UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MICHAEL KUZMA,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

REPORT AND RECOMMENDATION

16-cv-00347(RJA)(JJM)

Plaintiff Michael Kuzma commenced this action under the Freedom of Information Act ("FOIA"), 5 U.S.C §552, seeking the disclosure and release of certain Federal Bureau of Investigation ("FBI") records. Complaint [1].[1] Before the court are the parties' cross-motions for summary judgment pursuant to Fed. R. Civ. P. ("Rule") 56 [10, 14] which have been referred to me by District Judge Richard J. Arcara for initial consideration [17].[2] Having reviewed the parties' submissions [10-16], I recommend that the motions be granted in part and denied in part.

BACKGROUND

Plaintiff's June 22, 2015 FOIA request sought access to records relating to the "involvement of FBI informant Terrence Brooks Norman a.k.a. Terrence Norman in the May 4,

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[1] Bracketed references are to the CM/ECF docket entries. Unless otherwise indicated, page references are to numbers reflected on the documents themselves rather than to the CM/ECF pagination.

[2] Plaintiff also filed a motion for an index of the documents that have been withheld (either in whole or in part) pursuant to Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973) [5]. At the July 18, 2019 proceeding, the parties agreed that the motion was resolved [20].

1970 killing of four Kent State University students by National Guardsmen." Statement of Undisputed Facts [12], ¶7. In response, the FBI, a subdivision of the defendant U.S. Department of Justice ("DOJ"), stated that it could neither confirm nor deny the existence of any responsive records, since the request was for records of a third-party and not accompanied by a consent from the individual, proof of death, or a justification that the public interest outweighs the privacy interests of the third party. Id., ¶9. It also advised that if such records did exist, they would be exempt from disclosure pursuant to FOIA Exemptions 6 and 7(C), 5 U.S.C. §§552(b)(6) and (b)(7)(C). Id., ¶10. Plaintiff commenced this suit on May 4, 2016, after plaintiff's appeal to the DOJ Office of Information Policy ("OIP") was unsuccessful. Id., ¶¶12-15. Although it had earlier refused to release any responsive documents, on January 25, 2017 the FBI advised plaintiff that 171 pages of records were reviewed and released 49 pages in full and 122 pages in part, with certain information withheld pursuant to FOIA Exemptions 6, 7(C), and 7(D), U.S.C. §§552(b)(6), (b)(7)(C), and (b)(7)(D). Id., ¶¶17, 189.[3]

Shortly after the FBI's production, the parties cross-moved for summary judgment. The government's motion is supported by the Declaration of David Hardy [11], the Section Chief of the Record/Information Dissemination Section ("RIDS") of the FBI's Records Management Division, which details the FBI's treatment of plaintiff's FOIA request and its claimed exemptions. Id., ¶1.

[3] I have reviewed the redacted documents produced to plaintiff.

DISCUSSION

A. Summary Judgment Standard

"Summary judgment is the procedural vehicle by which most FOIA actions are resolved." Adelante Alabama Worker Center v. United States Department of Homeland Security, 376 F. Supp. 3d 345, 353 (S.D.N.Y. 2019). Although "FOIA generally calls for broad disclosure of Government records . . . . Congress provided that some records may be withheld from disclosure under certain exemptions". American Civil Liberties Union v. United States Department of Defense, 901 F.3d 125, 133 (2d Cir. 2018). Thus, "to prevail on a summary judgment motion in a FOIA case, an agency must demonstrate 'that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements.'" Ruotolo v. Department of Justice, Tax Division, 53 F.3d 4, 9 (2d Cir. 1995). Additionally, "the defending agency has the burden of showing that its search was adequate". Id. "To carry its burden, the defending agency may rely on a Vaughn index, which consists of 'affidavits to the court that describe with reasonable specificity the nature of the documents at issue and the justification for nondisclosure; the description provided in the affidavits must show that the information logically falls within the claimed exemption.'" Kuzma v. United States Department of Justice, 2014 WL 4829315, *2 (W.D.N.Y. 2014) (*quoting* Lesar v. United States Department of Justice, 636 F.2d 472, 481 (D.C.Cir. 1980)).

