UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY and CHARLES SAVAGE,	:	
Plaintiffs,	:	
	:	No. 10 Civ. 7920 (RPP)
- against -	:	
FEDERAL BUREAU OF INVESTIGATION,	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiffs The New York Times Company and Charles Savage (jointly, "NYT") respectfully submit this memorandum of law in support of their motion for summary judgment on their Complaint brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq*. This action arises from two FOIA requests by NYT seeking (1) statistics related to assessments that the Federal Bureau of Investigation ("FBI") conducted to collect information about individuals or organizations who may pose national security threats (the "Assessment Statistics") and (2) reports prepared by FBI Shooting Incident Review Teams, analyzing incidents when FBI agents discharged weapons (the "SIRT Reports"), as well as related documents.

Defendant FBI, a component of the United States Department of Justice ("DOJ"), has declined to disclose the Assessment Statistics, asserting an interest in protecting the "internal personnel rules and practices" of the agency and "techniques and procedures for law enforcement investigations and prosecutions," pursuant 5 U.S.C. §552(b)(2) ("Exemption 2") and 5 U.S.C. §552(b)(7)(E) ("Exemption 7(E)" of FOIA. The FBI's reliance on Exemption 2 is unfounded. The Assessment Statistics, as numerical data provided to Congress, are not "internal" records and reveal nothing about agency "personnel rules and practices." Instead, they are a matter of significant public interest, the disclosure of which would not facilitate criminal activity or enable any wrong-doer to evade detection. The FBI's reliance on Exemption 7(E) is equally unfounded. The Assessment Statistics are neither "guidelines" nor "techniques and procedures," as those terms have been defined by the Second Circuit.

As for the SIRT Reports and related documents, the FBI has also declined to reveal the names of FBI agents or to redact the names to allow initials to serve as unique identifiers for the agents who are subjects of the reports. In doing so, the FBI has asserted the privacy interests protected in 5 U.S.C. §552(b)(6) ("Exemption 6") and §552(b)(7)(C) ("Exemption 7(C)") of FOIA. However, the appropriate balance to be struck between protection of individual privacy and public disclosure under FOIA is to employ redaction to leave only the initials of the agents. While protecting privacy, such redaction permits the public to know whether the same agents are involved in multiple incidents and how the agency has responded in such cases – the sort of public oversight of agency action that FOIA is intended to advance.

The requested information is therefore not exempt under FOIA and must be disclosed.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of two requests submitted by NYT in 2009 under FOIA to the FBI. On November 3, 2009, NYT made a request (the "SIRT Request") to the FBI seeking the agency's SIRT Reports from 1999 forward. (*See* Declaration of David McCraw, dated February 25, 2011 (the "McCraw Dec."), ¶ 3 and Ex. A.) Following subsequent communications with the FBI, the SIRT Request was amended to include a request for the following sections from all individual SIRT Reports filed since January 1, 1993: the synopsis/summary section and the section identifying concerns identified by investigators. (McCraw Dec. ¶ 5 and Ex. C.) In addition, the SIRT Request was amended to encompass an overview study of shooting incidents (the "Overview Report") and electronic communications containing findings made by FBI reviewers and sent to FBI officials concerning the shooting incidents (the "Electronic Communications"). (McCraw Dec. ¶ 11.)

On November 4, 2009, NYT submitted a second request (the "Assessment Request") for the Assessment Statistics, which the request identified as "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." (*See* McCraw Dec. 12 and Ex. G.)

A. FBI Assessments

Under authority granted to it by the U.S. Attorney General in December 2008 (the "AG Guidelines"), the FBI "proactively" conducts "assessments" for the objective of "detecting criminal activities; obtaining information on individuals, groups, or organizations of possible investigative interest, either because they may be involved in criminal or national security-threatening activities or because they may be targeted for attack or victimization in such activities; and identifying and assessing individuals who may have value as confidential human sources." Federal Bureau of Investigation, *Domestic Investigations and Operations Guide*, 40 (Dec. 16, 2008), *available at*: http://foia.fbi.gov/diog/domestic_investigations_and_operations_guide_part2.pdf (the "FBI Guide"). According to the FBI Guide, "no particular factual predication" is needed to initiate an assessment. FBI Guide at 39. And although the assessment cannot be "based *solely* on the exercise of First Amendment protected activities or on the race, ethnicity, national origin or religion of the subject," these factors are not prohibited. FBI Guide at 39 (emphasis added). Assessments permit agents to use potentially intrusive techniques, such as using confidential informants to participate in organizations and religious services, following and photographing targets in public and semi-public places, and subpoenaing telephone records. FBI Guide at 58-72.

