UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY and CHARLES SAVAGE,	
Plaintiffs,	
v.	ECF CASE
FEDERAL BUREAU OF INVESTIGATION,	10 Civ. 7920 (RPP)
Defendant.	

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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PRELIMINARY STATEMENT

Defendant the Federal Bureau of Investigation (the "FBI" or the "Government") by its attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submits this memorandum of law in opposition to Plaintiffs' motion for summary judgment seeking release of selected documents under the Freedom of Information Act, 5 U.S.C. § 522 ("FOIA"), and in support of its cross-motion for summary judgment as to these same documents and its motion to dismiss under Federal Rule of Civil Procedure 12(b)(1).

Plaintiffs seek the release of the following records under FOIA: (1) copies of FBI Shooting Incident Review Team ("SIRT") reports prepared by the FBI; and (2) statistics on the aggregate results of investigative "assessments" conducted by the FBI pursuant to Attorney General Guidelines that went into effect in December 2008 ("Assessment Statistics"). Plaintiffs only challenge the exemptions invoked by the Government to withhold information from both categories of documents.

With respect to the SIRT reports, Plaintiffs object to the Government's withholding of the full names of the FBI Special Agents listed in the reports, and assert that the Government has an obligation under FOIA to redact the names so that only the agents' initials remain. However, not only do the agents' full names fall squarely within the protections of Exemptions 6 and 7(C), but the SIRT reports also contain sufficient information for Plaintiffs' stated purpose of "ensur[ing] adequate public oversight of the FBI." Moreover, releasing only the agents' initials will not further advance Plantiffs' stated interest because it would be impossible to verify whether the same agent was involved in more than one shooting incident, and to monitor how the FBI has handled cases involving subsequent incidents by that agent. *See infra* Point I.C. Finally, because the information requested by Plaintiffs is not reasonably segregable, the FBI should not

be saddled with the burdensome task of re-processing over 2,000 pages of SIRT Reports to display only the agents' initials.

With respect to the Assessment Statistics, although Plaintiffs initially disputed the Government's withholdings under Exemptions 2 and 7(E), Plaintiffs' FOIA claim as to that category of documents is now moot because the Government has released the Assessment Statistics without those exemptions. *See infra*, Point II.B.

As set forth below, and in the accompanying Declaration of David M. Hardy dated March 25, 2011 ("Hardy Decl."),[1] the Government has met its burden of demonstrating that the FBI names redacted from the SIRT reports are exempt from disclosure under FOIA, and that the Court lacks jurisdiction to consider Plaintiff's FOIA claim with respect to the Assessment Statistics because that claim is moot. The Court accordingly should grant both the Government's cross-motion for summary judgment on Plaintiffs' FOIA claims with respect to the SIRT Request and the Assessment Statistics Request, and the Government's Rule 12(b)(1) motion to dismiss Plaintiffs' FOIA claim with respect to the Assessment Statistics Request.

STATEMENT OF FACTS

A. Plaintiffs' FOIA Requests and Complaint

1. SIRT Request

On November 3, 2009, plaintiff Charles Savage ("Savage"), on behalf of plaintiff The

[1] The Government is not submitting a Statement pursuant to Local Civil Rule 56.1, in accordance with the general practice in this Circuit. *See Radcliffe v. I.R.S.*, 536 F. Supp. 2d 423, 432 (S.D.N.Y. 2008) (noting agency's burden on summary judgment can be satisfied "by affidavits or declarations"); *NAACP Legal Def. & Educ. Fund, Inc. v. HUD*, 07 Civ. 3378 (GEL), 2007 WL 4233008, at *1 n.1 (S.D.N.Y. Nov. 30, 2007) (granting government's summary judgment motion as "properly made" without Rule 56.1 statement); *Ferguson v. FBI*, 89 Civ. 5071 (RPP), 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995) (noting "general rule in this Circuit" that Local Civil Rule 56.1 statements should not be submitted in FOIA cases), *aff'd*, 83 F.3d 41 (2d Cir. 1996). If the Court wishes the Government to submit such a Statement, we will do so promptly.

