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SAN FRANCISCO BAY GUARDIAN

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA; SAN FRANCISCO BAY GUARDIAN,

Plaintiffs,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

CASE No.: 12-cv-3728-SI

PLAINTIFFS' NOTICE OF CROSS-MOTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY ADJUDICATION AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Hearing Date: March 15, 2012
Time: 9:00 a.m.
Dept.: Courtroom 10, 19th Floor

NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION

TO DEFENDANT AND ITS COUNSEL OF RECORD: PLEASE TAKE NOTICE THAT on March 15, 2013 at 9 am, or as soon thereafter as the parties may be heard, Plaintiffs American Civil Liberties Union of Northern California and San Francisco Bay Guardian will bring for hearing a cross-motion for summary adjudication pursuant to Federal Rule of Civil Procedure 56 in this Freedom of Information Act ("FOIA") action on the ground that Defendant is unlawfully withholding agency documents, in particular that the search conducted by the agency to date is inadequate and that the exemptions asserted by the agency as to the documents processed thus far are inapplicable. The hearing will take place before the Honorable Susan Illston, in Courtroom 10, 19th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102. This motion is based on this notice, the attached memorandum of points and authorities, the accompanying Declaration of Linda Lye and attached exhibits, all pleadings and papers filed in this action, and such oral argument and evidence as may be presented at the hearing on the motion.

Dated: January 18, 2013

Respectfully submitted,

By: /s/
Linda Lye

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Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

I. INTRODUCTION

Plaintiffs in this FOIA matter seek records regarding Defendant Federal Bureau of Investigation's ("FBI") surveillance of "Occupy," the political protest movement that swept the country in the fall of 2011 and fundamentally shifted the public debate on issues of economic inequality. The purpose of this FOIA request is to determine whether the FBI reached beyond its legitimate law enforcement mandate to investigate federal crimes, and impermissibly surveilled constitutionally protected political protests, under the guise of providing some unspecified "assistance" to state and local law enforcement.

Rather than disclosing information that would shed light on this issue, the FBI's response merely underscores concerns of overreach. Recognizing that FBI investigations can have an undue chilling effect on First Amendment activity, the FBI's own operations manual establishes detailed documentation requirements that serve the salutary purpose of ensuring that the FBI only engages in investigatory activity when legal predicates are satisfied. But even though the documents produced clearly show that the FBI gathered intelligence about Occupy, the agency produced no documentation confirming that internal safeguards were satisfied beforehand. Either the agency failed to produce these responsive documents, or violated its own documentation procedures. To justify both the adequacy of its search and the withholding of information, the FBI offers boilerplate assertions that do not address the facts of this case, or provide this Court an independent basis to assess the validity of its claims. Instead, the FBI effectively asks the Court to take it on faith that the agency has executed its statutory obligations. But the agency has a duty to clarify the basis for its conduct, not only regarding its authority to investigate Occupy, but also regarding its response to this FOIA request. The cookie-cutter declaration it submits here is substantially identical to declarations that the Ninth Circuit and this Court has repeatedly found lacking. The Court should deny the FBI's motion for summary judgment and grant Plaintiffs' motion for summary adjudication.

II. BACKGROUND

A. THE OCCUPY MOVEMENT

On September 17, 2011, the Occupy Movement was born, with an inaugural protest on Wall Street in New York City. Occupy Wall Street, a protest against corporate

power and social and economic inequality, spawned protests in cities and at university campuses across the country, including several throughout Northern California. Occupy captured national attention, and profoundly changed the public debate. As the *New York Times* succinctly summarized, Occupy "succeeded in implanting 'we are the 99 percent' into the cultural and political lexicon." *See* Lye Decl. at ¶2 & Exh. A.

Unfortunately, Occupy protests soon gained attention not simply for their message, but for the brutality of law enforcement's crackdown. The Oakland Police Department's handling of Occupy Oakland gained particular notoriety; OPD led dozens of law enforcement agencies on October 25, 2011 and again on November 2, 2011 in blanketing crowds of protesters with tear gas and exploding projectiles, resulting in widespread injuries. The media extensively covered the protests, the violent crackdown, and injuries to protesters, including by publicizing the names of those injured, for example, Iraq war veteran Scott Olsen who suffered a severe head injury after being hit with a projectile, and former Army Ranger Kayvan Sabeghi, who suffered a ruptured spleen after a brutal beating by law enforcement officers that was caught on video. *See id.* at ¶3 & Exh. B. Further heavy-handed police responses to Occupy ensued, at the University of California ("UC") at Berkeley on November 9, 2011, and at UC Davis on November 18, 2011. *See id.* at ¶4 & Exh. C. Cities across the country in an apparently coordinated effort evicted Occupy encampments almost simultaneously in November 2011. *See id.* at ¶5 & Exh. D.

From the start, the FBI was monitoring Occupy. The agency issued an unclassified Intelligence Bulletin on September 14, 2011, three days before the inaugural Occupy Wall Street protest on September 17, 2011; the Intelligence Bulletin reproduced a flyer generated to publicize the protest, dubbing it a "Propaganda poster." *See id.* at ¶6 & Exh. E. The media also reported on the FBI investigation of and receipt of intelligence about various Occupy movements. *See id.* at ¶7 & Exh. F.

B. PLAINTIFFS' FOIA REQUESTS

On March 8, 2012, Plaintiffs American Civil Liberties Union of Northern California ("ACLU-NC") and an award-winning local newspaper, the *San Francisco Bay Guardian* ("*Bay Guardian*"), submitted a Freedom of Information Act ("FOIA") request to the FBI seeking records about its surveillance of Occupy. The request seeks:

1) Records created, received, gathered or maintained by the FBI (including but not limited to sub-entities within the FBI such as the Joint Terrorism Task Force, the Campus Liaison Initiative, and the Academic Alliance Program) since June 1, 2011 pertaining to persons, planning, assemblies, marches, demonstrations, or any other activity associated with protest movements referring to themselves as Occupy Oakland, Occupy San Francisco, Occupy Cal, or Occupy UC Davis.

2) Intelligence Bulletins referring to the "Occupy" movement generally or any geographically specific Occupy movement.

3) Training for FBI agents regarding the Occupy movement generally or any geographically specific Occupy movement.

4) Written materials related or referring to the Occupy movement generally or any geographically specific Occupy movement, and setting forth or referring to legal reasoning or authority relied upon by the FBI with respect to its investigatory and enforcement activities.

See id. at ¶8 & Exh. G. Although category 1 seeks FBI records pertaining to specific Occupy movements in Northern California, the remaining portions of the request seek intelligence products (category 2), training materials (category 3), and justifications for investigating Occupy (category 4) pertaining to any Occupy movement in the country. Plaintiffs requested expedited processing, which the FBI granted by letter dated March 26, 2012. *See id*. at ¶11 & Exh. H. Having received no response to their request, despite a follow-up inquiry on May 15, 2012, Plaintiffs filed suit on July 17, 2012. *See id.* at ¶¶12-13 & Exh. I. Approximately one month later, the FBI released 13 pages in whole or part, and withheld an additional 24. *See* Hardy Decl. (Doc. 22-1) at ¶12 & Exh. E.

