No. 25-2383

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HONOLULU CIVIL BEAT, INC.,

Plaintiff-Appellant,

vs.

FEDERAL BUREAU OF INVESTIGATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Hawaii
No. 1:23-cv-00216-SASP-WRP

PLAINTIFF-APPELLANT'S OPENING BRIEF

ROBERT BRIAN BLACK 7659
BENJAMIN M. CREPS 9959
Public First Law Center
700 Bishop Street, Suite 1701
Honolulu, Hawai`i 96813
Telephone: (808) 531-4000
brian@publicfirstlaw.org
ben@publicfirstlaw.org

Attorneys for Plaintiff-Appellant

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I. STATEMENT OF JURISDICTION

Defendant-Appellee Federal Bureau of Investigation (FBI), a United States agency, denied Freedom of Information Act (FOIA) requests from Plaintiff-Appellant Honolulu Civil Beat, Inc. (Civil Beat) for access to investigation files concerning criminal charges filed against former Hawai`i State Senator Jamie Kalani English (English) and former Hawai`i State Representative Ty J.K. Cullen (Cullen). Civil Beat filed its complaint in the United States District Court for the District of Hawaii, pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. The District Court (Honorable Shanlyn Park presiding) entered final judgment on April 1, 2025. 1-ER-2.[1] Appellant timely filed the notice of appeal on April 11, 2025, pursuant to Fed. R. App. P. 4(a)(1)(B). 3-ER-386. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

II. ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred as a matter of law by allowing the FBI to withhold all internal records concerning the charges against Cullen and English on the basis that it "could reasonably be expected to

[1] "ER" citations refer to the Appellant's Excerpts of Record, pursuant to Circuit Rule 30-1. Citations to the record on appeal from the District Court are identified by "DC" with docket and page numbers below.

interfere with enforcement proceedings" (Exemption 7A), when the request for Cullen's records was made after he pleaded guilty; the request for English's records was made after he was sentenced; and the District Court entered judgment after both Cullen and English had served their sentences and been released by the Bureau of Prisons.

2. Whether the District Court erred as a matter of law by deferring to the FBI's assessment that disclosure of the records would interfere with enforcement proceedings.

3. Whether the District Court erred as a matter of law by alternatively allowing the FBI to collectively withhold all internal records concerning the charges against Cullen and English, when the District Court lacked sufficient information to conduct an independent de novo review for the *limited* withholdings permitted for confidentiality laws (Exemption 3), specifically Fed. R. Crim. P. 6(e), 18 U.S.C. § 3123(d) [Pen Register Act], 50 U.S.C. § 3024(i)(1) [National Security Act of 1947], and 31 U.S.C. § 5319 [Bank Secrecy Act]; discovery privileges (Exemption 5); privacy (Exemptions 6 and 7C); confidential sources (Exemption 7D); and secret investigative techniques (Exemption 7E).

4. Whether the District Court erred as a matter of law by holding that none of the more than 38,000 pages of internal records concerning the closed prosecutions of criminal charges against Cullen and English could be segregated from exempt information and disclosed.

III. CONCISE STATEMENT OF THE CASE

From 2019 to 2021, Hawai`i businessman Milton Choy (Choy)—now deceased—bribed Cullen and English for information and to steer legislation in the Hawai`i Legislature. The Government charged Cullen and English by information with honest services fraud in February 2022. They promptly pleaded guilty, were sentenced, and were released in 2024. But, beyond the publicly filed criminal filings in court, the FBI has refused to release any information about the investigations that led to the charges.

Besides obvious accountability concerns in monitoring FBI investigations generally, these investigations raise specific concerns about the FBI interfering in Hawaii's legislative process. During the investigation period, Choy was cooperating with the FBI, which provided the money used to bribe Cullen and English. In 2020, under FBI supervision, Choy paid English to kill a bill that would have funded much-needed research to test cesspool conversion technologies. Five years after the FBI paid to kill

the bill, the Hawai`i Legislature finally funded that research. The public needs greater insight into the investigations that led the FBI to decide what laws should be enacted in Hawai`i.

The District Court, however, simply deferred to the FBI's determination that nothing could be segregated and disclosed from the FBI's internal files regarding these investigations. Notwithstanding the information already known, the FBI has provided no public access to its internal records about the closed investigations into these charged crimes.

FOIA requires more. Civil Beat respectfully requests that the Court reverse the District Court's judgment that the FBI may withhold the entirety of its internal files on Cullen and English based on *other* enforcement proceedings, or alternatively based on the alleged collective effect of all claimed exemptions; vacate the District Court's holdings regarding all claimed exemptions; and remand for redaction and further factual development. *See* 2-ER-49-50.

A. The Key Players

1. Cullen

Elected to the Hawai`i House of Representatives in 2010, Cullen started serving in 2017 as Finance Committee vice-chair. 2-ER-100 ¶ 1, -106

¶ 1, -201-02. The FBI arrested Cullen on October 8, 2021. 2-ER-100 ¶ 2, -106 ¶ 2. He was charged with honest services wire fraud on February 8, 2022, resigning that day. *Id.*; *accord* 1-ER-4-5; 2-ER-121; *see also United States v. Cullen*, No. 22-CR-13 [Cullen Cr.] Dkt. 1.[2] Cullen pleaded guilty on February 15 and waived his right to appeal his conviction. 1-ER-5; 2-ER-100 ¶ 3, -106 ¶ 3; Cullen Cr. Dkt. 9, 10. Judge Susan Oki Mollway imposed a 24-month sentence on April 6, 2023 (later reduced to 19 months). 1-ER-5; 2-ER-100 ¶ 3, -106 ¶ 3, -200; Cullen Cr. Dkt. 27, 32. The Bureau of Prisons released Cullen as of April 30, 2024. 2-ER-100 ¶ 3, -106 ¶ 3, -124.

2. English

Elected to the Hawai`i Senate in 2000, English started serving in 2014 as Senate Majority Leader. 2-ER-100 ¶ 4, -106 ¶ 4, -209-10; *see also United States v. English*, No. 22-CR-12 [English Cr.] Dkt. 18 at PageID#:226-27. The FBI arrested English on January 14, 2021; he resigned May 2021. 1-ER-5; 2-ER-100 ¶ 5, -106 ¶ 5. He was charged with honest services wire fraud on

[2] Civil Beat requested that the District Court take judicial notice of certain filings in the criminal proceedings against Cullen and English. *E.g.*, 2-ER-106. The summary judgment order referenced details from those proceedings. *E.g.*, 1-ER-4-5. Civil Beat requests that this Court take judicial notice of referenced filings from various federal proceedings. *E.g.*, *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

February 8, 2022. *Id.*; *see also* English Cr. Dkt. 1. English pleaded guilty on February 15 and waived his right to appeal his conviction. 1-ER-5; 2-ER-100 ¶ 6, -106 ¶ 6; English Cr. Dkt. 7, 8. Judge Mollway imposed a 40-month sentence on July 5, 2022 (later reduced to 32 months). 1-ER-5; 2-ER-100 ¶ 6, -106 ¶ 6, -207; English Cr. Dkt. 22, 28. The Bureau of Prisons released English as of March 26, 2024. 2-ER-100 ¶ 6, -106 ¶ 6, -125.

3. Choy

Choy had a wastewater services company. 2-ER-100 ¶ 7, -107 ¶ 7. Working under the direction and control of the FBI for years, he bribed Cullen and English to influence legislation in the Hawai`i Legislature.[3] 2-ER-100 ¶ 8, -107 ¶ 8, -128 ("[U.S. Attorney Clare] Connors acknowledged Thursday that Choy is in fact 'Person A.'"), -132, -135-36, -138-40. Choy died June 22, 2024. 2-ER-100 ¶ 9, -107 ¶ 9, -282.

B. Choy's Bribes to Introduce and Kill Cesspool Legislation.

Choy had a history of bribes to Cullen and English, separately. 1-ER-4-5; Cullen Cr. Dkt. 1 at PageID#:23-26; English Cr. Dkt. 1 at PageID#:31-43. By 2019, Choy was cooperating with the FBI and recording his

[3] Choy started working with the FBI after he was caught bribing a Maui County official. *See United States v. Choy*, 22-CR-71 Dkt. 1.

conversations with Cullen and English. 2-ER-100 ¶¶ 8, 11-12, -107 ¶¶ 8, 11-12, -128, -132, -135-36, -138-40. Choy bribed Cullen for anticipated legislative assistance. 2-ER-100 ¶ 11, -107 ¶ 11; *see also* Cullen Cr. Dkt. 1 at PageID#:24.[4] And he bribed English to obtain a draft report of a cesspool working group. 2-ER-100 ¶ 11, -107 ¶ 11; *see also* English Cr. Dkt. 1 at PageID#:32-37.

In January 2020, Choy bribed Cullen and English to support bills funding research of cesspool conversion technologies—Senate Bill 2380 and House Bill 1859. 2-ER-100-01 ¶ 13, -107 ¶ 13, -145-47; Cullen Cr. Dkt. 1 at PageID#:24-25; English Cr. Dkt. 1 at PageID#:37-40; English Cr. Dkt. 18 at PageID#:227-30. Cesspools are a long-standing public concern in Hawai`i. 2-ER-100 ¶ 10, -107 ¶ 10, -110-12.

