Michael T. Risher (CA SBN 191627)
mrisher@aclunc.org
Linda Lye (CA SBN 215584)
llye@aclunc.org
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street, 2nd Floor
San Francisco, California 94111
Telephone: 415-621-2493
Facsimile: 415-255-8437

Attorneys for Plaintiffs
AMERICAN CIVIL LIBERTIES UNION OF
NORTHERN CALIFORNIA and
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,<br><br>Plaintiffs,<br><br>v.<br><br>FEDERAL BUREAU OF INVESTIGATION,<br><br>Defendant. | CASE No.: 12-cv-3728-SI<br><br>**PLAINTIFFS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY ADJUDICATION**<br><br>Hearing Date: March 15, 2012<br>Time: 9:00 a.m.<br>Dept.: Courtroom 10, 19th Floor |

## Table of Contents

## Table of Authorities

**Cases**

**Statutes and Regulations**



**Other Authorities**

## I. INTRODUCTION

The FBI continues to rely on conclusory factual assertions and amorphous grants of purported legal authority.

In arguing that it has provided sufficient factual information to carry its burden, the FBI confuses lengthy with particularized. Its supplemental declaration adds only further boilerplate. Both the original and supplemental declarations contain conclusory assertions virtually identical to declarations rejected in numerous cases.

In explaining why its search did not turn up documents that should exist when the FBI engages in authorized investigative activity, the agency claims it was "merely sharing information" pursuant to its broad authority to provide "support and services" to local law enforcement. But the FBI is only authorized to enforce *federal* law and can provide investigative assistance to local law enforcement only in clearly delineated circumstances – providing unspecified "support and services" is not among them. If the agency were acting within its legitimate mandate to enforce federal laws, it should be able to point to a federal statute it was enforcing. The agency's inability (or refusal) to do this, or to produce or identify any documents that should exist when it engages in *authorized* investigative activity, raise concrete concerns that in collecting and sharing information about Occupy, it exceeded its *legitimate* law enforcement mandate. In precisely these circumstances, "the sharp eye of public scrutiny" is most needed. *See United States Dep't of Justice v. Reporters Comm.,* 489 U.S. 749, 774 (1989).

## II. BACKGROUND

For important constitutional and historical reasons, internal FBI operating procedures require identification and documentation of clear statutory authority before the FBI engages in investigative activity or provides assistance to other agencies. Before these safeguards were in place, the agency, through its "COINTELPRO" program, "target[ed] people who opposed American involvement in the Vietnam War … [and] people seeking improvement of civil rights for Black people." *Hobson v. Wilson*, 737

F.2d 1, 10 (D.C. Cir. 1984).[1] "The lack of standards restricting the scope of this program … apparently led the FBI to investigate and target persons involved in nonviolent political expression, regardless of their involvement in disorders." *Id.*

To prevent these abuses, the agency now operates under strict standards requiring clear predicates before it may act. The agency's Domestic Investigations and Operations Guide ("DIOG"), which standardizes FBI policies and procedures, "stresses the importance of 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." *See* DIOG §1.2.[2] The DIOG goes on to state:

> One of the most important safeguards [in these guidelines] – one that is intended to ensure that FBI employees respect the constitutional rights of Americans – is the threshold requirement that all investigative activities be conducted *for an authorized purpose*. … [T]hat must be an authorized national security, criminal, or foreign intelligence collection purpose. [¶] Simply stating such a purpose, however, is not sufficient to ensure compliance with this requirement. *The authorized purpose must be well-founded and well-documented.* … [T]he Constitution sets limits on what that purpose may be. It may not be solely to monitor the exercise of constitutional rights, such as … free … speech…."

*Id.* §4.1.2 (emphasis added), attached to Supp. Lye Decl., Exh 1. To ensure the agency does not exceed its authority, the DIOG requires meticulous documentation of the authorized purpose of FBI activity. *See* Pltfs' Brf. (Doc. 23) at 4-6.

## III. ARGUMENT

### A. THE FBI HAS FAILED TO PERFORM AN ADEQUATE SEARCH

The FBI offers no new argument or evidence that would alter the conclusion that it failed to meet its burden to show it performed an adequate search. *See* Pltfs' Brf. at 8-14.

#### 1. The Hardy Declarations are still conclusory

Defendant does not dispute that its declaration is *substantially identical* to the declaration rejected in *Rosenfeld v. United States Dep't of Justice*, 2008 WL 3925633 (N.D. Cal. Aug 22, 2008) ("*Rosenfeld 2008*"); *see* Pltfs' Brf. at 9-10, and *significantly less detailed* than the subsequent declaration submitted by the FBI and again rejected in

[1] *Abrogated on other grounds by Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

[2] Unless otherwise noted, excerpts of the DIOG cited in this brief are attached to the Declaration of Linda Lye (Doc. 24), Exh. M.

*Rosenfeld v. United States Dep't of Justice*, 2010 WL 3448517 (N.D. Cal. Sept. 1, 2010) ("*Rosenfeld 2010*"). In *Rosenfeld 2010*, the FBI at least submitted a declaration that listed databases other than the CRS. *See id.* at *6. But Judge Patel found the declaration still lacking because it failed to "provide some basis for the court to evaluate whether its decision to not search additional databases was reasonable." *Id.* at *7. Here, the FBI has failed, in both declarations, to provide *any* information about databases other than the CRS, despite decisions of this Court requiring it to do so. *See* Pltfs. Brf. at 8-10.

The FBI's attempts to address and distinguish *Rosenfeld* fail.