New York Times Company, e-mailed a FOIA request to FBI, requesting copies of all SIRT reports "completed between January 1, 1999, and the present." Hardy Decl. ¶ 5 & Ex. A (the "SIRT Request"). By e-mail dated July 8, 2010, Plaintiffs amended the SIRT Request by expanding the timeframe for SIRT reports to "[January 1, 1993] to the present," and by reducing the scope of the request to include only the summaries of the SIRT reports, any electronic communications completed by the review panel containing its findings regarding each shooting incident, and any section of the SIRT report that contained investigator concerns. Hardy Decl. ¶¶ 10, 37 n.8 & Ex. F.

SIRT reports are generated when an FBI Special Agent or an FBI Task Force Officer is involved in a shooting incident while performing work as part of an FBI-led task force. *Id.* ¶ 3 n.1. These shooting incidents must be reported to the FBI's Inspection Division, which conducts an investigation into the shooting. *Id.* After the investigation is completed, the findings are presented to and reviewed by the FBI's Shooting Incident Review Group, which then assesses whether to take any action against the employee/shooter, and/or identifies and addresses other areas of concern. *Id.*

2. Assessment Statistics Request

On November 4, 2009, plaintiff Savage e-mailed a second FOIA request to the FBI, requesting "statistics on the aggregate results of assessments the FBI has conducted using the new authorities provided by the AG Guidelines that were put into effect in December 2008," and referred to in an FBI response to a question from Senator Russell Feingold during a March 25, 2009 Senate Judiciary Committee Hearing. Hardy Decl. ¶ 22 & Ex. Q (the "Assessment Statistics Request").

As part of its central mission of protecting national security, the FBI proactively gathers information from available sources to identify threats and activities, and to support appropriate intelligence analysis. *Id.* ¶ 3 n.2. This type of investigative activity is known as an

"assessment." *Id.* Assessments may be used when the FBI obtains an "allegation or information" or an "articulable factual basis" concerning crimes or threats to national security, and the matter can be investigated or resolved through relatively non-intrusive methods authorized in assessments. *Id.* After checking investigative leads in this manner and concluding that further investigation is unwarranted, the FBI can avoid having to proceed to more formal levels of investigative authority. *Id. See also* Domestic Investigations and Operations Guide, Section 5, *available at* http://www.foia2.fbi.gov/diog/domestic_investigations_and_operations_guide_part2.pdf.

3. Plaintiffs' Complaint

After pursuing their administrative appeals under FOIA, *see* Hardy Decl. ¶¶ 8-9, 26-28, Plaintiffs filed the instant lawsuit on October 18, 2010, seeking orders "compelling the FBI" to produce the statistics requested in the Assessment Statistics Request and to produce documents requested in the SIRT Request. Compl. ¶¶ 33, 41.

B. FBI's Production of Responsive Documents

1. The FBI's Release of Documents Responsive to the SIRT Request

On November 18, 2010, December 17, 2010, December 20, 2010, January 25, 2011, and February 16, 2011, the FBI released a total of 2,158 pages responsive to the SIRT Request to plaintiff Savage, with notations in the documents indicating information withheld pursuant to Exemptions 2, 3, 6, 7(A), 7(C), 7(D), and 7(E). Hardy Decl. ¶¶ 17-21 & Exs. L-P; *see also* 5 U.S.C. §§ 552(b)(2), (b)(3), (b)(6), (b)(7)(A), (b)(7)(C), (b)(7)(D), and (b)(7)(E). Plaintiffs do not challenge the agency's withholding of information under Exemptions 2, 3, 7(A), 7(D) or (7E), but challenge only the agency's withholding of FBI agents' names under Exemptions 6 and 7(C). *See* Mem. of Law in Support of Pls.' Mot. for Summ. J. ("Pls.' Mem.") at 2, 6, 19-23.

2. The FBI's Release of Documents Responsive to the Assessment Statistics Request

On December 1, 2010, the FBI released to plaintiff Savage two pages responsive to the Assessment Statistics Request, with notations indicating where it had withheld information under Exemptions 2 and 7(E). *See* Hardy Decl. ¶ 29 & Ex. W; *see also* 5 U.S.C. § 552(b)(2), (b)(7)(E). Upon further review, however, the FBI determined that the information withheld under Exemptions 2 and 7(E) could be released, and re-released the two pages to plaintiff Savage on March 7, 2011, with those exemptions removed. *See* Hardy Decl. ¶ 30 & Ex. X. Plaintiffs object only to the FBI's withholding of information under Exemptions 2 and 7(E). *See* Pls.' Mem. at 6, 8-18. However, because Plaintiffs' summary judgment motion was filed on February 25, 2011, before the two pages were re-released on March 7, 2011, Plaintiffs' FOIA claim with respect to the Assessment Statistics Request is now moot. *See infra*, Point II.B.