B. Adequacy of the Search

"[W]hen a plaintiff questions the adequacy of the search an agency made in order to satisfy its FOIA request, the factual question it raises is whether the search was reasonably

calculated to discover the requested documents, not whether it actually uncovered every document extant". Grand Central Partnership, Inc. v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999). Importantly, "[t]he adequacy of a search is not measured by its results, but rather by its method." New York Times Co. v. United States Department of Justice, 756 F.3d 100, 124 (2d Cir. 2014).

"FOIA does not give requesters the right to Monday-morning-quarterback the agency's search . . . . Indeed, the search need not be 'perfect" in Plaintiffs' estimation (or even the Court's), so long as the agency has provided logical explanations for each of the decisions it made as to search terms to be used and how to conduct the searches, evincing a good faith effort to design a comprehensive search." Immigrant Defense Project v. United States Immigration and Customs Enforcement, 208 F. Supp. 3d 520, 527 (S.D.N.Y. 2016). *See also* McLean on behalf of J.N.M. v. Social Security Administration, 2019 WL 2495333, *3 (S.D.N.Y.), adopted, 2019 WL 1074273 (S.D.N.Y. 2019) ("[p]erfection . . . is not required").

Plaintiff specifically requested only information relating to the alleged "involvement of FBI informant Terrence Brooks Norman a.k.a. Terrence Norman in the May 4, 1970 killing of four Kent State University students by National Guardsmen." Statement of Undisputed Facts [12], ¶7. In a nutshell, Hardy explains that the Central Records System ("CRS") is where the FBI maintains information about individuals, organizations, events, and other subjects of investigative interest for future retrieval and encompasses the records of the FBI headquarters, field offices, and legal attachè offices. Id., ¶¶20, 67.[4] To locate information contained within the CRS, RIDS employs an index search methodology. Id., ¶24. It is undisputed that the FBI searched for any "main" or "cross reference" material responsive to

[4] Hardy provides a much more detailed description of the FBI's databases and retrieval mechanisms, which are undisputed and not germane to plaintiff's specific challenges. Statement of Undisputed Facts [12], ¶¶34-56, 58-65.

plaintiff's request and conducted a three-way phonetic search of the CRS index and manual indices using the terms: Terrence Brooks Norman and Terry Norman. Id., ¶¶25, 55, 64, p. 11 n. 9.

Plaintiff points to several specific deficiencies with the search. First, he notes that while Hardy states that "one of the files located during the search was destroyed prior to the submission of the FOIA" (Hardy Declaration [14-2], p. 4 n. 2), he fails to identify "the type and number of records destroyed" or the "date of and authority under which the record destruction took place". Plaintiff's Memorandum of Law [14-2], p. 2 of 9 (CM/ECF). He also notes that two documents, Kuzma-60 and -61 ([14-7], pp. 2-3 of 12 (CM/ECF)),[5] reference the "Cleveland informant" and "sub A files" on Norman, but those files were not produced. Plaintiff's Memorandum of Law [14-2], p. 2 of 9 (CM/ECF). In response, Hardy explains that during its search, RIDS located a file on Norman at the Cleveland field office. The Cleveland file mentioned that copies were filed in a related FBI headquarters file. Second Hardy Declaration [16], p. 3 n.2. However, when RIDS attempted to locate the headquarters file, it learned that the copies were destroyed and that all of the original record materials were sent to and included in the Cleveland file, which was processed in response to plaintiff's FOIA request. Id., p. 3 n.2, p. 5 n. 3; and ¶9.

"An agency does not control a record which has been destroyed, and it is under no obligation to obtain a duplicate of or to re-create a record in order to fulfill a FOIA request." Davis v. United States Department of Homeland Security, 2013 WL 3288418, *13 (E.D.N.Y. 2013). In any event, from the DOJ's explanation (which I accept), nothing needs to be recreated.

[5] The produced documents were Bates-numbered Kuzma-1 through Kuzma-170. Hardy Declaration [11], ¶27. While this suggests that 170, rather than 171, pages were produced, one document (Kuzma-53a) was inadvertently omitted during the original numbering. Id., p. 12 n. 10.