Its supplemental declaration states that if responsive information is located outside the CRS, "it is very likely that the CRS record will educate the RIDS personnel handling the request of the existence of this non-CRS based information …." Supp. Hardy Decl. (Doc. 26-1) at ¶6. This statement is both conclusory and insufficient. It is conclusory because it does not provide even the most basic overview of the types of information stored outside the CRS or explain when or under what circumstances a CRS record will – and will not – point to the existence of non-CRS information. It is insufficient because Mr. Hardy necessarily admits that some records are stored outside the CRS without an indication thereof in CRS. Mr. Hardy's declaration in *Rosenfeld* described a database outside the CRS called the Integrated Intelligence Information Application, which "allows for the collection, collation, analysis and dissemination of intelligence information." *Rosenfeld* Hardy 5th Decl. at ¶77, attached as Lye Decl. (Doc. 24), Exh. N. But the FBI refuses to offer any facts that would support its conclusory assertion that it was reasonable not to look at a database that it uses to collect and disseminate intelligence, even though the FBI admits in this case "that intelligence was shared." Supp. Hardy Decl. at ¶12. By entirely refusing to explain what portion and types of information are stored outside CRS without any triggering indication in CRS, the supplemental declaration fails to "provide some basis for the court to evaluate whether its decision to not search additional databases was reasonable." *Rosenfeld 2010*, 2010 WL 3448517 at *7.

Defendant distinguishes *Rosenfeld* as a case where the Court "harbored" "apparent

'doubts' … about the completeness of the FBI's search in that particular case." FBI Opp. (Doc. 26) at 4 (quoting *Rosenfeld 2010*). But the word "doubts" appears in *Rosenfeld 2010* only in a quotation of another decision articulating general FOIA standards. *See* 2010 WL 3448517 at *7 (quoting *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982)).[3] *Rosenfeld* is not an anomalous case that applies only if the Court harbors doubts about the search; it applies the well-established rule that an agency bears the burden of submitting a non-conclusory declaration – a burden that the FBI has failed to meet here.

**2. The record contains positive indications of the search's inadequacy**

In any event, doubts *are* warranted. Plaintiffs previously identified several categories of documents that the record demonstrates do or should exist, but that Defendant failed to produce or identify. *See* Pltfs' Brf. at 10-14.

*Intelligence products and documentation of intelligence dissemination.* Plaintiffs previously pointed to documents that prove the FBI shared intelligence with other agencies. As a result: (a) the FBI must have had intelligence to share, and (b) the FBI should have documented the sharing of intelligence on a Form FD-999. *See* Pltfs' Brf. at 11-12 (citing DIOG §12.6). Although the FBI has not produced either category of document, it now acknowledges "that intelligence was shared." Supp. Hardy Decl. at ¶12.

To justify the failure to produce the underlying intelligence documents, the FBI appears to contend that the specific type of intelligence documents that were shared does not constitute the type of intelligence documents that it understood Plaintiffs to be requesting. FBI Opp. at 6. The FBI has a "duty to construe a FOIA request liberally." *Nation Magazine v. United States Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). The fact that Plaintiffs – like any FOIA requester – may "misapprehend the FBI's operations", FBI Opp. at 6, underscores the need "to assist [Plaintiffs] in reformulating their request" if necessary. *Ruotolo v. Dep't of Justice*, 53 F.3d 4, 10 (2d Cir. 1995); *see also Truitt v.*

[3] *Rosenfeld 2008* nowhere expressed a threshold doubt; it turned on the FBI's failure "to provide sufficient evidence" about its databases. 2008 WL 3925633 at *12. *Rosenfeld 2010* acknowledged that it might be reasonable not to search every database, but ruled against the FBI because of its failure, again, to provide sufficient information to evaluate reasonableness. *See* 2010 WL 3448517 at *7.

*Dep't of State*, 897 F.2d 540, 544 (D.C. Cir. 1990) ("When, however, an agency becomes reasonably clear as to the materials desired, FOIA's text and legislative history make plain the agency's obligation to bring them forth"); *Stockton E. Water Dist. v. United States*, 2008 WL 5397499, *2 (E.D. Cal. Dec. 19, 2008) (if defendants believed request did not sufficiently describe records sought, they were required to contact plaintiff to clarify what records were sought).[4]

With respect to documentation of the dissemination of these intelligence products, the FBI's own procedures provide for the "***[m]andatory use of the FD-999*** … to document the dissemination of all unclassified or classified (up to Secret level) information to … State, Local, or Tribal Agencies…." DIOG §12.6 (emphasis in original). The FBI states that no FD-999s were found because the FBI was "merely sharing information" with those agencies. Supp. Hardy Decl. (Doc. 26-1) at ¶10. But it provides no explanation of how "sharing" intelligence differs from "disseminating" it. In any event records it produced in response to another FOIA request discuss, in the agency's own words, its "*dissemination* of … [a] bulletin about … Occupy Wall Street." PCJF FOIA 00059 (emphasis added), attached as Lye Decl. (Doc. 24), Exh. O. Thus, the FBI's unelaborated and non-obvious distinction between sharing and disseminating intelligence is contradicted by the record and does nothing to upset the conclusion that either the agency's search was inadequate or it violated its own documentation requirements.

*Documentation of assistance to other agencies.* The FBI has guidelines requiring strict predicates, and documentation of those predicates, before it may act. *See* Pltfs' Brf. at 4-6. In its brief, the FBI interprets 28 U.S.C. §534 as a broad mandate for the FBI to "provid[e] services and support to state and local law enforcement agencies." FBI Opp. at 11. But its own internal operations guide devotes an entire chapter to enumerating the specific circumstances in which the agency may provide assistance to other agencies. *See*

[4] Plaintiffs do not point to the other FOIA request discussed in their opening papers to argue that all records produced in response to that request should also have been produced to Plaintiffs. *Cf.* FBI Opp. at 5:17-21. They discuss the other FOIA request because it resulted in the production of documents that in turn refer to documents that are responsive to this request but were not produced in response to either FOIA request, such as intelligence products. *See* Pltfs' Brf. at 11-12.