B. The Assessment Request

NYT's Assessment Request followed congressional testimony by FBI Director Robert Mueller about the assessment program. Director Mueller had testified on March 25, 2009 before the U.S. Senate Committee on the Judiciary at an FBI oversight hearing. (McCraw Dec. ¶ 14.) At that hearing, Sen. Russell Feingold requested information on the use of assessments since December 2008. (McCraw Dec. ¶ 4.) On November 4, 2009, NYT submitted the Assessment Request, seeking an up-to-date version of the statistics requested by Sen. Feingold. (McCraw Dec. ¶ 12 and Ex. G.)

By a letter dated December 23, 2009 (the "Assessment Denial"), the FBI denied the Assessment Request, asserting that the statistics were in "draft form" and therefore exempt from disclosure pursuant to Exemption 5, 5 U.S.C. §552(b)(5) (concerning inter- and intra-agency memoranda and letters). (McCraw Dec. ¶ 15 and Ex.H.) On December 30, 2009, NYT filed an administrative appeal with the Director of the Office of Information Policy ("OIP"), a component of DOJ. (McCraw Dec. ¶ 16 and Exhibit I.) On July 8, 2010, OIP affirmed the Assessment Denial, pursuant to Exemption 5. (McCraw Dec. ¶ 17and Ex.J.)

On October 19, 2010, NYT filed this suit to compel the FBI to grant the Assessment Request. Subsequently, on December 1, 2010, the FBI released a copy of a letter to the Senate Committee on the Judiciary (the "Senate Letter"), dated November 19, 2010, containing responses to Senator Feingold's questions. (McCraw Dec. ¶ 18 and Ex.K.) The Senate Letter redacted the data showing (1) how many assessments the FBI has conducted and completed using the new authorities provided by the AG Guidelines, (2) how many preliminary or full investigations were initiated based upon information developed in those assessments, and (3) how many assessments are still ongoing. (McCraw ¶ 19 and Ex.K.) The FBI asserted that the

statistics were exempt pursuant to Exemptions 2 (applying to internal personnel rules) and 7(E) (pertaining to law enforcement). (McCraw ¶ 20 and Ex. K.)

C. SIRT Reports and Related Documents

When an FBI agent discharges his or her firearms, an FBI Shooting Incident Review Team investigates and prepares a SIRT Report on the incident. (*See* McCraw Dec. ExF at 2.) These reports include the date, location, and time of the shooting, the names of the members of the investigating team, a detailed factual account of the shooting, the results of forensic examinations, the observations of the Review Team, and recommendations, such as remedial firearms training or disciplinary action. (*See* McCraw Dec. ¶ 4 and Ex. B.) Once the SIRT Report is finalized, it is presented to a Shooting Incident Review Group ("SIRG"), a high-level oversight panel with members from the FBI and DOJ. (*See* McCraw Dec. Ex. F at 2.) The SIRG will "assess whether the actions of the shooters complied with the FBI Deadly Force Policy and identify and address other areas of concern" such as "control and communication, planning, training, and/or equipment." McCraw Dec. Ex. F at 2. These finding are then transmitted via the Electronic Communications to FBI officials for implementation. In addition to individual SIRT Reports, the FBI also created the Overview Report, reviewing the 493 FBI shooting incidents that occurred from 1993 through 2009. (*See* McCraw Dec. ¶ 11 and Ex. F.)

D. The SIRT Request

The SIRT Request submitted by NYT on November 3, 2009 sought copies of all SIRT Reports since January 1, 1999. (*See* McCraw Dec. ¶ 3 and Ex.A.) Although FOIA requires that an agency respond to a request within 20 days, 5 U.S.C. § 552(a)(6)(A)(i), the FBI failed either to produce the requested reports or to deny the SIRT Request for over four months. (McCraw Dec. ¶ 6.)

On March 29, 2010, NYT filed an administrative appeal of the FBI's constructive denial of the SIRT request. (McCraw Dec. ¶ 7 and Ex. D) On May 4, 2010, OIP denied NYT's administrative appeal for lack of ripeness because an adverse determination had not yet been made. (*See* McCraw Dec. ¶ 8 and Ex. E.) During the pendency of the request, NYT engaged in negotiations with the FBI regarding the scope of the SIRT request in an attempt to expedite disclosure. (McCraw Dec. ¶ 5 and Ex. C.) NYT and the FBI agreed that the SIRT Request would be modified to include the Overview Report and the following sections of individual SIRT Reports filed since January 1, 1993: the synopsis/summary section and sections containing concerns identified by investigators, as well as the Electronic Communications containing findings. (*See* McCraw Dec. ¶ 5 and Ex. C .)

The FBI failed to produce any documents in response to the SIRT Request prior to this action being filed. (McCraw Dec. ¶ 9.) Subsequently, while this action was pending, the FBI produced the Overview Report, the Electronic Communications containing findings, and individual SIRT Reports from 1993 to 2009. (McCraw Dec. ¶¶ 10-11.) However, the FBI redacted the identities of agents named in the SIRT Reports and Electronic Communications. (McCraw Dec. ¶ 10.)

Following the FBI's productions, the remaining issues for the Court in this action are the FBI's redaction of the Assessment Statistics and redaction of the entire names of agents in the SIRT Reports and Electronic Communications.