Anything in the destroyed file is contained in the Cleveland file, which was processed in connection with plaintiff's FOIA request.

Next, plaintiff alleges that, during the course of a May 5, 1975 deposition, Norman was shown "notes of an interview taken by the FBI on May 10, 1970" and testified that the FBI received "prints of the pictures he took", but neither the notes nor the pictures were produced as part of the FBI's FOIA production. Plaintiff's Memorandum of Law [14-2], p. 2 of 9 (CM/ECF). In response, Hardy states that the FBI searched the CRS, "the most logical location for any such records", but did not locate the photos or interview notes. Second Hardy Declaration [16], ¶7. He also states that the FBI has "followed up on all leads discovered within the documents located during the FBI's search", and that "[i]t is unlikely that any other responsive records, if they exist, would be located outside of [the investigative file pertaining to the Kent State shootings and the informant file of Norman] or outside of the CRS". Id.

Although that explanation may not be satisfactory to plaintiff, "the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*" Weisberg v. U.S. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (emphases in the original). It is "long settled that the failure of an agency to turn up one specific document in its search does not alone render a search inadequate." Iturralde v. Comptroller of Currency, 315 F.3d 311, 315 (D.C. Cir. 2003).

Plaintiff requests a more rigorous search for these documents to be conducted outside of the CRS. Plaintiff's Memorandum of Law [14-2], pp. 2-3 of 9 (CM/ECF). Specifically, he points to an Electronic Case File search and searches of the FBI's I, S, and H-drives, as well as its "DO NOT FILE", and "Zero" files. Id., p. 2 of 9. However, he offers no explanation as to why potentially responsive materials, including the interview notes and photos,

could be discovered in these locations, but not on the CRS. "Absent some reason to believe that these locations are likely to contain responsive materials, Plaintiff's arguments are insufficient to require the FBI to conduct further searches." Rosenberg v. United States Department of Immigration & Customs Enforcement, 13 F. Supp. 3d 92, 104 (D.D.C. 2014).[6] Therefore, I recommend that the DOJ be granted summary judgment on the sufficiency of its search.

C. Segregability

Where some portion of a document is exempt from disclosure, the FOIA requires the government to disclose "[a]ny reasonably segregable portion," 5 U.S.C. §552(b), unless the non-exempt information is "inextricably intertwined with exempt portions". Mead Data Central, Inc. v. United States Department of Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977). "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material." Sussman v. United States Marshals Service, 494 F.3d 1106, 1117 (D.C. Cir. 2007). "Before approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld." Id. at 1116.

Here, Hardy states that "[t]he FBI processed the records under the access provisions of the FOIA to achieve maximum disclosure . . . . [T]here is no further non-exempt information that can be reasonably segregated and released without revealing exempt information". Hardy Declaration [11], ¶¶27, 60. "Courts often rely on affirmances like these -

[6] The FBI has also pointed to the existence of two other files previously accessioned to the National Archives and Records Administration ("NARA"), which are no longer in its possession, but may contain responsive documents. Hardy Declaration [11], p. 4 n.2; Second Hardy Declaration [16], ¶10. However, "[a]n agency is not obliged to conduct a search of records outside its possession or control", Jones-Edwards v. Appeal Board of National Security Agency, 196 Fed. App'x 36, 38 (2d Cir. 2006) (Summary Order), and the FBI has provided plaintiff with the information necessary to request these records from NARA.

which are entitled to a presumption of good faith absent a showing to the contrary - in FOIA litigation." Spadaro v. United States Customs & Border Protection, 2019 WL 1368786, *7 (S.D.N.Y. 2019) ("the affiants . . . stated that they reviewed the documents withheld by their respective agencies and concluded that all reasonably segregable information has been disclosed").

Plaintiff argues that "[i]n order to ensure that the FBI has fulfilled its obligation under FOIA, this . . . Court should conduct an *in camera* inspection of the sought-after documents to determine whether the FBI has indeed adequately segregated exempt from non-exempt data". Plaintiff's Memorandum of Law [14-2], pp. 3-4 of 9 (CM/ECF). However, plaintiff has not alleged or demonstrated any specific deficiency in the adequacy of the FBI's disclosure to overcome the presumption that it has complied with its obligation to disclose reasonably segregable material.