DIOG §12. It is authorized to provide investigative assistance to state and local agencies in only four enumerated circumstances. *See* DIOG §12.3.2.3. The DIOG lays out explicit approval, notice, and documentation requirements (on an FD-999) when the FBI provides assistance to state and local entities. *See* DIOG §12.3.2.3.1-12.3.2.3.3.

The FBI states that it "did not" and "would not expect to find" any Form FD-999 because it was engaged in the "mere sharing of information." FBI Opp. at 6. "Mere sharing of information" is not one of the four enumerated circumstances in which the FBI is authorized to provide assistance to local agencies. In any event, this characterization of its conduct is in significant tension with the description of its conduct in arguing for the applicability of Exemption (b)(7) for law enforcement records. In invoking Exemption (b)(7), the FBI strenuously contends it was *not* engaged in "generalized monitoring and information-gathering," but investigating crimes such as "rioting" or potentially even terrorism. FBI Opp. at 11:13, 13:6, 13:23. The FBI cannot have it both ways. Either it was engaged in *bona fide* investigative activity authorized under the DIOG and should have generated (and produced) documents such as an FD-999, or it exceeded its authorized mandate and thus lacked a *legitimate* law enforcement purpose that would justify withholding information. It must explain this discrepancy.

**B. THE FBI IS UNLAWFULY WITHHOLDING INFORMATION**

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

The FBI has failed to provide the Court with sufficient facts to justify withholding Bates 38-40 on "national security" grounds. *See* Pltfs' Brf. at 14-16. The FBI ignores the fundamental teaching of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), and binding Ninth Circuit cases such as *Wiener v. FBI*, 943 F.2d 972 (9th Cir. 1991). FOIA litigation fits poorly into our adversarial system because "only the party opposing disclosure will have access to all the facts." *Id.* at 977; *see also Vaughn*, 484 F.2d at 824. To address this imbalance, the government must "afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *Wiener*, 943 F.2d at 977 (quoting *King v. Dep't of Justice*, 830 F.2d 210,

218 (D.C. Cir. 1987)). This standard applies even in the context of the national security exemption, where courts still require "specificity." *Id.* at 979. The original declaration submitted by the FBI provides no meaningful opportunity to contest the agency's (b)(1) claim, and its supplemental declaration provides no additional facts.

Emphasizing that Mr. Hardy devotes *six* pages of the declaration to this exemption, *see* FBI Opp. at 8, the FBI confuses length with "detail and specificity." *Campbell v. United States*, 164 F.3d 20, 30 (D.C. Cir. 1998). *Bay Area Lawyers Alliance v. Dep't of State*, 818 F.Supp. 1291 (N.D. Cal. 1992), rejected a declaration that provided a "6 page description of the *types* of information subject to exemption, and the *types* of harm that can result from disclosure"; it was "precisely the approach rejected by the 9th Circuit in *Wiener* – categorical listing of harms and simply 'linking' a document to a category." *Id.* at 1298 (emphasis in original). The FBI does the same here.

Although the FBI contends that it "delves into detail regarding the specific information withheld," FBI Opp. at 9, its description hovers at the same level of generality as rejected in *Wiener*. *Compare* Hardy Decl. at ¶41 ("ACLU-NC-22 and 23 … pertains to a classified intelligence source"), *with Wiener*, 943 F.2d at 980 & n.12 (one of FBI's categories of withheld information was "detailed information pertaining to or provided by an intelligence source").[5] There is nothing approaching the level of specificity found adequate in *Bay Area Lawyers Alliance*, where the agency described the document as "examin[ing] the technical and military needs for the United States to conduct high yield (greater than 150 kilotons) underground nuclear tests." *Bay Area Lawyers Alliance*, 818 F.Supp. at 1297 & n.1. The FBI's declarations here provide only "categories of facts," *Wiener*, 943 F.2d at 981, but no information about the document that would allow Plaintiffs to contest or the Court to assess whether the document even falls into the

[5] *Compare also* Hardy Decl. at ¶34 & 35 (information in declaration "is very specific in nature" and "could reasonably be expected to cause serious damage to the national security" because, e.g., "disclosure would allow hostile entities to discover the current intelligence gathering methods used"), *with King v. United States Dep't of Justice*, 830 F.2d 210, 223 n. 99 ("observation that the information sought 'is specific' and 'therefore[] its disclosure would automatically reveal to a hostile intelligence analysis United States intelligence capabilities in a particular area'" held by court to be unacceptably "categorical in tenor").

category, let alone whether disclosure would result in the stated harms.[6]

In addition, as evidenced by its use of the disjunctive "or" rather than the conjunctive "and" in listing potential harms,[7] the FBI offers only a boilerplate list, not even bothering to "tailor[] its response to [the] specific … document[]." *Campbell*, 164 F.3d at 30-31 (rejecting FBI's (b)(1) claim); *see also Wiener*, 943 F.2d at 982 ("explanations of alternative harms that might result" inadequate).

Nor can the FBI rely on its conclusory assertion that further specificity would jeopardize national security. *Cf.* FBI Opp. at 9; *see Campbell*, 164 F.3d at 31 (rejecting (b)(1) claim where declaration stated that additional detail would "risk[] the disclosure of the very information that the FBI was attempting to protect").[8]

**2. (b)(7): The FBI lacks a legitimate law enforcement objective**

The FBI contends that it satisfies the threshold (b)(7) requirement for establishing a legitimate law enforcement objective, but it has completely failed to meet its burden to explain the particular legitimate law-enforcement purpose served by collecting information about Occupy. Its most recent declaration only highlights this failure.