The 13-page response consisted of a three-page "Liaison Information Report" prepared by the FBI and Department of Homeland Security for the Domestic Security Alliance Council[1] regarding a planned West Coast port shutdown on December 12, 2011 (Bates 1-3); six pages from the Coast Guard (Bates 7-13); and four pages consisting of two electronic communications ("EC") prepared by the FBI regarding an FBI's agent contact with the Port of Stockton Police "to share intelligence about 'Occupy' protesters targeting the Port of Oakland" (Bates 15-16) and a discussion of "Twitter reports" about

[1] According to its website, the "Domestic Security Alliance Council, a strategic partnership between the FBI, the Department of Homeland Security and the private sector enhances communications and promotes the timely and bidirectional effective exchange of information keeping the nation's critical infrastructure safe, secure and resilient." *See* Lye Decl. at ¶15 n. 1.

protesters' plans to "take over a vacant building in Oakland" or alternatively "to come to [Oakland International Airport]" (Bates 36-37). *See* Lye Decl. at ¶15.

None of the documents produced included training materials (category 2) or justifications for investigating Occupy (category 4). *See id.* at ¶16. Nor did the agency produce intelligence products (category 3), such as the September 14, 2011 *unclassified* Intelligence Bulletin discussing the inaugural Occupy Wall Street protest. *See id.*[2]

Counsel met and conferred on numerous topics, and Plaintiffs questioned, among other things, the adequacy of the search. *See* Lye Decl. at ¶17 & Exhs. J-L.

C. THE FBI'S DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE

The FBI has issued a Domestic Investigations and Operations Guide ("DIOG") "to standardize policies so that … investigative activities are consistently and uniformly accomplished whenever possible (e.g., same approval, opening/closing, notification, and reporting requirements)." *See* DIOG at §1.2.[3]

Areas of FBI authority. As set forth in the DIOG, the FBI has authority to act in four general areas: to "[c[onduct [i]nvestigations and [c]ollect [i]ntelligence and [e]vidence"; "to provide investigative assistance to other federal, state, local, or tribal agencies, and foreign agencies"; "to conduct intelligence analysis and planning"; and "to retain and share information obtained" pursuant to these guidelines. *See id.* at §§2.2.1, 2.2.2, 2.2.3 & 2.2.4.

Although FBI authority to act in these areas is broad, it is not limitless. For example, when the FBI conducts investigations, it has investigative jurisdiction only over violations of specified federal laws. *See, e.g., id.* at §§2.4.2 & 2.4.2.1 (enumerating federal statutory crimes of terrorism); §2.4.2.2 (enumerating additional offenses, such as Congressional, Cabinet and Supreme Court assaults); §2.4.4 (enumerating additional criminal statutes, such as violent crimes against foreign travelers).

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[2] Although the FBI has not produced category 3 documents, it has identified but withheld a document responsive to this category, described by the agency as an intelligence note pertaining to potential sovereign activity in Arkansas. *See* Hardy Decl. (Doc. 22-1) at ¶13 & Exh. H (Bates 38-40).

[3] The DIOG is available on the FBI's website at http://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29/fbi-domestic-investigations-and-operations-guide-diog-2011-version. Relevant excerpts of the DIOG are attached as Lye Decl., Exh. M.

Similarly, the FBI's authority to provide investigative assistance to state or local agencies is also limited to enumerated circumstances, such as the "investigation of crimes under state or local law when authorized by federal law." *Id.* at §12.3.2.3(A). While "the FBI is authorized to provide 'expert' personnel to assist law enforcement agencies in their investigations," the Office of Legal Counsel ("OLC") has opined that this authority is "limited" and "is not a broad grant of authority." *Id.* at §12.3.2.3(D). The DIOG sets forth detailed approval requirements that vary depending on the specific ground on which the investigative assistance is provided. *See id.* at §12.3.2.3.1. The DIOG establishes notice and documentation requirements, such as the filing of an "FD-999" form, when the agency provides investigative assistance to state or local agencies. *See id.* at §12.3.2.3.2 & 12.3.2.3.3. When the agency disseminates information to state or local agencies "related to their respective responsibilities," the DIOG provides for the "[***m***]***andatory use of the FD-999***." *Id.* at §12.6 (emphasis in original).

Predicates for and documentation of FBI activity. Recognizing the need "to ensure civil liberties are not infringed upon" through the FBI's conduct, the DIOG "emphasiz[es] the use of the least intrusive means to obtain information, intelligence, and/or evidence" to "mitigat[e] the potential negative impact on … privacy and civil liberties." *Id.* at §5.3. The DIOG describes authorized investigative methods in detail and sets forth various types of investigations, ranging from an "Assessment" (of which there are five types) to a "Preliminary Investigation," to a "Full Investigation." *See generally id.* at Table of Contents §18. For each type of investigation, different legal predicates are required and different investigative methods – varying in intrusiveness – are authorized.

The DIOG requires documentation justifying the opening of any type of investigation. For example, Section 5.5 of the DIOG sets forth standards for the opening of an assessment, including that it is "not based solely on the exercise of First Amendment activities." *Id.* at §5.5. The opening of an assessment is always documented in writing, either on an "FD-71," "Guardian (FD-71a)," or an EC (electronic communication). *Id.* at §5.6.2. This document must explain why the standards for opening an assessment are satisfied. *See id.* at §5.6.3.1.3 (Type 1 & 2 Assessment employee "must apply the standards for opening or approving a Type 1 & 2 Assessment"); §5.6.3.2.3 ("Type 3

Assessment cannot be opened based on oral approval"; supervisor must open assessment "by EC" "in accordance with the standards set forth in Section 5.5"); §5.6.3.3.3 (same for Type 4 Assessment); §5.6.3.4.4 (same for Type 5 Assessment).

The DIOG emphasizes meticulous documentation of the justification for opening assessments based on the recognition that "[e]ven when an authorized purpose is present, an Assessment could create the appearance that it is directed at or activated by constitutionally-protected activity…. If an Assessment touches on or is partially motivated by First Amendment activities, … it is particularly important to identify and document the basis for the Assessment with clarity." *Id.* at §5.3.

The DIOG similarly establishes Preliminary and Full Investigations, setting forth standards that must be met to open any such investigation and attendant documentation requirements. *See id.* at §6.6 ("Standards for Opening or Approving a Preliminary Investigation"); §6.7.1 ("The predication to open a Preliminary Investigation must be documented in the opening Electronic Communication (EC)."); §7.6 ("Standards for Opening or Approving a Full Investigation"); §7.7.1 ("The predication to open a Full Investigation must be documented in the opening EC.").

Documentation procedures are a key feature of the DIOG. This is necessary to further the DIOG's goal of promoting "oversight and self-regulation to ensure that all investigative and intelligence collection activities are conducted within Constitutional and statutory parameters and that civil liberties and privacy are protected." *Id.* at §1.2.