In Kuzma v. U.S. Department of Justice, 2016 WL 9446868, *7 (W.D.N.Y. 2016), aff'd, 692 Fed. App'x 30 (2d Cir. 2017) (Summary Order), an equally conclusory challenge by this plaintiff was rejected: "Plaintiff presents no substantive challenge to the FBI's segregability determination. Rather, he requests *in camera* review to determine if the FBI met its segregability obligations. But Plaintiff's simple desire for this Court to review the FBI's determinations, unaccompanied by any allegation or evidence of error, is not cause for *in camera* review."[7] I see no reason why the result here should be different. *See* Local 3, International Brotherhood of Electrical Workers, AFL-CIO v. National Labor Relations Board, 845 F.2d 1177, 1180 (2d Cir. 1988) ("*[i]n camera* review is considered the exception, not the rule, and the

[7] Similar to what Hardy represented here, there he stated that "'[e]very effort was made to provide plaintiff with all material in the public domain and with all reasonably segregable, non-exempt information in the responsive records'" and that "'[n]o reasonably segregable, nonexempt portions have been withheld from plaintiff.'" 2016 WL 9446868, *6.

propriety of such review is a matter entrusted to the district court's discretion"). *See also* Carter v. United States Department of Commerce, 830 F.2d 388, 393 (D.C. Cir. 1987) ("if there is evidence of agency bad faith - for example, if information contained in agency affidavits is contradicted by other evidence in the record - then, *in camera* inspection may be necessary to insure that agencies do not misuse the FOIA exemptions to conceal non-exempt information"). Therefore, I recommend that this portion of the DOJ's motion be granted.

D. Applicability of the Exemptions

When relying on a FOIA exemption, "[a]gencies . . . may use declarations to satisfy their burden of proving the applicability of claimed exemptions, but these declarations must provide reasonably detailed explanations." American Civil Liberties Union, 901 F.3d at 133. "Summary judgment is appropriate where the agency affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith. Ultimately, an agency may invoke a FOIA exemption if its justification appears logical or plausible." American Civil Liberties Union v. Department of Justice, 681 F.3d 61, 69 (2d Cir. 2012). "Agency affidavits, including a Vaughn index, are presumed to have been made in good faith", New York Times Co. v. United States Department of Justice, 390 F. Supp. 3d 499, 512 (S.D.N.Y. 2019), and "privacy interests protected by the exemptions to FOIA are broadly construed". Long v. Office of Personnel Management, 692 F.3d 185, 195 (2d Cir. 2012).

1. Exemptions 6 and 7(C)

Exemption 6 permits the withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy". 5 U.S.C. §552(b)(6). In determining whether identifying information may be withheld pursuant to Exemption 6, the Court must "1) determine whether the identifying information is contained in personnel and medical files and similar files; and (2) balance the public need for the information against the individual's privacy interest in order to assess whether disclosure would constitute a clearly unwarranted invasion of personal privacy." Associated Press v. United States Department of Defense, 554 F.3d 274, 291 (2d Cir. 2009). All information that relates to an individual qualifies for consideration under exemption (b)(6). *See* Department of State v. Washington Post Co., 456 U.S. 595, 602 (1982).

Exemption 7(C) similarly protects "information compiled for law enforcement purposes" to the extent it "could reasonably be expected to constitute an unwarranted invasion of personal privacy". 5 U.S.C. §552(b)(7)(C). "It is properly invoked when the invasion of personal privacy outweighs the public's interest in disclosure." Kuzma, 2016 WL 9446868, *8.