> Hawai`i has nearly 88,000 cesspools that put 53 million gallons of raw sewage into the State's groundwater and surface waters every day. Cesspools are an antiquated technology for disposal of untreated sewage that have the potential to pollute groundwater. The State relies on groundwater for over 90% of its drinking water. Cesspools also present a risk of illness to

[4] The FBI refers to the bribes as Choy giving Cullen and English "funds provided by the FBI" rather than bribes. 2-ER-100-02 ¶¶ 8, 13, 15-16, 18. The practical implications for Cullen, English, and the public, however, are the same: Choy bribed Cullen and English to direct their work. The FBI's semantic distinction only underscores, however, that the FBI exercised direct control—through Choy—over how to steer the Hawai`i Legislature.

> island residents and a significant harm to streams and coastal resources, including coral reefs.

DC Dkt. 73 at PageID.577 (quoting Hawai`i Dep't of Health (DOH), *Report to Legislature Relating to Cesspools and Prioritization for Replacement* at 3 (Dec. 2017), *at* https://health.hawaii.gov/opppd/files/2017/12/Act-125-HB1244-HD1-SD3-CD1-29th-Legislature-Cesspool-Report.pdf).

S.B. 2380 did not progress. 2-ER-101 ¶ 14, -107 ¶ 14, -113 ¶ 10, -145. But H.B. 1859 did. 2-ER-101 ¶ 14, -107 ¶ 14, -146-47. Twenty-five (of fifty-one) representatives introduced H.B. 1859; it passed the House unanimously. *Id.* DOH, Hawai`i County Council, Honolulu Board of Water Supply, Honolulu Department of Environmental Services, environmental organizations (Hawai`i Reef & Ocean Coalition, Ulupono Initiative, Surfrider Oahu, Elemental Excelerator, and WAI: Wastewater Alternatives & Innovations), Environmental Caucus of the Democratic Party of Hawai`i, and several individuals supported the bill. *Id.*; 2-ER-148-96. None opposed it. *Id.*

In March 2020, notwithstanding broad community support for this important state legislation, the FBI—through Choy—paid Cullen and English to "kill" H.B. 1859. 2-ER-101-02 ¶¶ 15-16, -107-08 ¶¶ 15-16; Cullen Cr. Dkt. at PageID#:25; English Cr. Dkt. 1 at PageID#:40-43 ("ENGLISH:

It's easy to kill bills"); English Cr. Dkt. 18 at PageID#:229. Choy confirmed with English in April and June that the Senate would not consider H.B. 1859. 2-ER-101-02 ¶ 16, -108 ¶ 16; English Cr. Dkt. 1 at PageID#:42-43. The Senate did not consider H.B. 1859 further. 2-ER-102 ¶ 17, -108 ¶ 17, -146-47. Five years later, the Hawai`i Legislature finally funded the cesspool conversion research. 2025 Haw. Sess. Law Act 198;[5] *see also* Zach Lockwood, Stuart Coleman, & Ted Bohlen, *Commentary: It's Time to Stop Kicking Cesspools Down the Road*, Honolulu Civil Beat (Apr. 17, 2025) (advocates pushing for legislative approval of cesspool research funding); Tom George, *Bribery Scheme Hurts Efforts to Fix Hawaii's Cesspool Problem*, KITV (Feb. 9, 2022) (comments from advocates when Cullen and English were charged, explaining how the FBI's operation "set back ongoing efforts to fix Hawaii's massive problem with cesspools").[6]

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[5] Civil Beat requests that the Court take judicial notice of this subsequent development. *E.g.*, *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 945 n.2 (9th Cir. 2013) (courts may take judicial notice of state legislative history).

[6] Courts may take judicial notice of news publications "as an indication of what information was in the public realm at the time." *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 960 (9th Cir. 2010).

Choy also bribed Cullen and English in 2021. 2-ER-102 ¶ 18, -108 ¶ 18; Cullen Cr. Dkt. 1 at PageID#:25-26; English Cr. Dkt. 1 at PageID#:45. From 2019 to 2021, the FBI—through Choy—paid Cullen $30,000 for actions related to his work in the Hawai`i Legislature. 1-ER-4; Cullen Cr. Dkt. 1 at PageID#:24-26. During the same period, the FBI—through Choy—paid English more than $16,500 for actions related to his work in the Hawai`i Legislature. 1-ER-5; English Cr. Dkt. 1 at PageID#:33-45; English Cr. Dkt. 18 at PageID#:234.

C. The Criminal Charges Against Cullen and English Become a Focus of Public Concern.

After the Government charged Cullen and English, concern about legislative corruption dominated the public sphere and continues to drive public policy discussions. 2-ER-102 ¶¶ 19-20, -108 ¶¶ 19-20, -114-15, -205, -209-10, -213-14, -216, -220, -223-64, -273-81. News media covered the prosecutions and community efforts to address the loss of trust in government. 2-ER-276-81; DC Dkt. 79 at PageID.828 n.12 (citing additional articles published during summary judgment briefing).

As Judge Mollway observed at their sentencings, Cullen's and English's conduct as elected officials severely impacted public confidence in government. 2-ER-205 ("You were a state government employee, a

legislator, chosen by people who trusted you to work on their behalf. This was a grievous breach of public trust on your part."), -220 ("That is terrible for the people of Hawaii, for the purpose of instilling trust in public officials."). Alluding to Cullen and English, Chief Judge Derrick K. Watson remarked when sentencing Choy: "There is no dilemma as to the harm that Mr. Choy's conduct has caused to our public institutions, to the loss of trust that the public has in its officials, some of whom were elected to hold office and represent the very same people that they stole from and that they cheated." 2-ER-141. English's attorney aptly summarized: "The defense not only admits the conduct, Your Honor, but acknowledges the significance of this case. Accepting money betrays the public trust. Accepting money corrupts the legislative process. Accepting money undermines the confidence of our democratic institution." 2-ER-216.

To restore trust in government, the Hawai`i House of Representatives established the Commission to Improve Standards of Conduct (House Commission). 2-ER-223-26. The House recognized that "the strength and stability of our democratic government rely on the public's trust in the government's institutions and officers to act with prudence, integrity, and good, ethical judgment." 2-ER-223.

The House Commission's interim report led to some changes. 2-ER-232. The final report had 31 recommendations. 2-ER-248-64 ("The Commission understands that the public's trust and belief in the integrity of state and county governments have been shaken and can no longer be taken for granted but rather earned and regained over time.").

The Legislature passed two-thirds of those proposals in 2023. *Final Update! Civil Beat's Bill Tracker for Anti-Corruption and Accountability Proposals*, Honolulu Civil Beat (July 12, 2023).[7] Nevertheless, Cullen and English's conduct and the reform proposals continue to be a source of public debate and concern.[8]

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[7] Legislative details can be "accurately and readily determined" on the Legislature's website capitol.hawaii.gov. Fed. R. Evid. 201(b).

[8] Three years after the charges against Cullen and English, community concerns persist. The following articles discussing the conduct and related government reforms were published in the last five months. Patti Epler, *Hawai`i's Crackdown on Lobbyists Has Come a Long Way. Is It Far Enough?*, Honolulu Civil Beat (Feb. 9, 2025); Dan Nakaso, *"Clean Government" Bills Have Renewed Support*, Honolulu Star-Advertiser (Mar. 18, 2025); Christina Jedra & Blaze Lovell, *FBI Recorded Hawai`i Lawmaker Being Given $35,000*, Honolulu Civil Beat (Mar. 27, 2025); Christina Jedra & Blaze Lovell, *"This Has to End": Revelations Renew Calls for Government Accountability*, Honolulu Civil Beat (Apr. 2, 2025); Dan Nakaso, *Legislative Session Ends with Hotel, Cruise Ship Room Tax Increase to Aid Hawaii's Climate Fight*, Honolulu Star-Advertiser (May 4, 2025).

D. Civil Beat's FOIA Requests

Shortly after Cullen and English pleaded guilty and waived their rights to appeal the convictions, Civil Beat made the following request on February 25, 2022, for Cullen's files:

> I am requesting documents and reports that may have been gathered or produced between September 1, 2014 and February 15, 2022.
>
> I am requesting all investigative reports and materials maintained by the FBI relating to the criminal charges brought against Ty J.K. Cullen in criminal case number 1:22-cr-0013 SOM, district of Hawaii. I am not seeking Mr. Cullen's personal file, only those documents related to the criminal investigation against him.

2-ER-105; 3-ER-286 ¶ 1, -358-60. Civil Beat did not request records concerning Cullen's cooperation with the FBI *after his arrest*, only records relevant to the conduct specified in the criminal information. *E.g.*, DC Dkt. 49 at PageID.244-45 & n.5; DC Dkt. 73 at PageID.593 n.5. Five months after English's sentencing, Civil Beat made a similar request for his investigation materials on December 20, 2022. 2-ER-105; 3-ER-286 ¶ 5, -368-70.

The FBI denied both requests in their entirety, citing the privacy exemptions. 2-ER-105; 3-ER-286 ¶¶ 2, 6, -361, -371. Civil Beat appealed both denials. 2-ER-105; 3-ER-286 ¶¶ 3, 7, -365, -377. The U.S. Department

of Justice Office of Information Policy denied the appeals, citing the privacy exemptions. 2-ER-105; 3-ER-286-87 ¶¶ 4, 8, -366, -378.