D. THE FBI'S SEARCH

The FBI has submitted the declaration of David Hardy to justify the adequacy of its search and the exemptions asserted.[4]

1. The FBI searched only the General Indices and the CRS

Mr. Hardy states that the agency conducted a search of the Central Records System ("CRS") using the "General Indices." *See* Hardy Decl. (Doc. 22-1) at ¶¶14-15. He

[4] As a threshold matter, it is unclear how many documents the FBI identified in response to Plaintiffs' request. Initially, Mr. Hardy declares that it found 40 responsive pages, 31 of which were FBI documents and 9 of which were Coast Guard documents. *See* Hardy Decl. (Doc. 22-1) at ¶22, ¶25 & n.7. Elsewhere, though, he states, that Coast Guard documents totaled 13 pages. *See id.* at ¶84.

acknowledges that the "FBI does not index every name in its files" and "the decision to index terms in a specific document can vary from document to document." *Id.* at ¶19 & ¶21 n.5. The FBI therefore also ran a "text search of" the Electronic Case File ("ECF"). *Id.* at ¶21. His explanation is somewhat opaque, but it appears that ECF is an application within the "Automated Case Support System ("ACS")," which is "[t]he mechanism that the FBI uses to search the CRS." *Id.* at ¶¶14, 18. Presumably then, if a document were not contained within the CRS, it would not be found through a text search of ECF.

2. The FBI also maintains numerous indices and databases other than the General Indices and CRS

Mr. Hardy's declaration suggests that the CRS is the repository for *all* FBI records. *See id.* at ¶14. But in declarations submitted in *other* cases, Mr. Hardy acknowledges the existence of indices and databases other than the "General Indices" and the CRS. Mr. Hardy's declaration submitted here, however, entirely fails to mention that these other indices and databases exist, or explain what they contain and why they were not searched.

In a 2010 declaration submitted in another FOIA suit against the FBI, he explains that a search was performed of the CRS as well as the separate "Confidential indices." *See* Hardy 5th Decl. (Doc. 83) in *Rosenfeld v. FBI,* Case No. 07-cv-03240-EMC. at ¶77 & n.14, attached as Lye Decl., Exh. N (hereinafter *Rosenfeld* Hardy 5th Decl.). Mr. Hardy explains that the Confidential indices are "located only at Field Offices [and] consist[] of the Confidential Human Sources ('CHS') information. This type of information at FBIHQ is maintained within the Human Intelligence ('HUMINT') Division." *Id.* He also describes numerous databases other than the CRS, such as the "Criminal Law Enforcement Application," the "Integrated Intelligence Information Application ('IIIA')," and the "Criminal Intelligence Support Program ('CISP')." *Id.* at ¶77.

E. THE FBI'S RESPONSE TO ANOTHER FOIA REQUEST

By letter dated December 18, 2012, the FBI produced 99 pages in response to another, apparently broader, FOIA request by the Partnership for Civil Justice Fund ("PCJF") for records relating to the FBI's surveillance of Occupy. The production includes, among other things, numerous documents referring to the FBI's dissemination of intelligence about Occupy to other agencies. *See* Lye Decl. at ¶20 & Exh. O.

III. ARGUMENT

A. THE FBI HAS FAILED TO PERFORM AN ADEQUATE SEARCH

The FBI has not met its burden, on summary judgment, to "show beyond material doubt … that it has conducted a search reasonably calculated to uncover all relevant documents." *Weisberg v. United States Dep't of Justice,* 705 F.2d 1344, 1351 (D.C. Cir. 1983); *see also Zemansky v. United States EPA*, 767 F.2d 569, 571 (9th Cir. 1985) (adopting *Weisberg* standard). Instead, it submits a boilerplate declaration virtually identical to those previously rejected by this District as too conclusory in another FBI FOIA case. *See Rosenfeld v. United States Dep't of Justice,* 2010 WL 3448517 at *7 (N.D. Cal. Sept. 1, 2010) ("*Rosenfeld 2010*") (rejecting search declaration as inadequate); *Rosenfeld v. United States Dep't of Justice,* 2008 WL 3925633 *14 (N.D. Cal. Aug. 22, 2008) ("*Rosenfeld 2008*") (same). Moreover, the record contains "'positive indications of overlooked materials.'" *Valencia-Lucena v. United States Coast Guard,* 180 F.3d 321, 327 (D.C. Cir. 1999) (citation omitted). The DIOG mandates documentation of numerous activities that undisputedly occurred, such as the FBI's provision of assistance and the dissemination of information to local law enforcement agencies, but none of these documents have been produced. The FBI's response to another FOIA requester also points to the existence of responsive documents that have not been produced.

1. The Hardy declaration is too conclusory and fails to provide any explanation of databases other than the CRS

The Hardy declaration states only that the agency searched the CRS, but does not provide sufficient facts to support the conclusion that this search was adequate.

The court applies a "'reasonableness' test to determine the 'adequacy' of a search methodology, consistent with congressional intent tilting the scale in favor of disclosure." *Campbell v. United States Dept. of Justice,* 164 F.3d 20, 27 (D.C. Cir. 1998) (citation omitted). "An agency "cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Id.* at 28 (internal quotation marks, citation omitted). An agency must demonstrate adequacy through "reasonably detailed, nonconclusory affidavits." *Zemansky,* 767 F.2d at 571. It must "aver[] that *all* files likely to contain responsive materials (if such records exist) were searched." *Nation Magazine v.*

United States Customs Serv., 71 F.3d 885, 890 (D.C. Cir. 1995) (internal quotation marks, citation omitted) (emphasis added).

Applying these standards, Judge Patel in another FOIA lawsuit against the FBI rejected the adequacy of a search declaration (also submitted by Mr. Hardy) that, in language virtually identical to the declaration submitted in this case, merely stated that the CRS consists of administrative, criminal and other files compiled for law enforcement purposes, that the CRS is accessed through the ACS and the General Indices, and that the agency searched the CRS. *Compare Rosenfeld 2008,* 2008 WL 3925633 *12-13 (quoting and describing Hardy declaration), *with* Hardy Decl. (Doc 22-1) at ¶¶14-19. The court held that "[t]he general nature of the description contained within the affidavit combined with the lack of explanation about other electronic databases beyond the CRS necessitates a more detailed declaration." *Rosenfeld 2008,* 2008 WL 3925633 *14. It therefore ordered defendants to submit a revised declaration explaining:

> (1) *the nature and scope of all databases and indices maintained by defendants, including a description of the data contained in the same*; (2) which databases and indices were searched in response to Rosenfeld's requests, including case indices, whether within or without [the] CRS; [3] what terms were searched, or if a different mechanism for searching was used, to explain the same; [4] when the search was performed; [5] where the search was performed; and [6] *which databases and indices were not searched and why not*.

Id. at *14 (emphasis added). The FBI in *Rosenfeld* thereafter performed further searches and submitted another declaration. Despite having been previously ordered to explain *why* it had chosen not to search certain databases, the revised declaration it submitted was still lacking. Its declaration confirmed the existence of numerous databases it had not searched – such as the "Criminal Law Enforcement Application," "Integrated Intelligence Information Application," and "Criminal Intelligence Support Program" – but failed to provide much explanation as to why. *Rosenfeld 2010,* 2010 WL 3448517 *6; *Rosenfeld* Hardy 5th Decl. at ¶77, attached as Lye Decl., Exh. N. Judge Patel held that the agency's decision not to search every database might be reasonable, but that "the FBI must provide some basis for the court to evaluate whether its decision to not search additional databases was reasonable." *Rosenfeld 2010,* 2010 WL 3448517 *7.