"[I]t is well-settled law that an individual's death diminishes, but does not eliminate, [his/]her privacy interest in the nondisclosure of any information about [him/]her that appears in law enforcement records." Clemente v. Federal Bureau of Investigation, 64 F. Supp. 3d 110, 119-20 (D.D.C. 2014), aff'd, 867 F.3d 111 (D.C. Cir. 2017). "[I]n balancing an individual's privacy interests against any public interest in disclosure, an agency must typically take 'the fact of death . . . into account.' . . . The agency can only do that if it first 'ma[k]e[s] a reasonable effort to ascertain life status.'" Clemente, 64 F. Supp. 3d at 120; Schrecker v. United States Department of Justice, 349 F.3d 657, 662 (D.C. Cir. 2003) ("a court must assure itself that

the Government has made a reasonable effort to ascertain life status. And the Government's efforts must be assessed in light of the accessibility of the relevant information"). Hence, as a prerequisite to invoking FOIA Exemptions 6 and 7(C), the FBI "is required to make efforts to ascertain an individual's life status". Schoenman v. Federal Bureau of Investigation, 576 F. Supp. 2d 3, 10 (D.D.C. 2008).

The FBI has invoked Exemptions 6 and 7(C) to protect the names or identifying information of (1) FBI Special Agents who were responsible for conducting, supervising and/or maintaining the investigative activities reflected in the documents responsive to plaintiff's FOIA request; (2) third parties merely mentioned in the records at issue; (3) living victims injured during the May 1970 violence that occurred at Kent State University; (4) local and state government personnel, including law enforcement; (5) third parties of investigative interest; (6) non-FBI federal government personnel; (7) commercial institution employees who cooperated and provided assistance to the FBI and other law enforcement agencies during the course of the investigation; and (8) individuals who were interviewed and/or provided information to law enforcement during the investigation. Hardy Declaration [11], ¶¶37-46.

Plaintiff challenges both whether the FBI sufficiently attempted to ascertain the life status of individuals for which it has invoked these exemptions (plaintiff's Memorandum of Law [14-2], pp. 4-5 of 9 (CM/ECF), and whether the public interest in the records outweighs the privacy interests of the third-parties identified in the records. Id., pp. 6-7 of 9.

a. Life Status

Plaintiff argues that the FBI did not make a reasonable effort to ascertain the life status of the individuals for which it invoked these exemptions. Plaintiff's Memorandum of Law

[14-2], pp. 4-5 of 9 (CM/ECF). Specifically, he contends that he was able to "quickly and easily ascertain through an internet search that [several relevant law enforcement officers (Thomas Kelly, Harold Rice, and Bruce Vanhorn)] were deceased", and that "[r]equiring the FBI to consult the Social Security Death Index [("SSDI")] or databases at its disposal to determine if any of the individuals it seeks to protect are deceased would not be unduly burdensome". Id. at p. 5 of 9; [14-7] (including SSDI records for Thomas Kelly and Harold Rice).

The FBI does not dispute that it failed to consult the SSDI or other databases in determining whether the subject individuals were deceased. Instead, Hardy states that "[t]he SSDI is a pay service, not currently at the disposal of RIDS for purposes of FOIA", but that it applied the 100-year rule (*i.e.*- if the individual was born more than 100 years earlier he/she is presumed dead) and its institutional knowledge (*i.e.* - "knowledge gained from prior FOIA requests or internal records") to determine life status. Second Hardy Declaration [16], ¶11.

Without more, that explanation does not permit me to determine whether the FBI's efforts to ascertain the life status of the redacted individuals was reasonable. Given the "state of modern technology, it is not at all clear why the FBI thinks that even a successful application of the 100 - year rule - standing alone - would constitute a reasonable effort to determine the death status of the individuals in question". Brick v. Department of Justice, 293 F. Supp. 3d 9, 12 (D.D.C. 2017). "The Bureau does not appear to have contemplated other ways of determining whether the speakers are dead, such as Googling them." Davis v. Department of Justice, 460 F.3d 92, 95 (D.C. Cir. 2006).

While Hardy states that the FBI's "institutional knowledge" was employed, it appears from the minimal explanation provided "that the Bureau has been completely passive on the issue, taking death into account only if the fact has happened to swim into its agents' line of

vision." Id. at 99. For example, Hardy explains that institutional knowledge was "gained from prior FOIA requests". Second Hardy Declaration [16], ¶11(B). However, I "have no idea what that means. On its face . . . its utility must depend upon there having been a prior FOIA request involving the same individuals. The FBI does not suggest that there had ever been such a request." Davis, 460 F.3d at 99. Nor is there any explanation of what internal records exist (or how they were used) to determine life status.