ARGUMENT

POINT I

DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' FOIA CLAIMS

A. Legal Standards for FOIA and Summary Judgment

FOIA was enacted to "ensure an informed citizenry, . . . needed to check against corruption and hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The statute requires each federal agency to make available to the public an array of information, and sets forth procedures by which requesters may obtain such information. *See* 5 U.S.C. § 552(a). At the same time, FOIA exempts nine categories of information from disclosure, while providing that "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt under this subsection." *Id.* § 552(b). FOIA thus "calls for broad disclosure of [g]overnment records, while maintaining a balance between the public's right to know and the government's legitimate

interest in keeping certain information confidential." *Associated Press v. DOJ*, 549 F.3d 62, 64 (2d Cir. 2008) (citations and internal quotation marks omitted); *Center for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 925 (D.C. Cir. 2003).

Summary judgment pursuant to Federal Rule of Civil Procedure 56 is the procedural vehicle by which most FOIA actions are resolved. *See, e.g.*, *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999); *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). "In order to prevail on a motion for summary judgment in a FOIA case, the defendant agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to FOIA." *Carney*, 19 F.3d at 812. "Affidavits or declarations . . . giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." *Id.* (footnote omitted); *see also Halpern v. FBI*, 181 F.3d 279, 291 (2d Cir. 1999) (same). Although this Court reviews *de novo* the agency's determination that requested information falls within a FOIA exemption, *see* 5 U.S.C. § 552(a)(4)(B); *Halpern*, 181 F.3d at 287, the declarations submitted by the agency in support of its determination are "accorded a presumption of good faith," *Carney*, 19 F.3d at 812 (citation and internal quotation marks omitted).

B. The FBI Conducted an Adequate Search[2]

The FBI's searches were "'reasonably designed to identify and locate responsive documents.'" *Garcia v. DOJ, Office of Info. & Privacy*, 181 F. Supp. 2d 356, 368 (S.D.N.Y. 2002). As detailed in the Hardy Declaration, in response to Plaintiffs' SIRT Request, the FBI first searched its Central Records System, but found no responsive records. *See* Hardy Decl. ¶¶

[2] Although Plaintiffs do not challenge the adequacy of the FBI's searches, *see* Pls.' Mem. at 6, the Government has included a brief discussion of the searches here because "[i]n order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA." *Carney*, 19 F.3d at 812.

31-36, 37. The FBI then contacted its Inspection Division to search for and assemble all SIRT summaries and electronic communications from 1993 to the present. *Id.* ¶ 37. The search yielded numerous responsive reports and electronic communications. *Id.* The FBI also located a summary report, entitled "Shooting Database Review," of shootings that occurred between 1993 and 2009. *Id.* In response to Plaintiffs' Assessment Statistics Request, the FBI contacted the Office of Congressional Affairs to search for and retrieve the questions for the record arising from the March 25, 2009 Senate Judiciary Committee of Oversight Hearing concerning the FBI. *Id.* ¶ 38. As a result of the search, the FBI identified two pages of responsive materials. *Id.* Accordingly, the FBI has met its burden of undertaking a search that was "reasonably calculated to uncover all relevant documents." *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

C. The FBI Properly Withheld Personal Identifying Information Under Exemptions 6 and 7(C)

The FBI has withheld the complete names of FBI Special Agents who were listed in the SIRT Reports. *See* Hardy Decl. ¶ 45 & Ex. Y. "Exemption 7(C) and Exemption 6 are specifically aimed at protecting the privacy of personal information in government records." *Associated Press v. DOJ*, No. 06 Civ. 1758 (LAP), 2007 WL 737476, at *4 (S.D.N.Y. Mar. 7, 2007), *aff'd*, 549 F.3d 62 (2d Cir. 2008). Exemption 6 exempts from disclosure records or information in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).[3] Exemption 7(C), which applies only to information contained in law enforcement records, "is more protective of privacy than Exemption 6, because [Exemption 7(C)] applies to any

