6/7(C) are claimed for each of the documents listed. “Immediately after
25 listing the nine exemptions to the general policy of disclosure, FOIA provides that ‘[a]ny
26 reasonably segregable portion of a record shall be provided to any person requesting such record
27 after deletion of the portions with are exempt under this subsection.’ [5 U.S.C.] § 552(b).”
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1 Wilkenson v. FBI, 633 F.Supp. 336, 350 (C.D. Cal. 1986). Having determined that these two
2 exemptions apply to all of the documents, the court must determine if there remains segregable
3 information that Plaintiff is entitled to. In making this determination, it is useful to review with
4 some precision the categories of information requested by Plaintiff. As noted above, Plaintiff's
5 FOIA requests to FBI requested the same categories of information as to both Olaes and Alho.
6 The court quotes here Plaintiff's FOIA request to FBI as to Olaes with the understanding it
7 reflects all the information sought with respect to Alho:
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- 10 1. Criminal history, record of arrest, conviction, warrants or other
pending criminal cases
- 11 2. All case names, case numbers and judicial districts, federal, state or
12 local, where Mr. Olaes has testified under oath.
- 13 3. All instances where the Federal Bureau of Investigation has intervened
14 on Mr. Olaes behalf to assist him in avoiding criminal and/or tax problems
or prosecutions.
- 15 4. All administrative sanctions imposed on Mr. Olaes by FBI for any
16 dishonesty, false claims, or other deceit or behavior that FBI has deemed
inappropriate.
- 17 5. Agent's notes (including Special Agents: Cindy Maglasang and
18 Terrence Chu from Honolulu, Hawaii), documents, reports, memorandas
[sic], letters, electronic files, database references; "Do Not File" files,
19 "P&C" files, photographs, audiotape & video tapes, electronic (ELSUR) or
20 photographic surveillance, "JUNE" mail, male covers, trash covers and
other miscellaneous files, and any index citations relating to or referring to
Steven Olaes; and ("see also") files.⁷
- 21

22 Doc. # 138-3 at ¶¶ 13-14.

23 In determining whether the court should require *in camera* evaluation of the documents
24 listed in Defendant's Index, it is instructive to note what Plaintiff did not request through FOIA.
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26 _____
27 ⁷ Paragraph 5 is included here because it was enumerated in Plaintiff's FOIA request. The court
28 interprets Paragraph 5 not as a request for any specific type of information, but as a list of places to look
to retrieve the information that was requested.

1 Plaintiff did not request any generalized information concerning FBI policies and/or procedures
2 in handling informants; he did not request blank evaluation forms or examples of categories of
3 information that might be of interest to FBI in managing informants, paid or otherwise. In
4 addition he did not request any information that was produced, either directly or indirectly by
5 either informant alleged. All Plaintiff requested was information pertaining specifically to
6 Olaes' or Alho's criminal or questionable conduct; information that, while highly personal to
7 both Olaes and Alho, is entirely tangential to the issue of whether the public should have
8 confidence in Plaintiff's conviction. While Plaintiff attempts to invoke public interest in
9 information that would "shed light on the controversial use of paid informants and contingent fee
10 arrangements by Law Enforcement Agencies," he did not structure his FOIA inquiries in a way
11 that would most effectively serve that purpose.
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13
14 By inspection, it is apparent that a great deal of the information requested by Plaintiff is
15 information Defendant is not required to produce because it was generated before or following
16 the period of Plaintiff's investigation or prosecution. Because subsection 522(c)(2) justifies the
17 *non-disclosure* of the *existence* of information that either predated or postdated the period of
18 time covered by the investigation and prosecution of Plaintiff, the absence of Alho's or Oales'
19 rap sheets, histories of prior (or later) involvement as confidential informants, or disciplinary
20 issues in the Index indicates that none of the information sought by Plaintiff was generated
21 during the time relevant to Plaintiff's FOIA request, if it was ever generated at all.
22

23 With regard to information Defendant is required to produce, it is clear that both Olaes
24 and Alho have privacy interests that are cognizable under Exemption 6/7(C) that are not
25 overcome by the public's interest in disclosure which, as discussed above, is non-existent. See
26 Roth, 642 F.3d at 1174 (even convicted criminals have a substantial interest in their "rap
27 sheets"). Given that the combination of Exemptions 6/7(C) and 7(F) command that the court
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1 assiduously safeguard the privacy interests of the alleged informants and given that Plaintiff has
2 requested only information that actually or potentially would invade those interests, the court
3 must conclude that Plaintiff's FOIA request seeks precisely that information that Defendant must
4 withhold under law. The court concludes that, based on the scope of what Plaintiff requested
5 and the scope of information that is subject to exemption, there is no conceivable information
6 that would be responsive to Plaintiff's FOIA requests, as originally worded, that would not be
7 properly withheld under Exemptions 6/7(C) and 7(F). Therefore, the court concludes that it need
8 not conduct an *in camera* review of documents to determine if they contain segregable
9 information.
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13 In closing, the court notes that Plaintiff moved to amend his motion for a more complete
14 Vaughn Index on September 15, 2015. Doc. # 148. The amendment requested consisted of an
15 opinion from the District Court of Northern California, Pickard v. Dep't of Justice, 2015 U.S.
16 Dist. LEXIS 20319 (N.D.Cal. Feb. 19, 2015), rejecting a Vaughn Index submitted by a
17 government agency in a drug-related case and directing the agency to submit an index that
18 included information sufficient to determine whether there was segregable information. The
19 court did, in fact, review the opinion submitted by Plaintiff but found it inapposite to the facts of
20 this case on several grounds. The two primary considerations that led to the court's conclusion
21 that the Pickard case is inapposite are the facts that; (1) the Defendant in this case did tailor the
22 exemptions claimed to the description of the documents in question, rather than simply reciting
23 all of the exemption categories for each document, and (2) the requester in the Pickard case
24 appears to have requested a broader scope of documents generated in the investigation of his
25 case whereas Plaintiff, in this case, merely sought disciplinary and criminal conduct history of
26 two particular subjects. The court will deny Plaintiff's motion at Docket Number 148 as moot to
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1 indicate that the proposed amendment was considered but not applied to the facts of this case.

2 THEREFORE, pursuant to the foregoing discussion, it is hereby ORDERED that
3 Defendant's motion for summary judgment is GRANTED. The Clerk of the Court shall ENTER
4 JUDGMENT for Defendants and against Plaintiff as to all claims and all defendants. The Clerk
5 of the Court shall CLOSE THE CASE. Plaintiff's motion to amend, Doc. # 148, is hereby
6 DENIED as moot.
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9 IT IS SO ORDERED.

10 Dated: March 2, 2016



11 SENIOR DISTRICT JUDGE

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