In its initial declaration, the agency claimed that its law enforcement objective was "provid[ing] support to state and local law enforcement agencies regarding the 'Occupy' movements across the country." Hardy Decl. at ¶52. Its supplemental declaration now clarifies that its provision of "support" to state and local agencies derives from "its general

---

[6] The declarations are merely a verbose, boilerplate version of the coding system rejected in *King*. Although the government has provided a declaration rather than coding, it "has nevertheless withheld [a] whole document[] … on the theory that [it] contain[s] information capable of identifying an intelligence source … leaving [Plaintiffs and the Court] no contextual information on [the document's] general contents." 830 F.2d at 227.

[7] *See* Hardy Decl. at ¶34 (disclosure "would reveal the actual intelligence activities and methods used …; identify a target of a foreign counterintelligence investigation; *or* disclose the intelligence gathering capabilities …."), ¶42 ("disclosure of sources' identities could jeopardize the emotional and physical well-being of the source or the sources' family or associates *and/or* subject them to public ridicule and ostracism") (emphasis added).

[8] Defendant dismisses Plaintiffs' distinction of *Council on Am.-Islamic Relations v. FBI*, 749 F.Supp.2d 1104 (S.D. Cal. 2010), as a case in which the Court reviewed the materials *in camera*. This is significant because the court's acceptance of the FBI's (b)(1) claim did not rest solely on its conclusory declaration. Plaintiffs agree with the FBI that the proper course is not *in camera* review. *Cf.* FBI Opp. at 9. A more detailed declaration should be required first. *See Wiener*, 943 F.2d at 979; *Campbell*, 164 F.3d at 31.

authority to collect records in 28 U.S.C. § 534." Supp. Hardy Decl. at ¶15. In addition, it now asserts two *additional* law enforcement objectives not previously raised: "the FBI's general investigative authority in 28 U.S.C. § 533" and the FBI's "lead role in investigating terrorism and in the collection of terrorism threat information within the United States by 28 C.F.R. § 0.85." FBI Opp. at 11; Supp. Hardy Decl. at ¶15.

First, the FBI has failed "to 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). The FBI tosses out three broad grants of purported authority, but never clarifies which document was collected for what purpose.

Second, the FBI has still failed to "explain with sufficient specificity the 'law enforcement purposes,'" underlying its investigation. *Wiener*, 943 F.2d at 985. Even under the deferential "rational nexus" standard, an agency must identify both a *grant* of investigative authority and the *factual predicate* justifying the investigation. The Ninth Circuit in *Wiener* found the FBI's declaration insufficient even though it explained that John Lennon, the subject of the request, "was under investigation for possible violations of the Civil Obedience Act, 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." *Id.* at 985-86. Those acts, the Court stated, "are very broad criminal statutes, prohibiting a wide variety of conduct. … Without providing Wiener with further details of the kinds of criminal activity of which John Lennon was allegedly suspected, Wiener cannot effectively argue that the claimed law enforcement purpose was in fact a pretext." *Id.* at 986. Similarly, in *Quiñon v. FBI*, 86 F.3d 1222 (D.C. Cir. 1996), the FBI invoked (b)(7), claiming an obstruction of justice investigation. *Id.* at 1229. But the Court found that the FBI had failed to establish a legitimate basis for the investigation because the declaration "fail[ed] to supply facts that would justify an obstruction of justice investigation," instead "simply allud[ing] to 'certain events,' which they fail to describe or characterize, that allegedly supplied the basis for one." *Id.*

The FBI has provided even less specificity than in *Wiener* or *Quiñon*. Unlike those

cases, the FBI here has not even identified any specific criminal statute that it was investigating, instead referencing only general grants of "investigative authority," "authority to collect records," or to "investigat[e] terrorism." FBI Opp. at 11. These are "very broad" statutes – far broader than the Anti-Riot Act and Civil Obedience Act. *Wiener,* 943 F.2d at 986. As in *Weiner*, "[c]itation to these statutes do little to inform [Plaintiffs] of the claimed law enforcement purpose underlying the investigation." *Id.* Nor do the agency's declarations even attempt to supply facts to support its conduct pursuant to the broad grants of authority invoked, thus providing even less information than in *Quiñon,* where the agency at least alluded to "certain events." 86 F.3d at 1229. The FBI offers *no* information to support its apparent assertion that Occupy-related records were compiled to investigate terrorism. FBI Opp. at 11; Supp. Hardy Decl. at ¶15.

Third, the agency's lack of specificity and indeed inconsistency about the bases for and nature of its conduct in connection with Occupy heightens concerns that it was engaged in the illegitimate purpose of "generalized monitoring and information-gathering." *Rosenfeld v. United States Dep't Of Justice,* 57 F.3d 803, 809 (1995). In compiling records responsive to this request, was the FBI, as it now claims in connection with (b)(7), exercising its "general investigative authority" and "lead role in investigating terrorism"? *See* FBI Opp. at 11. If so, why did the agency not raise these legitimate law enforcement objectives until reply? *See Quiñon,* 86 F.3d at 1228 ("asserted law enforcement duty cannot be pretextual") (internal quotation marks, citation omitted).

Alternatively, was the FBI engaged in "the mere sharing of information"? *See* FBI Opp. at 6. But in order to "share" information about Occupy, the agency would have to first monitor and gather information about it. "[G]eneralized monitoring and information-gathering" are objectives "not related to the Bureau's law enforcement duties." *Rosenfeld,* 57 F.3d at 809 (internal quotation marks, citation omitted).

Defendant contends that a document quoted by Plaintiffs somehow justifies its monitoring of Occupy, but the full document confirms Plaintiffs' concerns.

> This movement [known as Occupy Wall Street] has been known to be peaceful *but demonstrations across the United States show that other groups have joined in*

> *such as Day of Rage and the October2011 Movement*.