STANDARD OF REVIEW

Under FOIA, this Court is to undertake *de novo* review of an agency decision to withhold information from the public. 5 U.S.C. § 552(a)(4)(B); *see also Massey v. FBI*, 3 F.3d 620, 622 (2d Cir. 1993); *American Civil Liberties Union v. Dep't of Defense ("ACLU")*, 389 F. Supp. 2d

547, 552 (S.D.N.Y. 2005). This review is conducted without deference to the agency's initial determination. *A.T.& T. v. Fed. Commc'ns Comm'n*, 582 F.3d 490, 496 (3d Cir. 2009); *Al-Fayed v. CIA*, 254 F.3d 300, 306-07 (D.C. Cir. 2001).

FOIA was enacted in order to "promote honest and open government and to assure the existence of an informed citizenry [in order] to hold the governors accountable to the governed." *Grand Central P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999) (internal quotation and citation omitted). The Act strongly favors a policy of disclosure. *Halpern v. F BI*, 181 F.3d 279, 286 (2d Cir. 1999). "'Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.'" *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (quoting *EPA v. Mink*, 410 U.S. 73, 80 (1973)).

Accordingly, FOIA requires the government to disclose its records unless its documents fall within one of the specific, enumerated exemptions set forth in the Act, and these statutory exemptions are to be narrowly construed. *Nat'l Council of La Raza v. Dept. of Justice*, 411 F.3d 350, 355-56 (2d Cir. 2005); *Wood v. FBI*, 432 F.3d 78, 83 (2d Cir. 2005) (Sotomayor, J.) ("We construe FOIA exemptions narrowly"); s*ee also Lawyers Comm. for Human Rights v. Immigration & Naturalization Serv.*, 721 F. Supp. 552, 560 (S.D.N.Y. 1989) (FOIA exemptions are "narrowly construed to ensure that Government agencies do not develop a rubber stamp, 'top secret' mentality behind which they can shield legitimately disclosable documents"). Thus, the burden is on the agency to show that an exemption applies. *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 2009 U.S. App. LEXIS 28610, at *18 (2d Cir. Dec. 30, 2009) ("The agency asserting the exemption bears the burden of proof, and all doubts as to the applicability of the exemption must

be resolved in favor of disclosure"); *Ortiz v. U.S. Dep't of Health & Human Servs.*, 70 F.3d 729, 735 (2d Cir. 1995). As the Second Circuit has held, to meet this standard in a FOIA suit, the agency must prove "that each document that falls within the class requested either has been produced, is unidentifiable**,** or is wholly exempt from [FOIA's] inspection requirements." *Ruotolo v. Dep't of Justice, Tax Div.*, 53 F.3d 4, 9 (2d. Cir. 1995); *see also Long v. U. S. Dep't of Justice*, 10 F. Supp. 2d 205, 209 (N.D.N.Y. 1998)**.** The burden extends to decisions to redact certain material within documents. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991); *see* 5 U.S.C. § 552(a)(4)(B); *see also Rose v. Dep't of the Air Force*, 495 F.2d 261, 268 (2d Cir. 1974), *aff'd*, 425 U.S. 352 (1976) (agency has burden for establishing right to withhold materials under FOIA).

In a FOIA case, as in other litigation, summary judgment is properly granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Bryant v. Maffuci*, 923 F.2d 979, 982 (2d Cir. 1991).

ARGUMENT

I.

THE ASSESSMENT STATISTICS CANNOT BE WITHHELD UNDER EXEMPTION 2

By its terms, Exemption 2 protects documents "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). As construed by the courts, the exemption only applies to (a) information that is predominantly internal to an agency and has no public interest or (b) information that is predominantly internal to an agency and though of public interest, cannot be disclosed without significant risk of circumventing agency regulations. *Massey*, 3 F.3d at 622 (2d Cir. 1993). The FBI cannot meet either of those standards here, where

the Assessment Statistics are of public interest, are not merely matters of internal agency practice, and their disclosure would not pose a risk to the FBI's operations.

FOIA's broad disclosure requirements were intended to replace the public access provisions of the Administrative Procedure Act ("APA"), which imparted such wide discretion to agency officials to withhold documents from the public that it became known more as a withholding statute than one of disclosure. *Rose*, 425 U.S. at 360. Recognizing the importance of government transparency and public access, Congress purposely used language in FOIA intended to rein in the overly broad provisions found in the APA.

This congressional objective is evident in the wording of Exemption 2. While the APA formerly stated that records reflecting "any matter relating solely to the internal management of an agency" need not be disclosed, 5 U.S.C. § 1002 (1964), Exemption 2 now provides that agencies may withhold records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). This shift in language is traceable to congressional dissatisfaction with exemption from disclosure under the former section of the APA, and the current Exemption 2 under FOIA has a far narrower reach than the former APA exemption for "internal management." *See Elliott v. U.S. Dep't of Agriculture*, 596 F.3d 842, 846 (D.C. Cir. 2010).