The FBI does not dispute that the SSDI is a feasible means for readily determining the life status of the third parties. Instead, Hardy explains that RIDS currently lacks access to the SSDI for FOIA requests and that it is a pay service. Second Hardy Declaration [16], ¶¶11. While I recognize that the court may not mandate "a bright-line set of steps for an agency to take in this situation", Johnson v. Executive Office for United States Attorneys, 310 F.3d 771, 776 (D.C. Cir. 2002), I find Hardy's statement to be in need of further explanation, especially given the apparent access the FBI had to the SSDI in another case brought by plaintiff and because the other methods employed by the FBI appear unlikely to produce the needed information. *See* Kuzma, 2016 WL 9446868, *9 (there the FBI searched the SSDI to determine living or deceased status). Also in need of further explanation is how the FBI balanced the privacy interest against the public interest when individuals were determined to be deceased. From the limited explanation provided, it appears that the FBI disclosed identities when individuals were determined to be dead, but withheld disclosure pursuant to Exemptions 6 and 7(C) when the FBI was unable to ascertain the life/death status of the third-party. Second Hardy Declaration [16], ¶11.

Without this further information and "confirmation that the Government took certain basic steps to ascertain whether an individual was dead or alive, [I am] unable to say

whether the Government reasonably balanced the interests in personal privacy against the public interest in release of the information at issue." Davis, 460 F.3d at 98. Therefore, I recommend that this portion of the parties' motions be denied, without prejudice to renewal upon a supplemental record. *See* Brick, 293 F. Supp. 3d at 13. *See also* Hertz Schram PC v. F.B.I., 2014 WL 1389331, *1–2 (E.D. Mich. 2014) ("there is precedent for allowing an agency to supplement deficient affidavits with further affidavits or declarations"); Black v. U.S. Department of Justice, 52 F. Supp. 3d 25, 27 (D.D.C. 2014) (where the court was unable to properly address the DOJ's reliance on Exemption 7(C), it held the motions for summary judgment in abeyance and permitted supplemental briefing addressing its efforts to ascertain life status).

2. Exemptions 7(D) and 7(E)[8]

Exemption 7(D) protects confidential sources or information and exemption 7(E) safeguards investigative techniques and procedures. *See* 5 U.S.C. §§(b)(7)(D) and (E). Here, these exemptions have been asserted to protect individuals who assisted the FBI with its investigation of the Kent State shooting pursuant to an "express" assurance of confidentiality - *i.e.*, furnished information with the understanding that their identities and information provided would not be released outside of the FBI. Hardy Declaration [11], ¶¶49, 57.

Plaintiff's only objection to the FBI's reliance on these exemptions is its decision to withhold confidential source file and symbol numbers. Plaintiff's Memorandum of Law [14-2], pp. 7-8 of 9 (CM/ECF). He notes that Norman worked as an informant approximately 50 years ago, and that there is no indication in Hardy's initial Declaration that the confidential source file and symbol numbering system used at that time remains in use today. Id.

[8] Exemption 7(E) was not included among the original exemptions relied upon by the FBI. Hardy Declaration [11], p. 29 n. 22.

In response, Hardy explains that "[o]nly recently" did the FBI convert from a system which assigned sequential numbers to confidential informants who reported information to the FBI on a regular basis, to a system that "makes that accumulation of information by a single source less detectable by a hostile analyst". Second Hardy Declaration [16], ¶18. He also explains that the only information concerning Norman that has been officially reported by the FBI was that, in April 1970, Norman supplied information of value to the FBI regarding the National Socialist White People's Party for which he received payment of $125. However, Norman may have reported on other matters that have not been officially acknowledged. Id. According to Hardy, disclosure of the source symbol or confidential source file numbers would provide plaintiff and others with a means of tracking when and whether Norman may have provided information to the FBI outside of what has been officially acknowledged, and in turn violate the FBI's confidentiality agreement with him and have a chilling effect on the cooperation of other informants. Id., ¶¶19-20. Although the information here dates back approximately 50 years, Hardy states that "an analysis of the number of informants in a specific area at any given time continues to provide insight to criminals as to the likelihood the FBI has been able to infiltrate their ranks or has knowledge of facts that would impact the success of their future criminal activities". Id., ¶21.