[3] Exemption 6 does not merely apply to "files 'about an individual,'" but applies more broadly to "bits of personal information, such as names and addresses," contained in otherwise releasable documents. *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152 (D.C. Cir. 2006); *see also U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982).

disclosure that 'could reasonably be expected to constitute' an invasion of privacy that is 'unwarranted.'" *Associated Press*, 2007 WL 737476 at *4; *see also Associated Press*, 549 F.3d at 65.

1. The Use of Identifiers Will Not Serve the Public Interests Identified by Plaintiffs

In determining whether personal information is exempt from disclosure under these provisions, the Court must balance the public's need for this information against the individual's privacy interest. *Wood v. FBI*, 432 F.3d 78, 86 (2d Cir. 2005); *see also Sherman v. U.S. Dep't of the Army*, 244 F.3d 357, 361 n.6 (5th Cir. 2001) ("[T]he manner in which courts analyze the applicability of exemption 7(C) is the same as that used with respect to exemption 6."). Where privacy concerns are present, the party requesting the information must "establish a sufficient reason for the disclosure" by: (1) showing that the "public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake"; and (2) showing that the "information is likely to advance that interest." *Nat'l Archives and Records v. Favish*, 541 U.S. 157, 172 (2004). Unless both prongs are met, "the invasion of privacy is unwarranted." *Id.*

Plaintiffs do not dispute that the SIRT reports were compiled for law enforcement purposes and therefore meets the threshold test for Exemption 7(C). *See* Pls.' Mem. at 19; *see also* Hardy Decl. ¶ 42 (explaining how SIRT reports fall within the FBI's law enforcement duties). Plaintiffs also agree that the FBI Agents named in the SIRT Reports have cognizable privacy interests under Exemptions 6 and 7(C), and that such privacy interests warrant protection through the withholding of their complete names. *See* Pls.' Mem. at 19; *see also* Hardy Decl. ¶¶ 45-46. Indeed, as the Hardy Declaration explains, FBI Special Agents' investigations of criminal law violations and national security cases put them in contact with various members of society. *Id.* ¶ 46. Given that individual targets of law enforcement actions can carry long-standing grudges against individual agents, releasing an agent's identity in connection with a particular

investigation could trigger hostility towards that agent, and therefore constitute an unwarranted invasion of the agent's personal privacy. *Id.; see Lahr v. Nat'l Transp. Safety Board*, 569 F.3d 964, 977 (9th Cir. 2009) (observing that "the directly applicable precedents nonetheless establish that 'FBI agents have a legitimate interest in keeping private matters that could conceivably subject them to annoyance or harassment'") (citing cases). However, Plaintiffs contend that "the appropriate balance between privacy and disclosure is struck by redacting the names so that the initials remain (the 'Identifier')." Pls.' Mem. at 19.

Plaintiffs' argument fails because they have not and cannot establish a nexus between the use of Identifiers and the purported public interest. In *Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976), law review editors researching disciplinary systems and procedures at military service academies sought case summaries of United States Air Force Academy honor and ethics hearings that were triggered by suspected violations of the Academy's Honors and Ethics Codes. *Id.* at 355, 358-59. Although the Court noted that the public had a "genuine and significant" interest in understanding how the codes operated and how they affected the training of future Air Force officers, the Court also made clear, and the parties agreed, that such summaries should be produced for *in camera* review after "redacting the records so as to delete personal references and all other identifying information . . . to safeguard affected persons in their legitimate claims of privacy." *Id.* at 355, 358, 370 n.8. *See also Lahr*, 569 F.3d at 979 (denying plaintiff's request for release of names of FBI agents appearing in documents related to National Transportation Safety Board investigation of plane crash, because "[plaintiff] already possesses the substance of the eyewitnesses' reports and the FBI agents' thoughts as they are expressed in the released memoranda and emails," such that releasing the names was "insufficient to override the . . . agents' privacy interests"); *Forest Service Employees for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1027-28 (9th Cir. 2008) (holding that, under Exemption 6, the Forest Service was not

required to release an unredacted copy of agency's investigative report of forest fire with the names of all agency employees identified in the report, where "the identities of the employees alone will shed no new light on the Forest Service's performance of its duties beyond that which is already publicly known," and "would not appreciably further the public's important interest in monitoring the agency's performance during that tragic event").