Courts have generally embraced the notion that Exemption 2 encompasses two types of agency material – categorized either as low 2 or high 2 information. *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992) (describing low 2 and high 2 aspects of exemption). The rationale behind this approach derives largely from the D.C. Circuit's decision in *Crooker v. Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (*en banc*). Holding that portions of an ATF manual were exempt from disclosure because their public disclosure would risk

circumvention of agency rules and regulations, the *Crooker* court expressly indicated that "the scope of Exemption 2 [is not restricted] to minor employment matters." *Crooker*, 670 F.2d at 1069. In coming to this determination, the court relied on a test that exempted material from disclosure so long as the requested documents were "predominantly internal," and their release would "significantly risk[ ] circumvention of agency regulations or statutes." *Crooker*, 670 F.2d at 1073-74. Thus, trivial internal agency data is protected as low 2 information while more significant internal information, the disclosure of which would pose a risk, falls within the ambit of high 2.

The Second Circuit has followed an approach similar to *Crooker*: Internal agency information may be withheld if "it is of no genuine public interest *or* if the material is of public interest and the government demonstrates that disclosure of the material would risk circumvention of lawful agency regulations." *Massey*, 3 F.3d at 622 (quotation omitted).[1]

[1] Disagreements continue to exist as to the propriety of recognizing the high 2 strand of the exemption – an issue that is currently pending before the Supreme Court in an appeal from *Milner v. U.S. Dept. of Navy*, 575 F.3d 959 (9th 2009) *cert. granted*, 2010 U.S. LEXIS 5361 (U.S., June 28, 2010). The controversy stems in large part from the differing descriptions of the exemption's intended scope as set forth in the Senate and House Reports. *See Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544, 546 (2d Cir. 1978). The Senate Report has come to be viewed as supporting the "low 2" exemption for trivial internal documents deemed of no interest to the public, while the broader view espoused by the House Report has been offered as support for the purported existence of the high 2 exemption. To this day, the Senate Report has generally been favored over the House Report in its interpretation of Exemption 2. In fact, in its only decision discussing Exemption 2, the Supreme Court in *Rose* noted that virtually all courts at the time "ha[d] concluded that the Senate Report more accurately reflects the Congressional purpose." *Rose*, 425 U.S. at 363. The Court's near endorsement of the Senate Report derived from its belief that the exemption was to delineate between trivial matters and more substantial matters in which the public might have a legitimate interest. *Id.* at 365. Accordingly, minor issues such as "rules as to personnel's use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like" may be lawfully withheld from the public. S. Rep. No. 89-813, at 8 (1965).

A. The Assessment Statistics Are Not Predominantly Internal And Are of Genuine Public Interest

The first requirement for the invocation of Exemption 2 under any theory is that the information at issue be predominantly internal. *See Elliot*, 596 F.3d at 847 (D.C. Cir. 2010). Although the information need not literally be "rules and practices," it must be "'used for predominantly internal purposes' and relate to 'rules and practices for agency personnel.'" *Elliot*, 596 F.3d at 847 (quoting *Crooker*, 670 F.2d at 1073). For example, Air Force Academy disciplinary case summaries were predominantly internal because, although they were not technically personnel rules, they implemented Air Force rules. *Rose*, 425 U.S. at 364-65. Similarly, notations on documents that indicated the agency's routing and distribution practices were predominantly internal because disclosure of the notes would have disclosed the underlying practices. *See Lesar v. U.S. Dep't of Justice*, 636 F.2d 471, 485-86 (D.C. Cir. 1980).

The Assessment Statistics cannot meet the "predominant internality" requirement because they are not used for predominantly internal purposes, and they are unrelated to rules and practices for FBI personnel. Instead, they track the external work of the FBI in monitoring potential threats. And, tellingly, the document at issue here was prepared for Congress, a separate branch of government, concerned about the impact of the assessments on citizens.

Further, unlike Air Force case summaries or routing notes, the raw statistics reveal nothing about the internal rules and procedures FBI agents follow in initiating or conducting assessments. The statistics reveal even less about the internal operations of an agency than, for example, the roster of names and duty addresses of military personnel at Bolling Air Force Base at stake in *Schwaner v. Dep't of the Air Force*, 898 F.2d 793 (D.C. Cir. 1990). The court

determined that "the list does not bear an adequate relation to any rule or practice of the Air Force" and failed the threshold predominant internality requirement for Exemption 2. *Id.* at 794.

The only information that the release of the statistics would convey is the number of initiated assessments, the number of ongoing assessments, and the number of investigations opened up as a result of data gathered from assessments. Courts have questioned whether such raw data can ever be considered a "practice." *See Elliot*, 596 F.3d at 847 (discussing the Bolling roster and "recognizing that Exemption 2 was a poor fit because data itself is not a practice").

