

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Dave Levinthal, et al.,

Plaintiffs,

v.

Federal Election Commission,

Defendant.

Civil Action No. 15-1624 (APM)
ECF

**PLAINTIFFS' REPLY IN SUPPORT OF
THEIR MOTION FOR SUMMARY JUDGMENT**

Plaintiffs, Dave Levinthal and the Center for Public Integrity, reply as follows:

I. Plaintiffs have adequately explained their factual and legal arguments.

Defendant has objected that Plaintiffs' Opposition did not include a separate statement of genuine issues in response to Defendant's Statement of Material Facts as to Which There Is No Genuine Dispute. Plaintiffs hope and believe that their position was adequately explained in their Memorandum. Nevertheless, in response to Defendant's objection, Plaintiffs are now filing a Statement of Genuine Issues of Fact.

As the cases cited by Defendant indicate, it is within the Court's discretion to determine whether a party has adequately identified the material facts and genuine issues in dispute. *See, e.g., Quick v. U.S. Dept. of Commerce, Nat'l Inst. of Standards and Tech.*, 775 F. Supp. 2d 174, 178 (D.D.C. 2011).

II. The NIST Study is not a law enforcement record.

As Plaintiffs have previously argued, to withhold the NIST Study under Exemption 7(E), the FEC must meet the so-called “threshold” requirement of demonstrating that it falls within the category of “records or information compiled for law enforcement purposes” U.S.C. § 552(b)(7). This requirement applies to all the categories of information covered by Exemption 7, not just to Exemption 7(E).

Defendant has not addressed this argument at all in its Opposition and Reply. Its arguments discuss the standard under Exemption 7(E), but not the standard applicable to the threshold requirement of Exemption 7 generally.

The cases Defendant cites concerned actual law enforcement records. *Skinner v. Dep’t of Justice*, 893 F. Supp. 2d 109, 112 (D.D.C. 2012) (concerning information from the “Treasury Enforcement Communications System,” “a comprehensive computerized law enforcement and communications information system”); *Barouch v. Dep’t of Justice*, 87 F. Supp. 3d 10, 22 (D.D.C. 2015) (also concerning the same TECS system of records).

Defendant has not established, and cannot establish, that the NIST Study was “compiled for law enforcement purposes.” Rather, Defendant describes the NIST Study as “an information technology vulnerability assessment.” (Palmer Decl., ¶ 18.) Exemption 7(E) is, therefore, inapplicable.

III. Defendant has not met its burden of showing that no segregable portion of the NIST Study can be released.

Plaintiffs have conceded that substantial portions of the NIST Study may be withheld under Exemption 5.

Likewise, Defendant has conceded that the NIST Study contains “factual statements ... which are central to its analyses.” Defendant’s Statement of Facts, ¶ 10.

Defendant has asserted that none of this factual information is “reasonably segregable” (Defendant’s Statement of Facts, ¶ 47), but has provided no explanation that would allow Plaintiffs or the Court to test its assertions. In a case brought under FOIA, “the burden is on the agency to sustain its action.” 5 U.S.C. § 552(a)(4)(B); see also *Electronic Privacy Information Center v. Dep’t of Homeland Security*, 384 F. Supp. 2d 100, 106 (D.D.C. 2005). Defendant has not met this burden.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs’ Motion for Summary Judgment and deny Defendant’s Motion for Summary Judgment.

Respectfully submitted,

/S/

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