In this case, the FBI has submitted a declaration from Mr. Hardy virtually identical

to the declaration it submitted in the *Rosenfeld* matter in 2008 and that the Court found inadequate. Despite having *twice* been ordered by another Court of this District in *Rosenfeld* to describe the nature and scope of all databases and indices and to provide a factual basis for its decision not to search various databases, the FBI has failed in the declaration submitted here even to acknowledge that these other databases exist, let alone explain why it is reasonable not to search them. Indeed, based on Mr. Hardy's description of these databases in *Rosenfeld,* it is hard to understand why responsive documents are *not* likely to be found in the Criminal Law Enforcement Application, "which is a repository of data derived from criminal investigations," or the Integrated Intelligence Information Application, which "allows for the collection, collation, analysis and dissemination of intelligence information." *Rosenfeld* Hardy 5th Decl. (Doc. 83) at ¶77, attached as Lye Decl., Exh. N. These databases would appear to be especially relevant given that one of the documents produced confirms that the agency was engaged in disseminating intelligence about Occupy protesters to local law enforcement (see Bates 15, attached at Hardy Decl. (Doc. 22-1), Exh. G) and Mr. Hardy's representation that a number of the documents withheld "originated in FBI files which pertain to ongoing criminal national security investigations." Hardy Decl. (Doc. 22-1) at ¶¶ 75, 76, 79, 81, 82. A search of these or other databases that the FBI has refused to discuss may well produce yet more responsive documents. The FBI, however, provides no information to support any conclusion to the contrary. *Rosenfeld 2008* and *Rosenfeld 2010* compel the conclusion that the FBI has failed to demonstrate that its search of the CRS was adequate.

2. The record contains positive indications that the FBI overlooked materials

The FBI has failed to meet its burden of demonstrating the adequacy of the search for the separate and independent reason that FBI documentation protocol and documents produced in this and another FOIA matter point to the existence of responsive documents that the agency has failed to produce or identify on its *Vaughn* index.

A search is "inadequate" where "the record itself reveals 'positive indications of overlooked materials.'" *Valencia-Lucena,* 180 F.3d at 327 (citation omitted). Thus, for example, an agency "must revise its assessment of what is 'reasonable' in a particular case

to account for leads that emerge during its inquiry." *Campbell,* 164 F.3d at 28. "If … the record leaves substantial doubt as to the sufficiency of the search," the agency cannot prevail. *Truitt v. Dep't of State,* 897 F.2d 540, 542 (D.C. Cir. 1990).

There are concrete reasons to believe that the following responsive documents exist, but the agency has failed to produce or identify them.

Intelligence products: Category 2 of Plaintiffs' FOIA request sought intelligence products regarding Occupy.[5] The FBI has identified (and withheld) only one document, an intelligence note pertaining to potential sovereign activity in Arkansas, responsive to this request. *See* Hardy Decl. (Doc. 22-1) at Exh. H, Bates 38-40. Yet other intelligence products about Occupy clearly exist. First, the FBI has not produced the Intelligence Bulletin it issued about the inaugural September 17, 2011 Occupy Wall Street protest. *See* Lye Decl., Exh. E. The poster depicted on the Intelligence Bulletin says "#OCCUPY WALL STREET SEPTEMBER 17TH. BRING TENT" and warns of a "Day of Rage" protest. *See id.* This document is plainly an intelligence product that refers to Occupy Wall Street and is thus responsive to Plaintiffs' request. The agency's failure to identify this document casts serious doubt on the adequacy of its search.

Second, there are concrete reasons to believe that additional intelligence products exist. A number of documents show that the FBI shared intelligence about Occupy with other agencies. A December 2, 2011 document produced by the FBI to another FOIA requester, PCJF, is a memo that "document[s] dissemination" of a "bulletin … about Occupy Wall Street mailings that have become a part of the Occupy Wall Street groups strategy to notify individuals of the perceived injustices of our capitalistic society." Lye Decl., Exh. O at PCJF FOIA 0059. The code at the bottom of the document reads: "WMD-PRODUCE/CONTRIBUTE/*DISSEMINATE INFO-OTHER INTEL PROD*." *Id.* (emphasis added). Another document produced to PCJF is an electronic communication describing FBI briefings to other agencies in the Memphis area on December 7 and 8,

[5] Although the FOIA request used the term "Intelligence Bulletins," correspondence between the parties clarified that Plaintiffs sought "all intelligence analysis and planning documents within the meaning of DIOG §15." *See* Lye Decl., Exh. K at ¶ 2). The DIOG describes written intelligence products broadly as "reports and intelligence assessments (analytical written products) concerning matters relevant to authorized FBI activities." DIOG §15.6.1.2.

2011. Lye Decl., Exh. O at PCJF FOIA 0078-79. It states: "IA [redacted] *briefed Domestic Terrorism intelligence* related to Aryan Nations, Occupy Wall Street, and Anonymous." *Id.* (emphasis added). A third document describes contact with the Federal Reserve Law Enforcement Unit in which the FBI "pass[ed] on update" about Occupy; a summary states "POSITIVE INTELLIGENCE (DISEMINATED OUTSIDE FBI)." *See id.* at PCJF FOIA 0090, 0092. Finally, Bates 15 produced to Plaintiffs is an electronic communication in which the writer states that he contacted the "Stockton Police Department *to share intelligence* about 'Occupy' protesters targeting the Port of Oakland." Hardy Decl. (Doc. 22-1), Exh. G (emphasis added). All of these documents confirm that the FBI generated intelligence about Occupy and disseminated it to other agencies, but the FBI has failed to produce or identify any of those intelligence products.

Documentation of intelligence dissemination. The documents discussed above (PCJF FOIA 0059, 0078-79, 0090-92, and Bates 15) all show that the FBI disseminated intelligence about Occupy to other agencies. The DIOG requires documentation on a form FD-999 when the agency disseminates information to state or local agencies. *See* DIOG §12.6. Yet the FBI has not produced a single FD-999. Either its search was inadequate or it violated DIOG documentation requirements.

Documentation of opening of assessment. The documents discussed above also show that the FBI was collecting and analyzing intelligence about Occupy. This strongly suggests that – at a minimum – it opened an Assessment. The DIOG requires documentation that an assessment was opened on an FD-71, a Guardian FD-71a, or an EC, and confirmation that the standards for opening an assessment were satisfied, including that the assessment was "not based solely on the exercise of First Amendment activities." DIOG §5.5, §5.6.2 & *supra* Part II-C. These documentation requirements serve the salutary purpose of ensuring that "civil liberties are not infringed upon through Assessments." DIOG §5.3. These documents would also be responsive to Category 4 (justifications for engaging in investigatory or enforcement activity), but the FBI has produced no such documents.

Documentation of opening of predicated investigation. There is no dispute that responsive documents were found in files pertaining to pending investigations. *See* Hardy

Decl. (Doc. 22-1) at ¶¶75, 76, 79, 81, 82. Elsewhere in the Hardy declaration, the agency also acknowledges the existence of "pending FBI investigations." *Id.* at ¶54. But the DIOG sets forth standards for opening a predicated investigation and documentation that these standards have been satisfied. *See supra* Part II-C. To the extent these investigation(s) pertain(s) to Occupy, the documents are responsive to Category 4 (justifications for engaging in investigatory activity) but none have been produced.