The Assessment Statistics have such a weak relationship to agency rules and practices that exempting them would result in the very error cautioned against in *Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir. 1975):

> In some attenuated sense, virtually everything that goes on in the Federal Government, and much that goes on outside of it, could be said to be "related" through some chain of circumstances to the "internal personnel rules and practices of an agency." The potentially all-encompassing sweep of a broad exemption of this type [would] undercut . . . the vitality of any such approach.

Id. at 1150 (Leventhal, J., concurring). Because the Assessment Statistics are not related predominantly to the internal practices of the FBI, they cannot meet the threshold internality requirement for withholding under Exemption 2.

But even if the Assessment Statistics were considered internal, Exemption 2 permits withholding only if the data concerns "those rules and practices that affect the internal workings of an agency, and, therefore would be of no genuine public interest." *Massey*, 3 F.3d at 622 (quotation omitted). The exemption eases the administrative burden put on federal agencies by FOIA by allowing for the withholding of internal information related to minor, trivial matters. *See Rose*, 425 U.S. at 369.

The Assessment Statistics are not minor administrative data applying to internal personnel management, such as data recording sick leave statistics, personnel policies, or other trivial administrative information. The Assessment Statistics record the frequency and extent of intrusive and controversial FBI investigations that raise a whole host of privacy and civil rights concerns that are of great importance to the general population.

The AG Guidelines enable the FBI to conduct assessments without requiring any factual predicate that the target of the investigation is involved in illegal activity or threats to national security. FBI Guide at 39. In addition, these same guidelines do not clearly prohibit the FBI from using race, religion, or national origin as factors in initiating assessments, and they allow the FBI to utilize a number of intrusive investigative techniques during assessments, including physical surveillance, confidential informants, subpoenaing telephone records, and engaging in pretext interviews. FBI Guide at 40, 58-72. As a result, the guidelines have provoked considerable concern from members of Congress, the legal community, and the public. *See, e.g.*, Letter from Russell D. Feingold, Edward M. Kennedy, Richard J. Durbin and Sheldon Whitehouse, U.S. Sens., to Robert Mukasey, U.S. Att'y Gen. (Aug. 20, 2008), *available at*: http:// whitehouse.senate.gov/newsroom/press/release/?id=a1e03e6a-6c34-4577-a24c-b595e84b9195; Allison Jones, Note, *The 2008 FBI Guidelines: Contradiction of Original Purpose*, 19 B.U. Pub. Int. L.J. 137 (2009); Evan Perez, *FBI Seeks to Loosen Restrictions On National-Security Probes*, Wall Street Journal, Sept. 13, 2008, at A3, *available at*: http://online.wsj.com/article/ SB122126125303530343.html.

These expanded investigatory powers are also of concern because the Justice Department has found that even prior to the AG Guidelines the FBI conducted surveillance of non-violent domestic political groups without justification and improperly retained data on citizens. *See*

Office of the Inspector General, U.S. Dep't of Justice, *A Review of the FBI's Investigations of Certain Domestic Advocacy Groups* (Sept. 2010), *available at*: http://www.justice.gov/oig/special/s1009r.pdf. The use of assessments by the FBI represents a significant expansion of the agency's power to gather data about innocent citizens. As such, the Assessment Statistics cannot be characterized as low 2 information and may not be withheld from public disclosure under the pretense that the information they convey is of no public interest.

B. The Release of Assessment Statistics Would Not Risk Agency Circumvention

Because the Assessment Statistics are a matter of serious public concern, they may only be withheld if their disclosure would significantly risk circumvention of agency regulations or statutes. *Massey*, 3 F.3d at 622. The purpose of the exemption is that a FOIA disclosure should not "benefit those attempting to violate the law and avoid detection." *Crooker*, 670 F.2d at 1054. Thus, a "high 2" exemption requires a determination of reasonably expected harm as a result of disclosure.

Exempt information has included, for example, blueprints of buildings showing the location of biological agents, toxins, narcotics and radioactive materials, disclosure of which would pose a national security risk, *Elliott*, 596 F.3d at 847; the Bureau of Alcohol, Tobacco & Firearms manual used to train new agents in surveillance techniques, disclosure of which might assist wrong-doers to evade surveillance, *Crooker*, 670 F.2d at 1073; government credit card numbers, disclosure of which would enable financial fraud and abuse, *Judicial Watch, Inc. v. United States Dep't of Commerce*, 83 F. Supp. 2d 105, 110 (D.D.C. 1999); FBI informant codes, information that could facilitate unmasking confidential informants, *Davin v. United States Dep't of Justice*, 60 F.3d 1043, 1065 (3d Cir. 1995); and agency audit guidelines useful to circumventing Medicare reimbursement regulations, disclosure of which could facilitate fraud,

Dirksen v. United States Dep't of Health & Human Services, 803 F.2d 1456, 1458-59 (9th Cir. 1986).