FBI Opp. at 13 (citing Lye Decl., Exh. O, at PCJF FOIA 0090) (emphasis in FBI Opp.). The document goes on to describe "[t]he October2011 Movement [as] planning an occupation and *nonviolent* resistance action in Washington, DC" and describes in detail the ideological views of the groups:

> The October2011 Movement *protests corporatism and militarism* … US Day of Rage *is calling for free and fair elections*, not elections manipulated by the economic elite … The October2011 Movement and US Day of Rage know that abuses of the people and planet will end when we take unified and persistent action. We stand in solidarity with each other and with the growing *nonviolent* movements around the nation … Occupy Richmond is still camped *peacefully* at Kanawa Plaza, across from the Federal Reserve.

Lye Decl., Exh. O, at PCJF FOIA at 0090-91 (emphasis added).

This document shows that the FBI was compiling information about the ideological views of groups it knew to be peaceful and non-violent, and raises the troubling concern that the agency's invocation of its purported authority to provide unspecified "services and support" to local law enforcement, FBI Opp. at 11, was a "mere[] pretext to pursue routine monitoring." *Rosenfeld,* 57 F.3d at 810.[9]

Fourth, and relatedly, this Court should not accept the FBI's invitation to extend (b)(7) to include records compiled pursuant to the FBI's asserted amorphous authority to provide "services and support" to local law enforcement. The FBI only has authority to enforce *federal* laws; when acting outside this authority, it exceeds its mandate and is thus not engaged in a *legitimate* law enforcement objective.

The FBI's law enforcement authority is limited to what Congress has specifically granted to it. *See* 5 Op. O.L.C. 45, 47-48, 1981 WL 30874 (1981), *abrogated on other grounds by* 28 U.S.C. §540; *see also* 28 U.S.C. § 533 *et seq.* and 28 C.F.R. §0.85 (grant of authority and implementing regulation). Congress has not granted any general authority to investigate or enforce state or local laws. 2 Op. O.L.C. 47, 47, 1978 WL 15263 (1978)

[9] Defendant alludes to disruptions and transit delays in an attempt to justify its monitoring of Occupy, FBI Opp. at 13, but its declaration offers no facts – citing only broad purported legal authority – in describing the (b)(7) threshold. *See* Hardy Decl. at ¶52; Supp. Hardy Decl. at ¶15; *Quinon,* 86 F.3d at 1229 (FBI "fail[ed] to supply facts that would justify an obstruction of justice investigation").

("the FBI has no Federal authority to take action with respect to violations of State law"). Nothing in the statutory or regulatory scheme grants the agency any general authority to provide services and support to local law enforcement. To the contrary, federal law generally *prohibits* the FBI from assisting local authorities in investigations that do not involve violations of federal law or some other crime that the FBI is specifically authorized to enforce. *See* 5 Op. O.L.C. at 47-48. If the FBI has created a document for a legitimate law-enforcement purpose, it should therefore be able to point to the federal statute that it was investigating, or some specific grant of authority for it to investigate or enforce a state or local statute. But the FBI has failed to do so here, invoking instead its indeterminate authority to provide "support and services."

The Ninth Circuit correctly described the rational nexus that an agency must demonstrate as one "between enforcement of a *federal* law and the document for which an exemption is claimed." *Church of Scientology v. United States Dep't of Army*, 611 F.2d 738, 748 (9th Cir. 1979) (emphasis added). Because the FBI is only authorized to enforce federal law, records that it creates should necessarily relate to the enforcement of federal, not state or local, law – unless it has exceeded its mandate. While Defendant notes that this statement is dictum, it has not identified any Ninth Circuit cases, nor are Plaintiffs aware of any, that extend the (b)(7) exemption to encompass law enforcement objectives other than an agency's enforcement of federal laws.[10] Defendant cites *Rojem v. United States Dep't of Justice*, 775 F.Supp. 6 (D.D.C. 1991), which applied (b)(7) to records compiled when the FBI offered expert technical assistance to local law enforcement by providing a psychological profile of a serial killer, assistance that is authorized pursuant to 28 C.F.R. §0.85(g). *Id.* at 10. This regulation forms the basis for one of the four circumstances under which the FBI may provide investigative assistance to local law

[10] Defendant emphasizes that the FBI need only establish a rational "nexus." FBI Opp. at 11. Plaintiffs agree that is the relevant standard, but contend that the nexus must be with enforcement of a *federal* law. *See* Pltfs' Brf. at 17. *Wilkinson v. FBI*, 633 F.Supp. 336, 343 (C.D. Cal. 1986), involved records compiled in the course of the agency's investigation of potential violations of *federal* law, *viz.*, 18 U.S.C. §§2383-85 and 50 U.S.C. §§781-90. *Binion v. United States Dep't of Justice*, 695 F.2d 1189, 1190 (9th Cir. 1983), involved the agency's investigation of applicants for *federal* Presidential pardons.

enforcement. *See* DIOG §12.3.2.3. Three of these involve enforcement of *federal* statutes.[11] The fourth permits the FBI in "limited circumstances" to provide "expert assistance" pursuant to 42 U.S.C. §3771 and 28 C.F.R. §0.85(g). *Id.* But to provide any of these four forms of assistance to local agencies, the FBI must comply with detailed approval, notification, and documentation requirements (Form FD-999). *See* DIOG §12.3.2.3.1-12.3.2.3.3. This careful delineation of circumstances under which the FBI may assist local agencies and these meticulous approval and documentation requirements ensure the agency only acts when it has an authorized purpose. *See* DIOG §4.1.2 ("One of the most important safeguards [in these guidelines] – one that is intended to ensure that FBI employees respect the constitutional rights of Americans – is the threshold requirement that all investigative activities be conducted for an authorized purpose.") (attached to Supp. Lye Decl., Exh. 1).