Likewise, in this case, the SIRT Reports already contain specific and detailed information about FBI shooting incidents and recommended courses of action, and therefore provide sufficient information for Plaintiffs' stated purpose of "maintaining public accountability of the FBI" by assessing the FBI Special Agents' use of force and agency recommendations regarding that use of force. Pls.' Mem. at 19; Hardy Decl. ¶ 47 & Ex. Y. To the extent the interests extend further "to track whether the same agent has been involved in more than one shooting incident and to monitor how the agency has handled cases involving subsequent incidents by the same agent" or to discern "a pattern involving the same agent or agents," *see* Pls.' Mem. at 19, 22, redacting the first name and the last name to release only the first letter of each name will not advance those interests. The SIRT Reports contain the first and last name of the agents and in some instances, only the agent's last name. *See* Hardy Decl. ¶ 48. Considering the likelihood that multiple agents will have the same initials or last names beginning with the same letter, there is no way to verify that the Identifiers would link the same agent to more than one incident. *Id.*

2. The Identifiers Are Not Reasonably Segregable From the Full Names of the FBI Special Agents

Moreover, even assuming that the first letters of the Special Agents' first and last names are non-exempt under FOIA, the FBI has satisfied its obligation to release "[a]ny reasonably segregable portion of a record . . . after deletion of portions which are exempt." 5 U.S.C. § 552(b).

As a preliminary matter, "[a]gencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). If the party requesting the information rebuts this presumption, it is the Government's burden to show that "no segregable, nonexempt portions were withheld." *Id.* (citing 5 U.S.C. § 552(a)(4)(B)). "A determination of whether non-exempt information in a record is reasonably segregable turns on the intelligibility of the record after the removal of the exempt information and the burden that removing the exempt material would impose on the agency." *Kalwasinski v. Fed. Bureau of Prisons*, 08 Civ. 9593 (PAC), 2010 WL 2541363, at *9 (S.D.N.Y. Mar. 12, 2010) (citing cases); *see also Lead Industries Ass'n, Inc. v. Occupational Safety and Health Admin.*, 610 F.2d 70, 85 (2d Cir. 1979) ("A determination of which if any portion of an otherwise exempt document are nonexempt must begin with a consideration of the nature of the document as a whole."). As the Second Circuit has instructed, "[i]f the proportion of nonexempt factual material is relatively small and is so interspersed with exempt material that separation by the agency and policing of this by the courts would impose an inordinate burden, the material is still protected because, although not exempt, it is not 'reasonably segregable,' under the final clause of § 552(b)." *Id.* at 86 (citing *Mead Data Central, Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 260-61 (D.C. Cir. 1977)).

The FBI's redaction of the Special Agents' full names complies with FOIA's mandate to provide all reasonably segregable material. Moreover, Plaintiffs have not and cannot rebut the presumption that the FBI has met this obligation. As set forth in the Hardy Declaration, the FBI would have to undertake a highly burdensome task of reprocessing the approximately 2,000 pages of SIRT Reports by carefully displaying the first letters of the first and last names only, which are clearly "interspersed" with the remainder of the protected name, and unlike entire phrases or paragraphs, are not reasonably segregable. Hardy Decl. ¶ 48. *See Sussman v. U.S.*

Marshals Serv., 734 F. Supp. 2d 138, 146 (D.D.C. 2010) (holding that entire phrases around redacted names and other identifying information were segregable from the exempt information). In addition, in considering the SIRT Reports as a whole, the Identifiers clearly would not link the same agent to more than one shooting incident, and therefore would not add additional meaningful information to an already intelligible record of FBI shooting incidents and recommendations on courses of action. *See Canning v. U.S. Dep't of Justice*, 567 F. Supp. 2d 104, 110 (D.D.C. 2008) ("The agency is not required to 'commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content.'") (quoting *Mead Data Central, Inc.*, 566 F.2d at 261, n.55). Accordingly, the FBI properly withheld the names of the FBI Special Agents under Exemptions 6 and 7(C).