E. Procedural History

On May 18, 2023, Civil Beat filed this action for disclosure of the records. DC Dkt. 1. After the District Court (Mollway, J.) denied the FBI's requests for 2-4 year delays, the FBI disclosed that it was reviewing 38,597 pages and 28 minutes of media. DC Dkt. 28 (June 21, 2024 Order), 52 (September 3, 2024 Order), 55 (September 13, 2024 first status report), 59 (September 27, 2024 third status report). It moved for summary judgment on November 1, 2024. DC Dkt. 67. The FBI's motion asserted the following "categorical" exemptions as a basis to withhold *all* records:

- Privacy (Exemptions 6 and 7C), 3-ER-302-06; and
- Pending enforcement proceedings (Exemption 7A), 3-ER-306-07, -381-85.

The summary judgment motion further asserted other exemptions as a basis to withhold limited information within the records:

- Grand jury information (Exemption 3, Fed. R. Crim. P. 6(e)), 3-ER-315-17;

- Pen register information (Exemption 3, Pen Register Act, 18 U.S.C. § 3123), 3-ER-317-18;
- Intelligence sources and methods (Exemption 3, National Security Act, 50 U.S.C. § 3024), 3-ER-319-21;
- Financial Crimes Enforcement Network (FinCEN) reports (Exemption 3, Bank Secrecy Act, 31 U.S.C. § 5319), 3-ER-321-22;
- Privileged information (Exemption 5), 3-ER-322-28;
- Identities of named individuals (Exemptions 6 and 7C), 3-ER-329-35;
- Confidential source information (Exemption 7D), 3-ER-335-41; and
- File numbers, FBI unit names/locations, FBI internal contact information, collection and analysis methods, focus of investigations, sensitive databases, surveillance techniques, investigation code names, details of specific undercover operations, monetary payments, informant procedures, and tactical information in operational plans (Exemption 7E), 3-ER-341-54.[9]

[9] The FBI's submitted declaration and *Vaughn* index also alleged withholding wiretap information (Exemption 3, Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510 *et seq.*). *E.g.*, 3-ER-318-19. But the FBI did not move for summary judgment on that assertion. DC Dkt. 67-1 at PageID.403-05. The District Court did not address the issue. 1-ER-15-17.

With its summary judgment motion, the FBI released 145 pages that consisted solely of publicly filed court documents in Cullen's and English's criminal proceedings that happened to also be maintained in the FBI's investigative files. 2-ER-103 ¶ 22, -108 ¶ 22, -115-16 ¶ 19.

The FBI produced a document that it described as a *Vaughn* index. 2-ER-60-98. That document did not provide dates, number of pages, or any individualized information about the content of the records—other than generic references to the FBI form number or some other basic description (*e.g.*, "Operational Plan"). 2-ER-65-98. The FBI claimed that none of the requested records could be redacted. 3-ER-355, -383.

Civil Beat opposed the FBI's motion for summary judgment and moved for summary judgment on the FBI's categorical claims that everything could be withheld based on privacy and pending investigation concerns. DC Dkt. 73, 79. The District Court (Park, J.) held a summary judgment hearing on February 20, 2025. 2-ER-22-58.

On April 1, the District Court granted the FBI summary judgment on its categorical claim to withhold all internal records based on pending

enforcement proceedings (Exemption 7A).[10] 1-ER-14-15. As an alternative holding, the District Court held that the FBI could withhold all the internal records based on the collective effect of other exemptions, and nothing could be disclosed in redacted form. 1-ER-15-20.

Based on the April 1 Order, the District Court entered Judgment the same day. 1-ER-2. On April 11, the Law Center timely appealed the April 1 Judgment. 3-ER-386.

IV. SUMMARY OF THE ARGUMENT

The FBI cannot withhold its files on closed investigations into state legislators who pleaded guilty, were sentenced, and are now released from prison simply because the FBI continues to investigate other public corruption cases. The FBI is "always investigating" public corruption. 2-ER-129 (statement of U.S. Attorney for the District of Hawaii). Courts must be more discerning in an independent de novo review under FOIA to determine whether disclosing records from two very public closed investigations will interfere with a separate enforcement proceeding. Blind

[10] The District Court did not grant the FBI's motion as to categorical withholding of everything on the basis of the privacy exemptions, limiting the scope to withholding third-party identities. 1-ER-18.

deference to the FBI's assertion of interference—as adopted by the District Court—is not reasonable nor consistent with FOIA.

The D.C. Circuit addressed this issue in 2014 when a nonprofit requested FBI records regarding the investigation of former U.S. Representative Tom Delay as part of a broad public corruption probe into the conduct of a former lobbyist (Jack Abramoff). *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 746 F.3d 1082 (D.C. Cir. 2014) [*CREW I*]. The Court of Appeals held that the FBI cannot rely on sweeping claims of interference with other Abramoff-related investigations when the requested records concern the closed investigation into Delay; more specificity is required. Similar scrutiny is necessary and lacking here.

The District Court's alternative holding also is contrary to FOIA's mandate. A mish-mash of limited-scope exemptions and the FBI's conclusory segregability assertion are not sufficient to withhold everything. Addressing similar claims in 2015, this Court held that district courts must have more than an agency's statement on segregability when *everything* is withheld from the public. *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759 (9th Cir. 2015). Redaction of the limited exempt information—as expressly

provided in FOIA—is proper here in light of all the public (non-exempt) information already available about these closed investigations.

For example, the criminal pleadings against Cullen and English identify at least 20 specific encounters with Choy. Some of those interactions are described in great detail, including transcripts of recordings. There is no basis for withholding the FBI's internal files that contain the same details of those encounters. *See* 2-ER-24-26, 46-47. And if those records will be disclosed with redactions, the FBI can assess whether releasing additional details will pose a *specific* danger of interfering with another enforcement proceeding. That analysis—required by FOIA—illustrates the flaws in the FBI's and District Court's categorical withholding and blanket segregability assessments.

The District Court's decision to affirm withholding *everything* in over 38,000 pages from these closed bribery prosecutions should be reversed. Redaction is sufficient to address any of the FBI's legitimate concerns.

V. ARGUMENT

A. Standard of Review

Summary judgment decisions in FOIA cases are reviewed de novo. *Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 990 (9th Cir. 2016) (en banc).

B. FOIA Favors Public Disclosure of Government Information.

"FOIA recognizes that 'an informed citizenry [is] vital to the functioning of a democratic society.'" *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 770 (9th Cir. 2015). "The FOIA's 'core purpose' is to inform citizens about 'what their government is up to.'" *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 687 (9th Cir. 2012). "[D]isclosure, not secrecy, is the dominant objective of the Act." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989).

Congress has emphasized that FOIA's purpose is *disclosure* of information because federal agencies aggressively seek to deny public access. *E.g.*, H.R. Rep. No. 391, 114th Cong., 2d Sess., at 8 (2016) ("FOIA has been amended multiple times in efforts to increase agency compliance with the requirements of the Act and to improve the process. FOIA was amended in 1974, 1976, 1986, 1996, 2007, and 2010. Despite these

amendments, barriers to the public's right to know persist."). In 2007, Congress found that "the American people firmly believe that our system of government must itself be governed by a presumption of openness" and that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act." OPEN Government Act of 2007, 110 Pub. L. No. 175 § 2, 121 Stat. 2524, 2524. In 2016, Congress imposed the reasonably foreseeable harm standard—even where an exemption may allow withholding—because "there is concern that agencies are overusing these exemptions to protect records that should be releasable under the law." H.R. Rep. No. 391 at 9; FOIA Improvement Act of 2016, 114 Pub. L. No. 185 § 2, 130 Stat. 538. Congress sought to codify and reinforce a presumption of openness:

> In the face of doubt, openness prevails. . . . All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

H.R. Rep. No. 391 at 9 (internal quotations omitted).

The agency bears the burden of proving that an exemption applies. 5 U.S.C. § 552(a)(4)(B). In that analysis, FOIA's disclosure provisions are interpreted "broadly." *Lion Raisins Inc. v. U.S. Dep't of Agric.*, 354 F.3d 1072,

1079 (9th Cir. 2004). In contrast, FOIA exemptions "must be narrowly construed." *Id.* "The focus of the FOIA is information, not documents, and the agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Willamette Indus., Inc. v. United States*, 689 F.2d 865, 867 (9th Cir. 1982).

For FOIA, "[s]uccess lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 362 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess., at 3 (1965)). "An agency may withhold only that information to which the exemption applies, and so must provide all 'reasonably segregable' portions of that record to the requester." *Yonemoto*, 686 F.3d at 688. Redaction is favored because it "is a familiar technique in other contexts and exemptions to disclosure under the Act were intended to be practical workable concepts." *Rose*, 425 U.S. at 381-82. Congress reinforced the importance of redaction when it amended FOIA in 2016. *See* 5 U.S.C. § 552(a)(8) & (b).

C. Categorical 7A Withholding: Disclosing Some Information About the Closed Investigations into Cullen and English Will Not Interfere with Enforcement Proceedings.

Cullen and English have been charged, pleaded guilty, been sentenced, served their time, and been released from prison. Civil Beat only requested records concerning those closed criminal charges. But the FBI asserted that all of the requested records were categorically exempt because disclosure "could reasonably be expected to interfere with enforcement proceedings."[11] 5 U.S.C. § 552(b)(7)(A). When the scope and nature of closed enforcement proceedings are publicly known—as here—categorical withholding of *everything* under Exemption 7A (as ordered by the District Court) cannot be justified.[12] 1-ER-14-15.