Based on the record before me, I agree with the FBI that disclosure of the withheld material could potentially lead to the identification of confidential sources and affect the cooperation of future FBI informants. Accordingly, I find that the FBI has properly withheld this material under Exemptions 7(D) and 7(E), and recommend that this portion of the DOJ's motion be granted.

E. Plaintiff's Request for Attorney's Fees

The FOIA provides that "[t]he court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. §552(a)(4)(E)(i). Relevant here, a complainant substantially prevails "if the complainant has obtained relief through . . . a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial". 5 U.S.C. §552(a)(4)(E)(ii).

If the complainant has established an eligibility for attorney's fees by having "substantially prevailed" under the statute, the court must determine the complainant is "entitled" to fees, by weighing the following four factors: "(1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) whether the Government had a reasonable basis for withholding requested information." Pietrangelo v. United States Army, 568 F.3d 341, 343 (2d Cir. 2009). *See* Schwartz v. United States Drug Enforcement Administration, 2019 WL 1299192, *2 (E.D.N.Y.), adopted, 2019 WL 1299660 (E.D.N.Y. 2019).

Plaintiff argues that he is eligible for attorney's fees because the DOJ unilaterally changed its position by producing 171 pages of responsive documents after he filed suit. Plaintiff's Memorandum of Law [14-2], p. 8 of 9 (CM/ECF). He also contends that he entitled to these fees because the production "will help increase the public's understanding of the facts and circumstances surrounding . . . Norman's role in the deaths of four Kent State University students and wounding of nine others", he has not (and will not) derive any commercial benefit from the production, and has created a website at his own expense to disseminate this information to the general public. Id.; Kuzma Declaration [14-6], ¶¶7, 8.

In response, the DOJ offers no opposition to either plaintiff's eligibility or entitlement to attorney's fees. Instead, its lone argument is that plaintiff's attorney's fees should be limited to the period of time from when he commenced the action to the production of documents that occurred on January 25, 2017. Government's Reply Memorandum of Law [15], p. 12. I agree, and recommend that plaintiff be awarded reasonable attorney's fees incurred through January 25, 2017, in an amount yet to be determined. If this portion of the Report and Recommendation is adopted, a timetable will be set for submissions on plaintiff's attorney's fees.

CONCLUSION

For these reasons, I recommend that the DOJ's motion for summary judgment [10] be denied, without prejudice, to the extent that it relies on Exemptions 6 and 7(C), but otherwise be granted; and that plaintiff's cross-motion for summary judgment [14] be granted to the extent that it seeks an award of reasonable attorney's fees incurred through January 25, 2017, but otherwise be denied, without prejudice.

Unless otherwise ordered by Judge Arcara, any objections to this Report and Recommendation must be filed with the clerk of this court by November 19, 2019. Any requests for extension of this deadline must be made to Judge Arcara. A party who "fails to object timely . . . waives any right to further judicial review of [this] decision". Wesolek v. Canadair Ltd., 838 F. 2d 55, 58 (2d Cir. 1988); Thomas v. Arn, 474 U.S. 140, 155 (1985). Moreover, the district judge will ordinarily refuse to consider *de novo* arguments, case law and/or evidentiary material which could have been, but were not, presented to the magistrate judge in the first

instance. Patterson-Leitch Co. v. Massachusetts Municipal Wholesale Electric Co., 840 F. 2d 985, 990-91 (1st Cir. 1988).

The parties are reminded that, pursuant to Rule 72(b) and (c) of this Court's Local Rules of Civil Procedure, written objections shall "specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for each objection . . . supported by legal authority", and must include "a written statement either certifying that the objections do not raise new legal/factual arguments, or identifying the new arguments and explaining why they were not raised to the Magistrate Judge". Failure to comply with these provisions may result in the district judge's refusal to consider the objections.

Dated: November 5, 2019

/s/ Jeremiah J. McCarthy
JEREMIAH J. MCCARTHY
United States Magistrate Judge