POINT II

THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' FOIA CLAIM WITH RESPECT TO THE ASSESSMENT STATISTICS REQUEST BECAUSE THAT CLAIM IS MOOT

A. Legal Standard for 12(b)(1) Motion

Plaintiffs carry the burden of establishing that subject matter jurisdiction exists over their complaint. *See Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994). In considering challenges to subject matter jurisdiction under Rule 12(b)(1), the Court may consider evidence extrinsic to the pleadings. *See Phifer v. City of New York*, 289 F.3d 49, 55 (2d Cir. 2002) (noting that in challenges to subject-matter jurisdiction, a court "may consider materials extrinsic to the complaint"). *See also Luckett v. Bure*, 290 F.3d 493, 496-97 (2d Cir. 2002) ("In resolving the question of jurisdiction [on a motion made pursuant to Rule 12(b)(1)], the district court can refer to evidence outside the pleadings and the plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists.").

B. Plaintiffs' FOIA Claim as to the Assessment Statistics Request is Moot Because the FBI Has Re-Released the Document Without the Contested Exemptions

This Court lacks subject matter jurisdiction over an action if the underlying controversy is moot. *Ward v. Bank of New York*, 455 F. Supp. 2d 262, 266 (S.D.N.Y. 2006) (citing cases). Here, "FOIA confers jurisdiction on the district courts 'to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld.'" *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (quoting 5 U.S.C. § 552(a)(4)(B)). Hence, "federal jurisdiction is dependent on a showing that an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records.'" *Id.* (quoting *Kissinger v. Reporters Comm. for Freedom of Press*, 445 U.S. 136, 150 (1980)). Unless each of the three criteria is met, "a district court lacks jurisdiction to devise remedies to force an agency to comply with the FOIA's disclosure requirements." *Id.*

As previously noted, on March 7, 2011, the FBI re-released two pages that were responsive to Plaintiffs' Assessment Statistics Request after disclosing material previously withheld under Exemptions 2 and 7(E). Hardy Decl. ¶ 30 & Ex. X. Because Plaintiffs can no longer argue that the FBI has "improperly withheld agency records," the FBI's release of information responsive to the Assessment Statistics Request moots Plaintiffs' claim as to that request and deprives the district court of jurisdiction to devise further remedies for that request. *See, e.g., Dixon v. Admin. Appeal Dep't Office of Info. and Privacy*, No. 06 Civ. 6069 (LAK), 2008 WL 216304, at *4 (S.D.N.Y. Jan. 22, 2008) (dismissing FOIA claim for lack of subject matter jurisdiction because defendant's release of materials sought in FOIA request "moots [plaintiff's] current claim since the only relief that he seeks in the operative pleading is the disclosure of those materials"); *Ercole v. U.S. Dep't of Transp.*, No. 07 Civ. 2049, 2008 WL 4190799, at *8 (E.D.N.Y. Sept. 10, 2008) (dismissing FOIA claim for lack of subject matter jurisdiction because plaintiff "eventually received the requested documents," and "[a]ny requests

for relief by this Court to 'enjoin' defendant and 'order the production' of plaintiff's FOIA requests would be rendered moot"); *DiModica v. United States Dep't of Justice*, No. 05 Civ. 2165 (GEL), 2006 WL 89942, at *3-4 (S.D.N.Y. Jan. 11, 2006) (dismissing FOIA claim for lack of subject matter jurisdiction because complaint sought a court order commanding defendant to respond to plaintiff's FOIA request, and defendant had sent plaintiff the responsive document); *Fisher v. Fed. Bureau of Investigation*, 94 F. Supp. 2d 213, 218 (D. Conn. 2000) (dismissing FOIA claim for lack of subject matter jurisdiction because plaintiff "has been provided all documents necessary to satisfy his FOIA[] requests"). As a result, this Court should grant the Government's motion to dismiss Plaintiffs' claim as to the Assessment Statistics Request for lack of subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' motion for summary judgment and grant the Government's cross-motion for summary judgment and its motion to dismiss for lack of subject matter jurisdiction.

Dated: New York, New York
March 25, 2011

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