Documentation of assistance to other agencies. The FBI admits that it provided "support to state and local law enforcement agencies regarding the 'Occupy' movements across the country." Hardy Decl. (Doc. 22-1) at ¶52. The DIOG establishes detailed approval and documentation requirements when the FBI provides assistance to state or local agencies. *See* DIOG §§12.3.2.3.1, 12.3.2.3.2, 12.3.2.3.3 & *supra* Part II-C. These requirements are significant because the FBI's authority to act is not limitless. The standards for providing assistance to other agencies include that "the assistance is within the scope authorized by the [Attorney General's Guidelines for Domestic FBI Operations], federal laws, regulations, or other legal authorities" and "[t]he investigation being assisted is not based solely on the exercise of First Amendment activities." DIOG §12.3.1. These approval and documentation requirements thus serve the important purpose of ensuring that the agency is not overreaching. These documents are also responsive to Category 4, which seeks justification for the agency's activities with respect to Occupy. But the agency has produced no such documents, again suggesting either that it violated the DIOG in providing state and local agencies assistance, or that its search was inadequate.

Given the FBI's conclusory search declaration (essentially identical to one previously rejected by another Court of this District) as well as this extensive evidence of additional responsive documents that must exist but that the agency has failed to produce, the Court should require the FBI to perform a more thorough search of the CRS[6] and to search all databases and recordkeeping systems likely to contain responsive information. *See Nation Magazine,* 71 F.3d at 890. In addition, the FBI should explain in a further

[6] The FBI has not responded to Plaintiffs' inquiry whether electronic searches with Boolean-type inquiries (such as "and" connectors) are possible. Plaintiffs had expressed concern that using geographically specific phrases would omit responsive documents, while use of the term "Occupy" would be overinclusive. *See* Lye Decl., at ¶17.

declaration "the nature and scope of all databases and indices maintained by defendants, including a description of the data contained in the same," and "which database and indices were not searched and why not." *Rosenfeld 2008,* 2008 WL 3925633 *14.

B. THE FBI IS UNLAWFULLY WITHHOLDING INFORMATION

The FBI has not met its burden of proving the claimed exemptions.

The government "has 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). The agency cannot rely on unsupported assertions that disclosure will or may result in a particular consequence, and must instead provide sufficient information "to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991) (internal quotation marks, citation omitted). A non-conclusory *Vaughn* index[7] is necessary to minimize distortions in the adversary process inherent in FOIA litigation, in which "only the party opposing disclosure will have access to all the facts." *Id.* "*In camera* review of the withheld documents by the court is not an acceptable substitute for an adequate *Vaughn* index" because it "does not permit effective advocacy." *Id.* at 979.

1. (b)(1): The FBI has not provided sufficient information to satisfy its burden of withholding information on "national security" grounds

The FBI seeks to withhold under FOIA's national security exemption (5 U.S.C. §552(b)(1)) a two page Intelligence Note on the ground that it contains file numbers, intelligence activity information, and intelligence source information. *See* Hardy Decl. (Doc. 22-1) at ¶36 & Exh. H (Bates 38-40). But the FBI has not provided sufficient information to meet its burden of establishing this exemption.

Although an agency's classification decision is accorded substantial weight, "deference is not the equivalent to acquiescence." *Campbell,* 164 F.3d at 30. FOIA "requires the district court to review the propriety of the classification, and places the burden on the withholding agency to sustain its Exemption 1 claims." *Wiener,* 943 F.2d at 980. Declarations are insufficient to support summary judgment for the government on

[7] *Vaughn v. Rosen,* 484 F.2d 820 (D.C. Cir. 1973).

(b)(1) grounds, if they are lacking in "detail and specificity." *Campbell,* 164 F.3d at 30. The government's declarations must "provide [a FOIA requester] a reasonable opportunity to contest the Exemption 1 withholdings." *Wiener,* 943 F.2d at 980.

Courts have not hesitated to reject (b)(1) claims where, as here, the government merely recites a boilerplate list of harms to national security without explaining why those harms could reasonably be expected to follow from disclosure of the information in the specific documents it seeks to withhold. In *Wiener,* the Ninth Circuit rejected the government's (b)(1) assertion for FBI files related to John Lennon. *Wiener,* 943 F.2d at 981. The agency made only "general assertions that disclosure of certain *categories of facts* may result in disclosure of the source," and in turn "lead to a variety of consequences detrimental to national security," but failed to "identify the *kind of information* found in th[e withheld] document that would expose the confidential sources." *Id.* (emphasis added). Similarly, in *Campbell,* the D.C. Circuit rejected the FBI's invocation of (b)(1) to justify withholding files pertaining to author and activist James Baldwin; the declaration did "not contain any specific reference to Baldwin or any other language suggesting that the FBI tailored its response to a specific set of documents," and "fail[ed] to draw any connection between the documents at issue and the general standards that govern the national security exemption." *Campbell,* 164 F.3d at 30-31; *see also King v. United States Dep't of Justice,* 830 F.2d 210, 226 (D.C. Cir. 1987) (FBI's submissions inadequate because they provided "no contextual information … to supplement and particularize" the (b)(1) assertions). Another Court of this District rejected declarations as inadequate to support a (b)(1) exemption where they "fail[ed] to particularize the harm claimed from disclosure of *those* documents" and "never explain[ed] what information in the memo could harm national security, or how." *Bay Area Lawyers Alliance for Nuclear Arms Control,* 818 F.Supp. 1291, 1298 (N.D. Cal. 1992).

The Hardy declaration, exactly like the inadequate declarations in *Wiener, Campbell*, *King,* and *Bay Area Lawyers Alliance,* contain "merely a categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure." *Campbell,* 164 F.3d at 30 (internal quotation marks, citation omitted). Mr. Hardy offers a conclusory assertion that the information sought to be

withheld under (b)(1) would disclose intelligence activities and an intelligence source, followed by a lengthy but entirely boilerplate recitation of harms that would flow from disclosure of these categories of information. *See* Hardy Decl. (Doc. 22-1) at ¶¶39-47. "This is precisely the approach rejected by the 9th Circuit in *Wiener* – categorical listing of harms and simply 'linking' a document to a category." *Bay Area Lawyers Alliance,* 818 F.Supp. at 1298. Although the *Vaughn* index cursorily describes the withheld document as an "Intelligence Note … related to potential sovereign activity in Arkansas," Hardy Decl. (Doc. 22-1) at Exh. H (Bates 38-40), there is nothing comparable to the detail or specificity of the declarations found adequate in *Bay Area Lawyers Alliance*, which explained that the document described the government's technical and military needs for conducting high yield (defined as greater than 150 kilotons) underground nuclear tests. *See Bay Area Lawyers Alliance,* 818 F.Supp. at 1297-98 & n.1. Moreover, neither the index nor Mr. Hardy's declaration "explains what information in the [Intelligence Note] could harm national security, or how." *Id.* at 1298. In short, the agency's submissions "fail[] to tie the FBI's general concern about disclosure of confidential sources [and intelligence methods] to the facts of this case." *Wiener,* 943 F.2d at 981.[8]

Further, although agencies have a duty to provide "[a]ny reasonably segregable portion of" records that are not exempt, 5 U.S.C. §552(b)(9), the FBI provides no factual basis to explain why any exempt information is not reasonably segregable.[9]

2. (b)(7): The FBI has failed to establish as a threshold matter a legitimate law enforcement objective

The FBI invokes several law enforcement exemptions (5 U.S.C. §552(b)(7)), but has failed at the outset to establish that the records at issue were compiled pursuant to a legitimate law enforcement activity within the FBI's authority.