Under Exemption 7A, the FBI must prove (1) "the criminal investigation remains ongoing" and (2) "release of the Reports would jeopardize that investigation." *E.g.*, *Lion Raisins Inc. v. U.S. Dep't of Agric.*, 231 Fed. Appx. 565, 566 (9th Cir. 2007). Congress intended to "prevent

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[11] Civil Beat does not dispute that the requested records were "compiled for law enforcement purposes"—the threshold Exemption 7 inquiry.

[12] Civil Beat does not dispute that *particular* information within the Cullen and English files theoretically may qualify for withholding under Exemption 7A. But such withholding requires more than the generic assertions of harm offered by the FBI and accepted by the District Court.

harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigatory files than he would otherwise have . . .[, but] material cannot be and ought not be exempt merely because it can be categorized as an investigatory file compiled for law enforcement purposes." *NLRB v. Tire & Rubber Co.*, 437 U.S. 214, 227 (1978). The jeopardized proceeding must still be pending at the time of the court's decision because Exemption 7A is temporal in nature, requiring disclosure if circumstances change. *CREW I*, 746 F.3d 1082, 1097 (D.C. Cir. 2014).

When the person named in the files remains under investigation—unlike this case—courts have recognized that disclosing the particular information maintained by the agency would "prematurely reveal[] to the subject of th[e] ongoing investigation the size, scope and direction of th[e] investigation." *Alyeska Pipeline Serv. Co. v. U.S. EPA*, 856 F.2d 309, 312 (D.C. Cir. 1988); *accord Lion Raisins*, 231 Fed. Appx. at 567 (withholding proper because target of investigation would be provided "an understanding – which it presently lacks – of the investigation's narrow focus and the specific scope, and an opportunity to devise methods to circumvent the

prospective prosecution"). But there is no dispute: All enforcement proceedings against Cullen and English are closed.

The FBI, therefore, relied on public corruption investigations of "other public officials." 3-ER-306 ¶ 36, -383 ¶ 11. But "enforcement proceedings" under Exemption 7A are not defined so broadly as to incorporate other targets connected only by the type of crime.[13] If that were true, absent a *sui generis* prosecution, no investigation records would ever be disclosed. 2-ER-129 ("I don't want to say we're ever done. . . . We're always investigating."); *e.g.*, *NLRB*, 437 U.S. at 230 ("congressional concern in its amendment of Exemption 7 was to make clear that the Exemption did not endlessly protect material simply because it was in an investigatory file"). The criminal proceedings against Cullen were based on discrete facts different from the criminal proceedings against English and his conduct. And the underlying conduct that resulted in both those

[13] Civil Beat does not dispute that Cullen cooperated with the FBI after his arrest in October 2021. *E.g.*, 2-ER-32-33, -199-200 (prosecutor explaining that Cullen started cooperating immediately after his arrest). But Civil Beat only requested records of the criminal conduct that Cullen pleaded guilty to committing. To justify hiding everything from the public, however, the FBI obfuscated this difference in its *Vaughn* index by refusing to provide dates. *Rein v. U.S. Patent & Trademark Off.*, 553 F.3d 353, 366 n.21 (4th Cir. 2009) ("in many situations the date of the document may be a critical factor" for a *Vaughn* index).

criminal proceedings—as the subject of Civil Beat's request—is distinct from any other public corruption purportedly being investigated by the FBI. No enforcement proceedings remain ongoing as it concerns the requested records of Cullen and English.

More importantly, as to the second element, the scope and nature of the enforcement proceedings into Cullen and English are well known and outlined in detail in the criminal filings against them. At this point, the FBI's generic assertions of harm are insufficient to justify categorically withholding everything.[14] *Lion Raisins*, 231 Fed. Appx. at 567 & n.3 (acknowledging that Exemption 7A may not apply when the scope of the government's investigation is already known); *accord Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1114 (D.C. Cir. 2007) ("it is not sufficient for an agency merely to state that disclosure would reveal the focus of an

[14] The FBI claimed that disclosure of the Cullen and English investigation files will "either alert ['suspects and persons of interest'] to efforts directed towards them and/or would allow them to analyze pertinent information about the investigation." 3-ER-383-84 ¶¶ 11-12; *accord* 3-ER-306-07 ¶¶ 36-37 (reveal "strategies in ongoing matters related to other subjects of the investigations, allow them to predict and potentially thwart these strategies, and/or allow them to discover/tamper with witnesses and/or destroy evidence").

investigation; it must rather demonstrate *how* disclosure would reveal that focus.").

As the D.C. Circuit observed under less compelling circumstances than here, typical declarations of harm do not work when the requested investigation is closed—even if related proceedings may be open.

> We have often found that similar concerns justify withholding under Exemption 7(A). In the typical case, however, the requested records relate to a specific individual or entity that is the subject of the ongoing investigation, making the likelihood of interference readily apparent. Here, by contrast, the documents requested relate to DeLay, who is no longer under investigation; he was told more than three years ago that he would not be charged. Thus, assuming some individuals do remain under investigation, the relevant question is whether any of the responsive records, which are primarily about DeLay, would disclose anything relevant to the investigation of *those* individuals.

CREW I, 746 F.3d at 1098-99 (citations omitted). Here, unlike the Delay files in *CREW I*, there were prosecutions of Cullen and English that specifically revealed the nature and scope of the FBI's investigation into their conduct.

The District Court cited this Court's decision in *Barney v. IRS*, 1-ER-14-15, but that case concerned disclosure of records about a specific person *while the investigation into that person was still ongoing*. 618 F.2d 1268, 1273 (9th Cir. 1980) ("Barneys are currently under investigation . . . . [T]hey

request disclosure of all investigatory records compiled on them by the IRS."). The facts here are distinguishable and are not susceptible to categorical withholding. *E.g.*, *CREW I*, 746 F.3d at 1095 (categorical withholding "appropriate only if 'a case fits into a genus in which the balance *characteristically* tips in one direction'"); *Batton v. Evers*, 598 F.3d 169, 181 (5th Cir. 2010) ("[I]t is one thing to say that a particular type of document—e.g., a 'rap sheet'—is categorically a 'law enforcement document' and quite another to say 'we withheld a group of law enforcement documents.'").

The FBI's Exemption 7A claim reduces to an improper assertion that the entirety of the Cullen and English files are confidential simply because they are investigation files. *NLRB*, 437 U.S. at 236 ("Exemption 7 was designed to eliminate 'blanket exemptions' for Government records simply because they were found in investigatory files compiled for law enforcement purposes.").

> [A]ll of the affidavits repeat the government's dominant assertion that disclosure of the documents could aid Lilly or other potential targets in determining the scope, direction, and focus of the investigation. . . . The government makes that claim but, consonant with the style it has adopted for its other assertions of interference with the investigation, it offers not even a slim bill of particulars.

Campbell v. Dep't of Health & Human Servs., 682 F.2d 256, 260 (D.C. Cir. 1982). Courts cannot presume that disclosing investigation files inevitably interferes with enforcement proceedings. *See U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 174-75 (1993) (courts cannot presume that all FBI sources are confidential sources that qualify for withholding under Exemption 7D).

These issues come all the more starkly into focus in light of Congress's 2016 mandate that agencies must not only show that an exemption applies, but also that it is reasonably foreseeable that disclosure would harm an interest protected by the exemption. 5 U.S.C. § 552(a)(8)(i)(I). Congress imposed "an independent and meaningful burden on agencies." *Reporters Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 369 (D.C. Cir. 2021). The FBI cannot rely on "speculative or abstract fears" or "generalized assertions." *Id.* (quoting legislative history). Notwithstanding this independent burden to demonstrate more than simply that an exemption applies, however, the FBI's entire proof here was reliance on the same abstract concerns it cited as a basis for the exemption. 3-ER-354. There was no reasonably foreseeable harm that justified

withholding *in their entirety* more than 38,000 pages about two fully prosecuted and closed criminal investigations.

The District Court's holding that the FBI may categorically withhold everything under Exemption 7A should be reversed. Any more specific proof of interference with enforcement proceedings can be addressed on remand after the FBI redacts the investigation files.

D. Deference: Courts Do Not Blindly Accept Agency Declarations Asserting that Disclosure Will Interfere with Enforcement Proceedings.

Irrespective of agency good faith, courts must question agency declarations that offer only abstract speculation as a basis for withholding under FOIA—especially when, as here, circumstances call into question the validity of the agency's concerns. The District Court, however, incorrectly read this Court's precedent to *require* deference to agency justifications for withholding as it concerns any law enforcement issues. 1-ER-9, -13. This Court has never required anything approximating the blind deference adopted by the District Court.

In FOIA cases, courts "determine the matter de novo." 5 U.S.C. § 552(a)(4)(B). "Congress imposed the requirement of de novo judicial review 'in order that the ultimate decision as to the propriety of the

agency's action is made by the court and [to] prevent [the proceeding] from becoming meaningless judicial sanctioning of agency discretion.'" *Truitt v. Dep't of State*, 897 F.2d 540, 547 (D.C. Cir. 1990) (quoting S. Rep. No. 813).