In contrast, disclosure of the Assessment Statistics would pose no risk, never mind a "significant" risk, of harm or circumvention. The redacted statistics include only the number of assessments that have been initiated by the FBI, the number of assessments that are ongoing, and the number of FBI investigations that have been opened based on information gathered through those assessments. (*See* McCraw Dec. Exhibit __.) The data is broken into two broad categories: assessment types 1 and 2 (assessments of organizations or individuals) and assessment types 3, 4, 5, and 6 (assessments of national security vulnerabilities and intelligence sources). (*See* FBI Guide, pp. 44-45.) No more specific information is sought. The existence and use of assessments are public knowledge. The statistics, if released in full, would not expose the targets of the assessments, the locations in which assessments have been conducted, or the manner in which targets for assessments have been found. The statistics cannot conceivably be used for any sort of criminal purpose and would not enable any individuals or organizations to circumvent the law or evade detection.

As it stands, the requested material would do nothing more than provide the public with valuable oversight information on the prevalence of the FBI's use of assessments, a relatively new law enforcement practice that implicates a legitimate public interest insofar as it raises important privacy and civil rights concerns.

II.

THE ASSESSMENT STATISTICS CANNOT BE WITHHELD UNDER EXEMPTION 7(E)

Exemption 7(E) protects from disclosure records or information compiled for law enforcement purposes to the extent that disclosure "would reveal 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).

The standards for exemption under 7(E) are in many ways similar to those for Exemption 2. However, Exemption 7(E) only applies to "guidelines" and "techniques and procedures." It is readily apparent that the Assessment Statistics are neither under Second Circuit precedent:

> The term "guidelines" – meaning, according to *Webster's Third New International Dictionary* (1986), "an indication or outline of future policy or conduct" – generally refers in the context of Exemption 7(E) to resource allocation. For example, if a law enforcement agency concerned with tax evasion directs its staff to bring charges only against those who evade more than $100,000 in taxes, that direction constitutes a "guideline." The phrase "techniques and procedures," however, refers to how law enforcement officials go about investigating a crime. *See Webster's Third New International Dictionary* (1986) (defining "technique" as "a technical method of accomplishing a desired aim"; and "procedure" as "a particular way of doing or of going about the accomplishment of something"). For instance, if the same agency informs tax investigators that cash-based businesses are more likely to commit tax evasion than other businesses, and therefore should be audited with particular care, focusing on such targets constitutes a "technique or procedure" for investigating tax evasion.

Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec., 626 F.3d 678, 682 (2d Cir. 2010).

The Court further held that "guidelines" will be exempt only if disclosure could also reasonably be expected to risk circumvention of the law. *Id.* at 681. The purpose is to protect "information that would train potential violators to evade the law or instruct them how to break

the law" and "information that could increase the risks that a law will be violated or that past violators will escape legal consequences." *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009).

The Assessment Statistics cannot conceivably be construed as either "techniques and procedures" or "guidelines." At stake are aggregate figures about the number of assessments conducted in two very broad categories. They disclose nothing about who or what was investigated, where they were investigated, why they were investigated, or what specific techniques were used. No wrong-doer will evade detection or punishment by knowing whether twenty or two hundred assessments have been conducted.

In addition, the exemption covers only investigatory records that disclose investigative techniques and procedures *not generally known* to the public. *See Rosenfeld v. United States Dep't of Justice*, 57 F.3d 803, 815 (9th Cir.1995) (emphasis added); *Doherty v. United States Dep't of Justice*, 775 F.2d 49, 52 n.4 (2d Cir. 1985); *National Sec. Archive v. FBI*, 759 F. Supp. 872, 885 (D.D.C. 1991). It is no secret that the FBI uses assessments – it is a matter of widespread public knowledge and concern. The techniques authorized for use used during an assessment, such as conducting interviews, soliciting informants, and engaging in surveillance in public places, are also public knowledge. (*See* FBI Guide, pp. 58-72.) Because a wide range of techniques may be used in assessments, the mere existence and number of assessments also would not disclose that any specific technique is being relied on by the FBI.

The Assessment Statistics are not remotely comparable to the type of specific, operational information that courts have found exempt under 7(E). *See, e.g.*, *Allard K. Lowenstein*, 626 F.3d 678 (withholding the specific criteria used to rank the priority of immigration investigations); *Mayer Brown LLP*, 562 F.3d 1190 (denying disclosure of IRS