The FBI does *not* here contend that it assisted local law enforcement under one of the four circumstances delineated in the DIOG. If it had, it should have generated a form FD-999, which the agency did not find here. *See* Supp. Hardy Decl. at ¶10. Instead, the FBI states it was exercising some amorphous authority to "shar[e] … information", FBI Opp. at 6, but has not explained the authorized basis for doing so under its own internal guidelines. Thus, *Rojem*, an out of circuit decision, stands at most for the proposition that the agency has a legitimate law enforcement objective when it has a clearly authorized basis for acting (because for example it is providing investigative assistance to local law enforcement in one of the four permissible situations outlined by the DIOG). It does not stand for the proposition that (b)(7) should extend so far as to encompass any and all conduct undertaken by the agency pursuant to its inchoate authority to provide "services and support" to local law enforcement. The danger of the agency overstepping its mandate in such circumstances is too great to warrant a shield from public scrutiny.

[11] *See* DIOG. §12.3.2.3 ("investigation of crimes under state or local law *when authorized by federal law* (e.g., …serial killings)"; "investigation of matters that may *involve federal crimes* or threats to national security," "when such assistance is requested by the government of the state *pursuant to 42 U.S.C. §10501*" and the assistance is approved by the Attorney General) (emphasis added).

Defendant emphasizes "the importance of confidential information-sharing between federal, state, and local law enforcement officials." FBI Opp. at 12. But declining to extend (b)(7) would not undermine authorized cooperation; it would merely ensure transparency where, as here, the agency has failed to articulate a clear legal basis for providing assistance to local law enforcement. Allowing the agency to invoke the (b)(7) exemption for the monitoring of political protests in the name of providing amorphous "services and support" to local law enforcement would cast a cloud of secrecy where the need for sunshine is greatest.

**3. (b)(7)(A): File numbers can be reasonably segregated**

The FBI has clarified that it withheld control file numbers and entire pages pursuant to (b)(7). *See* FBI Opp. at 14. Its declarations remain conclusory.

The supplemental declaration contains the bare bones statement that the documents "pertain to ongoing criminal or national security investigations" and thus "could reasonably be expected to interfere with these ongoing enforcement proceedings", *see* Supp. Hardy Decl. at ¶16, but fails to explain "*how* releasing each of the withheld documents would interfere with the government's ongoing … investigation." *Lion Raisins v. United States Dep't of Agric.*, 354 F.3d 1072, 1084 (9th Cir. 2004) (rejecting applicability of (b)(7)(A)) (emphasis added); *see also Lawyers' Comm. for Civil Rights of San Francisco Bay Area v. United States Dep't of Treasury*, 2008 WL 4482855 *15, *17 (N.D. Cal. Sept. 30, 2008) (rejecting applicability of (b)(7)(A) where declaration stated only that disclosure could result in harms but "[did] not explain *how*… [it] is likely to jeopardize … pending proceedings") (emphasis in original).

Plaintiffs do not object to redacting control file numbers, but the conclusory statement that "it is not possible to segregate portions of these pages" is insufficient. Supp. Hardy Decl. at ¶16. The agency must "*explain[]* why segregation is not possible in this case." *See Lawyers' Committee*, 2008 WL 4482855 at * 14 (statement that "'[agency] determined that there was no reasonably segregable information that could be released'" inadequate to justify withholding entire documents). No such explanation would be

possible here because only control file numbers can be withheld.

**4. (b)(7)(C): The public has a strong interest in learning about the FBI's surveillance of a protest movement and privacy interests can be adequately addressed by redactions rather than wholesale withholding**

Privacy interests do not outweigh in *this case* the public interest in shedding light on the FBI's surveillance of a political movement it described as peaceful, and can be addressed by selective redactions rather than wholesale withholdings.

*Third parties.* The FBI references "the legions of cases" withholding third party information. FBI Opp. at 15. There is no *per se* rule that this exemption applies whenever third parties appear in FBI files. Instead, as the Ninth Circuit held in *Wiener*, "[t]he privacy interests of third persons whose names appear in FBI files, the public interest in disclosure, and a proper balancing of the two, will vary depending upon the content of the information and the nature of the attending circumstances." 943 F.2d at 985. *Wiener* thus rejected the FBI's categorical argument that privacy interests warranted the withholding of entire documents or lengthy passages in which third parties were identified. *Id.* at 984-85.

There are concrete, non-speculative reasons in this case to believe the FBI abused its law enforcement mandate. *Cf.* FBI Opp. at 17 (citing cases stating that speculation about public benefits do not outweigh privacy interests). First, the FBI document quoted above, *see supra* at 11, demonstrates that the FBI was cataloguing information about the ideological views of groups it knew to be peaceful and nonviolent. *See* DIOG §4.1.2 (investigation may "not be solely to monitor the exercise of constitutional rights") (attached to Supp. Lye Decl., Exh. 1). Second, its shifting and somewhat inconsistent characterization of the basis for its conduct (terrorism investigation, mere sharing of information) and its inability to point to an authorized basis for providing investigative assistance to state and local law enforcement under its own internal guidelines, *see supra* at 11-14, raise further concrete concerns that the agency exceeded its mandate.

Plaintiffs do not dispute the existence of privacy interests. But those privacy interests are outweighed in this case. As in *Rosenfeld*, there is a "cognizable public interest" within the meaning of "FOIA[]…to disclose publicly records that document

whether the FBI abused its law enforcement mandate by overzealously investigating a political protest movement to which some members of the government may have objected." 57 F.3d at 811-12. *Rosenfeld* explained the public benefit from "disclosing the names of investigation subjects": it "would make it possible to compare the FBI's investigation to a roster of the FSM's leadership." *Id.* at 812. The FBI seeks to distinguish this case as one that "would have no similar benefit." FBI Opp. at 18. But learning whether the FBI interviewed and sought or obtained information about Occupy activists would shed light, exactly as in *Rosenfeld,* on the extent to which the FBI targeted its investigative attention on a political protest movement. Nor can *Rosenfeld* be characterized as turning on the "age of the documents." *Compare* FBI Opp. at 17, with *Rosenfeld*, 57 F.3d at 812 (FBI's argument "that the district court erred by concluding that 'the passage of time' diminished investigation subjects' interest in keeping secret the events … incorrectly characterizes the district court's" holding).[12]