But this Court has recognized various measures of deference in limited contexts when courts lack particular expertise to question agencies. The greatest deference holds for withholdings involving national security concerns. *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 770 (9th Cir. 2015) ("[W]hen dealing with properly classified information in the national security context, we are mindful of our limited institutional expertise on intelligence matters, as compared to the executive branch."); *accord, e.g.*, *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 926-30 (D.C. Cir. 2003) (explaining the constitutional and other special reasons for deference on FOIA determinations related to national security).

And as to the threshold question under Exemption 7 of whether records are "compiled for law enforcement purposes"—an undisputed issue here—courts have developed a more deferential "rational nexus" standard, albeit only for agencies whose principal function is law enforcement. *ACLU v. FBI*, 881 F.3d 776, 779 (9th Cir. 2018). The "rational nexus" Exemption 7 threshold standard, however, does not require any

deference to agency justifications for withholding under the substantive prongs of Exemption 7A-F. *E.g.*, *Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 808-15 (9th Cir. 1995) (applying "rational nexus" threshold, but not deferring to agency on Exemption 7C, 7D, and 7E determinations); *cf. Ctr. for Nat'l Sec. Studies*, 331 F.3d at 928 (deferring to agency determinations under Exemption 7A solely in national security context; "Judicial deference depends on the substance of the danger posed by disclosure—that is, harm to the national security—not the FOIA exemption invoked.").

This Court also has given "substantial weight" to agency declarations concerning a confidentiality statute (Exemption 3). *Shannahan v. IRS*, 672 F.3d 1142, 1148-49 (9th Cir. 2012) (deferring to IRS determination of whether disclosure would "seriously impair Federal tax administration" pursuant to 26 U.S.C. § 6103(e)(7); "We accord substantial weight to an agency's declarations regarding the application of a FOIA exemption."); *see Civ. Beat Law Ctr. for the Pub. Interest, Inc. v. CDC*, 929 F.3d 1079, 1087 n.4 (9th Cir. 2019) (discussing deference and *Shannahan* in the context of Exemption 3 and national security issues). Unlike the FOIA exemptions, confidentiality statutes are not construed narrowly in a FOIA analysis. *E.g.*, *CIA v. Sims*, 471 U.S. 159, 169 (1985) (rejecting a narrowing

interpretation of the National Security Act). Although *Shannahan*'s quotation could be read out of context to give "substantial weight" to agency declarations concerning *any* FOIA exemption, the *Shannahan* Court only cited a national security case concerning classified information and the National Security Act. *Shannahan*, 672 F.3d at 1148 (citing *Hunt v. CIA*, 981 F.2d 1116, 1118-19 (9th Cir. 1992)). Giving "substantial weight" to agency declarations in every FOIA context would be contrary to Congress's mandate for de novo judicial review and contradict Supreme Court precedent, especially when courts deny discovery to test the merits of such declarations. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 n.9 (1989) (no deference to agencies regarding harm to privacy from disclosure of law enforcement records); *see also* 1-ER-13; 2-ER-37-38, -116-17 ¶¶ 20-29, -265-72.

Regardless, even in the national security context, deference has never meant blind acceptance of agency assertions of harm.

> However, deference is not equivalent to acquiescence; the declaration may justify summary judgment only if it is sufficient "to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." Among the reasons that a declaration might be insufficient are lack of detail and specificity, bad faith, and failure to account for contrary record evidence.

Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 30 (D.C. Cir. 1998) (citation omitted). Here, beyond the lack of detail and specificity necessary to provide for meaningful review (see below), the FBI's declarations failed to account for the simple fact that detailed information about the nature and scope of the Cullen and English investigations was publicly available in court records, undermining the FBI's sweeping generic claims that disclosure would interfere with enforcement proceedings.

The D.C. Circuit's analysis in *CREW I* illustrates the issue. In that case, the court passingly referenced deference for Exemption 7A determinations regarding harm—albeit citing *Center for National Security Studies*, a national security case—but only to then hold that the FBI's affidavits were insufficient. 746 F.3d 1082, 1098 (D.C. Cir. 2014) ("although we give deference to an agency's predictive judgment of the harm that will result from disclosure of information, it is not sufficient for the agency to simply assert that disclosure will interfere with enforcement proceedings; 'it must rather demonstrate *how* disclosure' will do so. The DOJ has made no such demonstration here." (citations omitted)). The FBI's declaration there—as rejected by the D.C. Circuit—outlined the same generic harms

proffered here. *Compare CREW v. U.S. Dep't of Justice*, No. 12-5223 (D.C. Cir.), Dkt. 1428245 (Appendix) at 40-43, *with* 3-ER-306-07, -382-85.

Substantial deference to agency declarations is all the more questionable in light of Congress's more recent requirement in 2016 that harm from disclosure must be "reasonably foresee[able]." 5 U.S.C. § 552(a)(8)(A)(i). Assuming an agency provides sufficient detail, courts have sufficient expertise to determine whether harms from disclosure are foreseeable and whether an agency's claims of harm are reasonable. Broad deference for *any* FOIA issue is not grounded in the plain language of FOIA or Congressional intent. Broad deference to agency discretion ignores Congress's efforts to create more than a judicial rubberstamp of agency discretion and to address agency abuse and overuse of FOIA exemptions.

In any event, no level of deference can hold the weight of what the District Court allowed here. In light of all that is known already about the Cullen and English prosecutions and Choy's conduct, the FBI's vague and conclusory allegations that anything disclosed from its investigation files would interfere with enforcement proceedings was contrary to the evidence and unsustainable.

But the District Court accepted the FBI's declarations without question.

> The Court acknowledges that law enforcement agencies have specialized expertise in determining whether disclosing certain records would interfere with investigations or compromise public safety. This deference is grounded in the agency's superior knowledge and understanding of the potential consequences of disclosure. In this case, the FBI conducted the underlying investigation leading to the convictions of Cullen and English. Thus, the Court grants deference to the FBI's assertions.
>
> . . .
>
> As the Ninth Circuit has recognized, courts defer to agencies–particularly the FBI–in law enforcement matters when assessing their justification for withholding records.

1-ER-9, -13 (citing *ACLU*'s discussion of the rational nexus standard for the—uncontested here—Exemption 7 threshold inquiry). This Court has never endorsed such sweeping deference to agency declarations.

The District Court's judgment granting the FBI summary judgment should be vacated for applying the wrong legal standard by simply deferring to the FBI's assessment of whether the FOIA exemptions apply.

E. Detail and Specificity: The District Court Lacked Sufficient Information to Address the Scope of Other FOIA Exemptions.

Agencies have a heavy burden in FOIA cases to provide the requester a meaningful opportunity to respond to exemption claims and to provide the courts with a basis for independent review of the claimed justifications

for withholding. As a basis for asserting the limited withholdings under various FOIA exemptions, the FBI's purported *Vaughn* index and accompanying declarations here, however, fell well short of that burden.[15]

The *Vaughn* index identified each document by broad document type (*e.g.*, FBI form number, notes, or media); whether it concerned Cullen, English, or both; and whether some unspecified portion of the record was allegedly protected by an exemption. The FBI declaration described the general scope of the document types and the exemption claims. But nothing described the content of specific documents, and there were no redacted records to provide context. The District Court had an inadequate basis to independently assess whether the FBI's proposed withholding based on other exemptions was justified.

Even if the FBI properly withheld everything under Exemption 7A—it did not—this Court must vacate the District Court's alternative holding regarding the other exemptions. That holding exceeded the scope of the

[15] Instead of following this Court's guidance that agencies alleging categorical withholding need not waste time reviewing all requested documents, the FBI here insisted on reviewing 38,000+ pages and asserting all potential exemptions. *Compare Lewis v. IRS*, 823 F.2d 375, 380 (9th Cir. 1987) (review of records and *Vaughn* index not required if Exemption 7A categorical withholding proper), *with, e.g.*, 3-ER-314 ¶ 43.

FBI's motion for summary judgment. DC Dkt. 76 at PageID.790-91 (clarifying that the FBI was not arguing that everything may be withheld after its other investigations completed). Unless vacated, however, the District Court determined that everything may be withheld under the other exemptions, potentially precluding Civil Beat from ever obtaining anything from these investigation files. And Civil Beat will never have had a meaningful opportunity to address the FBI's justifications for withholding because its declarations and *Vaughn* index were inadequate.

1. The FBI Did Not Meet Its Burden to Provide an Adequate Factual Basis for Its Withholding Claims.

Judicial review of FOIA exemptions requires an adequate factual basis for withholding. *E.g.*, *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 769 (9th Cir. 2015). Agencies must submit detailed public affidavits that provide "a particularized explanation of why each document falls within the claimed exemption." *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 688 (9th Cir. 2012). "Unless the agency discloses 'as much information as possible without thwarting the [claimed] exemption's purpose,' the adversarial process is unnecessarily compromised." *Wiener v. FBI*, 943 F.2d 972, 979 (9th Cir. 1991) (citation omitted); *accord Transgender Law Ctr. v. Immigration & Customs Enf't*, 33 F.4th 1186, 1196 (9th Cir. 2022). The

affidavits must "afford the requester an opportunity to intelligently advocate release of the withheld documents and to afford the court an opportunity to intelligently judge the contest." *Wiener*, 943 F.2d at 979. "The affidavits must not be conclusory." *Pac. Fisheries Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir. 2008); *Stolt-Nielsen Transp. Group Ltd. v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008) (agency's "conclusion on a matter of law is not sufficient support for a court to conclude that the self-serving conclusion is the correct one"); *King v. U.S. Dep't of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987) ("affidavits cannot support summary judgment . . . if they are too vague or sweeping").