settlement goals, litigation hazards, and settlement ranges in tax prosecutions); *Catledge v. Mueller*, 323 Fed. Appx. 464 (7th Cir. 2009) (denying disclosure of the identity of individuals under FBI investigation through National Security Letters); *Morley v. CIA*, 508 F.3d 1108, 1128 (D.C. Cir. 2007) (exempting details of CIA background investigation and security clearance techniques); *PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 250-51 (D.C. Cir. 1993) (exempting portions of a FBI manual describing patterns of violations, investigative techniques, and sources of information available to investigators); *Barnard v. Dep't of Homeland Sec.*, 598 F. Supp. 2d 1, 22 (D.D.C. 2009) (exempting Homeland Security procedures for screening international airline passengers); *Maguire v. Mawn*, 2004 U.S. Dist. LEXIS 9099, at *10 (S.D.N.Y. May 17, 2004) (exempting information about whether and how a specific bank employs "bait money."); *Piper v. Dep't of Justice*, 294 F. Supp. 2d 16, 30 (D.D.C. 2003) (exempting polygraph test information because disclosure "has the potential to allow a cunning criminal to extrapolate a patter or method to the FBI's questioning technique"); *Tax Analysts v. IRS*, 152 F. Supp. 2d 1, 17 (D.D.C. 2001) (withholding summary of tax-avoidance scheme, "including identification of vulnerabilities" in IRS operations); *Schwarz v. Dep't of Treasury*, 131 F. Supp. 2d 142, 150 (D.D.C. 2000) (exempting characteristics used by the Secret Service to determine an individual's threat potential); *Germosen v. Cox*, 1999 U.S. Dist. LEXIS 17400, at *54 (S.D.N.Y. Oct. 29, 1999) (exempting the use and rating of investigative techniques and counterfeiting designations by the Secret Service); *Hammes v. United States Customs Serv.*, 1994 U.S. Dist. LEXIS 17567 (S.D.N.Y. Dec. 2, 1994) (exempting the criteria used by Customs officers to determine which passengers to stop and examine).

The Assessment Statistics poses none of the risks that are found in cases where Exemption 7(E) is properly invoked and the information should be disclosed, as a matter of law.

III.

THE FBI IMPROPERLY REDACTED THE COMPLETE NAMES OF AGENTS IN THE SIRT REPORTS AND THE ELECTRONIC COMMUNICATIONS UNDER EXEMPTIONS 6 AND 7(C)

In response to the NYT's SIRT Request, the FBI disclosed the SIRT Reports and the Electronic Communications about the incidents (as well as the Overview Report), but redacted the names of the agents involved. While NYT does not dispute here the withholding of the agents' complete names under FOIA's privacy exemptions, the appropriate balance between privacy and disclosure under FOIA is struck by redacting the names so that the initials remain (the "Identifier"), allowing the public 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. *See Trans-Pacific Policing Agreement v. U.S. Custom Service*, 177 F.3d 1022, 1026-27 (D.C. Cir. 1999) (agency has obligation to consider partial redaction of identifying number); 5 U.S.C. § 552(b) ("any reasonably segregable portion" of public record must be released).

Disclosure of the FBI shooting incident reports and the Electronic Communications helps ensure adequate public oversight of the FBI as envisioned under FOIA. As records of federal agents' use of deadly force and of agency action in response, SIRT Reports and the Electronic Communications contain information that is critical to maintaining public accountability of the FBI. Their release with the Identifiers is in line with the general purpose of FOIA, which is to "ensure an informed citizenry . . . [which is] 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). To advance that purpose, agencies must properly disclose "official information that sheds

light on an agency's performance of its statutory duties." *U.S. Dept. of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 773 (1989).

The SIRT Reports are just that: reports by specially commissioned FBI officials that reveal in part the manner in which FBI agents fulfill their statutory duties under 18 U.S.C. § 3052 to carry firearms and make arrests. The Electronic Communications contain the recommendations arising from the FBI's review of the SIRT Reports. As a group, these materials show patterns over time in how, when, and which FBI agents discharged their weapons, the circumstances under which their use of force is or is not justified, the manner in which that action is addressed by agency superiors, and the effectiveness of remedial and disciplinary measures. To establish a reason for disclosure under *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004), when a privacy exemption is asserted, a citizen must show that "the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake" and that "the information is likely to advance that interest." *Favish*, 541 U.S. at 172. The records here meet that standard. The SIRT Reports, with the Identifiers included, will disclose whether particular agents are the subject of multiple reports and should be disclosed in that fashion in order to advance the public's interest in knowing what its government is "up to," *Reporters Comm.*, 489 U.S. at 773.

A. The public interest would be advanced by the inclusion of Identifiers

The full public benefit of the SIRT Reports and Electronic Communications comes from their capacity to show broad patterns of agency conduct, and that cannot be achieved by the FBI's current method of redaction. Without Identifiers, public oversight of FBI action will be confined to individual situations and will hinder the public's ability to get a broader view of agency conduct. Since both FOIA Exemptions 6 and 7(C) claimed by the FBI require a balancing

of the public interest in disclosure against the privacy interest implicated by the release of information, *Associated Press v. U.S. Dep't of Defense*, 554 F.3d. 274, 291 (2d Cir. 2009), it is important to remember in undertaking this analysis that "the public has a significant, enduring interest in remaining informed about actions taken by public officials in the course of their duties." *New England Apple Council v. Donovan*, 725 F.2d 139, 144 (1st Cir. 1984). The "course" of FBI conduct cannot be examined absent records that allow for examination of patterns of agency action.