An agency invoking exemption 7 must establish as a threshold matter that the

[8] The FBI relies on *Council on Am. –Islamic Relations v. FBI,* 749 F.Supp.2d 1104 (S.D. Cal. 2010) (CAIR), and *Singh v. FBI,* 574 F.Supp.2d 32 (D.D.C. 2008). But *CAIR* upheld the (b)(1) exemption after reviewing the documents *in camera* and did not rely solely on the agency's declaration. 749 F.Supp.2d at 1113. The court in *Singh* was not bound by the Ninth Circuit's decision in *Wiener* and in any event provided no analysis. After describing the declaration, the court simply stated "The Court concurs." 574 F.Supp.2d at 43. The lack of reasoning in *Singh* renders it unpersuasive.

[9] Plaintiffs do not challenge the withholding of File Numbers, but File Numbers are reasonably segregable.

record was "compiled for law enforcement purposes." *Id.* Where an agency, such as the FBI, has a "clear law enforcement mandate," courts apply the "rational nexus" test. *Church of Scientology v. United States Dep't of Army,* 611 F.2d 738, 748 (9th Cir. 1979). The "court's 'deferential' standard of review is not, however, 'vacuous.'" *Campbell,* 164 F.3d at 32. "The burden is on the government to show that the information … was received for a law enforcement purpose; the burden is not on the plaintiffs to show that it was not." *Gordon v. FBI,* 390 F.Supp.2d 897, 901 (N.D. Cal. 2004). Courts applying the rational nexus test have articulated several principles applicable here.

First, the Ninth Circuit has made clear that the rational nexus that the agency must demonstrate is "between enforcement of a *federal* law and the document for which an exemption is claimed." *Church of Scientology,* 611 F.2d at 748 (emphasis added); *accord Rosenfeld v. United States Dep't of Justice,* 57 F.3d 803, 808 (9th Cir. 1995).

Second, the agency must describe with specificity the alleged federal law violation. In *Wiener,* the FBI stated that John Lennon, the subject of the records request, "was under investigation for possible violations of the Civil Obedience Act of 1968 … and the Anti-Riot Act … because of his association with a [specified] radical group." *Wiener,* 943 F.2d at 985. The Ninth Circuit held that the FBI failed to establish a rational nexus: The cited statutes were "very broad" and "prohibit[ed] a wide variety of conduct." *Id.* at 986. Thus, "[c]itations to these statutes do little to inform Wiener of the claimed law enforcement purpose underlying the investigation of John Lennon." *Id.* The FBI's failure to "provid[e] Wiener with further details of the kinds of criminal activity of which John Lennon was allegedly suspected" prevented the requester from effectively challenging the applicability of the exemption. *Id.* Specificity is necessary to ensure that the records were compiled pursuant to a law enforcement objective "within the authority of the" agency. *See Church of Scientology,* 611 F.2d at 748 (insufficient evidence to warrant finding that agency "had a law enforcement purpose based upon properly delegated enforcement authority").

Third, "generalized monitoring and information-gathering" are objectives "not related to the Bureau's law enforcement duties." *Rosenfeld,* 57 F.3d at 809 (quoting *Lamont v. Dep't of Justice,* 475 F.Supp. 761, 776 (S.D.N.Y. 1979)). In *Rosenfeld,* the Ninth Circuit affirmed the district court's conclusion that the FBI lacked a legitimate law

enforcement objective where the documents "strongly support the suspicion that the FBI was investigating [former UC President Clark] Kerr … because FBI officials disagreed with his politics" and were simply engaged in "generalized monitoring and information-gathering." *Id.* (internal quotation marks, citation omitted); *see also Powell v. United States Dep't of Justice,* 584 F.Supp. 1508, 1522 (N.D. Cal. 1984) (where documents pertained to group's effort to publicize constitutional questions regarding a criminal prosecution, court failed "to see any rational nexus between this sort of general surveillance and information-gathering and the enforcement of a federal law").

The FBI in this case attempts to demonstrate a rational nexus by stating that "[d]ocuments responsive to plaintiffs' request relate to the FBI's mission to provide services and support to federal, state, municipal, and international agencies and partners. In this instance, the FBI provided support to state and local law enforcement agencies regarding the 'Occupy' movements across the country." Hardy Decl. (Doc. 22-1) at ¶52. Under each of the three principles discussed above, the FBI fails to meet (b)(7) threshold.

First, the FBI does not even claim to have compiled these records to enforce any *federal* law, notwithstanding the Ninth Circuit's requirement of a federal law enforcement nexus. *See Rosenfeld,* 57 F.3d at 808; *Church of Scientology,* 611 F.2d at 748. The out of circuit authority cited by the FBI (*see* FBI Brf. (Doc. 22) at 13-14) does not undercut the binding nature of the Ninth Circuit caselaw.[10]

Second, the FBI has failed to provide any *specificity* as to the alleged federal law violation. While it states that *some* of the documents "pertain to ongoing criminal national security investigations" (*see* Hardy Decl. (Doc. 22-1) at ¶¶75, 76, 79, 81, 82), it fails to

[10] In any event, *Hopkinson v. Shillinger,* 866 F.2d 1185 (10th Cir. 1989), while opining that "Exemption 7 is not limited only to information gathered for federal law enforcement purposes," expressly noted that other courts, including the Ninth Circuit, require "a federal law enforcement purpose." *See id.* at 1222 n. 27. The plaintiff in *Leadership Conference on Civil Rights v. Gonzales,* 404 F.Supp.2d 246 (D.D.C. 2005), "concede[d] that the [local criminal] records were compiled for law enforcement purposes," *id.* at 258, so the court did not did not decide whether the FBI satisfied the (b)(7) threshold. *Code v. FBI,* 1997 WL 150070 (D.D.C. Mar. 26, 1997), is distinguishable because the FBI was assisting a local police department "in solving a series of local homicides," *id*. at *5, and thus appears to have been acting pursuant to *federal* statute. *See* DIOG §12.3.2.3 ("FBI may provide investigative assistance to state, local and tribal agencies … in the investigation of crimes under state or local law *when authorized by federal law* (e.g., …[28 U.S.C. §]540B – serial killings)") (emphasis added).

provide any "details of the kinds of criminal activity" investigated, let alone to cite the criminal statutory provisions at issue. *Wiener*, 943 F.2d at 986 (citation of two criminal statutes without description of alleged criminal activity insufficient to establish (b)(7) threshold). Moreover, the statement regarding national security investigations suggests that these documents were compiled in the course of the FBI's own criminal investigation, thus contradicting its other representation that they were compiled in the course of the FBI's provision of support to state and local entities. In any event, it only claims that *some* of the documents originated in a national security investigation file. "[T]he FBI must explain why *each* withheld document or set of closely similar documents relate to a particular law enforcement purpose." *Campbell,* 164 F.3d at 33 (emphasis added).