Failure to disclose redacted records is relevant to whether courts have an adequate factual basis for withholding. This Court's analysis in *Hamdan* is instructive. The *Hamdan* court held that the FBI's less than "robust" affidavits were sufficient only because it released documents "redacting only the bare minimum of information." *Hamdan*, 797 F.3d at 780. But, at the same time, this Court rejected the Defense Intelligence Agency (DIA) affidavits. *Id.* at 780-81. The DIA did not provide individualized explanations for the information withheld in each document, and "[a]ll of the DIA's documents are completely withheld, so

the district court did not have an opportunity to observe the DIA's approach to redaction." *Id.*

Here, "[t]hese 'boilerplate' explanations were drawn from a 'master' response filed by the FBI for many FOIA requests. No effort is made to tailor the explanation to the specific document withheld."[16] *Wiener*, 943 F.2d at 978-79.

> Without revealing any facts about the documents' contents, the Agencies have merely asserted their conclusion that the document is exempt, employing general language associated with [an exemption]. But the entries provide no salient information by which the district court can independently assess the asserted privilege. To find such superficial entries to be sufficient would permit the Agencies to evade judicial review because the district court and we are entirely dependent upon the Agencies' assertions that the documents were appropriately withheld.

[16] As noted, the FBI refused to follow *Lewis*'s guidance that would have resolved the FBI's broader Exemption 6, 7A, and 7C claims for categorically withholding everything before addressing exemptions that only justify redacting limited portions of the 38,000 pages. As a result, the FBI's declarations and *Vaughn* index are vague solely because the categorical claims had not been resolved first. *E.g.*, 2-ER-61 ¶ 5 (declaring that the *Vaughn* index did not include dates solely because the FBI was asserting Exemption 7A as a basis for categorical withholding). If the FBI had first presented the categorical claims alone to the District Court, the case either would have ended early because the District Court agreed with the FBI's categorical withholding or the FBI would have been required to provide redacted records and could have disclosed a more complete factual basis and *Vaughn* index. 2-ER-50-51.

Rein v. U.S. Patent & Trademark Off., 553 F.3d 353, 369 (4th Cir. 2009).

"The explanations offered are precisely the sort of 'categorical descriptions of redacted material coupled with categorical indication of anticipated consequences of disclosure' the D.C. Circuit properly rejected in *King* as 'clearly inadequate.'" *Wiener*, 943 F.2d at 979. The FBI's proffer here provided no information about the content of any document that would permit independent assessment of whether exemptions apply.[17] *See, e.g.*, 2-ER-27-31.

In addition to the general lack of adequate factual basis, the District Court lacked sufficient justification for the scope of its holdings regarding specific exemptions.

2. The Privacy Exemptions Do Not Protect the Identities of Cullen, English, and Choy (Exemptions 6 and 7C).

The District Court held that the FBI could withhold the identities of third parties under the FOIA privacy exemptions (Exemptions 6 and 7C). 1-ER-18. It did not address, however, the more critical issue of whether the

[17] Although the District Court discussed the adequacy of the FBI's proffer for purposes of Exemption 7A—erroneously for the reasons explained above—the District Court did not address the adequacy of the factual basis for other exemptions. *See* 1-ER-10-13.

FBI could withhold the identities of Cullen, English, and Choy.[18] In the end, the bribery of two state legislators and the FBI involving itself in the Hawai`i legislative process are not "private" affairs that can be withheld entirely from the public. The FBI did not justify withholding the identities of Cullen, English, and Choy.

Civil Beat did not argue, and is not arguing here, that the identities of all third parties—other than Cullen, English, and Choy—must be disclosed. *E.g.*, DC Dkt. 79 at PageID.817 ("In the end, [Civil Beat] may not dispute properly supported redactions for names of witnesses, secret investigative techniques, attorney-client privilege, or other information."). But, as illustrated by the following standards, context is critical to the balance of privacy and public interest. With no context regarding the third parties identified in the records, it is impossible to determine whether withholding is proper. The District Court's order lacked sufficient basis to address the privacy exemptions and should be vacated.

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[18] The District Court may have denied the FBI's broader privacy claims concerning Cullen, English, and Choy when it implicitly rejected the FBI's *categorical* claim for withholding on privacy grounds. However, the scope of the District Court's order is unclear regarding third party identities because the District Court did not know who, if anyone, the exemptions would cover other than Cullen, English, and Choy.

Relevant here, Exemption 7C permits withholding information that "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[19] 5 U.S.C. § 552(b)(7)(C). An agency first must demonstrate a non-trivial privacy interest. *Yonemoto*, 686 F.3d at 694. If there is a non-trivial privacy interest, the requester identifies a public interest advanced by disclosure. *NARA v. Favish*, 541 U.S. 157, 172 (2004). Once a public interest is identified, the Court balances the privacy and public interests in disclosure. *Tuffly v. U.S. Dep't of Homeland Security*, 870 F.3d 1086, 1093 (9th Cir. 2017). "[T]he relevant inquiry under the 'FOIA balancing analysis is the extent to which disclosure of the information sought would she[d] light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to.'" *Id.* at 1094.

First, here, any privacy interest for Cullen, English, and Choy is trivial because information is already public. *E.g.*, *ACLU v. U.S. Dep't of Justice*, 880 F.3d 473, 491 (9th Cir. 2018) ("The 'logic of FOIA' postulates that

[19] Exemption 6 privacy is not relevant. If the FBI must disclose information under Exemption 7C, then it must disclose the same information under Exemption 6, which requires greater public disclosure. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989).

an exemption can serve no purpose once information . . . becomes public."); *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) ("materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record"). Individuals already "publicly identified . . . as having been charged, convicted, or otherwise implicated in connection with the public corruption investigation" have a "diminished privacy interest" in the FBI's investigative records. *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 854 F.3d 675, 682 (D.C. Cir. 2017) [*CREW II*]. Cullen, English, and Choy have no privacy interest in the facts publicly recited in the complaints, plea agreements, hearing transcripts, and other public records of Cullen's and English's prosecutions. And given Cullen's and English's convictions and Choy's role—publicly acknowledged by the U.S. Attorney, Judge Watson, and Choy—they have trivial privacy interests at best in the records generally.

Second, although the FBI acknowledged that "privacy concerns are typically obviated once an individual is deceased," the FBI and the District Court failed to account for Choy's death in its privacy analysis. 3-ER-303 ¶ 31; *e.g.*, *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 33 (D.C. Cir. 1998)

("death clearly matters, as the deceased by definition cannot personally suffer the privacy-related injuries that may plague the living").

Third, privacy concerns for names and identifying information do not justify withholding entire documents.[20]

> [T]he DOJ does not seek to withhold only the identities of private citizens; it seeks to withhold every responsive document *in toto*. Although *SafeCard* may authorize the redaction of the names and identifying information of private citizens mentioned in law enforcement files, it does not permit an agency "to exempt from disclosure *all* of the material in an investigatory record solely on the grounds that the record includes some information which identifies a private citizen or provides that person's name and address."

CREW I, 746 F.3d 1082, 1094 (D.C. Cir. 2014). Cases about protecting identifying information concern *redacted* records and whether—after redaction—revealing a person's identity would provide "additional usefulness." *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 978-79 (9th Cir. 2009) ("Lahr already possesses the substance of the eyewitnesses' reports and the FBI agents' thoughts as they are expressed in the released memoranda and emails."); *accord, e.g.*, *U.S. Dep't of State v. Ray*, 502 U.S. 164, 178 (1991); *Tuffly*, 870 F.3d at 1094-95; *Cameranesi v. U.S. Dep't of*

[20] The FBI described identifying information as "dates of birth, places of birth, residences, telephone numbers, social security numbers, and/or singular professional titles." 3-ER-303 n.10.

Defense, 856 F.3d 626, 645 (9th Cir. 2017); *Forest Serv. Emp. For Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1027 (9th Cir. 2008). Without redacted records, as here, there is an insufficient factual basis to assess such a privacy claim.

Regarding the public interest in disclosure, at its most basic level, this information would shed light on the FBI performing its statutory duty to investigate corruption.

> Disclosure of the FD-302s and investigative materials could shed light on how the FBI and the DOJ handle the investigation and prosecution of crimes that undermine the very foundation of our government. . . . Disclosure of the records would likely reveal much about the diligence of the FBI's investigation . . . .

CREW I, 746 F.3d at 1093.