Under FOIA Exemption 6, an agency can withhold information only where disclosure "would constitute a clearly unwarranted invasion of personal privacy." Exemption 7(C) applies to records compiled for law enforcement purposes, and that information may be exempted only where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552 (b)(6) and (7)(C). But even under the somewhat broader language of 7(C), disclosure is warranted where, as in the case of the SIRT Reports and the Electronic Communications, the public interest is great. "[T]he mere fact that records pertain to an individual's activities does not necessarily qualify them for exemption. Such records may still be cloaked with the public interest if the information would shed light on agency action." *Quinon v. FBI*, 86 F.3d 1222, 1231 (D.C. Cir. 1996) (quoting *Nation Magazine, Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 894-895 (D.C. Cir. 1995).

With the Identifiers, the public would be able to identify whether any Special Agents have repeatedly discharged their weapons. In the current redacted form of the materials, it is impossible to know whether a single agent is involved in one incident, two incidents, or multiple incidents (or, for that matter, whether there are no agents with multiple incidents). Similarly, because some of the incidents involve relatively minor events while others raise more serious

questions about agent conduct, it is important to know whether there is a pattern involving the same agent or agents, whether the pattern is one of repeated minor incidents or a series of more serious occurrences.

Further, by obtaining Identifiers, the public will be able to scrutinize how the FBI has responded to the conduct of particular agents. The public interest "extends to knowing whether an investigation was comprehensive and that the agency imposed adequate disciplinary measures." *Lurie v. Dep't of Army*, 970 F. Supp. 19, 37 (D.D.C. 1997) The Electronic Communications include a section summarizing the "Observations and Recommendations" of the Shooting Incident Review Group, which consists of a number of division heads and supervisors, following the shooting. In some instances, the group has recommended that no administrative action be taken; in others, it advises some form of corrective or administrative action. Likewise, the Electronic Communications carry recommendations about particular cases. With no method of indicating whether a certain agent is the subject of multiple SIRT Reports, the public cannot evaluate the efficacy of those actions – for instance, how the FBI dealt with subsequent incidents involving a single agent and whether the response to the initial incident was appropriate.

Courts have recognized the public interest in drawing statistical patterns from agency data. They have found that that oversight requires a level of disclosure that allows interested members of the public to draw those patterns from agency reports. *See Ctr. to Prevent Handgun Violence v. U.S. Dep't of Treasury*, 981 F. Supp. 20 (D.D.C. 1997). There the court recognized the public benefit of opening up information on sales of firearms to allow analysis of the reports for correlations between locations of dealers, multiple sales transactions and guns used in crime. It noted that the "self-appointed watchdog role" is recognized in our system and ordered

disclosure of the information since it was not "inculpatory or inflammatory" and would not jeopardize an ongoing criminal investigation. *Id.* at 24.

B. The Use of Identifiers Does Not Invade Agents' Privacy

Because Identifiers allow the FBI to maintain the anonymity of the agents, no real threat to any privacy interest is posed. Exemptions 6 and 7(C) allow an agency to withhold records or information compiled for law enforcement purposes, but only to the extent that the production of that information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552 (b)(7)(C); *Lurie*, 970 F. Supp. 19 at 36 (the privacy interests cognizable under Exemption 6 are also cognizable under Exemption 7(C). No invasion of privacy, let alone an unwarranted one, occurs with the use of Identifiers.

Where courts have approved the withholding of personal information under Exemptions 6 and 7(C), it has been because of the potential for "embarrassment or harassment" that comes with public disclosure of names and addresses. *Wood*, 432 F.3d. at 88. See also *Halpern v. FBI*, 181 F.3d at 279. No such risk is posed by the Identifiers. The redaction proposed here requires non-invasive disclosure only to the extent that would allow for public scrutiny of patterns of FBI agency conduct.

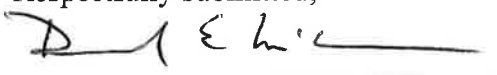
In short, the position taken here by NYT carefully balances the privacy interest in the agents' names with the public interest in being able to monitor the activities of the federal government's most important law enforcement agency.

CONCLUSION

For each of these reasons and those presented in its opening brief, NYT respectfully asks this Court to (i) grant summary judgment as limited by the Memorandum of Law; (ii) declare that Defendant improperly redacted names in the Shooting Incident Team Reports and Electronic Communications; (iii) declare the Assessment Statistics prepared and compiled by the Defendant are public under 5 U.S.C. § 552; (iv) order the Defendant to produce new copies of the Shooting Incident Team Reports and Electronic Communications properly redacted; (v) provide the Assessment Statistics to Plaintiffs within 20 business days of the Court's order; (vi) award Plaintiffs the costs of this proceeding, including reasonable attorney's fees under 5 U.S.C. § 552(a)(4)(E); and (vii) grant such other and further relief as the Court deems just and proper.

Dated: New York, NY
February 25, 2011

Respectfully submitted,



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