Even if the (b)(7) threshold were satisfied when the FBI is not investigating violations of federal law, the requisite specificity is still lacking because the agency provides no information as to the specific grant of authority pursuant to which it was providing "support" to state and local entities. As discussed above, the FBI's authority to assist state and local authorities is not limitless. *See supra* at Part II-C. The DIOG carefully enumerates the specific instances in which the FBI is authorized to provide assistance to state and local entities. *See* DIOG §12.3.2.3. For example, while it may provide "expert assistance," the Office of Legal Counsel "has made clear that this is *not* a broad grant of authority." *Id.* at §12.3.2.3(D) (emphasis added). Because the FBI has failed to identify the claimed basis on which the FBI was providing support to state and local entities or to provide any facts regarding the nature of that support, the agency has not met its burden to establish a rational nexus. *See Church of Scientology,* 611 F.2d at 748 ("no showing that the investigation involved the enforcement of any statute or regulation within the authority of" agency); *Campbell,* 164 F.3d at 32 ("If the declarations 'fail to supply facts' in sufficient detail to apply the … rational nexus test, then a court may not grant summary judgment for the agency.").

Third, and relatedly, clarity as to the agency's basis for its actions is essential, to ensure that the FBI was not overreaching and engaged in the illegitimate purpose of "generalized monitoring and information-gathering" about First Amendment activity. *Rosenfeld,* 57 F.3d at 809; *see also* DIOG §4.2 ("investigative activity may not be based

solely on the exercise of rights guaranteed by the First Amendment"). A document produced to PCJF confirms that the FBI did not believe Occupy to be engaged in criminal activity. *See* Lye Decl., Exh. O at PCJF FOIA 0090 ("the movement known as occupy Wall Street … has been known to be peaceful"). Under these circumstances, the FBI's vague and potentially contradictory statements that the records in dispute pertained to unspecified support to state and local entities and a criminal national security investigation may have been a mere pretext for unlawful surveillance of First Amendment activity. *See Gordon,* 390 F.Supp.2d at 901 ("burden is on the government to show ... law enforcement purpose; the burden is not on the plaintiffs to show that it was not.").

Although the FBI has failed to establish the threshold for invoking the (b)(7) exemption, we address in turn the specific claimed law enforcement exemptions.

3. (b)(7)(A): Any exemption for file numbers does not justify withholding entire documents

The FBI invokes exemption (b)(7)(A) for pending law enforcement proceedings but only for the limited purpose of withholding "control file numbers of pending FBI investigations." Hardy Decl. (Doc. 22-1) at ¶54; *see also* FBI Brf. (Doc. 22) at 14. But the agency has invoked this exemption even as to eight documents that it withheld *in full. See* Hardy Decl. (Doc. 22-1), Exh. H (Bates 4-5, 20-21, 17-19, 24, 25, 26-31, 32-35, and 38-40). This exemption would only entitle the FBI to redact the file numbers, not withhold entire documents. *See* 5 U.S.C. §552(b) (requiring provision of "[a]ny reasonably segregable portion of" record that is not exempt).

4. (b)(6) and (b)(7)(C): The public interest in shedding light on potentially unlawful FBI surveillance of First Amendment activities favors disclosure of third party information

The FBI invokes privacy interests (5 U.S.C. §§552(b)(6) & (b)(7)(C)) to withhold four kinds of information: FBI Special Agents and support personnel; third parties who provided information to the FBI; third parties who were mentioned; and state or local law enforcement personnel. *See* Hardy Decl. (Doc. 22-1) at ¶¶57-63). Plaintiffs do not challenge the first category. The public interest in disclosure of the remaining categories outweighs privacy interests and does not justify withholding entire documents.

Third parties who provided information to FBI. Disclosure of information

pertaining to third parties that provided information to the FBI serves "FOIA's purpose to disclose publicly records that document whether the FBI abused its law enforcement mandate by overzealously investigating a political protest movement…." *Rosenfeld,* 57 F.3d at 811-12 (affirming district court's disclosure order on certain documents pertaining to Free Speech movement, notwithstanding government's claim of (b)(7)(C)). Information about FBI interviewees would shed light on the scope – and propriety – of the FBI's investigation of Occupy and further the public interest in learning "whether and to what extent the FBI investigated individuals for participating in political protests, not federal criminal activity." *See id.* at 812 ("Disclosing the names of the investigation subjects would make it possible to compare the FBI's investigations to a roster of the FSM's leadership" and thus "promotes the public interest of this FOIA request").

To justify withholding this information, the FBI offers only boilerplate assertions about the importance of offering assurances of confidentiality to FBI interviewees to overcome any fears of reprisal. *See* Hardy Decl. (Doc. 22-1) at ¶61. But Congress has created a specific statutory exemption for confidential law enforcement sources, *see* 5 U.S.C. §552(b)(7)(D), and the Supreme Court and lower courts have announced specific standards that must be met to invoke this exemption. *See infra* Part III-B-5. The FBI should not be permitted to circumvent those requirements by asserting conclusory fears of retaliation untethered to the facts of this case, and these speculative fears do not in any event outweigh the public interest in disclosure.

Third parties merely mentioned. For the reason discussed above with respect to third party interviewees, there is also a "strong public interest" in disclosure of information about third parties mentioned in the FBI files – to shed light on the scope and propriety of the FBI's investigation of Occupy. *Rosenfeld,* 57 F.3d at 812. There is also an additional interest in disclosure of this information: Individuals who have reason to suspect but no evidence to confirm that they have been targeted for government surveillance are often barred from suit. *See, e.g., Al-Haramain Islamic Found., Inc. v. Bush,* 507 F.3d 1190, 1205 (9th Cir. 2007) (foundation designated as terrorist organization lacked standing to challenge terrorist surveillance program, absent evidence that its members were surveilled); *American Civil Liberties Union v. Nat'l Sec. Agency,* 493 F.3d

644, 655 (6th Cir. 2007) (no concrete injury for Article III standing to challenge warrantless wiretapping where no plaintiff "can show that he or she has actually been wiretapped."). The government should not be able to immunize itself from challenges to unlawful surveillance by suppressing information about its surveillance activities.[11]

On the other side of the scale, the FBI offers only speculative, boilerplate concerns that disclosure could lead to "possible harassment or criticism." Hardy Decl. (Doc. 22-1) ¶62. But there is no case-specific information to support the conclusion that individuals mentioned in FBI documents about the Occupy movement would suffer any of these consequences. Moreover, at least two of the disputed documents are complaints – one an email and the other "[m]edia reports" – about people being injured in confrontations with local law enforcement. *Id*, at Exh. H at Bates 26-31 & 32-35. News coverage of excessive police force on Occupy protesters was extensive and included the names of the injured, including Scott Olsen and Kayvan Sabeghi. *See* Lye Decl. at ¶3 & Exh. B. The FBI cannot plausibly claim an unwarranted invasion of privacy for information that derives from "newspaper articles and other public sources" or includes names already in the public arena. *Gordon,* 390 F.Supp. 2d at 901 (rejecting (b)(7)(C) claim).

State or local law enforcement personnel. The FBI seeks to withhold names or identifying information of state or local law enforcement personnel. In *Lissner v. United States Customs Serv.,* 241 F.3d 1220, 1223-24 (9th Cir. 2001), the Ninth Circuit rejected the applicability of this exemption to information about local law enforcement officers.

Reasonable segregability. In any event, the FBI asserts but does not explain why the documents in this case are not reasonably segregable. *See* FBI Brf. (Doc. 22) at 21; *see Gordon,* 390 F.Supp.2d at 901 (FBI "improperly used this privacy exemption to withhold entire documents when [it] could have simply redacted the third party's name").

[11] The FBI's reliance on *CAIR* is misplaced. *Cf.* FBI Brf. (Doc. 22) at 17. The *CAIR* Plaintiffs apparently did not raise, and the court did not discuss, *Rosenfeld* in the context of the (b)(7)(C) exemption. *CAIR,* 749 F.Supp.2d at 1121. Nor did *CAIR* address the additional argument raised here that the public interest weighs in favor of disclosure of information that would remove barriers to legal challenges to unlawful surveillance.

5. (b)(7)(D): The FBI has failed to establish the factual predicates for the confidential source exemption

The FBI claims that seven documents should be withheld in full as confidential source information (*see* Hardy Decl. (Doc. 22-1), Exh. H (Bates 4-5, 20-21, 17-19, 22-23, 24, 25, and 38-40)), but fails to establish the exemption's factual predicates.

In *United States Dep't of Justice v. Landano,* 508 U.S. 165 (1993), the Supreme Court rejected "a presumption that a source is confidential within the meaning of Exemption 7(D) whenever the source provides information to the FBI." *Id.* at 181. The exemption applies only if "the particular *source* spoke with an understanding that the communication would remain confidential." *Id.* at 172.

The FBI asserts that certain sources were provided "an express assurance of confidentiality." *See* Hardy Decl. (Doc. 22-1) at ¶65. But it offers no facts to support this "bald assertion" and it is unclear why the Section Chief of the FBI's records section would have personal knowledge of communications between FBI personnel and sources. *See Billington v. United States Dep't of Justice,* 233 F.3d 581, 584 (D.C. Cir. 2000) ("This bald assurance that express assurances were given amounts to little more than the recitation of the statutory standard, which we have held is insufficient."); *Campbell,* 164 F.3d at 34 (FBI declarations regarding express assurances of confidentiality insufficient to warrant summary judgment where agency failed to provide probative evidence such as "notations on … a withheld document" or "personal knowledge").

The agency claims other sources spoke under an implied assurance of confidentiality, but offers purely generic concerns about harms from disclosure in any case. *See* Hardy Decl. (Doc. 22-1) at ¶67. It fails to describe any source-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." *Landano,* 508 U.S. at 179. To allow the FBI to withhold information based on the boilerplate declaration submitted here would amount to an "infer[ence] that all FBI criminal investigative sources are confidential," an inference the Supreme Court found "unreasonable." *Id.*[12]

[12] *Span v. United States Dep't of Justice,* 696 F.Supp.2d 113 (D.D.C. 2010), on which the FBI relies, upheld the withholding of confidential source information but only based on the *joint* application of Exemption 2 and 7(D). *See id.* at 121. The Supreme Court has since rejected the application of Exemption 2 outside the context of "records relating to

Moreover, FOIA's requirement that the agency provide "[a]ny reasonably segregable" non-exempt "portion of a record" precludes the FBI's argument that documents can be withheld in full on this basis. *See* 5 U.S.C. §552(b) .

6. (b)(7)(E): The FBI fails to provide facts in support of the investigative technique exemption

The FBI's effort to withhold two types of information under FOIA's exemption for investigative techniques and procedures (5 U.S.C. §552(b)(7)(E)) is meritless.

First, the agency invokes this exemption for investigative techniques and procedures, but its declaration contains only boilerplate assertions of harms that might flow whenever investigative techniques are disclosed and offers no case-specific analysis. *See* Hardy Decl. (Doc. 22-1) at ¶71. As this Court has held, "[i]n order to justify non-disclosure, the [agency] must provide non-conclusory reasons why disclosure of each category of withheld documents would risk circumvention of the law." *Feshbach v. SEC,* 5 F.Supp.2d 774, 787 (N.D. Cal. 1997) (granting summary judgment for Plaintiffs on (b)(7)(E)). Moreover, the FBI provides no factual basis to support the conclusion that the techniques at issue are not "routine and generally known." *Rosenfeld,* 57 F.3d at 815. Indeed, they may well be commonplace. The DIOG makes public a lengthy list of authorized techniques. *See* DIOG, Table of Contents at §18. The FBI has also invoked this exemption for documents described as "Confidential Human Source Reporting Documents" (*see* Hardy Decl. (Doc. 22-1), Exh. H at Bates 24 & 25), suggesting that the technique at issue is the well-known one of using confidential informants.

Second, the FBI invokes this exemption to withhold the identity of FBI units. *See* Hardy Decl. (Doc. 22-1) at ¶72. This Court recently rejected this very argument based on an apparently similar, conclusory declaration by Mr. Hardy. *See Elec. Frontier Found. v. Dep't of Defense, et al.*, 2012 WL 4364532, *7 (N.D. Cal. Sept. 24, 2012).

C. THE COAST GUARD CANNOT REDACT "NON-RESPONSIVE" INFORMATION WITHIN RESPONSIVE DOCUMENTS

The FBI found two responsive documents that originated with the Coast Guard.

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issues of employee relations and human resources." *Milner v. Dep't of Navy,* _U.S. 131 S.Ct 1259, 1271 (2011). *Span* thus relies on an interpretation of Exemption 2 that has been rejected by the Supreme Court in *Milner.*

Plaintiffs do not challenge the (b)(3) or (b)(7)(E) exemptions. But the agency also redacted information as "not responsive to the FOIA request." Hatch Decl. (Doc. 22-2) at ¶8; *see* Bates 7, 8, 12. FOIA requires agencies, "upon any request for records" to "make the records promptly available," 5 U.S.C. §552(a)(3)(A), unless a statutory exemption applies. *See* 5 U.S.C. §§552(b)(1)-(9). The statute expressly states: "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions *which are exempt* under this subsection." *See id.* at §552(b) (emphasis added). There is no authority to delete portions unless they are exempt, and "non-responsive" is not among FOIA's enumerated exemptions.[13]

IV. CONCLUSION

For the foregoing reasons, the Court should deny the FBI's motion for summary judgment. In addition, the Court should grant Plaintiffs' motion for summary adjudication that the search conducted to date is inadequate, or in the alternative, that the FBI should prepare a revised search declaration. The Court should also grant Plaintiffs' motion for summary adjudication that the asserted withholdings are inapplicable. *See Feshbach,* 5 F.Supp.2d at 787 (where agency "failed to present substantial evidence in opposition to" FOIA requester's motion for summary judgment, court granted summary judgment for requester on exemption). In the alternative, that Court should order the FBI to produce a revised *Vaughn* index and supporting affidavit.

[13] The Department of Justice agrees that "[i]f any of the information on a page of a document falls within the subject matter of a FOIA request, then that entire page should be included as within the scope of that request." With respect to longer, multiple-subject documents, "the requester should be fully informed of any 'scoping' determination in all instances and should be given an opportunity to question or disagree with it. In any instance in which a requester disagrees, the document pages involved should be included without question by the agency." U.S. Dept. of Justice, Office of Information Policy, Determining the Scope of a FOIA Request, OIP Guidance: FOIA Update, Vol. XVI, No. 3 (1995), available at http://www.justice.gov/oip/foia_updates/Vol_XVI_3/page3.htm.

Dated: January 18, 2013

Respectfully submitted,

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