Moreover, there is significant public interest in the FBI's decision to involve itself in the Hawai`i legislative process. "'[M]atters of substantive law enforcement policy . . . are properly the subject of public concern,' whether or not the policy in question is lawful." *ACLU v. U.S. Dep't of Justice*, 655 F.3d 1, 14 (D.C. Cir. 2011). The FBI already had evidence of Choy bribing Cullen and English. But the FBI then directed Choy to bribe the legislators to introduce and kill popular legislation on a matter of significant public concern—the environmental impact of cesspools. What

information did the FBI have when it made the decision to change the course of state legislation? What safeguards exist to ensure that the FBI does not regularly use federal monies to covertly influence state legislation? Why did the FBI use federal monies to kill state legislation when it already had evidence of bribes before the 2020 legislative session started? Did the FBI consider the importance of this legislation for the community? Did the FBI alert anyone in state government that Cullen and English were corrupt when, for example, Cullen ran for re-election in 2019 after multiple bribes?[21] The public interest in the FBI's policies around meddling in state legislative affairs is exceptionally strong. *E.g.*, *CREW I*, 746 F.3d at 1093 ("we have repeatedly recognized a public interest in the manner in which the DOJ carries out substantive law enforcement policy"). The requested records would inform how the FBI became so involved in the state legislative process.

Lastly, the ongoing attention focused on Cullen's and English's conduct demonstrates public interest. *ACLU*, 655 F.3d at 12-13 (public

[21] The FBI argued that it did not have the power to remove Cullen and English from office. DC Dkt. 76 at PageID.800. But the FBI remained silent; it did not alert authorities who could have removed Cullen and English from office, and it did not alert the electorate before the election despite knowing that Cullen had accepted multiple bribes.

interest because issue "has received widespread media attention" and disclosure would inform "ongoing public policy discussion"). Nearly three years after the charges, Cullen and English remain a focus for government reform, and those reform discussions would be informed if the public better understood the two investigations.

These three categories of public interest are each a sufficient independent basis to require more careful balancing and redacted disclosure.

The FBI's concerns about the privacy interests of individuals other than Cullen, English, and Choy or highly sensitive information about those three could have been addressed through limited redaction.

3. The District Court Lacked Sufficient Factual Basis for the FBI's Claimed National Security Act Withholding (Exemption 3).

The FBI marked virtually all records as "intelligence sources and methods" under the National Security Act, 50 U.S.C. § 3024(i)(1), stating only that disclosure would "reveal intelligence sources and methods." 3-ER-321 ¶ 58. Nothing proffered by the FBI explained how the FBI applied the scope of that withholding. The District Court, however, simply recited the basis for why the National Security Act *might* apply to FBI records

generally before holding that "the FBI properly withheld the records." 1-ER-16-17.

The District Court lacked sufficient factual basis for its holding. *E.g.*, *Wiener v. FBI*, 943 F.2d 972, 981 & n.15 (9th Cir. 1991) ("The discussion in the affidavits of withholdings based on the exemption from disclosure of information related to intelligence activities and methods is particularly scanty."); *accord Halpern v. FBI*, 181 F.3d 279, 292-94 (2d Cir. 1999); *Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep't of State*, 818 F. Supp. 1291, 1298 (N.D. Cal. 1992); *Elec. Frontier Found. v. CIA*, No. 09-C-3351 SBA, 2013 U.S. Dist. LEXIS 142146, at *30-35 (N.D. Cal. Sept. 30, 2013); *ACLU of Wash. v. U.S. Dep't of Justice*, No. 09-C-642 RSL, 2011 U.S. Dist. LEXIS 26047, at *8-11 (W.D. Wash. Mar. 10, 2011) ("The FBI has, in effect, parroted the language of the Executive Order (in the disjunctive) and declared that the redacted information falls within one or more of the categories covered by the order. This categorical approach is 'clearly inadequate.'").

The District Court's holding should be vacated, and any legitimate claims addressed on remand through redactions.

4. The District Court Lacked Sufficient Factual Basis to Hold that an Entire Document Could Be Withheld Under the Bank Secrecy Act (Exemption 3).

The FBI cited the Bank Secrecy Act, 31 U.S.C. § 5319, as a basis to withhold one record—described as "FD-1036, Operational Plan." 2-ER-68 (column b3-6). The Bank Secrecy Act concerns only reports collected from financial institutions by FinCEN. 3-ER-321-22. While Civil Beat concedes that the Bank Secrecy Act would permit withholding of information derived from a FinCEN report, the withheld document—based on the FBI's limited description as an "operational plan"—includes more than information derived from FinCEN reports; thus redaction would be appropriate. Without redactions consistent with the limited scope of the confidentiality provisions, the District Court lacked sufficient factual basis to affirm the FBI's withholding under the Bank Secrecy Act. *See* 1-ER-17.

5. The District Court Erroneously Construed the Pen Register Act (Exemption 3).

The District Court held that the Pen Register Act, 18 U.S.C. § 3123(d), prohibits disclosure of court orders *and* "information pertaining to 'the existence of then [sic] pen register or trap and trace device or the existence of the investigation." 1-ER-16. The Pen Register Act, however, only provides confidentiality for the court order. *Labow v. U.S. Dep't of Justice*,

831 F.3d 523, 528-29 (D.C. Cir. 2016) ("Exemption 3 of FOIA, as regards the Pen Register Act, primarily authorizes the government to withhold a responsive pen register order itself, not all information that may be contained in or associated with a pen register order."). The statute addresses other information about the existence of the pen register, but restrictions on such disclosure only apply to specific private entities, not government agencies. *Id.* at 528 ("Although the statute additionally bars disclosures by certain private parties about the existence of a pen register order in the absence of a court order allowing disclosure, *id.* § 3123(d)(2), that limitation does not apply to the government.").[22] The District Court's expansive reading of the Pen Register Act should be vacated.

6. The District Court Erroneously Construed the Scope of Grand Jury Secrecy (Exemption 3).

The FBI claimed that Fed. R. Crim. P. 6(e) protected not only grand jury subpoenas, but also documents obtained through grand jury subpoenas and related internal discussion of those documents. 3-ER-315-17. But Fed. R. Crim. P. 6(e) only specifically protects "a matter occurring

[22] Other FOIA exemptions may apply if, for example, untimely disclosure of the existence of a pen register would interfere with enforcement proceedings, but confidentiality under the Pen Register Act is limited.

before a grand jury." Disclosing documents obtained in response to a grand jury subpoena does not inevitably reveal anything about grand jury proceedings. *Labow*, 831 F.3d at 529-30 ("subpoenaed documents would not necessarily reveal a connection to a grand jury."). "The mere fact the documents were subpoenaed fails to justify withholding under Rule 6(e)." *Id.* at 530.

The FBI declared that the documents were marked on their face as grand jury information. 3-ER-316-17 ¶¶ 48-49. But such markings without further context, at best, may support limited redaction. *Labow*, 831 F.3d at 530 ("On the current record, however, we do not know whether the documents at issue somehow necessarily evince their connection to a grand jury, much less do so in a manner that could not be dealt with through redactions."). If it were otherwise, the FBI could stamp documents unnecessarily with a "grand jury" legend for the sole purpose of evading disclosure obligations. *See id.* ("Of course, if the documents are now belatedly released, it might be apparent that they had been subpoenaed by a grand jury given that the potential connection with a grand jury is now known. That fact, however, should not bar disclosure. As we have previously held, the relevant question is whether the documents would

have revealed the inner workings of the grand jury had they been released in response to the initial FOIA request.").

The District Court erroneously adopted the full scope of the FBI's interpretation of Fed. R. Crim. P. 6(e). 1-ER-16. That construction should be vacated with remand for further development of the record and possible redaction.

7. The District Court Lacked an Adequate Factual Record to Support Withholding Based on Discovery Privileges (Exemption 5).

The FBI declared that it withheld information pursuant to the deliberative process privilege, attorney-client privilege, and attorney work product doctrine. 3-ER-324-28. But without redacted records to provide context or a detailed privilege log, there was no way to independently assess the FBI's claims. *E.g.*, *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 20 F.4th 49, 55 (D.C. Cir. 2021) (deliberative process privilege depends on "the individual document and the role it plays in the administrative process"); *United States v. Richey*, 632 F.3d 559, 566-68 (9th Cir. 2011) (describing limited scope of the attorney-client privilege and attorney work product doctrine). For example, documents are not protected by the deliberative process privilege simply because they are "internal deliberations." *E.g.*,

Transgender Law Ctr. v. Immigration & Customs Enf't, 33 F.4th 1186, 1197-98, 1201 (9th Cir. 2022); *Judicial Watch*, 20 F.4th at 54-57. Despite a lack of adequate factual basis, the District Court held that all of the FBI's Exemption 5 claims were proper. 1-ER-17-18. That holding should be vacated for further development on remand.

8. The District Court Lacked an Adequate Factual Record to Support Withholding Based on Confidential Sources (Exemption 7D).

There is no presumption that FBI sources are confidential.[23] *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 178 (1993) ("Congress did not expressly create a blanket exemption for the FBI; the language that it adopted requires every agency to establish that a confidential source furnished the information sought to be withheld under Exemption 7(D)."). Beyond boilerplate about confidential sources generally and unspecified "evidence" in its files, 3-ER-338-44, the only information provided specific to confidential sources here was reference to a single "Confidential Human Source" who provided information "that Mr. English and Mr. Cullen received these personal benefits, such as cash, in exchange for influencing

[23] 5 U.S.C. § 552(b)(7)(D) permits an agency to withhold information that "could reasonably be expected to disclose the identity of a confidential source" or "information furnished by a confidential source."

their official actions as legislators." 3-ER-382 ¶ 6. The District Court upheld the FBI's claims. 1-ER-18-19.

