No. 16-15178

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, et al.,

Plaintiffs-Appellees,

v.

FEDERAL BUREAU OF INVESTIGATION

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California,

BRIEF FOR APPELLEES
AMERICAN CIVIL LIBERTIES UNION, ET AL.

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CORPORATE DISCLOSURE STATEMENT

The American Civil Liberties Union and the American Civil Liberties Union Foundation of Northern California, Inc. are affiliated non-profit membership corporations. They have no stock and no parent corporations.

Asian Americans Advancing Justice – Asian Law Caucus (formerly Asian Law Caucus) is a not-for-profit organization. It has no stock and no parent corporations.

I. INTRODUCTION

This Freedom of Information Act ("FOIA") action spotlights the FBI's monitoring of American Muslims and other communities in Northern California. Information the FBI has produced in this action demonstrates the agency's use of racial, ethnic, and religious stereotypes as part of its general monitoring programs. FOIA was enacted to make the government accountable to the public and to create transparency for precisely such activity.

But the FBI continues to withhold large swaths of responsive information at issue in this appeal. That withheld information concerns the following activities, which fall under the umbrella of general monitoring and information gathering:

(1) "assessments" of individuals and local communities, where the FBI targets, or assesses, individuals and groups based on race, culture, or religion;

(2) "domain management," where the FBI maps local communities (domains) based on race and ethnicity;

(3) general intelligence-gathering under the guise of "community outreach";

(4) the use of "voluntary interviews" with unsuspecting community members whom the FBI may in the future seek to recruit as potential informants; and

(5) training and programmatic information relating to these activities.

The FBI attempts to divert attention from these important issues by focusing on the last category, ignoring that a significant number of documents concern information gathered about specific individuals, groups, and communities.

The FBI withheld the information under FOIA's Exemption 7, which applies to information "compiled for law enforcement purposes." To satisfy the threshold requirement to invoke Exemption 7, the FBI must factually establish a rational nexus between (a) the enforcement of a federal law and (b) the withheld information. *Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 808 (9th Cir. 1995). This rational nexus test allows FOIA requesters to gain sufficient information to assess whether the claimed "law enforcement purpose" is legitimate or pretextual. *See Wiener v. FBI*, 943 F.2d 972, 986 (9th Cir. 1991).

In this action, the district court correctly held that the FBI's broad statements about its general law enforcement responsibilities, untethered to the enforcement of any federal law or any factual showing of a rational nexus, fail this test as to the information at issue. The district court's judgment should be affirmed.

In arguing for reversal, the FBI makes two primary arguments. Both are red herrings. *First*, the FBI implies that the district court incorrectly held that the information must relate to a *particular investigation* in order to fall under Exemption 7. But the district court made no such holding. Instead, the district court properly applied the Ninth Circuit's rational nexus test to hold that the FBI must *tether the withheld information to the enforcement of a federal law*, a legally and conceptually distinct test from a requirement to identify a particular investigation. The district court properly applied the Ninth Circuit's precedent to

all of the documents at issue, including documents that concern specific facts regarding an individual, a group, or a community, which might be called "investigatory," as well as documents that the FBI described below as "programmatic." *See* SER 57.

Second, the FBI states that FOIA was amended in 1986 to permit training and programmatic documents to potentially fall within Exemption 7. But the FBI incorrectly concludes that all of the FBI's responsive programmatic documents are automatically covered by Exemption 7. Not so. The FBI must still satisfy the threshold requirements for Exemption 7 if it seeks to withhold programmatic documents. When Congress passed the 1986 amendments, it consciously retained the existing statutory and related case-law requirements to establish that the information was "compiled for law enforcement purposes" in the first place. Thus, the FBI still must make a factual showing of a rational nexus between the withheld information and the enforcement of a federal law. The sort of general monitoring and information-gathering materials at issue here fail this test.

II. STATEMENT OF JURISDICTION

The American Civil Liberties Union, the American Civil Liberties Union Foundation of Northern California, Inc., and the Asian Americans Advancing Justice – Asian Law Caucus (collectively, the "Public Interest Groups"), filed a complaint, raising claims under the FOIA. GER 33–83. The district court had

subject matter and personal jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), 28 U.S.C. § 1331, and 5 U.S.C. §§ 701-706. The district court granted summary judgment in favor of the Public Interest Groups, GER 19–25, and entered final judgment as set forth in the stipulated order, GER 32. The stipulated order requires the FBI to produce the "information that Plaintiffs challenged in their motion for summary judgment" and "similarly situated information that was withheld." GER 26–31. The government appealed. GER 1–2. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

III. STATEMENT OF THE ISSUES

Under Ninth Circuit law, the FBI can withhold information responsive to a FOIA request under FOIA Exemption 7 only if it (1) establishes "a 'rational nexus' between enforcement of a federal law and the [information]" *and* (2) proves that disclosure would result in one of the six harms recognized in the subsections to Exemption 7. *Rosenfeld*, 57 F.3d at 808 (quoting *Church of Scientology v. Dep't of the Army*, 611 F.2d 738, 748 (9th Cir. 1979)). The Public Interest Groups challenged the FBI's withholdings under Exemption 7 for the specific information

identified in Exhibits 7 and 8[1] that supported the Public Interest Groups' summary judgment motion. SER 212, SER 336.

The issues presented in this appeal are:

1. Did the district court correctly hold that the FBI failed to meet its burden to establish a rational nexus between the enforcement of a federal law and the withheld information challenged by the Public Interest Groups in Exhibits 7 and 8? The answer is: Yes.

2. As an alternative basis for affirmance, did the FBI fail to meet its burden to show how Exemptions 7(A), 7(D), and 7(E) allow the FBI to withhold the specific information challenged by the Public Interest Groups in Exhibit 7? The answer is: Yes.

IV. STATUTORY ADDENDUM

Pursuant to Ninth Circuit Local Rule 28-2.7, Appellees have provided the Court a statutory addendum accompanying this brief and separated from the body of the brief.

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[1] The "Exhibit __" references in this brief refer to exhibits attached to the Declaration of Debra Urtega filed in support of the Public Interest Groups' Motion for Summary Judgment in the district court. SER 96-450.

V. STATEMENT OF THE CASE

A. The FBI Engages in General Monitoring and Information Gathering.

By its own words, "The FBI is an intelligence agency as well as a law enforcement agency."[2] Based on disclosures in the FBI's 2008 Domestic Investigation and Operations Guide ("2008 DIOG," excerpted at ADD 7–40) and other documents, the public became aware of questionable FBI initiatives established during its shift to an "intelligence agency." Among other things, the FBI now monitors and gathers information about racial, ethnic, and religious communities without first requiring a criminal predicate or a suspicion of criminal wrongdoing.

The specific actions of the FBI at issue here include the practices described above: "domain management"; "assessments"; informant recruitment; and "community outreach." See FBI Domestic Investigation and Operations Guide, October 2011 ("2011 DIOG") ADD 41-138. The DIOG instructs:

> Some FBI activities are not traditional investigative or intelligence activities. Activities such as liaison, tripwires, and other community outreach represent relationship-building efforts or other pre-cursors to developing and maintaining good partnerships.

---

[2] ADD 9 (2008 DIOG § 2.3), 44 (2011 DIOG § 2.3); GER 136 (Hardy Supp. Decl. at 8).

ADD 49 (2011 DIOG § 5.1.3.). The FBI may also undertake assessments proactively to obtain information on individuals, groups, or organizations of possible investigative interest as well as to identify and assess individuals who may have value as confidential human sources. ADD 49-50 (2011 DIOG §§ 5.1.2, 5.2.).

Most, if not all, of these activities are not intended to bring the subjects of the FBI's actions to a criminal court and therefore will never receive the judicial scrutiny afforded law enforcement actions. Accordingly, ensuring that Exemption 7 is not used to shroud these practices in secrecy is important.

B. The FOIA Requests Sought Information on FBI's Monitoring of Specific Communities.

The Public Interest Groups are both non-profits with a mission to protect the civil rights of U.S. citizens and residents. In 2010, upon learning of these FBI initiatives, the Public Interest Groups filed two FOIA requests under 5 U.S.C. § 552 seeking information about the FBI's "assessments" of local Muslim communities; training for FBI employees regarding Muslim culture; use of "informants"; use of race, religion, ethnicity, language, or national origin for law enforcement purposes; FBI activities in Northern California pertaining to "domain management"; certain data about mosques, churches, synagogues, or Islamic centers in Northern California with open "assessments" or "investigations"; racial and ethnic "mapping" in Northern California; the number of communities from

which the FBI has collected such information or mapped; and other related issues. GER 51–63, 65–71.

The FBI failed to provide any documents in response to the FOIA requests, forcing the Public Interest Groups to file suit. Documents produced by the FBI thereafter revealed much to the public. Among other things, they disclosed FBI assumptions, stereotypes, and activities that raise significant concerns and that could benefit from public debate. *See* Yael Chanoff and Natalie Orenstein, "The Feds Are Watching – Badly," San Francisco Bay Guardian, June 26, 2012.

The FBI, however, withheld a substantial amount of information. An agency withholding responsive information under FOIA exemptions must produce a *Vaughn* index that identifies "each document withheld, the statutory exemption claimed, and a particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption." *Wiener*, 943 F.2d at 977.

Here, the FBI produced a *Vaughn* index for a small sample of the withheld documents. The parties agreed (1) to use this *Vaughn* index as a representative sample, and (2) that the resolution of whether the FBI properly withheld information on a basis described in the *Vaughn* index would resolve all disputes as to other information on the same basis.

C. The Public Interest Groups Presented Narrow Challenges to the FBI's Withheld Information.

The FBI and Public Interest Groups filed cross-motions for summary judgment regarding the adequacy of the FBI's justifications for withholding information. The Public Interest Groups focused their challenge on a specific subset of information that the FBI withheld under Exemption 7 (as well as certain information withheld under Exemption 5 that is not at issue on appeal). The challenged documents at issue are listed in Exhibits 7 and 8 to the Public Interest Groups' motion for summary judgment.[3] SER 212, SER 336.

The Public Interest Groups forewent challenging other information withheld under Exemption 7 that the Public Interest Groups elected not to dispute, such as the identities of confidential informants. The Public Interest Groups also did not challenge information that the FBI withheld under other exemptions.

The information withheld under Exemption 7 and challenged by the Public Interest Groups falls into five general categories, described in turn below.

1. Domain Management Documents

Domain Management is the FBI's term for its practice of FBI field offices mapping their local territory or "domain." ADD 88-89 (2011 DIOG § 15.6.1.1);

[3] As discussed below, *see infra* Part IV-E, the FBI's Brief relies on documents that are not at issue on appeal (i.e., not identified in Exhibit 7 or 8 and therefore not part of the district court's order or judgment) as a factual basis for its arguments.

See generally ADD 30 (2008 DIOG § 15.2), 86 (2011 DIOG § 15.2.1). For example, the "San Francisco Domain" is the territory under responsibility of the San Francisco field office. The purpose of domain management, according to the FBI, is "to identify and understand trends, causes, and potential *indicia* of criminal activity and other threats to the United States." GER 138. "Domain assessments" "may be opened to obtain information that informs or facilitates the FBI's intelligence analysis and planning functions." Such assessments are not "threat specific," and "no particular factual predication is required" to conduct domain management assessments. ADD 63 (2011 DIOG, § 5.6.3.3).

For example, Exhibit 7-1, SER 220-227, is a presentation about Domain Management in the San Francisco division. SER 220. A copy of the first page is as follows:

(Rev. 01-31-2003)

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE **Date:** 12/21/2006

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 08-30-2011 BY 65179 DMH/STW

To: San Francisco

From: San Francisco
Squad [redacted] Field Intelligence Group Oakland Resident Agency
Contact: IA [redacted]

b6 b7C b7E

Approved By: [redacted]

Drafted By: [redacted] ape ape

Case ID #: 800D-SF-138682-CRIM (Pending) -33
804B-SF-C139511-CE/VC (Pending) -66

Title: INTELLIGENCE BRIEFING LIAISON

Synopsis: Provide file copies of Domain Presentation regarding [redacted] Criminal Enterprises [redacted] in the San Francisco Division which was presented to San Francisco Division, SAC Thornton on 12/5/2006.

Enclosure(s): Enclosure (1) is a 13 slide Power Point presentation titled [redacted] Criminal Enterprises."

b6 b7C b7E

Details: On 12/5/2006 a domain briefing was presented to SAC Thornton that outlined the [redacted] Criminal Enterprise [redacted] presence and threat in the San Francisco Division.

The topics covered included the characteristics of [redacted] open [redacted] cases in the division, their criminal activity, their area of operation, the [redacted] population density for the San Francisco Bay Area, [redacted] intelligence gaps and recommendations.

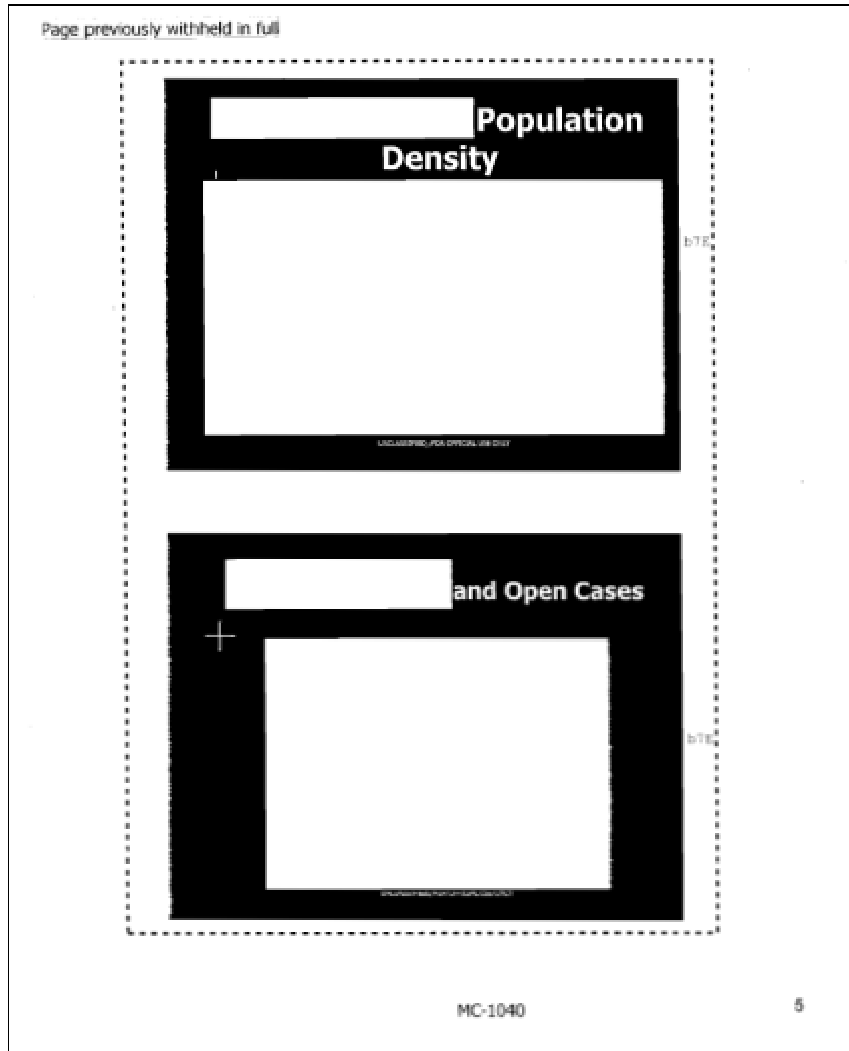
♦♦

MC-1035

800D-SF-138682-Crim-33
[redacted] 355ape-ec03.wpd

b6 b7C

As is evident, this document is not a "programmatic" document or a general policy document. It concerns specific facts regarding a specific situation and has the subject line, "Intelligence Briefing Liaison." As another example of information withheld from this document, the FBI redacted the top slide on page MC-1040 which describes a particular group's "population density":



SER 225. The FBI claims that this redaction "protects the targets of domain threat assessment collection efforts," SER 390, and "protect[s] the analysis and conclusions . . . gleaned from FBI domain based intelligence assessments," SER 391. The FBI did not factually tie any of the withheld information in this document to the enforcement of a federal law as required by Exemption 7. On the

contrary, the documents are clearly the product of "generalized monitoring and information- gathering." *See Rosenfeld*, 57 F.3d at 809.

2. Assessments

Assessments are an FBI practice of targeting specific persons for monitoring or information-gathering activities. ADD 12 (2008 DIOG § 5.2), 49-50 (2011 DIOG § 5.2). *See generally* ADD 11-12 (2008 DIOG § 5.1), 47-48 (2011 DIOG § 5.1), 109. Assessments are performed "to collect or acquire information for current or future intelligence analysis and planning purpose." ADD 63 (2011 DIOG § 5.6.3.3). This targeting does not require a "particular factual predication," but the FBI is not permitted to base assessments "solely on . . . race, ethnicity, national origin, or religion, or a combination of only such factors." ADD 67 (2011 DIOG § 5.6.3.4.1.1.). As an example, Exhibit 7-5 is a domain management-related assessment concerning a specific factual situation, which is as follows:

(Rev. 05-01-2008)

UNCLASSIFIED

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE **Date:** 11/09/2009

To: Intelligence Directorate **Attn:** [redacted] SSA [redacted]

San Francisco **Attn:** SA [redacted]

b6 b7C b7E

From: San Francisco

[redacted] RA [redacted]

Contact: [redacted]

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 08-31-2011 BY 65179 DMH/STW

Approved By: [redacted]

Drafted By: [redacted] elj

b6 b7C b7E

Case ID #: 803H-SF-143727[redacted] (Pending)

Title: DOMAIN MANAGEMENT - CYBER

Synopsis: Results of 90-day file review for the captioned Type [redacted] Assessment file.

b7E

Reference: 803H-SF-143727-[redacted] Serial 1

b7E

Details: A file review was conducted on 9 November 2009 for the captioned matter. The writer acknowledges that this review is past due, as the assessment was opened on 1 June 2009. The purpose of the file review was to determine whether or not the assessment should be continued. In order to make this determination, the following was reviewed:

The purpose of this assessment was to identify the [redacted]

b7E

To date, the assessment has identified [redacted] On 12 October 2009, information was received from the [redacted]

b7E

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MC-945

803H-SF-143727-[redacted]-4

b7E

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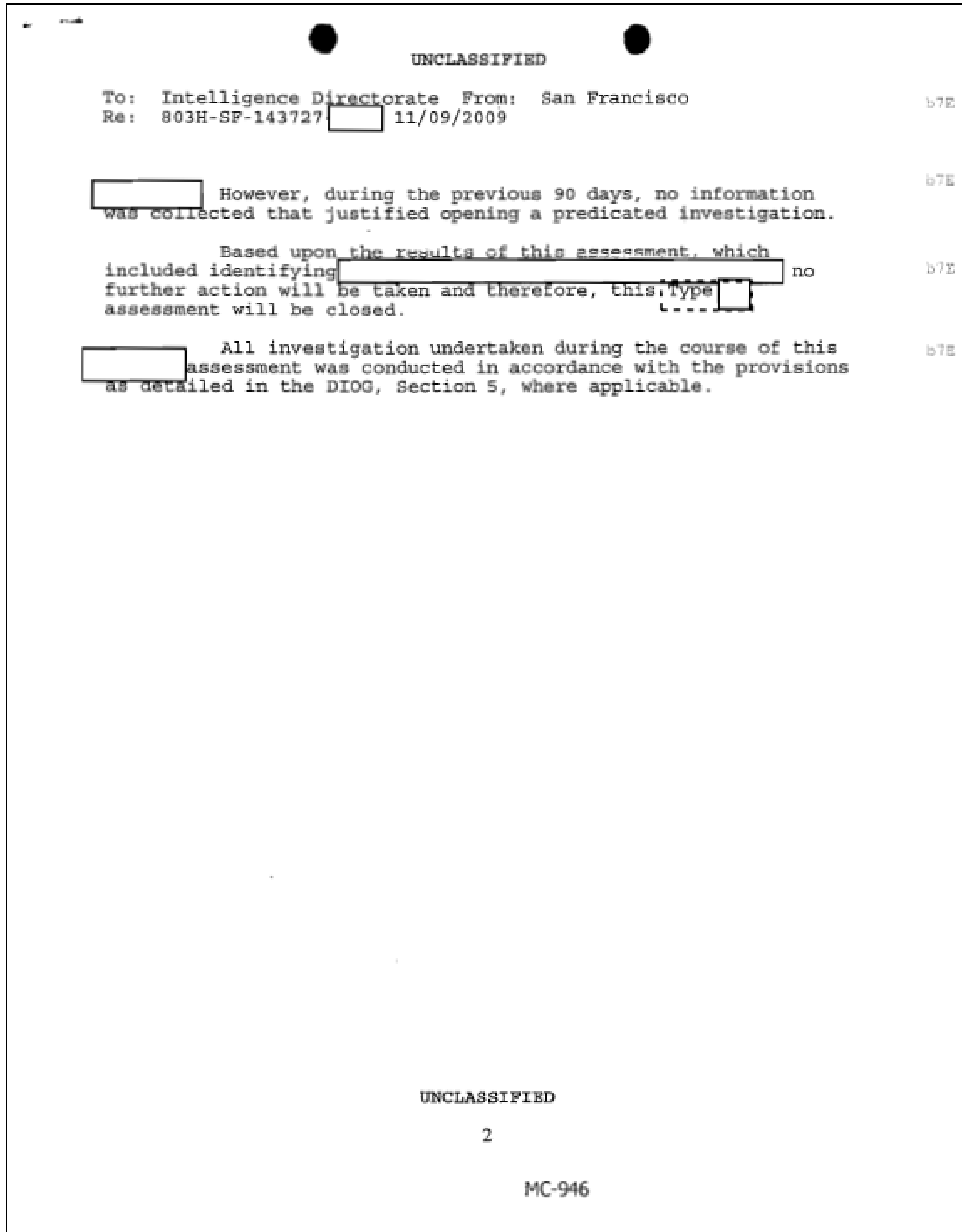


UNCLASSIFIED

To: Intelligence Directorate From: San Francisco
Re: 803H-SF-143727 [redacted] 11/09/2009

b7E

[redacted] However, during the previous 90 days, no information was collected that justified opening a predicated investigation.

b7E

Based upon the results of this assessment, which included identifying [redacted] no further action will be taken and therefore, this Type [redacted] assessment will be closed.

b7E

All investigation undertaken during the course of this [redacted] assessment was conducted in accordance with the provisions as detailed in the DIOG, Section 5, where applicable.

b7E

UNCLASSIFIED

2

MC-946

SER 301-02. The document states that the purpose of this assessment was to "identify the [redaction.]" It further says after redaction, "during the previous 90 days no information was collected that justified opening a predicate investigation." This document is clearly about an "assessment" of specific facts

and circumstances. Again, it is not a general policy or guideline document. And the FBI has failed to present any facts showing any law enforcement purpose for the redacted information.

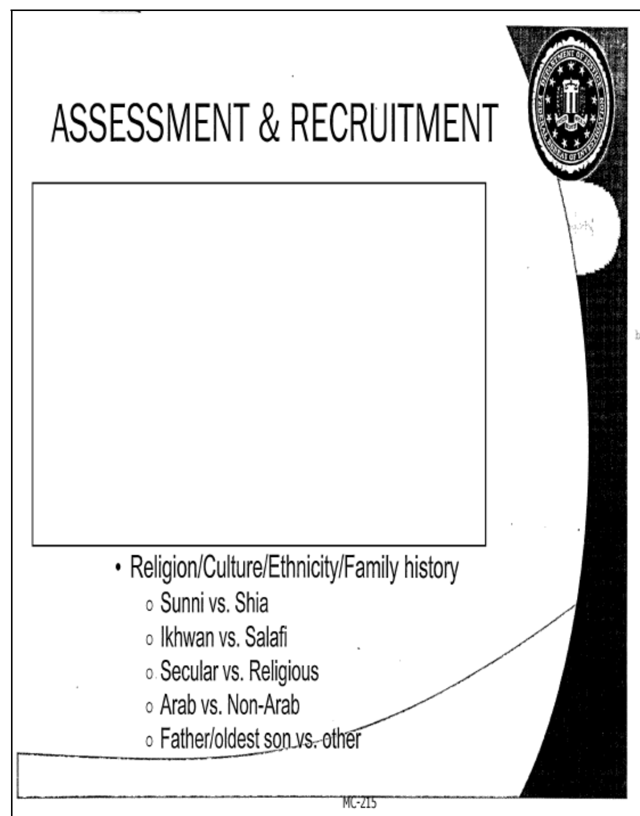
3. Community Outreach Documents

The FBI has adopted "community outreach" as an information-gathering tool. For example, the "outreach" includes so-called "voluntary interviews" of innocent community members, who typically perceive the interviews as non-optional and coercive encounters with law enforcement. This "community outreach" requires no criminal predicate. The FBI states that these are not "traditional investigative or intelligence activities," but rather "represent relationship-building efforts or other pre-cursors to developing and maintaining good partnerships." ADD 49 (2011 DIOG § 5.1.3); *see also* ADD 84 (§ 11.1).

For example, according to the FBI, Document Nos. 137-159 cited in Exhibit 7 were "created to house records concerning the community outreach and liaison efforts of the FBI's San Francisco Field Office." SER 366. The *Vaughn* Index states that "numerous redaction blocks protect sensitive/intelligence gathering file numbers," among other reasons for the withholdings. SER 368. The FBI, however, did not tie this general information-gathering activity (or any other Exemption 7 withholdings in these documents) to the enforcement of any federal law.

4. Documents Relating to Potential Future Informants

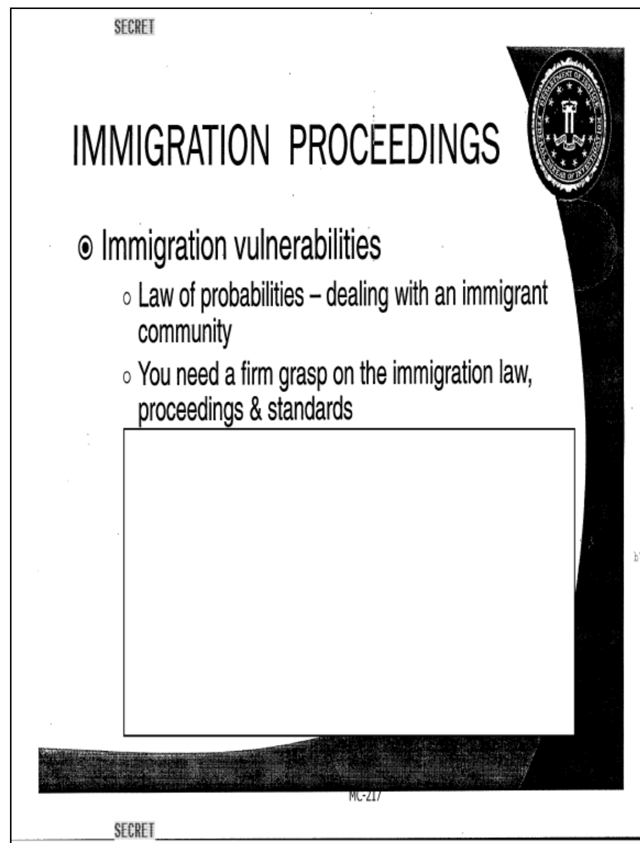
The FBI's efforts to gather what it calls "confidential human sources" relate to finding potential future informants. *See* GER 139. This "intelligence gathering effort[] . . . do[es] not start out as full-fledged criminal or national security investigations," but rather "can and will be transitioned to criminal/national security investigations should evidence of criminal behavior be discovered." GER 140. As an example, Exhibit 7-2, SER 236-252, entitled "CHS Assessment, Recruitment & Handling 101" teaches FBI employees how to "assess[], recruit[], and handl[e] confidential human sources" with an Arabic ancestral history. An example of a redacted page from this document is as follows:



sf-3672902

SER 344.

The redacted information describes how the FBI assesses and recruits individuals based on "guidelines" related to racial and cultural "factors that influence [the] decisions to recruit certain individuals . . . ." SER 240-241, 346. Another example of redacted information from this document is as follows:



SER 242. The FBI did not tie any of the withheld information in this document to the enforcement of a federal law. Indeed, imagining a legitimate law enforcement justification for withholding information on the FBI's use of racial and cultural factors and immigration vulnerabilities of U.S. residents is challenging—and disconcerting.

5. Race-Based Training Documents

The FBI's training documents show that it has used racial, ethnic, and religious biases and stereotypes to train its employees. The FBI produced several of these training documents, examples of which are set forth in Exhibit 4, that contain statements such as the following:

- "Arabs feel, act, then think" (SER 157);
- Arabs will "[e]xpress threats [and] demands which [they] do[] not intend to carry out" (SER 139);
- "Yes means perhaps" (SER 140);
- Arabs have "[n]o real concept of 'waiting in line'" *Id.*;
- Arabs have "[d]ifficulty in accepting responsibility and blame" (SER 141);
- "Honor more important than facts" (SER 142);
- Arabs have a "'[b]lack and white' view of the world (extremes)" (SER 143);
- Arabs believe that "[e]very catastrophe is attributed to the Israeli Mossad or the U.S. CIA" (SER 151);
- Arabs would "[r]ather die of starvation than ask for help" (SER 166); and
- Arabs have "[n]o concept of privacy" or "constructive criticism"

(SER 138).

The FBI, however, withheld other similar documents. For example in Exhibit 7-4, the FBI withheld information describing its view on "specific cultural factors which FBI Special Agents must be cognizant of when utilizing" an investigative technique. SER 297-98. The following is an excerpt from Exhibit 7-4:

2 A look at Arabic/Middle Eastern Cultures

b7E

12 **How do we disrupt Islamic terrorist cells?**

Information

15 Arab Countries (22)

- Algeria
- Bahrain
- Comoros Islands
- Djibouti
- Egypt
- Iraq
- Jordan
- Kuwait
- Lebanon
- Libya
- UAE
- Morocco
- Mauritania
- Oman
- Palestine
- Qatar
- Saudi Arabia
- Somalia
- Sudan
- Syria
- Tunisia
- Yemen

16 Muslim Majority Countries

- Afghanistan
- Algeria
- Azerbaijan
- Bahrain
- Bangladesh
- Bosnia/Herzegovina *
- Burkina Faso *
- Brunei
- Chad *
- Comoros
- Côte d'Ivoire *
- Djibouti
- Eritrea*

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18 Language

- Arabic is the primary factor that determines membership in the national aggregate.
-

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- Spoken words to Arabs are as music.

19 Stylistic Elaborateness

- ex: colloquial Arabic for thank you:
  - Allāh yukaththin khayraka – meaning: May allah increase your well-being.
  - Speedy recovery = ma alāk illā 1 – 'afiye in sha allāh which means: May there be upon you nothing but health, if allah wills.

20 When two Americans meet:

- One may say, "Good morning." The other replies, "Good morning."
- This would offend an Arabian by such an ignorant reply.
  - The first Arabian would phrase his good morning wishes as follows:
  - "Nehārkum sa'īd" which means "May your day be prosperous. To which the other will reply, "Nehārkum sa'īd wemubārak. Meaning: "May your day be prosperous and blessed."

21 Courage

- Bravery is expressed by a man's willingness to risk his life for the benefit of the group.
- Courage is the ability to stand physical pain.
  - Courage tested by lashings
  - Arms burned with cigarettes
  - Cut or stabbed with a dagger
- All this done to "toughen the boys for their future life."
- Tribal Marriage Practices

23 Honor

- Virility
  - Sons = high honor
- Impotence
  - One of the few causes for wife being granted a divorce.

Honor is the collective property of the family: if any single member of the family incurs dishonor,the whole family is disgraced.

What happens if a woman loses her "honor" in the family?

24

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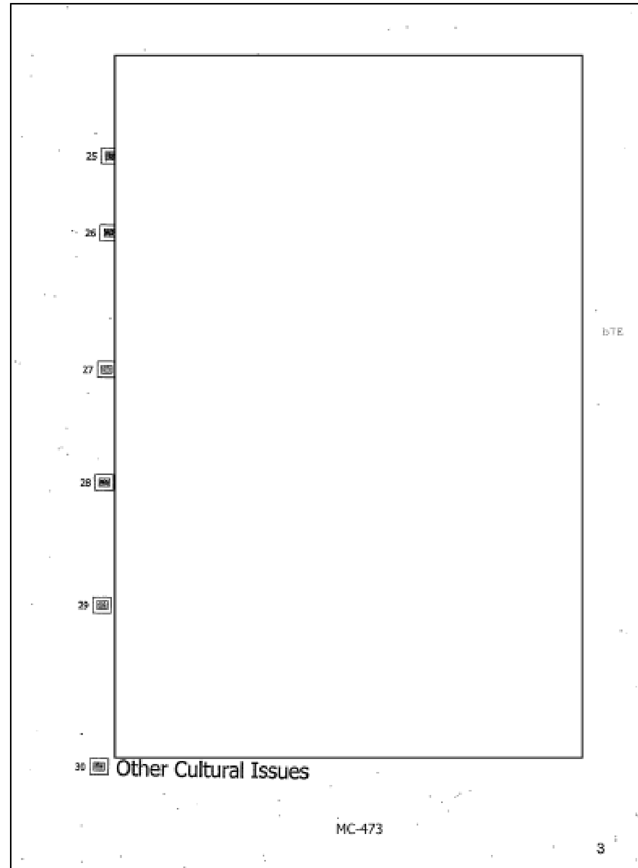

SER 289-91. Like the other withheld information at issue, the FBI failed to explain how the redacted information on these pages, such as "Cultural Issues," has any factual connection to the enforcement of a federal law.

D. The Parties Filed Cross-Motions for Summary Judgment.

At the hearing on the parties' cross-motions for summary judgment, the district court gave the FBI every opportunity to show how the withheld information related to the enforcement of a federal law. *See* SER 61-62. The FBI essentially admitted that the documents at issue could not meet the Exemption 7 threshold. The FBI also failed to articulate a standard for the law enforcement

exemption that would exclude documents related to generalized monitoring and surveillance:

> FBI: [T]hat sort of concern or standard can't really be applied to documents of this type, that are really more about explaining different techniques and different sorts of methods and different ways of gathering data to help map out threats. . . .
>
> THE COURT: Well, but why can't you? [I]f you, in good faith, can make the argument that the techniques that are revealed in a particular document are being utilized in conjunction with espionage, terrorism statutes – we have lots of statutes that pertain to those areas. Why can't you identify those statutes?
>
> FBI: Well, in theory, I think for many of these we probably could. But, as Your Honor pointed out earlier . . . . for these types of documents, it almost isn't helpful to anybody to try to cite for all the possible statutes . . . .

SER 61. The FBI repeatedly failed to explain how the withheld information related to the enforcement of *any* federal law. *See generally*, SER 57, 61-62.

E. The District Court Properly Applied Ninth Circuit Law.

The district court ruled that the FBI failed to prove that the challenged information was "compiled for law enforcement purposes" under the Ninth Circuit's rational nexus test. *See Rosenfeld*, 57 F.3d at 808. The district court held that the FBI's evidence of how the withheld information "serve[s] the purpose of establishing working relationships with community partners whose cooperation is essential to law enforcement missions," "help[s] law enforcement learn of dangerous illegal activit[ies]," and "make[s] FBI personnel more effective at

detecting and preventing [illegal activities]," "does not, without more, permit the FBI to apply Exemption 7 to withhold or redact information about such tactics." GER 24–25.

The FBI repeatedly mischaracterizes the district court's opinion as requiring the FBI to relate the withheld information to "particular investigations." FBI-Br. at 11, 12, 16, 18–24 (tying the legislative history argument to this phrase), 25–28 (discussing other Circuits' rejection of tying withheld documents to a specific "investigation"), 35, 39–40. But the district court did not require the FBI to tie the withheld information to "particular investigations"; this language from the district court's opinion simply characterizes the "FBI's refrain at oral argument." GER 25. Nor did the Public Interest Groups argue for such a requirement—Ninth Circuit precedent requires the FBI to tie the withheld information to the "enforcement of a federal law," not a "specific investigation."[4] Rather, the district court held, "Neither the Hardy declarations nor the FBI's pleadings tether the activities the withheld documents concern to the enforcement of any particular law." GER 25.

[4] In any event, the FBI's refrain characterizing the district court's order is not relevant: appellate courts review the district court's judgment, not the specific words used by the district court in its opinion. *See Helvering v. Gowran*, 302 U.S. 238, 245 (1937).

F. The Scope of This Appeal Is Narrow.

The FBI frames the issue here as whether the "core law enforcement training and guidance materials of the nation's preeminent law enforcement agency" must be produced. FBI-Br. at 1. That is wrong. The information at issue here is the material withheld by the FBI under Exemption 7 in the documents listed in Exhibits 7 and 8. The information relates to the FBI's general monitoring of minority communities based on racial, ethnic, and religious status, as well as the materials the FBI uses to train its employees on how to perform this monitoring and information-gathering.

To be clear, the only information on appeal is the information addressed in the district court's judgment: the information withheld by the FBI under the guise of Exemption 7 *and* challenged in the Public Interest Group's summary judgment motion. The Public Interest Groups were surgical and challenged only the withheld information described in Exhibits 7 and 8. *See* SER 212, 336.[5] As to Exemption 7, the Stipulated Order requires the FBI to produce "information that [the Public Interest Groups] challenged in their motion for summary judgment," which is "information to which Exemption 7 is applied in the FBI's sampled

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[5] If this appeal is resolved in favor of the Public Interest Groups, the FBI will also have to produce "similarly situated information that was withheld under [Exemption 7] but not listed in the sampled *Vaughn* index." GER 28.

Vaughn index" unless the information "is also withheld pursuant to [another] FOIA exemption." GER 28.

The FBI makes two other errors in its attempt to expand the scope of this appeal. *First*, the FBI engages in fearmongering by attempting to tie the withheld information to its authority to protect the U.S. public from "terrorism and threats to national security." FBI-Br. at 7. If that were true, the FBI could have withheld the information at issue under Exemption 1, which protects national security information. Exemption 1 specifically exempts from disclosure records that are: "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." *See Hamdan v. United States DOJ*, 797 F.3d 759, 773 (9th Cir. 2015). In this case, the FBI withheld large amounts of responsive information under Exemption 1, and the Public Interest Groups did not challenge those withholdings. The FBI had the opportunity to withhold the information at issue here under Exemption 1, but elected not do so. In the alternative, the FBI could have identified a terrorism-related federal law and provided the required factual nexus for the withheld information, but the FBI was unable to do so. Thus, the information at issue here does not threaten national security.

Second, as a factual basis for its arguments, the FBI misdirects the Court by citing information withheld under Exemption 7 *but not challenged* by the Public Interest Groups. For example, the portions of the *Vaughn* indices in the FBI's Excerpts of Record (GER 157–276) and cited throughout the FBI's brief contains Document 15 (GER 204–09). According to the FBI, this document "provides FBI personnel an instructional foundation on the legal issues associated with domestic terrorism ('DT') investigations and provides practical exercises to test students' knowledge." GER 204. But the Public Interest Groups did not challenge the withheld information in this document. Document 15 does not appear in Exhibits 7 or 8. SER 212, 336. Similarly, the FBI cites to portions of the Hardy Declaration discussing "firearms training" and "driving techniques." FBI-Br. at 34 (quoting GER 133–34). Again, none of the withheld information at issue in this appeal relates to "firearms training" or "driving techniques." Likewise, the FBI cites to Documents 31, 32, and 381 (GER 210-222, GER 258-262), which apparently contain non-public information about the FBI's strategies and requirements for investigations; and Documents 306, 308, 309, 317, 320, and 323 (GER 237-249), which apparently contain classified intelligence sources and intelligence gathering methods. The Public Interest Groups, however, did not challenge any of the withholdings in any of these documents. They are not at issue in this matter.

The FBI's misdirection attempts to hide the agency's failure to meet its burden regarding its monitoring and information-gathering of minority communities using racial, cultural, and religious stereotypes.

VI. SUMMARY OF ARGUMENT

The FBI can withhold information responsive to a FOIA request under FOIA Exemption 7 only if it: (1) establishes that the information was "compiled for law enforcement purposes," which is a threshold requirement; *and* (2) proves that disclosure would result in one of the six harms recognized in the subsections to Exemption 7.

1. The FBI Failed to Meet the Threshold Requirements. The information at issue concerns various FBI activities, such as "assessments" and "domain management," that fall under the umbrella of information gathering and general monitoring of specific individuals, groups, and communities. Many of the documents rely upon racial, ethnic, and religious factors and stereotypes. The documents regarding these activities appear to fall into two categories: Documents describing information regarding specific individual, groups, and communities, which are fact specific; and documents describing how to gather that type of information, which are more general. The FBI failed to satisfy the Exemption 7 threshold requirements for any of these documents.

As to determining whether information was "compiled for law enforcement purposes," this Court holds that the FBI must demonstrate a "rational nexus between enforcement of a federal law and the document for which [a law enforcement] exemption is claimed." *Rosenfeld*, 57 F.3d at 808 (alteration in original). This test requires the government to identify (a) a law or laws it seeks to enforce, and (b) a factual basis that ties the records to those efforts. *See Wiener*, 943 F.2d at 985-86. Where the facts indicate that the government compiled the records for the purpose of "generalized monitoring and information-gathering," however, the FBI cannot as a matter of law satisfy the rational nexus test. *See Rosenfeld*, 57 F.3d at 809 (quoting *Lamont v. Dep't of Justice*, 475 F. Supp. 761, 775 (S.D.N.Y. 1979)). That is precisely the type of withheld information at issue here—generalized monitoring and information gathering.

Relying on Ninth Circuit precedent, the district court thus correctly held that the FBI failed to establish a rational nexus for any of the information at issue. This is because the FBI failed to tether the information to the enforcement of any federal law, *i.e.*, the FBI both failed to identify any law or laws that it was seeking to enforce and failed to show any factual connection between the information withheld to that law. This Court should affirm.

The FBI departs from Ninth Circuit precedent and dispenses with the well-established rational nexus test. The FBI proposes a new rule that would allow the

FBI to satisfy Exemption 7's threshold by showing that information is related to the FBI's duties. In essence, the FBI seeks a per se rule that would enable all of the FBI's documents to satisfy Exemption 7's threshold. But that is not the rule in the Ninth Circuit. Thus, the FBI asks this panel to overturn precedent, which the FBI cannot do.

The FBI purports to distinguish this Court's precedent as applying only to "investigatory," but not "programmatic" records. But many of records in this case are investigatory in that they concern specific factual situations, and in any event this Court's rational nexus test applies to all documents. The rational nexus test rests soundly on the text, legislative history, and purpose of FOIA. This Court should reject the FBI's efforts to dilute the test.

The FBI seeks refuge in a 1986 amendment to FOIA, without avail. Congress amended Exemption 7 in 1986 to make possible the inclusion of investigatory, non-investigatory, and guideline documents, but it specifically retained the threshold requirement that the documents be "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7); S. Rep. No. 98-221, at 23 (1983). In doing so, Congress retained the case law interpreting this statute, including this Court's rational nexus test. Indeed, *after the 1986 amendments*, this Court continued to apply the rational nexus test.

Requiring the government to identify a law it seeks to enforce and the factual nexus between the document and that enforcement effort is also consistent with the 1986 amendments. The amendment merely expanded the universe of documents as to which the government could invoke Exemption 7; it did not dispense with the requirement to demonstrate that the document was "compiled for law enforcement purposes" as that term has been consistently interpreted. Nor is the requirement at odds with Exemption 7(E). The FBI apparently reads Exemption 7(E) to apply to any "guideline" when by contrast it applies only to guidelines "for law enforcement investigations or prosecutions." All such guidelines necessarily involve the government's efforts to investigate or prosecute the law, and so the government would have no difficulty identifying the law it was seeking to enforce when it compiled any document that would actually qualify under Exemption 7(E).

Requiring the government to identify the law it seeks to enforce balances the government's need to engage in legitimate law enforcement functions and the public's right to disclosure under FOIA. Particularly as government agencies such as the FBI continue to expand their activities, the Court's well-established rational nexus test provides a principled basis for distinguishing documents that the government may seek to withhold from documents that merit the light of public scrutiny.

2. The FBI Failed to Satisfy Exemption 7's Subsections. In the alternative, the Court should affirm the district court's order on the grounds that the FBI failed to show that the documents described in Exhibit 7 satisfy any of the subsections to Exemption 7. The Public Interest Groups raised these issues before the district court, which did not reach the issue given its ruling that the FBI failed to satisfy Exemption 7's threshold requirements discussed above.

VII. STANDARD OF REVIEW

The Ninth Circuit reviews the district court's legal conclusions de novo and applies "a special standard to review factual issues arising in an appeal from a grant of summary judgment in a FOIA case." *Rosenfeld*, 57 F.3d at 807. "Instead of determining whether a genuine issue of material fact exists, [the Court] employ[s] the following two-step standard": it first "inquire[s] whether an adequate factual basis supports the district court's ruling," and then, if such a basis exists, this Court "overturns the [district court's] ruling only if it is clearly erroneous." *Id.*

The district court held that the FBI did not meet its burden to establish a rational nexus between the enforcement of a federal law and the withheld information challenged by the Public Interest Groups. GER 24–25. To support its holding, the district court found, as a factual matter, that the statements put into evidence by the FBI did not sufficiently "tether the activities the withheld

documents concern to the enforcement of any particular law." GER 25. The FBI is not challenging the factual findings of the district court. Instead, the FBI appears to argue that the district court applied the incorrect law. In effect, the FBI argues on appeal that the Ninth Circuit law underlying the district court's holding is incorrect and should be overturned by this panel.

VIII. ARGUMENT

A. The FBI Failed the Ninth Circuit's Exemption 7 Threshold Test.

The FBI failed to meet its burden to prove that the withheld documents—those relating to the general monitoring of racial, ethnic, and religious communities—have a rational nexus to the enforcement of a federal law. The FBI incorrectly implies that these documents meet this test merely because the FBI is a law enforcement agency. That is false: "generalized monitoring and information-gathering . . . are not related to the [FBI's] law enforcement duties.'" *Rosenfeld*, 75 F.3d at 809. Indeed, to hold otherwise would effectively eliminate Exemption 7's threshold test and overturn this Court's precedent.

1. FOIA Favors Disclosure.

FOIA requires government agencies, such as the FBI, to "make available to the public a broad spectrum of information." *EPA v. Mink*, 410 U.S. 73, 74 (1973). Congress enacted FOIA to "facilitate public access to Government documents," *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991), and to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against

corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

FOIA contains several specific exemptions that permit the government to withhold information, "[b]ut these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U. S. 352, 361 (1976); *see John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (holding that there is a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language"). In providing these exemptions, "Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.'" *John Doe Agency*, 493 U.S. at 152 (quoting H. R. Rep. No. 1497, 89th Cong., 2d Sess., 6 (1966)).

FOIA's pro-disclosure policies are reflected throughout the statutory scheme. Among other things, exemptions "must be narrowly construed." *Rose*, 425 U.S. at 361. And, the government bears "the burden of proving the applicability of any FOIA exemption claimed." *Favish v. Office of Indep. Counsel*, 217 F.3d 1168, 1175 (9th Cir. 2000) (citation omitted); *see also* 5 U.S.C. § 552(a)(4)(B). To meet that burden, the government must provide "a particularized explanation of how disclosure of the particular document would

damage the interest protected by the claimed exemption." *Wiener*, 943 F.2d at 977. The information must be sufficiently concrete to "afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *Id.* (internal quotation marks and citation omitted). The information asymmetry in FOIA cases, in which "only the party opposing disclosure will have access to all the facts," "seriously distorts the traditional adversary nature of our legal system." *Id.* (internal quotation marks and citation omitted). This Court has thus embraced the particularity requirement "to restore the adversary process to some extent, and to permit more effective judicial review." *Id.* at 977-978.

2. Exemption 7 Requires Law Enforcement Agencies to Satisfy the Rational Nexus Test.

FOIA Exemption 7 exempts from production "records or information compiled for law enforcement purposes" to the extent that disclosure would result in one of the six recognized harms. 5 U.S.C. § 552(b)(7). Ninth Circuit law on the threshold requirement for Exemption 7 is well-developed. To meet this requirement, the FBI has the burden to establish a rational nexus between the enforcement of a federal law and the withheld information, meaning that it must (a) identify one or more laws that it seeks to enforce and (b) articulate some factual connection between the withheld information and its efforts to enforce that federal law. The identified law need not be tediously comprehensive nor overly precise—

but must be identified with sufficient specificity to allow the FOIA requesters and the courts to assess the claimed factual nexus. *See Wiener*, 943 F.2d at 977, 985-86.

This Court first addressed the Exemption 7 threshold requirement in *Church of Scientology of California v. Army*, 611 F.2d 738 (1979). The issue was whether the specific office of the defendant agency that created the document at issue had "a law enforcement purpose based upon properly delegated enforcement authority." *Id.* at 748. The Court recognized that some agencies, "such as the FBI," have "a clear law enforcement mandate." *Id.* To satisfy the Exemption 7 threshold, those agencies "*need only establish a 'rational nexus' between enforcement of a federal law and the document for which an exemption is claimed*." *Id.* (quoting *Irons v. Bell*, 596 F.2d 468, 472 (1st Cir. 1979)) (emphasis added).

This Court applied the "rational nexus" test a few years later in *Binion v. DOJ*, 695 F.2d 1189 (9th Cir. 1983). There, a prisoner who made multiple applications for presidential pardons filed a FOIA request for all records about his pardon applications. *Id.* at 1190. Pardon applications are initially sent to the Pardon Attorney in the Department of Justice, and the Pardon Attorney requests the FBI's assistance in determining "whether the applicant is currently engaging in criminal activity and thus should be ineligible for a pardon." *Id.* at 1190, 1194.

The FBI produced information it had on the prisoner, but redacted portions that identified confidential sources who assisted in the investigation, pursuant to Exemption 7(D). *Id.* at 1193. This Court found that the agency satisfied the rational nexus test because the FBI is expressly authorized by federal regulation to conduct pardon investigations and the documents were compiled in the course of a particular pardon investigation.

a. The 1986 Amendments Did Not Alter Exemption 7's Threshold Requirements.

In 1986, Congress amended Exemption 7 to broaden its application as follows:

> (7) ~~investigatory records~~ records or information compiled for law enforcement purposes, but only to the extent that the production of such ~~records~~ records or information . . . . (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose ~~investigative records~~ guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law . . . .

S. Rep. No. 98-221, at 23-25 (1983).

These modifications were prompted by the Attorney General's 1981 Task Force on Violent Crime, which found that criminals used FOIA requests to "evade criminal investigation or retaliate against informants." S. Rep. No. 98-221, at 2. Specifically, the Task Force found that Exemption 7's requirement that the records be "investigatory" could lead to the disclosure of an informant's identity that was

located in a non-investigatory record.[6] 132 Cong. Rec. S14039 (daily ed. Sept. 27, 1986). Congress thus removed "investigatory" to "resolve any doubt that . . . non-investigatory materials *can be* withheld under (b)(7)." S. Rep. No. 98-221, at 23 (emphasis added).

Most importantly for the issue here, Congress specifically retained Exemption 7's threshold "law enforcement purposes" requirement. Congress took pains to note:

> The Committee amendment [later passed into law], however, *does not affect the threshold question* of whether 'records or information' withheld under (b)(7) were 'compiled for law enforcement purposes.' *The standard would still have to be satisfied in order to claim the protection of the (b)(7) exemption.*

Id (emphasis added). The amendment simply made possible the inclusion of all types of information, investigatory or not, under Exemption 7. *See id.* The agency withholding information under Exemption 7 must still prove that (1) the information was "compiled for law enforcement purposes," and (2) disclosure would result in one of the six recognized harms.

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[6] The Public Interest Groups did not seek the identities of any confidential informants. SER 59-60.

b. Ninth Circuit Law after the 1986 Amendments Continues to Apply the Rational Nexus Test.

After Congress amended Exemption 7, this Court has twice addressed the Exemption 7 threshold requirements and in both cases held that the FBI failed to satisfy the rational nexus test.

Wiener is instructive on what the FBI must show to establish a rational nexus. 943 F.2d at 985-86. In that case, Professor Wiener sought FBI records concerning John Lennon. *Id.* at 976-977. The Ninth Circuit held that the *Vaughn* index descriptions relating to Exemption 7 failed to explain with sufficient specificity the "law enforcement purpose" underlying the FBI's investigation of John Lennon. *Id.* at 985. The index stated that "John Lennon was under investigation for possible violations of the Civil Obedience Act of 1968, 18 U.S.C. § 231 (1988), and the Anti-Riot Act, 18 U.S.C. § 2101 (1988), because of his association with a radical group known as the Election Year Strategy Information Center (EYSIC)." *Id.* at 985–86. This description was inadequate because "[t]he Civil Obedience Act and the Anti-Riot Act are very broad criminal statutes, prohibiting a wide variety of conduct." "Citations to these statutes," without more, the Court explained, "do little to inform Wiener of the claimed law enforcement purpose underlying the investigation of John Lennon." *Id.* at 986. The FBI must additionally "provid[e] Wiener with further details of the kinds of criminal activity of which John Lennon was allegedly suspected." *Id.* Absent such information,

"Wiener cannot effectively argue that the claimed law enforcement purpose was in fact a pretext." *Id.* at 986.

Accordingly, identification of the statutes the agency seeks to enforce is necessary but not sufficient. The FBI must also provide sufficient factual information for the requester to challenge and the court to assess the rationality of the nexus between the document and the efforts to enforce the cited law.

Afterwards, *Rosenfeld* reiterated the holding that the FBI must demonstrate a "'rational nexus' between enforcement of a federal law and the document for which [a law enforcement] exemption is claimed." 57 F.3d at 808 (internal quotation marks, citation omitted). *Rosenfeld* clarified that the FBI cannot satisfy the rational nexus test when it engages in "generalized monitoring or information-gathering" unrelated to enforcement of any laws. *Id.* at 809.

That case involved FOIA requests seeking information regarding the Free Speech Movement at the University of California, Berkeley, based on the FBI's "concern that its leaders were members of communist or subversive organizations." *Id.* at 806. The FBI also collected information regarding the then-Chancellor of UC Berkeley, Clark Kerr, and the then-President of the UC system, Marguerite Higgins. *Id.* The Court held that the documents related to Chancellor Kerr were not compiled for a law enforcement purpose because the FBI's claim that the documents were compiled to complete four personnel investigations for

political appointments was pretextual. *Id.* at 809. The Court noted that "the FBI knew *no investigation was pending and that the FBI had no reason to investigate him*" other than for having him "removed from the UC administration because FBI officials disagreed with his politics or his handling of administrative matters." *Id.* *Accord id.* at 810 (holding that the documents "were compiled with an illegitimate law enforcement purpose, to have Kerr fired from his position in the UC system"). These documents could not be withheld under Exemption 7 because they related to "'precisely the sort of *generalized monitoring and information-gathering that are not related to the [FBI's] law enforcement duties*.'" *Id.* at 809 (emphasis added).

The information on the Free Speech Movement that the FBI withheld was organized into two groups: documents compiled before and after January 19, 1965. *Id.* at 810. The FBI began investigating the Free Speech Movement to determine "whether and to what extent the FSM was influenced by subversive organizations or would be likely to lead to civil disorder."[7] *Id.* On January 19, 1965, the FBI issued a memorandum that concluded that the "[Free Speech Movement] and the UC demonstrations were not controlled by communists." *Id.* at 811. After this memorandum issued, however, the FBI continued to "pursue *routine monitoring*"

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[7] Whether the claimed purposes for investigating the Free Speech Movement were legitimate "law enforcement purposes" (i.e., whether the investigation was tied to the "enforcement of a particular law") was not challenged in *Rosenfeld*.

of the Free Speech Movement. *Id.* at 810. This routine monitoring, the Ninth Circuit held, was not a legitimate law enforcement purpose. *Id.* at 811.

3. The FBI's Argument for a Different Threshold Standard Is Without Merit.

Most of the FBI's brief is devoted to rejecting the established requirements for the rational nexus between the withheld information and the enforcement of a federal law. Its arguments are based on false distinctions regarding the type of documents at issue here and a misapplication of the legislative history and established case law.

a. *Wiener* and *Rosenfeld* Govern the Challenged Records.

The rational nexus test as articulated in *Wiener* and *Rosenfeld* governs this case. The FBI attempts to distinguish these decisions as involving investigatory records and urges an alternative Exemption 7 threshold test for "general law enforcement materials." FBI-Br. at 29. But this Court's rational nexus test applies to all records withheld under Exemption 7. Applying a single threshold test is consistent with the text, legislative history, and purpose of the statute.

First, Exemption 7 contains six subsections, some of which cover investigatory files and others, such as 7(E), which cover "guidelines." *See* 5 U.S.C. § 552(b)(7). The plain language of the statute establishes a single threshold test—"compiled for law enforcement purposes"—that applies to all documents.

See id. The rational nexus test articulated in *Wiener* and *Rosenfeld* amplifies the meaning of the term "compiled for law enforcement purposes" and applies regardless of document type. *See Rosenfeld*, 57 F.3d at 808 ("[Exemption 7] includes six different exemptions, *all of which share* the threshold requirement that the withheld record be 'compiled for law enforcement purposes.'") (emphasis added); *Wiener*, 943 F.2d at 985 ("*No withholding* under any of the exemptions listed in section 552(b)(7) is valid unless the withholding agency establishes a "'rational nexus'….") (emphasis added).

The 1986 amendment does not alter this conclusion. The amendment modified the threshold Exemption 7 language to apply more broadly to "records or information," rather than only "investigatory records." S. Rep. No. 98-221, at 23. Congress thus amended the statute to "resolve any doubt that . . . non-investigatory materials *can be* withheld under (b)(7)." S. Rep. No. 98-221, at 23 (emphasis added).

In amending the statute, however, Congress specifically noted that it was *not* modifying the pre-existing threshold requirement that withheld information be "compiled for law enforcement purposes." S. Rep. No. 98-221, at 23; *see supra* § VII.A.2.a. Instead, the amendment simply made it possible to place all information, investigatory or not, under Exemption 7. The withholding agency must still prove at the outset that the information was "compiled for law

enforcement purposes."[8] In leaving the "compiled for law enforcement purposes" requirement untouched, Congress also left in place existing legal interpretations of the requirement. *Cf. Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change."). Thus, the 1986 amendment did not change this Court's pre-1986 rational-nexus case law, nor could it supersede post-1986 decisions such as *Wiener* and *Rosenfeld*.[9]

Second, the rational nexus test articulated in *Wiener* and *Rosenfeld* gives meaning to the statutory language and sensibly applies to both investigatory and non-investigatory records. Contrary to the FBI's assertion (FBI-Br. at 29), there is no requirement to identify a particular investigation. The test simply requires the government to identify a law or laws it seeks to enforce and the factual basis that

[8] The Attorney General's memorandum acknowledges as much. *See* FBI-Br. at 23 ("Thus, '[e]ven records generated pursuant to routine agency activities that could never be regarded as 'investigatory' now qualify for Exemption 7 protection *where those activities involve a law enforcement purpose*'….") (quoting Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information At (1987) at 7) (emphasis added).

[9] The FBI contends it satisfied the threshold because it compiled these documents for purposes such as "community outreach" and that the district court acknowledged these purposes "advance law enforcement interests." *See* FBI-Br. at 17. The FBI undertakes a wide range of activities that it contends "advance" its "interests." *See* ADD 49 (DIOG § 5.1.3) ("Some FBI activities are not traditional investigative or intelligence activities.") But these "interests" do not constitute a "law enforcement purpose" within the meaning of Exemption 7 unless they involve the enforcement of a federal law as defined by *Wiener* and *Rosenfeld*.

ties the document to its efforts to enforce that law. *See Rosenfeld*, 57 F.3d at 808; *Wiener*, 943 F.2d at 985-86.

The FBI contends that requiring it to identify the laws it seeks to enforce would somehow require disclosure of materials that Congress expressly intended to exempt when it amended Exemption 7(E). FBI-Br. at 35. Not true. The 1986 amendment merely added to Exemption 7(E) "guidelines *for law enforcement investigations or prosecutions* if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E) (emphasis added). In other words, the amendment exempted guidelines for the government's investigations or prosecutions *of the law*. It did not exempt from disclosure "general law enforcement materials" untethered to the government's efforts to enforce the law. *Cf.* FBI-Br. at 18. Requiring the government as a threshold matter to identify the law it sought to enforce is thus entirely consistent with the language of Exemption 7(E).

The factual showing required to establish a rational nexus may vary depending on the type of records at issue. That showing is fact specific and must be done on a document-by-document basis. Where investigatory documents are at issue, for example, the FBI must provide "details of the kinds of criminal activity of which [the subject of the investigatory files] was allegedly suspected." *Wiener*, 943 F.2d at 986. Where programmatic documents are at issue, the FBI might not

need not describe any individual's specific conduct, but it still must identify the federal law or laws to which the documents relate and provide a sufficient factual basis to assess the government's "claimed law enforcement purpose." *Id.*

Third, each prong of this Court's two-part rational nexus test effectuates the purpose of the statute. "[D]isclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U. S. at 361. Requiring the FBI to identify a law and to adduce facts sufficient to show a rational nexus serves an important function in FOIA's statutory scheme by affording requesters—who otherwise entirely lack information about the withheld material—"a meaningful opportunity to contest, and the district court an adequate foundation to review" the claimed nexus. *Wiener*, 943 F.2d at 977. For example, if the FBI claimed that a training manual on how to perform racial profiling has a rational nexus to the enforcement of 18 U.S.C. § 1956 (laundering of monetary instruments), the Public Interest Groups could challenge whether the FBI's citation to 18 U.S.C. § 1956 was legitimate, or a pretext to hide an improper basis for racial profiling. *See Wiener*, 943 F.2d at 986.

At bottom, the FBI's argument rests on the incorrect assumption that "programmatic" documents cannot by definition have a rational nexus to the enforcement of a federal law. Of course they can. *See* FBI-Br. at 19 (agreeing that "the test established by the amended statute is readily satisfied by . . . a law enforcement agency's general training and guidance materials that are used in

carrying out all of its law enforcement functions"); SER 61 (stating that the FBI "could" "in theory" identify applicable federal laws for "many" of the documents at issue).

For some documents, however, such as the types of documents at issue here, they cannot. Indeed, the FBI so admitted: "[D]ocuments related to things like training, recruiting informants, domain management and assessments, which necessarily are not going to be tied to specific laws because they are about assessing." SER 57. These types of documents are precisely what this Court has held fall outside the scope of Exemption 7. This is also a fundamental reason why the district court was correct.

Documents detailing the general monitoring and information-gathering of a person or group, whether it be Chancellor Kerr, or the Free Speech Movements, or Muslim Communities in Northern California, without being tied to the enforcement of a federal law, cannot meet the Exemption 7 threshold test. *See Rosenfeld*, 57 F.3d at 809. Nothing in the statute or the case law allows the FBI to withhold non-investigatory documents that instruct FBI employees how to perform that type of surveillance.

Indeed, such a rule would be fundamentally backwards. The FBI does not dispute that it must show a rational-nexus with the enforcement of a federal law to withhold documents concerning the actual information gathering about specific

communities, *i.e.*, investigative documents, just as the FBI was required to do in connection with the Free Speech Movement in *Rosenfeld* and John Lennon in *Wiener*. The FBI has no basis to argue that general training manuals and guidelines instructing FBI employees how to spy on those very same communities, such as the Free Speech Movement, somehow slip past the Exemption 7 threshold. Indeed, any asserted law enforcement purpose for those general training manuals and guidelines would be wholly pretextual. Further, if the racial and ethnic training manuals and guidelines at issue in this case were compiled for a law enforcement purpose, the FBI could have readily drawn a rational nexus to the enforcement of a federal law. The fact that it was unable to do so, in the extensive material submitted below, speaks volumes.[10]

b. The FBI's Proposed Rule Contradicts Ninth Circuit Precedent and Would Eliminate Exemption 7's Threshold Requirement.

The FBI argues on appeal that the withheld information passes the Exemption 7 threshold because the withheld materials "are authorized by federal regulation and are part of [the FBI's] duties." FBI-Br. at 15 (quoting *Binion*, F.2d at 1194). The "federal regulation" that the FBI points to as authorizing the underlying activities (*e.g.*, "community outreach," assessments, and domain

[10] *See* https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/guidance_on_race.pdf (prohibiting the FBI from using race "to any degree" (with minimal exemptions not relevant here) in law enforcement investigations).

management) is the extraordinarily broad 28 U.S.C. §§ 509, 533, and 534 statutes, from which the FBI claims it derives its "law enforcement mandate." FBI-Br. at 10 (quoting GER 24). These statutes, as well as others in 28 U.S.C. Chapter 33, create the FBI and give it certain authority.

The FBI's proposed rule fails for several reasons. *First*, although it claims not to do so, *the FBI in fact argues for a per se rule*. When distilled, the FBI's position is that all FBI documents satisfy the Exemption 7 threshold because the FBI has a law enforcement mandate. But that is not Ninth Circuit law. This Court has refused to relieve the FBI of its burden to prove that withheld information satisfies the rational nexus test to meet the Exemption 7 threshold requirements. *Wiener* required the FBI to provide "details of the kinds of criminal activity of which John Lennon was allegedly suspected" to allow the requestor to challenge whether "the claimed law enforcement purpose [in the Exemption 7 threshold] was in fact a pretext." 943 F.2d at 986. *Rosenfeld* affirmed the district court's holding that information compiled from the general monitoring of individuals and the Free Speech Movement, without connecting the monitoring "to any possible criminal liability," was not "compiled for law enforcement purposes." 57 F.3d at 809. In both *Wiener* and *Rosenfeld*, as in this case, the FBI was generally monitoring and gathering information on certain individuals and groups. According to the FBI here, documents relating to these activities are "indisputably created to implement

the FBI's law enforcement mandate" and thus should automatically advance past the Exemption 7 threshold. FBI-Br. at 17–18. But that is not the law of this Circuit.

Second, the Ninth Circuit already accounted for the FBI's "law enforcement mandate" when it construed Exemption 7's "compiled for law enforcement purposes" language. As *Rosenfeld* held:

> The government always bears the burden to show that a given document is covered by an exemption and should be withheld. 5 U.S.C. § 552(a)(4)(B). However, in this case, the government's burden for satisfying the threshold requirement of exemption 7 is easier to satisfy than the burden for other requirements. The releasing agency in this case, the *Federal Bureau of Investigation, has a clear law enforcement mandate*. *Binion v. Dep't of Justice*, 695 F.2d 1189, 1194 (9th Cir.1983). *Because of this mandate*, the government need only *establish a 'rational nexus' between enforcement of a federal law and the document for which [a law enforcement] exemption is claimed*.

57 F.3d at 808 (emphasis added) (internal citations omitted). The FBI's "law enforcement mandate" is irrelevant to determining whether the FBI has met the rational nexus test because the test only applies to agencies that already have a "law enforcement mandate." *See Church of Scientology*, 611 F.2d at 748 (alternative test applies to "mixed function" agencies).

Third, *Binion* and *Rosenfeld* do not contradict the Ninth Circuit's "rational nexus" test, despite the FBI's selective quotations from those cases. The FBI cites

to the 1983 *Binion* decision to argue that the rational nexus test only requires the FBI to establish a rational nexus between the withheld material and "its law enforcement duties," rather than "the enforcement of a federal law." FBI-Br. at 15, 17 (quoting *Binion*, 695 F.2d at 1194). This is inconsistent with *Binion* and subsequent decisions. *Binion* did not modify the rational nexus test. It simply cited *Church of Scientology* as a basis for the test, which used the phrases "law enforcement duties" and the "enforcement of a federal law" interchangeably. We know *Binion* does not remove the "enforcement of a federal law" requirement from the test because *Wiener* quotes *Binion*'s articulation of the test and continues to require the FBI to set forth in detail "the kinds of criminal activity" related to the withheld information, rather than simply citing the broad statute invoked there.

The FBI cites *Rosenfeld* for its argument that the withheld information be compiled with a rational nexus to "a legitimate law enforcement purpose," rather than "the enforcement of a federal law." FBI-Br. at 17 (quoting *Rosenfeld*, 57 F.3d at 811). But *Rosenfeld* did not change the rational nexus test, and in fact quotes the test verbatim from *Church of Scientology*. 57 F.3d at 808. The "legitimate law enforcement purpose" language was used by the district court opinion underlying *Rosenfeld* and appears in *Rosenfeld* only when the Court quoted or described the district court's holding. The "law enforcement purpose" phrase comes from the statute (5 U.S.C. § 552(b)(7)), which the Ninth Circuit has consistently interpreted

as requiring the FBI to establish a nexus between the "enforcement of a federal law" and the withheld information.

Fourth, the FBI performs many activities that do not have a "law enforcement purpose." For example, the "generalized monitoring and information-gathering" performed by the FBI does not have a law enforcement purpose. *Rosenfeld*, 57 F.3d at 809. This is significant because the FBI functions today not only as an agency to investigate and fight crime in the traditional sense, but also separately gathers intelligence on U.S. citizens and residents, including intelligence gathered without the reasonable suspicion of criminal activity. *See supra* § V.C.

Fifth, the out-of-Circuit decisions the FBI cites do not help it. The FBI cites *Tax Analysts v. IRS*, 294 F.3d 71 (D.C. Cir. 2002), for the incorrect proposition that "every appellate court . . . has held that a law enforcement agency's general training or guidance documents qualify under the Exemption 7 threshold." FBI-Br. at 13. *Accord id.* at 26–27. But *Tax Analysts* only states that an agency "may" withhold "internal agency materials relating to guidelines, techniques, sources, and procedures . . . [that] have not been compiled in the course of a specific investigation." 294 F.3d at 79. This is true, but the document must still satisfy the Exemption 7's threshold, which in the Ninth Circuit requires satisfying the rational nexus test. Contrary to the FBI's assertion, *Tax Analysts* did not state that *all* training materials and guidelines *automatically* pass the Exemption 7 threshold. It

only held that Exemption 7 *may apply* to *some* such documents. Specifically, *Tax Analysts* held that the district court applied the wrong Exemption 7 threshold test to the specific documents at issue. The district court applied a D.C. Circuit-specific test that only applies to the situation where "there is an ongoing law enforcement 'investigation'" to information that "does not relate to any ongoing 'investigation.'" *Id.* at 77, 78. The D.C. Circuit held that "law enforcement manuals and other non-investigatory materials *can* be withheld under (b)(7) *if* they were compiled for law enforcement purposes and would result in one of the six recognized harms . . . ." *Id.* at 79 (quoting S. Rep. No. 98-221, at 23 (1983)) (emphasis added). In other words, the agency still must prove the withheld information meets the threshold requirement of Exemption 7. The D.C. Circuit then reversed and remanded to the district court so that it could "apply the correct threshold" "in the first instance." *Id.* at 79.

The FBI cites *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 488 F.3d 178 (3d Cir. 2007), for the incorrect proposition that "general materials meet the Exemption 7 threshold and therefore qualify for Exemption 7 protection." FBI-Br. at 25–26. Again, such materials *may* meet the Exemption 7 threshold, but only if the FBI satisfies its burden of proof for these materials. Regarding general FBI materials, the Third Circuit specifically rejected the "[a]doption of a per se rule . . . [that] would have resulted in a conclusion that the records requested from the FBI .

. . fell within Exemption 7's threshold." *Abdelfattah*, 488 F.3d at 185. *Abdelfattah* further imposed an agency requirement similar to the Ninth Circuit: "[S]imple recitation of statutes, orders and public laws is an insufficient showing of a rational nexus to a legitimate law enforcement concern." *Abdelfattah*, 488 F.3d at 186 (quoting *Davin v. United States Dep't of Justice*, 60 F.3d 1043, 1056 (3d Cir. 1995)).

In the end, the FBI provides no principled basis for identifying what constitutes "law enforcement purposes" and what does not. According to the FBI, everything it does has a law enforcement purpose, so all FBI documents satisfy the Exemption 7 threshold. But that is not the law; the Ninth Circuit has no such per se rule. In contrast, Ninth Circuit precedent provides a principled basis to identify what constitutes "compiled for law enforcement purposes," *i.e.*, the rational nexus test, which must be followed.

4. The Documents at Issue Do Not Meet the Threshold Exemption 7 Rational Nexus Test.

The FBI failed to meet the rational nexus test for the documents at issue. The documents at issue regarding the five types of activities discussed above can be divided into two general categories.

First, certain documents concern information regarding specific facts, individuals, or groups, which are sometimes called "investigatory." These documents are exemplified by Exhibit 7-1 and Exhibit 7-5. *See supra* § V.B.1 and

2. The FBI virtually ignores these types of documents, as if they are not at issue. These types of documents are no different than the documents at issue in *Wiener* and *Rosenfeld*. There is no principled distinction between the FBI's documents regarding John Lennon, Chancellor Kerr, and the Free Speech Movement, at issue in those cases, and the FBI's documents regarding the individuals and the Muslim and Middle Eastern communities at issue here for purposes of Exemption 7. Just as the FBI had to meet the rational nexus test by tethering the documents in *Wiener* and *Rosenfeld* to the enforcement of a federal law in those cases to claim Exemption 7, so too must the FBI do the same here.

Second, the FBI focuses almost entirely on what it calls "general FBI training materials and enforcement guidelines that govern a wide range of the FBI's law enforcement activities." FBI-Br. at 2 ("Statement of the Issue"). The FBI, however, speaks in the abstract and does not focus on the documents identified in Exhibits 7 or 8. Regardless, documents that appear to be more general and not about specific facts may be represented by Exhibit 7-2 and Exhibit 7-4. *See supra* § IV.B.4 and 5. The FBI also fails to adduce any facts showing the required nexus between the enforcement of a federal law and these types of "training" and "guideline" documents. Indeed, the FBI admitted below that these documents are "necessarily . . . not going to be tied to specific laws because they are about assessing." SER 57.

The district court properly granted summary judgment as to each category of documents at issue in this appeal.

a. Domain Management Documents

As discussed in § IV.B.1 above, the "Domain Management" program is racial mapping that involves local FBI offices tracking groups in their "domains" based on race and ethnicity. The FBI failed to satisfy the rational nexus test for documents concerning Domain Management. For example, the FBI failed to show any rational nexus between the enforcement of a federal law and Exhibit 7-1, which is a presentation about general monitoring of specific groups of people in San Francisco. *See id.* This failure is not surprising because the document clearly relates to generalized monitoring and information gathering.

On appeal, the FBI attempts to justify withholding such Domain Management information on the ground that the FBI's "threat-assessment role directly relates to the FBI's core mission of detecting and preventing crime and identifying national security threats." FBI-Br. at 37. Genuine efforts to "detect[] and prevent[] crime and identify[] national security threats" is certainly part of the FBI's purpose, but that is not the question on appeal. *Id.* The issue is whether the FBI established a rational nexus between the withheld information in these documents and the enforcement of a federal law. If the withheld information truly relates directly to "detecting and preventing crime and identifying national security

threats," as the FBI asserts, then the FBI would presumably be conducting such activity in connection with a number of criminal and national security federal laws. *Id.* But despite repeated opportunities, the FBI failed identify any.

The FBI might, in other circumstances, attempt to satisfy this Exemption 7 threshold by connecting information about mapping Muslim populations to the enforcement of a statute, such as 18 U.S.C. § 2339A (providing material support to terrorists). If so, the Public Interest Groups could challenge whether 18 U.S.C. § 2339A was simply a pretext for the FBI's generalized monitoring. *See Wiener*, 943 F.2d at 986. But the FBI did not do so. And below, it did not dispute that the Domain Management documents related to general monitoring and information gathering that is based, in part, on "cultural identifiers," rather to than the enforcement of a federal law. SER 16-18; 41.

b. Assessments

The FBI withheld information regarding its "assessments" of communities and individuals, including documents describing the "assessment" of specific people and communities by gathering information about them during a specific period of time. Exhibit 7-5 described above is an example. *See supra* § IV.B.2. But the FBI fails to identify any federal law it might be hoping to enforce in connection with this information gathering, let alone try to establish a nexus

between the assessment documents and the enforcement of a federal law, as is required.

The FBI claims that the assessment documents "reveal[] why and when the FBI interviews particular individuals in counterintelligence investigations." SER 88. This justification is questionable given that (1) the context of the documents cited suggests that the documents describe supposed general characteristics of cultural and religious groups, and not the "why and when" of interviews and (2) information withheld related to at least one assessment specifically states that it did *not* result in the collection of "information . . . that justified opening a predicate investigation." SER 300. And, these documents do not implicate national security because the FBI neither claimed Exemption 1 nor attempted to tie them to any national security related statute. The FBI's talismanic invocation of "counterintelligence" fails the Ninth Circuit's rational nexus test for the reasons described above. On the contrary, the materials appear to relate to general monitoring of and information gathering from Muslim Americans, which cannot be withheld under Exemption 7.

c. Community Outreach

According to the FBI, it uses Community Outreach programs (discussed in section IV.B.3) to "build cooperative relationships and educate the public about suspicious activities or potential threats." FBI-Br. at 36 (quoting GER 135). On

appeal, the FBI argues that (1) participants in the programs "receive training in evidence" and "basic law enforcement procedure," (2) the programs allow the "FBI . . . to exchange ideas and dispel misunderstandings" in communities, (3) the programs can "result in tips and leads in active FBI investigations," and (4) the programs help the FBI "establish[] working relationships with community partners whose cooperation is essential to law enforcement missions." FBI-Br. at 36 (quoting GER 24 and GER 135).

Whether these programs are effective or good public policy is irrelevant. These purported justifications fail to establish a nexus between the enforcement of a federal law and the withheld information. For example, in order for the FBI to withhold the redacted information in the document described in SER 366—which describes material "created to house records concerning the community outreach and liaison efforts"—the FBI would have to show the rational nexus between the material reflecting such "community outreach and liaison efforts" and the enforcement of a federal law. The FBI fails to do so, and instead claims generally that the omitted information "protect sensitive/intelligence gathering file numbers," among other reasons. This is insufficient.

d. Potential Future Informants

Documents regarding general efforts to recruit potential informants for use in potential future law enforcement activity (*see* § IV.B.4) also do not qualify for

Exemption 7 for the same reasons. For instance, the FBI fails to explain the nexus between the information withheld in Exhibit 7-2, SER 236-252, which teaches FBI employees how to assess individuals based on racial and cultural factors—and the enforcement of a federal law. The FBI claims that this information was redacted because disclosure "would reveal to criminals which individuals are or may potentially become FBI informants." SER 346.

The use of the phrases "confidential human source," "informants," and "reveal to criminals" sounds official and ominous. But what the FBI is actually doing, in plain terms, is talking in a coercive setup to unsuspecting, innocent civilians who happen to belong to targeted ethnic or religious groups, with the hope that they may someday be useful in a future investigation. The FBI did not tie information about this practice to the enforcement of a federal law as Exemption 7 requires, but instead argues that the program "assist[s] law enforcement" generally.[11] *See, e.g.*, SER 43; GER 140. Again, this argument proves too much. As an enforcement agency, the FBI's work ought to always have the "ultimate goal of assisting law enforcement." SER 43. That does not mean that the FBI may invoke Exemption 7 for every document it generates.

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[11] The documents contain information on assessing, recruiting, and handling of Muslims. *Cf.* SER 240. The *Vaughn* index for this document, however, does not provide any further law enforcement justification for this information; it only contains statements relevant to subsections of Exemption 7. SER 344-356.

e. Training and Guidance Documents

As discussed above (§ IV.B.5), at least some of the general training and guidance documents at issue here rely on biases and stereotypes of Arab and Muslim history and culture. While the FBI has produced some such materials, albeit in redacted form, most have been withheld.

Once again, the FBI provides no genuine law enforcement nexus between these materials and the enforcement of a federal law. For instance, as discussed above, the FBI has withheld sections of Exhibit 7-4, which provides "A look at Arabic/Middle Eastern Cultures." Most of the text—including a page-long explication of unidentified "Cultural Issues"—is redacted on the grounds that it would reveal "cultural factors which FBI Special Agents must be cognizant of." SER 99, 291. The FBI did not explain what law enforcement was being taught here, or what actual law enforcement a training on "cultural issues" and Middle Eastern history and psychology could possibly rationally relate to.

B. The District Court's Order Should Be Affirmed on Alternative Grounds Because the FBI Failed to Satisfy Exemption 7's Subsections.

In addition to failing to meet the threshold Exemption 7 requirements described above, the FBI failed to show how particular claimed subsections of Exemption 7 apply to the withheld information for the documents described in

Exhibit 7. These failures provide independent grounds to affirm the district court's order.

1. Exemption 7(A)

Exemption 7(A) provides that "records or information compiled for law enforcement purposes" may be withheld only if they "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7). The government must explain "how releasing each of the withheld documents would interfere with the government's ongoing criminal investigation." *Lion Raisins Inc. v. U.S. Dep't of Agric.*, 354 F.3d 1072, 1084 (9th Cir. 2004). Reliance on conclusory and generalized allegations of exemptions is insufficient. *See Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 485 n.5 (2nd Cir. 1999).

The FBI has made only conclusory assertions that disclosure of particular documents would "jeopardize" the pending investigations." SER 20. The FBI's declarant only stated that he confirmed with FBI personnel that the information was "associated with pending law enforcement *or* intelligence gathering matters." GER 122-123 (Hardy Dec. ¶ 74 (emphasis added).) That is not enough. "[T]he FBI is relying upon 'conclusory and generalized allegations of exemptions' when it states only that the information 'could reasonably be expected' to interfere with pending enforcement proceedings without explaining how or why. The Court cannot make an assessment of the FBI's claim without any basis other than the

FBI's bald assertion." *See, e.g.*, *ACLU v. FBI*, No. C 12-03728 SI, 2013 U.S. Dist. LEXIS 93079, at *22 (N.D. Cal. Jul. 1, 2013) (citing *Lions Raisins v. U.S. Dep't of Agric.*, 354 F.3d 1072, 1084 (9th Cir. 2004; *Church of Scientology v. United States Dep't of Army*, 611 F.2d 738, 742 (9th Cir. 1979)).

Moreover, to the extent the documents withheld do not actually relate to any "pending law enforcement matters"—which the FBI acknowledged by adding the vague phrase "or intelligence gathering matters"—Exemption 7(A) cannot apply as a matter of law.

2. Exemption 7(D)

The FBI withheld numerous documents under Exemption 7(D), which protects documents from production under FOIA if the documents "could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D). The FBI asserted that these documents reflect information provided by sources to whom the FBI gave an implied or express grant of confidentiality. SER 44-48. To meet its burden to withhold such documents under Exemption 7(A), however, the FBI must "make an individualized showing of confidentiality with respect to each source; confidentiality cannot be presumed." *Wiener*, 943 F.2d at 980.

First, as to the documents withheld under an asserted implied grant of confidentiality, the FBI failed to make the requisite showing. For instance, in the

Vaughn index to Documents 212 and 213, the FBI made general assumptions regarding each confidential source: "These individuals are considered to be confidential sources since they furnished information only with the understanding that their identities and the information provided will not be released outside the FBI." SER 85. Without more, the FBI concluded that the information the source furnished must be considered confidential because it purportedly "learned" that is what a confidential source would want. (*Id.*) That is not, as a matter of law, sufficient. The FBI must show some specific circumstances that would support an inference of confidentiality, such as "the character of the crime at issue" or "the source's relation to the crime," which the FBI has failed to do. *U.S. v. Landano*, 508 U.S. 165, 179 (1993).

Second, for nearly all documents withheld pursuant to an asserted express grant of confidentiality, the FBI has failed to present the requisite probative evidence that the source did in fact receive an express grant. *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1061-62 (3d Cir. 1995) (holding government's declaration was insufficient to establish grant); *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 34 (D.C. Cir. 1998). Such evidence may include notations on the face of the document, "the personal knowledge of an official familiar with the source, a statement by the source, or contemporaneous document discussing practices policies for dealing with the source or similarly situated sources." *Campbell*,

164 F.3d at 34. The FBI has stated that five documents bear a "CHS" identification, meaning that pursuant to FBI policy the FBI must have given the source an express assurance of confidentiality. The Public Interest Groups therefore ceased challenging those documents. For the remaining documents at issue, however, the FBI relied solely on a declaration that baldly asserted that "there existed evidence of an agreement with [informants] that the FBI would not disclose their identities or the information they provided." GER 124.

This is insufficient for two reasons. First, the declarant failed to assert personal knowledge of the alleged confidentiality grant, and his testimony regarding the alleged grant should therefore be disregarded. Fed. R. Civ. Proc. 56(e); *Campbell*, 164 F.3d at 34-35 (holding that more information was needed when an FBI declarant merely "assert[ed] that various sources received express assurances of confidentiality without providing any basis for the declarant's knowledge of this alleged fact."); *see also Voinche v. FBI*, 46 F. Supp. 2d 26, 34 (D.D.C. 1999) (holding that a declaration, in which the government offered the unsupported assertion that the informant "received an 'expressed promise of confidentiality" was insufficient, noting that "[t]o properly invoke Exemption 7(D) . . . the FBI must present more than the conclusory statement of an agent that is not familiar with the informant"). Second, the FBI declarant's conclusory statements concerning the alleged express grant of confidentiality lack the requisite

specificity. A mere assertion that an express assurance of confidentiality was given falls short of the particularized justification required to support the exemption. *Billington v. U.S. Dep't of Justice*, 233 F.3d 581, 584 (D.C. Cir. 2000); *see also Campbell*, 164 F.3d at 30.

3. Exemption 7(E)

The FBI has also failed to satisfy Exemption 7(E) for the documents identified in Exhibit 7. Exemption 7(E) protects information that "would disclose techniques and procedures for law enforcement investigations or prosecutions" or "would disclose guidelines for law enforcement investigations or prosecutions" if either disclosure could reasonably be expected to risk circumvention of the law. 5 U.S.C. § 552(b)(7) (emphasis added). The FBI must show that the law enforcement rules they seek to withhold are not well known to the public. *See Rosenfeld*, 57 F.3d at 815. The FBI's justifications for withholding under Exemption 7(e) the documents listed in Exhibit 7 are insufficient.

The FBI has withheld documents pertaining to techniques that are admittedly known to the public, but for which "the circumstances of [their] usefulness" are not publicly known. SER 363-365; GER 125. But it is already established that the FBI cannot withhold documents regarding a publicly known technique simply because they also include information regarding the application

of that practice to the facts underlying the FOIA request. *Rosenfeld*, 57 F.3d at 815.

The FBI also improperly withheld extensive information based on boilerplate, conclusory language. *See Wiener* 943 F.2d at 979; *see generally ACLU v. Office of the Dir. of Nat'l Intelligence*, No. 10 Civ. 4419 (RJS), 2011 U.S. Dist. LEXIS 132503, at *34-35 (S.D.N.Y Nov. 15, 2011); SER 376-388, 395-403. This includes justifications such as the claim that "if such information were to be disclosed, it "would weaken FBI investigative strategies and make it easier for criminals to circumvent the law"; and generic assertions that disclosing information about the "tools used in Domain Management" and purported recruitment of potential informants would "risk circumvention of the law." *See id.* In no case did the FBI make a factual showing of *how* revealing such information would actually risk circumventing law enforcement.

Conclusory legal assertions unsupported by a particularized factual showing do not provide plaintiffs a meaningful opportunity to challenge or the court an adequate foundation to assess whether the exemption is properly applied. *See Wiener*, 943 F.2d at 979; *Davin v. United States DOJ*, 60 F.3d 1043, 1064 (3rd Cir. 1995) (holding that exemption 7(E) could not be invoked because "[t]he speculation provided in the government's brief of political groups' increased ability to detect informants within their ranks is not supported by evidence.").

IX. CONCLUSION

The district court's order should be affirmed.

Dated: July 14, 2016

Respectfully submitted,

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STATEMENT OF RELATED CASES

Appellee is not aware of any related cases pending in this Court.

Dated: July 14, 2016 /s/ Somnath Raj Chatterjee

CERTIFICATE OF COMPLIANCE

I, Somnath Raj Chatterjee, certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), the typeface requirement of Fed. R. App. P. 32(a)(5), and the typestyle requirements of Fed. R. App. P. 32(a)(6). This brief contains 13,508 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and is prepared in a proportionally spaced typeface (14-point Times New Roman).

Dated: July 14, 2016

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I hereby certify that, on July 14, 2016, I electronically filed the foregoing

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