[12] Defendants dismiss Plaintiffs' argument that it should not be able to withhold informant information pursuant to the general balancing test of (b)(7)(C) without satisfying the more exacting standards of the specific (b)(7)(D) exemption for confidential informants. *See* FBI Opp. at 14-15. This argument rests on the well-established principle that "[h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Fourco Glass Co. v. Tarnsmirra Products Corp.*, 353 U.S. 222, 228 (1957) (internal quotation marks, citation omitted). In any event, Defendants' cases extending (b)(7)(C) to third parties (informants and those merely mentioned) are distinguishable because of the unique balance of interests *in this case* where there are concrete reasons to believe the FBI abused its mandate. In *Schiffer v. FBI,* 78 F.3d 1405 (9th Cir. 1996), there was no countervailing public interest; the plaintiff "admitted that his interest [in the records] was personal in nature, not public." *Id.* at 1410. In *KTVY-TV v. United States,* 919 F.2d 1465 (10th Cir. 1990), plaintiff sought the identity of third-party interviews in records compiled after fatal shootings by a postal employee. The court weighed the balance in favor of non-disclosure because, unlike this case, there was no basis to think that the information would shed on government misconduct. *Id.* at 1470. *Manna v. United States Dep't of Justice,* 51 F.3d 1158 (3d Cir. 1995), was a case with a significantly different balance as the FOIA requester's concerns about government misconduct were "unfounded" and he held a high-level position in a "particularly influential and violent La Cosa Nostra family" seeking information about witnesses involved in his criminal investigation. *Id.* at 1166. *Gabel v. IRS,* 134 F.3d 377 (9th Cir. 1998), is an unpublished pre-2007 disposition that may not be cited to courts of this circuit. *See* 9TH CIR. R. 36-3(c). In *Neely v. FBI,* 208 F.3d 461 (4th Cir. 2000), there was, unlike here, "no FOIA-cognizable public interest" in the information. *Id.* at 464. Although *Branch v. FBI,* 658 F. Supp. 204 (D.D.C. 1987), declined to find the public interest in third party information in FBI files outweighed privacy interests, this out of circuit district court was not bound by *Rosenfeld*'s recognition that there is a "cognizable public interest" under FOIA in shedding light on "whether the FBI abused its law enforcement mandate." 57 F.3d at 811.

In any event, to the extent privacy interests outweigh the public interest in disclosure, they can be safeguarded by adhering to FOIA's mandate of providing reasonably segregable information. "[I]f the government was merely concerned with protecting the privacy rights of the [third parties,] it could have simply redacted their names and other identifying information. It did not; instead, it redacted the entire discussion of each incident." *Gordon v. FBI*, 390 F.Supp.2d 897, 901 (2004). In *Lahr v. NTSB*, 569 F.3d 964 (9th Cir. 2009), cited by the FBI, the Ninth Circuit reasoned that the government could withhold the names of witnesses and agents in part because the plaintiff "already possesses the substance of the eyewitnesses' reports and the FBI agents' thoughts as they are expressed in the released memoranda and emails." *Id.* at 979. The FBI invokes a "presumption" that it has complied with its obligation to provide reasonably segregable information. *See* FBI Opp. at 18. But it offers the identical boilerplate restatements of the legal standard that courts have found to "fall short of the specificity required … to properly determine whether the non-exempt information is, in fact, not reasonably segregable." *Branch v. FBI*, 658 F.Supp. 204, 210 (D.D.C. 1987) (FBI affidavit stated "[e]very effort was made to provide plaintiff with all reasonably segregable non-exempt portions of the material requested").[13]

*State and local enforcement.* In *Lissner v. United States Customs Serv.*, 241 F.3d 1220 (9th Cir. 2001), the Ninth Circuit declined to apply (b)(7)(C) to local law enforcement officers. The Court acknowledged that public employees "do not waive all privacy interests," but also stated that their "privacy interests" were "not strong" as they were "public law enforcement officers." *Id.* at 1223. In that case "the officers' identities [had] already been released by [the agency]"; at issue was whether *further* identifying information should also be released. *Id.* at 1224. The court held a "general physical description of the officers" could be released because it "implicate[d] no personal privacy interests" and, exactly as here, the agency "has made absolutely no showing" that

[13] *Compare* Hardy Decl. ¶23 ("[e]very effort was made to provide plaintiffs … with all reasonably segregable portions of releasable material"). That it bothered to release in part *some* documents is irrelevant, *cf.* FBI Opp. at 19, and offers no information as to the basis for its conclusion that documents it withheld in full were not reasonably segregable.

disclosure would subject officers "to danger, harassment, or embarrassment." *Id.*[14]

**5. (b)(7)(D): The FBI offers no facts about assurances of confidentiality**

The FBI's supplemental declaration does not cure the deficiencies of the original. *See* Pltfs' Brf. at 23-24. Mr. Hardy states that some informants were given express promises of confidentiality, which "is evident from the face of the documents, which reflect that they contain information from a confidential human source." Supp. Hardy Decl. at ¶17. This is equivalent to the FBI's "bald assurance" rejected in *Billington v. United States Dep't of Justice,* 233 F.3d 581, 584 (D.C. Cir. 2000) (declaration stated: "this information was received with the explicit understanding that it would be held in the strictest confidence. It is obvious from the released information that these sources warrant confidentiality"). Whether the declaration describes the express promise as "evident" or "obvious," the problem is that it "may be obvious [or evident] to the affiant, but it is not obvious" or evident to Plaintiffs or the Court. *Id.* As to implied confidentiality, Mr. Hardy now states: "[b]ased on the contents of the documents, it was appropriate for the FBI to infer that, given the seriousness of the potential crime and the position of the sources, the information was provided with the expectation of confidentiality." Supp. Hardy Decl. at ¶17. But the FBI must provide some information about the content of those documents or the nature of the supposedly serious crime to justify the inference of confidentiality. This is even less information than in the inadequate declaration in *Quiñon*. *See* 86 F.3d at 1232 (investigation "related to the 'notoriously violent' crime of drug trafficking"). As to segregability, the agency provides only conclusory assertions.

**6. (b)(7)(E): The FBI provides no facts to support the investigative technique exemption**

Defendant claims it provided "a great amount of detail" about the harm that could occur if investigative techniques are disclosed. *See* FBI Opp. at 19-20; Hardy Decl. at

[14] Defendant's citation to out of circuit cases withholding identifying information of state and local enforcement officers is neither binding nor persuasive. The purported privacy interest is that of *local* law enforcement officers. But under California's parallel to FOIA, the California Supreme Court has rejected application of the privacy exception to justify withholding peace officer records in the absence of *evidence* of a threat from disclosure. *See Comm'n on Peace Officer Standards and Training v. Superior Court,* 42 Cal.4th 278, 302 (2007).

¶71. But it confuses length with specificity. The paragraph quoted in its brief contains a litany of generic harms that might flow from disclosure of law enforcement techniques ("enable subjects to circumvent"). *Id.* The agency is almost candid about the boilerplate nature of its declaration: it does not even state that harms "would" flow, merely that they "could." *Id.* The supplemental declaration now acknowledges that "the techniques may be known by the public in a general sense," Supp. Hardy Decl. at ¶18, *but see Rosenfeld,* 57 F.3d at 815 (agency must provide factual basis to support conclusion techniques are not "routine and generally known"), but then offers the circular statement that revealing the techniques, targets "and/or" nature of the information obtained "would effectively reveal specifics of how, and in what settings, the techniques are employed." Supp. Hardy Decl. at ¶18. In other words, he states that revealing the techniques would reveal the techniques. But the questions are whether the techniques are generally known (apparently so) and "why disclosure … 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)). The declaration offers no answer to the latter. Nor does the FBI even attempt to address this Court's rejection of its claim that (b)(7)(E) protects the identity of FBI units in *Elec. Frontier Found v. Dep't of Defense,* 2012 WL 4364532, *7 (N.D. Cal. Sept. 24, 2012).

**7. The FBI cannot redact non-responsive information**

The FBI muddles the key distinction between withholding non-responsive *documents* (obviously, the agency has no duty to produce non-responsive documents) and redacting non-responsive *information* from undisputedly responsive documents, which is what occurred here. The Ninth Circuit has long held that FOIA's "policy of broad disclosures" means that "[w]hen a request is made, an agency may withhold a document, *or portions thereof, only if* the information contained in the document falls within one of nine statutory exemptions to the disclosure requirement contained in § 552(b)." *Church of Scientology v. Dep't of Army,* 611 F.2d 738, 742 (9th Cir. 1979) (emphasis added). Thus, the statute authorizes withholding *only* of those portions of responsive documents covered by one of the statutory exemptions; there is no "non-responsive" exemption.

The reasoning in the only circuit decision to address the issue supports Plaintiffs.

In *Dettmann v. U.S. Dept. of Justice*, 802 F.2d 1472 (D.C. Cir. 1986), the plaintiff, who requested "all documents" containing references to her, argued that the language of the request required the FBI "to disclose the entire document(s)" in which responsive information was found. *Id*. at 1475. The court "acknowledge[ed] the force of [this] argument," and rejected "the Government's parsimonious reading" of the request that led it to disclose only the specific portions of records pertaining to plaintiff. *Id*. at 1475, 1476. But it found that she had not administratively exhausted the issue. *See id*. at 1476-77. One judge dissented on the procedural issue, but agreed that the redactions were improper. *See id*. at 1478 (Gesell, D.J., dissenting). Like the request in *Dettmann*, this request seeks complete "documents." *See* Lye Decl., Exh. G at 2 (requesting "records," defined to include, *inter alia*, "documents"). Under the *Dettmann* majority and dissent, the wording of this request precludes the FBI from redacting parts of responsive documents as "non-responsive," because the request was for the "documents" themselves.

The FBI's cases are not persuasive. *California ex. Rel. Brown v. Nat'l Highway and Traffic Safety Admin*., 2007 WL 1342514 (N.D. Cal. 2007), conflates the (permissible) non-production of irrelevant documents with the (impermissible) redaction of non-responsive information from documents the government produced. In *Wilson v. U.S. DOT*, 730 F.Supp.2d 140 (D.D.C. 2010), the *pro se* plaintiff argued that the deleted information *was* responsive; the court disagreed on factual grounds. *Id*. at 143, 156. The court's statement about non-responsive information is dicta.[15]

## IV. CONCLUSION

For the foregoing reasons, the Court should deny the FBI's motion for summary judgment and grant the relief requested in Plaintiffs' opening and opposition papers.

[15] The Justice Department issued guidance in 2006 that allows for "scoping" within a single page of a document, but it expressly prohibits the government from making a unilateral decision to withhold parts of documents as non-responsive without giving the requestor an opportunity to request and obtain the entire document. *See* 2006 FOIA Post at 4 (some punctuation omitted) (citing 1995 FOIA Update Vol. XVI, No. 3), available at http://www.justice.gov/oip/foiapost/2006foiapost3.htm. It then cites the 1995 guidance previously cited by Plaintiffs that requires the agency to consult with the requester on scoping and provide requested materials "without question by the agency." 1995 FOIA Update Vol. XVI, No. 3, at 5; *see* Pltfs' Brf. at 25 n. 13.

Dated: March 1, 2013

Respectfully submitted,

By: /s/
Linda Lye

Michael T. Risher
Linda Lye
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA

Attorneys for Plaintiffs