As expressly acknowledged by the U.S. Attorney, Judge Watson, and Choy, however, that singular "Confidential Human Source" referenced by the FBI is Choy. *Dow Jones & Co. v. Dep't of Justice*, 917 F.2d 571, 577 (D.C. Cir. 1990) ("if the exact information given to the FBI has already become public, and the fact that the informant gave the same information to the FBI is also public, there would be no grounds to withhold."); *cf. Pickard v. Dep't of Justice*, 653 F.3d 782, 787-88 (9th Cir. 2011) (agency cannot deny person's status as confidential informant after separate official confirmation of that status). The FBI submitted no evidence that Choy is a "confidential" source—implied or express. *E.g.*, *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 986 (9th Cir. 1985) ("no reasonable expectation of confidentiality" when formal proceedings anticipated). It also did not submit any evidence that all the information in the requested records was "furnished" by Choy. The District Court's sweeping endorsement of the FBI's confidential source claim lacked an adequate factual basis and should be vacated.

9. The District Court Lacked an Adequate Factual Record to Support Withholding Based on the Broad Categories of "Investigative Techniques" Claimed by the FBI (Exemption 7E).

The FBI claimed to withhold investigative techniques in broad categories of information such as information analysis, investigation focus, search results, surveillance techniques, undercover operations, monetary payments, and operational plans. 3-ER-341-54. Exemption 7E permits an agency to withhold law enforcement "techniques and procedures" or investigation guidelines if "disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). "Techniques and procedures cover how law enforcement officials go about investigating a crime." *Transgender Law Ctr.*, 46 F.4th at 784-85. Guidelines are "how the agency prioritizes its investigative resources." *Id.* at 784. Courts cannot support broad categories of exemptions without sufficient information to distinguish techniques from guidelines. *Id.* at 785 ("Such a finding is overbroad.").

Moreover, agencies may not withhold publicly known techniques. *E.g.*, *Pomares v. VA*, 113 F.4th 870, 886 (9th Cir. 2024). For guidelines, the agency also must demonstrate how the specific documents at issue would be used to circumvent the law. *Id.* The District Court allowed the full

scope of the FBI's claimed withholding. 1-ER-19. Without redactions or more detailed declarations, the District Court lacked an adequate factual basis to support the FBI's withholding. *Pomares*, 113 F.4th at 887-88 (scope of an agency's withholding under Exemption 7E relevant to the adequacy of its explanations); *Transgender Law Ctr.*, 46 F.4th at 785.

10. The District Court Failed to Independently Analyze the Foreseeable Harm Standard for Each Exemption.

The District Court referenced the FBI's declarations on foreseeable harm without applying any independent analysis. 1-ER-11. Congress amended FOIA to stop agencies from relying on perfunctory statements of harm that might technically permit withholding, but do not reasonably exist in a particular case. *E.g.*, 5 U.S.C. § 552(a)(8)(A)(i)(I); *Reporters Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 369 (D.C. Cir. 2021) ("Agencies cannot rely on mere speculative or abstract fears, or fear of embarrassment to withhold information. Nor may the government meet its burden with generalized assertions."); *Sea Shepherd Legal v. NOAA*, 516 F. Supp. 3d 1217, 1239 (W.D. Wash. 2021) ("In other words, even if an exemption applies, an agency still must release the record if the disclosure would not reasonably harm an exemption-protected interest."). Here, given all the information already publicly disclosed about these investigations, and considering

Choy's death, abstract potential harms—untethered from the actual records—were insufficient to carry the FBI's burden.

The District Court's alternative holding to withhold *everything* based on the collective effect of other exemptions should be reversed for lack of adequate factual basis. The individual holdings as to these other exemptions—with limited, but unclear scope in light of the FBI's generic assertions and refusal to redact—should be vacated. Legitimate concerns can be addressed on remand with more specific proof after the FBI redacts the investigation files.

F. Segregability: The District Court Lacked Sufficient Factual Basis to Hold that All Non-Exempt Information Had Been Disclosed.

Agencies must prove that all segregable non-exempt information has been disclosed. *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 779-81 (9th Cir. 2015); *Pac. Fisheries Inc. v. United States*, 539 F.3d 1143, 1149-50 (9th Cir. 2008). The court must have an independent basis to "make a specific finding that no information contained in each document or substantial portion of a document withheld is segregable." *Wiener v. FBI*, 943 F.2d 972, 988 (9th Cir. 1991).

The FBI declared that, of the 38,597 pages and media, only publicly filed court documents from the criminal proceedings could be disclosed. According to the FBI: "After review of the documents at issue, the FBI determined that there is no further non-exempt information that can be reasonably segregated and released without revealing exempt information." 3-ER-356. The District Court simply accepted that assertion. 1-ER-19-20.

That is plainly insufficient. Such conclusory declarations are inadequate and of questionable "good faith" when everything is withheld. *Hamdan*, 797 F.3d at 780-81 (remanding for segregability determination because declarations lacked detail and withholding entire document meant that "the district court did not have the opportunity to observe the DIA's approach to redaction"); *Stolt-Nielsen Transp. Group Ltd. v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008) (insufficient to declare paralegal "reviewed each page line-by-line to assure himself that he was withholding from disclosure only information exempt pursuant to the Act" because no support "to conclude that the self-serving conclusion is the correct one"); *Pac. Fisheries*, 539 F.3d at 1149-50 (insufficient to say declarant "attempted to make all reasonably segregable non-exempt portions of documents

available"). As this Court observed in *Hamdan* after the DIA withheld everything based on a conclusory segregability declaration: "Without further detail from the DIA it is not possible for the district court to presume that the DIA's declarations are made in good faith." 797 F.3d at 781.

FOIA exemptions are narrowly construed, and all segregable portions must be disclosed. Only then will citizens know "what the Government is up to." "This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." *NARA v. Favish*, 541 U.S. 157, 171-72 (2004). A conclusory holding of segregability on a scant record flaunts FOIA's purpose. *See* 2-ER-55-56; *accord Hamdan*, 797 F.3d at 780 ("Rather than withhold the entire document, the State Department took the correct view that it was required to release any information that was not classified, even if it was a single sentence."). The District Court's holding that nothing can be disclosed from the FBI's internal records should be reversed.

CONCLUSION

Based on the foregoing, Civil Beat respectfully requests that this Court reverse the April 1 Judgment to the extent that it permits the FBI to

withhold the entirety of over 38,000 pages concerning these two closed enforcement proceedings against convicted state legislators and otherwise vacate the District Court's decision regarding specific exemptions, so that on remand the process of redaction and public accountability can start.

DATED: Honolulu, Hawai`i, July 7, 2025

/s/ Robert Brian Black
ROBERT BRIAN BLACK
BENJAMIN M. CREPS
Attorneys for Plaintiff-Appellant

STATEMENT OF RELATED CASES

I am not aware of any related cases currently pending in this court.

DATED: Honolulu, Hawai`i, July 7, 2025

/s/ Robert Brian Black
ROBERT BRIAN BLACK
Attorney for Plaintiff-Appellant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

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5 U.S.C. § 552 PUBLIC INFORMATION; AGENCY RULES, OPINIONS, ORDERS, RECORDS, AND PROCEEDINGS [FREEDOM OF INFORMATION ACT]

(a) Each agency shall make available to the public information as follows:

. . .

(4)

. . .

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

. . .

(8)

(A) An agency shall—

(i) withhold information under this section only if—

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or

(II) disclosure is prohibited by law; and

(ii)

(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and

(II) take reasonable steps necessary to segregate and release nonexempt information; and

(B) Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3).

(b) This section does not apply to matters that are—

. . .

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)

(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

. . .

(5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

. . .

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in

this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

18 U.S.C. § 3123 ISSUANCE OF AN ORDER FOR A PEN REGISTER OR A TRAP AND TRACE DEVICE [PEN REGISTER ACT]

. . .

(d) Nondisclosure of existence of pen register or a trap and trace device. An order authorizing or approving the installation and use of a pen register or a trap and trace device shall direct that—

(1) the order be sealed until otherwise ordered by the court; and

(2) the person owning or leasing the line or other facility to which the pen register or a trap and trace device is attached or applied, or who is obligated by the order to provide assistance to the applicant, not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber, or to any other person, unless or until otherwise ordered by the court.

31 U.S.C. § 5319 AVAILABILITY OF REPORTS [BANK SECRECY ACT]

The Secretary of the Treasury shall make information in a report filed under this subchapter available to an agency, including any State financial institutions supervisory agency, United States intelligence agency or self-regulatory organization registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission, upon request of the head of the agency or organization. The report shall be available for a purpose that is consistent with this subchapter. The Secretary may only require reports on the use of such information by any State financial institutions supervisory agency for other than supervisory purposes or by United States intelligence agencies. However, a report and records of reports are exempt from search and disclosure under section 552 of title 5, and

may not be disclosed under any State, local, tribal, or territorial "freedom of information", "open government", or similar law.

50 U.S.C. § 3024 RESPONSIBILITIES AND AUTHORITIES OF THE DIRECTOR OF NATIONAL INTELLIGENCE [NATIONAL SECURITY ACT]

. . .

(i) Protection of intelligence sources and methods.

(1) The Director of National Intelligence shall protect, and shall establish and enforce policies to protect, intelligence sources and methods from unauthorized disclosure.

FED. R. CRIM. P. 6 THE GRAND JURY

. . .

(e) Recording and Disclosing the Proceedings.

. . .

(2) *Secrecy.*

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii);