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,

Plaintiffs,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

CASE No.: 12-cv-3728-SI

PLAINTIFFS' REPLY

Hearing Date: December 20, 2013
Time: 9:00 a.m.
Location: Courtroom 10, 19th Floor
Judge: Hon. Susan Illston

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I. INTRODUCTION

This Court previously held that the FBI failed to meet its burden as to each exemption invoked. Although the FBI could easily have supplied the missing information that led this Court to deny the agency's prior summary judgment motion, the agency has chosen not to do so. Instead, it complains that it should not be required to provide additional facts or that Plaintiffs have not definitively proven that the FBI engaged in wrongdoing. In so doing, the agency seeks to re-litigate legal issues on which this Court has already ruled and to shift the burden of proof to Plaintiffs. The law of this case and well-established FOIA caselaw foreclose both arguments. After submitting four public declarations, the agency has still failed to meet its burden. The Court should grant summary judgment for Plaintiffs and order disclosure.

II. ARGUMENT

A. The FBI Has Not Established A Legitimate Law Enforcement Objective

The FBI has failed to establish a threshold rational nexus to a legitimate law enforcement objective. The FBI's reliance on its "general investigative authority" is simply too conclusory and its authority to collect counter-terrorism information constitutes precisely the kind of "generalized monitoring and information-gathering" the Ninth Circuit has found not to establish the Exemption 7 threshold. *Rosenfeld v. United States Dep't of Justice*, 57 F.3d 803, 809 (9th Cir. 1995) (internal quotation marks, citation omitted); *see* Pls.' Br. (Doc. 43) at 12-17. While the FBI "need only establish a 'rational nexus,'" *Rosenfeld*, 57 F.3d at 808, the "court's 'deferential' standard of review is not, however, 'vacuous.'" *Campbell v. United States Dep't of Justice*, 164 F.3d 20, 32 (D.C. Cir. 1998). "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).

The FBI submitted two declarations in support of its prior summary judgment motion. This Court found those declarations "insufficient to establish a nexus. The FBI refers only vaguely to 'crimes' and 'federal laws,' but does not cite the specific laws that it was enforcing. The Ninth Circuit is clear that generalized investigatory power is not enough, and the

government must cite the specific law it is enforcing and the specific criminal activity suspected." Order (Doc. 32) at 10. The Court went on to observe that in *Wiener v. FBI*, 943 F.2d 972 (9th Cir. 1991), the Ninth Circuit found "that the FBI had failed to establish a rational nexus between enforcement of a federal law and the document when it explained it was investigating violations of the Civil Disobedience Act and the Anti-Riot Act because these 'are very broad criminal statutes.'" Order at 10 (quoting *Wiener*, 943 F.2d at 985). The Court found that "[t]he FBI in the instant case has not even done this much." Order at 10.

The FBI has now submitted two additional public declarations, the Third and Fourth Hardy Declarations, yet neither cures the defects previously identified by the Court.

1. The FBI's invocation of its general investigative authority still lacks the necessary legal and factual specificity

Continuing to rely on its "general investigative authority," Third Hardy Decl. (Doc. 34-1) ¶ 12, the FBI still does not "cite the specific law it is enforcing and the specific criminal activity suspected." Order at 10. Oddly, the FBI contends that it has provided the requisite statutory authority by pointing to 28 U.S.C. § 533 and § 534. FBI Opp. (Doc. 47) at 6:8-15.[1] These are the identical statutes cited in its prior declaration, which this Court found inadequate. *See* Order at 10; *compare* Second Hardy (Doc. 26-1) Decl. ¶ 15, *with* Third Hardy Decl. ¶ 15.

Nor does the FBI's invocation of its authority to investigate "federal crimes such as domestic terrorism (18 U.S.C. § 2331) and advocating overthrow of government (18 U.S.C. § 2385)," Third Hardy Decl. ¶ 12, provide sufficient legal specificity. Stunningly, the FBI invokes the Smith Act, 18 U.S.C. § 2385, which the Supreme Court narrowed in a series of cases culminating in *Yates v. United* States, 354 U.S. 298, 324 (1957) ("Smith Act reaches only advocacy of action for the overthrow of government by force and violence," not advocacy of ideas), *overruled on other grounds, Burks v. United States*, 437 U.S. 1 (1978). "*Yates* ... leaves the Smith Act, as to any further prosecution under it, a virtual shambles." *Fujimoto v. United*

[1] 28 U.S.C. § 533 authorizes the Attorney General, *inter alia*, to "detect and prosecute crimes against the United States." 28 U.S.C. § 534(a)(1) authorizes the Attorney General to "acquire, collect, classify, and preserve identification, criminal identification, crime, and other records."

States, 251 F.2d 342 (9th Cir. 1958); *see also* Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 San Diego L. Rev. 1, 20-21 (1991) (*Yates* "effectively ended the Smith Act 'advocacy' prosecutions"). In any event, exactly like the Civil Disobedience Act and the Anti-Riot Act, statutes prohibiting domestic terrorism and sedition "are very broad criminal statutes, prohibiting a wide variety of conduct." *Wiener*, 943 F.2d at 986. "Citations to these statutes do little to inform [Plaintiffs] of the claimed law enforcement purpose underlying the investigation." *Id.*

Even if mere reference to these broad statutes were sufficient, the FBI has not submitted any evidence that those were actually the laws the agency was enforcing when it compiled these records. *See* Third Hardy Decl. ¶ 12 (FBI is authorized to provide investigative assistance and such assistance "would" relate to investigation of federal crimes "such as" terrorism and sedition). Were that the case, it certainly would have been easy enough to say so. This is not a matter of "semantics." FBI Opp. at 7:25. An agency cannot meet its burden by "stat[ing] alternatively several *possible* reasons for withholding documents, without identifying the *specific* reason or reasons for withholding each particular document." *Wiener*, 943 F.2d at 979 (emphasis added). Any other approach would allow the agency to rely on *post hoc* rationalizations, even if an actual law enforcement purpose were lacking.

Further, the FBI has still failed to provide the necessary factual specificity. As the Ninth Circuit explained in *Wiener*, a FOIA matter involving the FBI's investigation of John Lennon, "further details of the kinds of criminal activity" the FBI was investigating, beyond mere identification of "broad criminal statutes," is necessary to "afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *Id.* at 977, 986 (internal quotation marks, citation omitted) (government in FOIA cases must provide particularized explanations of basis for withholding, to minimize distortions in adversary process that arise because only one has "access to all the facts"). Similarly, in *Quiñon v. FBI*, 86 F.3d 1222 (D.C. Cir. 1996), the D.C. Circuit found "the FBI affidavits … insufficiently detailed to demonstrate that there was a legitimate basis for the

investigation," where they "fail[ed] to supply facts that would justify an obstruction of justice investigation" and instead "simply allude[d] to certain events, which they fail[ed] to describe or characterize, that allegedly supplied the basis for one." *Id.* at 1229, 1230 (internal quotation marks, citation omitted). The FBI must identify the factual predicate for the investigation so that the Court has a basis for assessing whether the agency had "a plausible basis for the decision [to investigate]." *Rosenfeld*, 57 F.3d at 808 (internal quotation marks, citation omitted).

Once again, the FBI has entirely failed to provide any "details of the kinds of criminal activity" being investigated. *Wiener*, 943 F.2d at 986. The FBI's brief asserts that Mr. Hardy supplies the requisite "facts." FBI Opp. at 7:15-18 (citing Third Hardy Decl. ¶¶ 13, 22). But Paragraph 13 merely states a legal standard (that "'[t]errorism' includes 'the unlawful use of force and violence'"); it offers no facts. Third Hardy Decl. ¶ 13. Paragraph 22 has nothing to do with the FBI's basis for this investigation and instead describes, in a discussion of Exemption 7D for confidential sources, the sources here as "individuals who are members of organized violent groups." *Id.* ¶ 22. Even if this were so, was the FBI investigating a drug trafficking ring, a gambling ring, or something else entirely? The fleeting reference to "organized violent groups" simply does not "supply facts that would justify [a terrorism or sedition] investigation." *Quiñon*, 86 F.3d at 1229; Order at 10 (agency did not cite "specific criminal activity suspected"). Under *Wiener*, *Quiñon*, and this Court's order, the agency has not met its burden.

Equally unavailing are the citations in the FBI's *brief* to mentions of vandalism and physical clashes in documents the agency has produced. FBI Opp. at 7:18-24. If the FBI were investigating the acts referenced in the documents it produced when it compiled the separate set of documents that it withheld, then the agency could easily and should have so stated in its *declaration*. *See Campbell*, 164 F.3d at 33 (agency must "explain why *each* withheld document or set of closely similar documents relate to a *particular* law enforcement purpose") (emphasis added). But Mr. Hardy chose not to do so in his Third or Fourth Declarations. The FBI must meet its factual burden through a sworn affidavit, not *post hoc* legal rationalization.

Notably, the FBI contends that the documents it possesses "were created in the context

of investigating specific reports of threats." FBI Opp. at 3:8. If that were the case, then the FBI should have no difficulty in describing those specific reports of threats and the specific statutory violations the FBI consequently sought to investigate. Four declarations later, the agency is either unable or unwilling to do so. Whatever the reason, the agency has not met its burden.[2]

2. The FBI's reliance on its authority to collect counter-terrorism investigation is not a cognizable Exemption 7 objective

The FBI also relies on its authority to collect counter-terrorism information and emphasizes that it has "set[] forth in detail the statutory basis for the collection of law-enforcement records in the eGuardian system." FBI Opp. at 5:12-13. The FBI's account of the statutory basis for its collection and sharing of counter-terrorism information would be relevant if this case involved a substantive challenge to the legality of the suspicious activity reporting program or eGuardian. It does not. Instead, this is a FOIA action and the question is whether the FBI, in collecting information pursuant to a program that sweeps up information about lawful and in some cases constitutionally protected activity, has identified a law enforcement objective sufficient to trigger Exemption 7. It has not.

First, the FBI's counter-terrorism/collection of records argument is similar to its general investigative authority argument, and like it, lacks the requisite legal and factual specificity. The FBI contends that the records at issue here were compiled pursuant to the FBI's "core counter terrorism function," noting that "the FBI is the lead investigative agency for crimes 'which involve terrorist activities or acts in preparation of terrorist activities,'" and citing its authority in 28 U.S.C. § 533 and § 534. Third Hardy Decl. ¶ 13; *see also* FBI Opp. at 5-6. But as with its "general investigative authority" argument, the FBI fails to "cite the specific law it is enforcing and the specific criminal activity suspected." Order at 10. A reference to "very broad

[2] The FBI emphasizes that there is no dispute about the adequacy of its documentation. FBI Opp. at 7:5-6. That is true but not dispositive. Plaintiffs previously observed that given the FBI's procedures, it should have documented the basis for its investigation. Pls.' Br. at 15. If that documentation existed, it should have been very easy for the agency to supply the missing information. But the adequacy of the FBI's internal documentation does not ultimately bear on whether the FBI has provided the requisite legal and factual specificity in this case. It has not.

criminal statutes," *Wiener*, 943 F.2d at 986, "such as domestic terrorism (18 U.S.C. § 2331) and advocating overthrow of government (18 U.S.C. § 2385)," Third Hardy Decl. ¶ 16, with no description of any "facts that would justify [a terrorism or sedition] investigation," *Quiñon*, 86 F.3d at 1229, is "insufficient to establish a nexus" to a legitimate law enforcement objective. Order at 10. For this reason alone, the Court should reject this asserted purpose.

Second, the Court should reject this asserted purpose on the independent ground that it is an excuse to engage in precisely the "generalized monitoring and information-gathering" that the Ninth Circuit found in *Rosenfeld* not to establish a cognizable law enforcement objective within the meaning of FOIA's Exemption 7. 57 F.3d at 809 (internal quotation marks, citation omitted); *see also* Pls.' Br. at 15-17. The FBI attempts to distinguish *Rosenfeld* as a case in which the "plaintiff introduced evidence into the record" demonstrating that the specific records were compiled for pretextual purposes. FBI Opp. at 8:6-9. This case is different, the FBI contends, because "[t]here is no such evidence here that relates directly to these documents." *Id.* at 8:10. The FBI misreads *Rosenfeld* and Plaintiffs' argument in two ways.

There are multiple reasons why an agency may fail to establish the Exemption 7 threshold. One is that it fails to "cite the specific law it is enforcing and the specific criminal activity suspected." Order at 10. Another is that "the asserted purpose was in fact pretextual." *See, e.g., Rosenfeld*, 57 F.3d at 808. Yet a third is that the agency's purpose is simply not the type of purpose that constitutes, as a matter of law, a legitimate law enforcement objective under Exemption 7. *Compare, e.g., Binion v. United States Dep't of Justice*, 695 F.2d 1189, 1194 (9th Cir. 1983) ("information compiled by the FBI in a pardon applicant investigation satisfies the rational nexus test"), *with Lamont v. Dep't of Justice*, 475 F. Supp. 761, 775 (S.D.N.Y. 1979) ("generalized monitoring and information-gathering … are not related to the Bureau's law enforcement duties"). Plaintiffs do not raise a pretext argument: The FBI asserts it was collecting what it believes to be counter-terrorism information. Plaintiffs do not contend otherwise. Instead, Plaintiffs contend that the limitless collection of information entailed by the FBI's eGuardian system and the suspicious activity reporting program are simply not

cognizable as a legitimate Exemption 7 law enforcement objective because these programs constitute precisely the kind of "generalized monitoring and information-gathering" rejected in *Rosenfeld*. 57 F.3d at 809 (internal quotation marks, citation omitted).[3]

In addition, while the FBI attempts to characterize *Rosenfeld* as a case in which the plaintiff introduced evidence of pretext, it ignores the fact that the agency first provided a specific enough description of the purpose for compiling each set of documents that the plaintiff had an opportunity to challenge and the Court had a basis to assess the asserted purpose as pretextual. *See, e.g.*, *id*. at 808 (FBI explained that it compiled records on Marguerite Higgins "as a security precaution before she married a chief of intelligence for a … military command," but record showed that investigation did not occur until four years after marriage). Here, the FBI invokes its generalized authority to "assess[] potential terrorist threats," Third Hardy Decl. ¶ 16, but provides nothing akin to specificity in *Rosenfeld* for compiling each document or set of documents. Under these circumstances, it would be impossible for Plaintiffs to raise (nor have they) a "pretext" challenge. Particularly in light of the FBI's claim in its brief that these records were "created in the context of investigating specific reports of threats," FBI Opp. at 3:8, its declaration's failure to identify these alleged specific "reports of threats" is striking. *See supra* at pages 4-5. The FBI correctly notes that, as a law enforcement agency, it is entitled to some deference. *See* FBI Opp. at 8:16-17. But it has not identified a specific enough law enforcement basis to which the Court could defer. *See Wiener*, 943 F.2d at 977 (agency must provide sufficiently particularized 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") (internal quotation marks, citation omitted).

In short, the FBI cannot fault Plaintiffs for not "proving" pretext when Plaintiffs have

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[3] The FBI contends that because the volume of records in this case is small, it has not engaged in the overcollection of information. But because the FBI relies on its broad authority to collect counter-terrorism information, the question is whether that program overall is cognizable under Exemption 7 as a legitimate law enforcement objective. If the FBI had a more specific basis to compile the records at issue here, then it should identify it.

not asserted this argument, and the burden lies on the FBI to establish a legitimate law enforcement objective, not on Plaintiffs to disprove it. *See Gordon*, 390 F. Supp. 2d at 901.

Third, the FBI urges the Court to find the collection of counter-terrorism information to be a legitimate law enforcement objective, emphasizing the importance of information sharing. FBI Opp. at 8:18-9:14. But none of the FBI's cases holds that information sharing is a legitimate law enforcement purpose within the meaning of Exemption 7. Instead, they address an issue not currently before the Court, whether the rational nexus must be with enforcement of a federal law or may "relate[] to a state prosecution." *Wojtczak v. United States Dep't of Justice*, 548 F. Supp. 143, 146 (E.D. Pa. 1982); *see also Rojem v. United States Dep't of Justice*, 775 F. Supp. 6, 9-10 (D.D.C. 1991). Nor does *Church of Scientology v. United States Dep't of Justice*, 612 F.2d 417 (9th Cir. 1979), assist the FBI. The Ninth Circuit gave "the term 'confidential source' its plain meaning" and construed Exemption 7D to include information from sources that were "foreign, state and local law enforcement agencies." *Id.* at 426. The court so held in light of "[t]he purpose of the FOIA … to serve disclosure of federal agency activity, not [to allow] private parties to find out what facts or opinions foreign, state or local law enforcement agencies have collected or made on them." *Id.* at 427. Here, FOIA's purpose to serve disclosure of federal agency activity weighs in Plaintiffs' favor: Plaintiffs seek information about what documents the FBI compiled on the Occupy movement.

In sum, the FBI's argument is troubling and at odds with precedent. The FBI urges this Court to find collection of counter-terrorism information to be a legitimate law enforcement objective, even though the record is undisputed that the criteria for collecting information pursuant to the suspicious activity reporting program sweeps up a wide swath of conduct, including entirely lawful and in some cases constitutionally protected activity, such as buying pallets of water and photographing courthouses. *See* Pls.' Br. at 10-11; 15-17. No court has previously so held. Indeed, this argument runs afoul of *Rosenfeld*, which held that "generalized monitoring and information-gathering" is not a cognizable Exemption 7 law enforcement objective. 57 F.3d at 809 (internal quotation marks, citation omitted). Significantly, it would

also allow the agency to circumvent the well-established requirement that to establish the Exemption 7 threshold, "the government must cite the specific law it is enforcing and the specific criminal activity suspected." Order at 10.

B. The FBI Has Not Met Its Burden Of Establishing The Remaining Elements Of Exemption 7

Summary judgment should be granted for Plaintiffs on all the Exemption 7 withholdings for the independent reason that the FBI has not justified each subsidiary exemption.

1. Exemption 7(A) for pending law enforcement proceedings

The FBI concedes that only "some of the information" pertains to pending investigations. Third Hardy Decl. ¶ 18. The agency has not explained why the document is not "reasonably segregable." *See* 5 U.S.C. § 552(b). Mr. Hardy's statement that the analysis has been "condensed" describes "intelligence report[s]" in general. FBI Opp. at 10:13-19; Third Hardy Decl. ¶ 17. The fact that intelligence reports typically provide a "condensed" analysis does not "explain[] why segregation is not possible *in this case*." *Lawyers Committee for Civil Rights v. Dep't of Treasury*, 2008 WL 4482855, at *14 (N.D. Cal. Sept. 30, 2008) (emphasis added).

2. Exemptions 6 and 7(C) for personal privacy

This Court previously rejected the FBI's declarations as "insufficient." Order at 13. Even two new declarations later, the FBI has still "provided no information specific to these third parties that allows the Court to weigh the privacy interests against the public interest." *Id*. Instead, it seeks to re-litigate legal issues it has already lost.

Third parties who provided information to the FBI. The FBI's new declaration hovers at the same level of generality as its prior insufficient declaration. *Compare* Third Hardy Decl. ¶ 20(a), *with* First Hardy (Doc. 22-1) Decl. ¶ 61; Pls.' Br. at 18-19.

In *Rosenfeld*, the Ninth Circuit found a public interest in disclosure of the names of individuals in FBI files and rejected the FBI's Exemption 6 and 7(C) claims: "Disclosing the names of the investigation subjects would make it possible to compare the FBI's investigations to a roster of the [Free Speech Movement's] leadership." *See Rosenfeld*, 57 F.3d at 812. The

FBI's efforts to distinguish *Rosenfeld* are unavailing.

First, the FBI states that *Rosenfeld* involved subjects of investigations rather than people who provided information to the FBI. FBI Opp. at 12. *Rosenfeld*'s rationale is still applicable. Learning whether the FBI cultivated as sources or sought information about Occupy activists would shed light on "the FBI's investigations," and the extent to which it targeted its investigative attention on a political protest movement. *Rosenfeld*, 57 F.3d at 812.[4]

Second, the FBI asserts that in *Rosenfeld* "the names could be compared to an independent roster." FBI Opp. at 12. That is equally true of a roster of leaders in the Free Speech and Occupy movements. The FBI complains that Plaintiffs "have not identified or defined who these 'leaders and activists' are, thus making their point moot." *Id*. at 14 (citation omitted). Nothing in *Rosenfeld* turned on plaintiffs having introduced into the record a roster of leaders; the point is that the names once disclosed could subsequently be compared. Further, any requirement that FOIA requesters "identify" to the FBI a list of leaders would ironically allow the FBI to accomplish precisely the type of illicit intelligence gathering about Occupy that the FBI strenuously disclaims. *See McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 357 (1995) ("anonymous [protest] is … an honorable tradition of advocacy and of dissent").

Third, the FBI states that the documents in *Rosenfeld* were "old." FBI Opp. at 12:24. That decision did not turn on "the passage of time." *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" holding below).

Third parties merely mentioned. The FBI complains that there is no public interest in

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[4] There are concrete reasons to believe that the FBI was improperly cataloguing information about the ideological views of groups it knew to be peaceful and non-violent. *Compare* Fourth Lye Decl., *filed herewith,* Exh. 2 at PCJF FOIA at 0090-91 ("This movement [known as Occupy Wall Street] has been known to be peaceful….The October2011 Movement[, which is] planning an occupation and nonviolent resistance action," "protest[s] corporatism and militarism …. US Day of Rage is calling for free and fair elections"), *with* Domestic Investigations and Operations Guide § 4.1.2 (investigation may "not be solely to monitor the exercise of constitutional rights") (attached as Fourth Lye Decl., Exh. 3); *see also* Pls.' Reply (Doc. 29) at 15.

third parties mentioned in FBI files. This argument rests on the agency's unsuccessful efforts to distinguish *Rosenfeld*. Its revised declaration merely rehashes the harms it believes might arise from disclosure, in generalities previously rejected by this Court. *See* Order at 13; *compare* First Hardy Decl. ¶ 62, *with* Third Hardy Decl. ¶ 20(b). In arguing that it need not provide facts specific to these or other third parties about whom it seeks to withhold information, the FBI seeks to re-litigate an issue it already lost. *See Richardson v. United States*, 841 F.2d 993, 996 (9th Cir. 1988) (discussing "law of the case" doctrine).[5]

Local law enforcement. With local law enforcement, too, the FBI still "provide[s] no information specific to these third parties." Order at 13; *see also* Third Hardy Decl. ¶ 20(c). *Lissner v. United States Customs Serv.*, 241 F.3d 1220 (9th Cir. 2001), is not distinguishable. As in *Lissner*, information about local law enforcement sheds light on the agency's conduct, *e.g.*, the propriety of the FBI's conduct with respect to Occupy, including whether the agency focused investigative efforts on non-federal crimes such as vandalism of small businesses (*cf.* FBI Opp. at 7), in response to complaints by local law enforcement officers, where similar pleas for assistance from private individuals might have gone unanswered. *See Lissner*, 241 F.3d at 1223 (public interest in learning "whether Customs afforded McColgan and Charles preferential treatment because of their status as law enforcement officers"). *Lissner* did not turn on the fact that the local law enforcement officials "were accused of wrongdoing." FBI Opp. at 16. The

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[5] Nor do the FBI's cases support its position. In *Schiffer v. FBI*, 78 F.3d 1405 (9th Cir. 1996), unlike *Rosenfeld* and this case, there was no countervailing public interest in disclosure: the plaintiff "admitted that his interest [in the records] was personal in nature, not public." *Id.* at 1410. In *Quiñon*, the plaintiffs speculated that documents pertained to the Chief Judge of the Eleventh Circuit. 86 F.3d at 1230-31. The D.C. Circuit held that the relevant question is whether the documents would shed light on "the agency's own conduct," not the conduct of third parties like the judge. *Id.* at 1231 (internal quotation marks, citation omitted). Here, as in *Rosenfeld*, the documents would shed light on the FBI's conduct (whether it targeted Occupy). In refusing to provide information specific to third parties, the FBI effectively relies on a categorical argument that privacy interests should always prevail. *But see Wiener*, 943 F.2d at 985 ("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").

Ninth Circuit rejected the contention that the FOIA requesters were required "to demonstrate any misconduct," even on the part of the federal agency. *Lissner*, 241 F.3d at 1223. Further, the FBI is correct that physical descriptions rather than officer names were at issue in *Lissner*. *Id.* at 1224. This is so because the federal agency apparently acknowledged, unlike the FBI here, that there was no basis for withholding the names. *Id.* ("identities have already been released"). The decision turned on the conclusion that the information did not "reveal intimate, private details." *Id.* In this case, the FBI has failed to show that disclosure would "reveal intimate, private details," or subject officers to "danger, harassment, or embarrassment." *Id.*

Segregability. The FBI does not explain why, even if identifying information could be withheld, privacy interests cannot adequately be protected by targeted redactions.

3. Exemption 7(D) For Confidential Sources

The FBI continues to refuse to provide "any probative evidence that there were express or implied assurances of confidentiality." Order at 14.

Express assurance. Mr. Hardy's assertion that certain sources were "established" sheds no light on whether they were expressly promise confidentiality. Third Hardy Decl. ¶ 21. A new source may have received an express assurance, while a longstanding one may not. The FBI's fourth declaration states that the express promise is apparent because the documents are titled "CHS," which "stands for Confidential Human Source." Fourth Hardy Decl. (Doc. 47-1) ¶¶ 3-4. On its face, this designation merely conveys that the agency wishes to treat the source as confidential. Since 1993, it has been clear that the FBI may not rely on the "presumption that a source is confidential within the meaning of Exemption 7(D) whenever the source provides information to the FBI." *United States Dep't of Justice v. Landano*, 508 U.S. 165, 181 (1993).

If a source receives a "CHS" designation only when given an express assurance of confidentiality, the agency could easily have said so. *See Campbell*, 164 F.3d at 34 ("'probative evidence'" of express assurance of confidentiality could include "policies for dealing with the source or similarly situated sources") (citation omitted). But Attorney General Guidelines show that no such promise is automatically given. Those Guidelines contain minimum "initial

validation" requirements to be documented for each CHS, including "*any* promises or benefits, and the terms of such promises or benefits." Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources at 13 (emphasis added) (attached as Fourth Lye Decl., Exh. 1). Thus, an express promise of confidentiality is *not* among the prerequisites that must be satisfied to designate someone a "Confidential Human Source." Had the particular sources in this case been given an express promise, it would be documented in the file and the agency could and should have stated this in its declaration.

Implied assurance. The FBI's conclusory assertion that some sources are members of an "organized" and "violent" group does not support an inference of implied confidentiality. Pls.' Br. at 20-21. *Quiñon* is exactly on point. *Cf.* FBI Opp. at 19. While the district court in that case focused on an argument not at issue here (whether a social or business association provides the requisite basis for inferring confidentiality), the D.C. Circuit explicitly rejected the FBI's argument that confidentiality could be inferred because "the investigation in the instant case was related to the 'notoriously violent' crime of drug trafficking." *Quiñon*, 86 F.3d at 1232. Here, the FBI has provided even less information, having failed to identify "the character of the" supposedly violent "crime at issue." *Landano*, 508 U.S. at 179. Does this involve drug trafficking, human trafficking? This "falls short of the particularity mandated by *Landano.*" *Quiñon*, 86 F.3d. at 1231.

Segregability. The agency asserts but does not explain why confidential source information is not segregable. *See* FBI Opp. at 19 n.8.[6]

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[6] The FBI repeatedly urges this Court to follow *Light v. Dep't of Justice*, _F. Supp. 2d_, 2013 WL 3742496 (D.D.C. July 17, 2013), in which the court granted the FBI summary judgment. The Court has already rejected the path taken by *Light*, which was issued after this Court's July 1, 2013 summary judgment order. In any event, and with due respect to that court, *Light*'s analysis is too conclusory to be persuasive. For example, it sustains the FBI's Exemption 6, 7(C), and 7(D) arguments after simply stating "[t]he FBI withheld the names and identifying information of federal and state law enforcement officers and personnel as well as that of individuals who provided information to the FBI under implied assurances of confidentiality or who were merely third parties mentioned in the records." 2013 WL 3742496, at *10 (citations omitted). Unlike this Court, it apparently did not seek to "weigh the privacy interests against the public interest"

4. Exemption 7(E) for investigative techniques

National security investigation techniques, FBI file numbers, FBI units. Ignoring the law of this case, the FBI recapitulates the boilerplate harms this Court previously found insufficient in asserting 7(E) to withhold techniques used to conduct national security investigations, FBI file numbers, and the identity of FBI units. *See* Pls.' Br. at 21-22.[7]

Database and collection/analysis of information. The only new factual assertions or argument by the FBI in support of 7(E) is the claim that disclosure would reveal information about its database and collection/analysis of counter-terrorism information. Third Hardy Decl. at ¶23(a), (b). Significantly, the FBI does not dispute that the criteria used by the federal government for tracking so-called suspicious, potential terrorist activities in federal databases is well known. *See* Pls.' Br. at 22; FBI Opp. at 21:3. Instead, it distinguishes between "revealing 'the *characteristics and data*' – as opposed to the *general existence* of a system for collecting those data." FBI Opp. at 21:6-8 (emphasis added). But here, Plaintiffs have introduced more than public evidence of the "general existence" of a suspicious activity reporting database. The record is undisputed that the federal government has itself published the "characteristics and data" regarding the specific types of behaviors that it defines as having a potential nexus to

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or recognize the need to evaluate "information specific to these third parties." Order at 13. Nor apparently did it require more than an unsupported assertion of an implied assurance of confidentiality. This Court correctly adhered to Ninth Circuit precedent such as *Wiener* and *Rosenfeld* in rejecting the FBI's conclusory assertions. Finally, this Court would not create any "conflicting result" with *Light* (*cf.* FBI Opp. at 23 n.9); rather, any conflict was already created by *Light*, which post-dates this Court's summary judgment order. The conclusory, out-of-circuit decision in *Light* does not justify departure from the law of this case.

[7] While an agency is entitled to withhold a "technical analysis" of generally known techniques and procedures, *Bowen v. FDA*, 925 F.2d 1225, 1228 (9th Cir. 1991), the assertion that a practice is a more specific application of an otherwise generally known technique does not suffice. *See Rosenfeld*, 57 F.3d at 815; *Davin v. United States Dep't of Justice*, 60 F.3d 1043, 1064 (3d Cir. 1995). The conclusory "assertion that the public is unaware of the specifics of how and when a technique is employed is not enough." Order at 15. The agency opines in highly abstract fashion that "[r]elease of the details of specific law enforcement techniques … could aid individuals in circumventing the law." Third Hardy Decl. ¶ 23(c). But it never states that disclosure of *these* documents would release any such details and offers no particularized explanation of harm.

terrorism and has determined should be reported in federal "suspicious activities" databases. *See* Pls.' Br. at 9-10; Third Lye Decl., Exh. 6 at 29-30 (categories include "[c]yber [a]ttack[s]," "[i]mpersonation of authorized personnel (e.g. police/security, janitor)," "unusual amounts of weapons or explosives"). Disclosure of these documents would thus no more reveal information about the characteristics and data of counter-terrorism information collected by the federal government than its publication of the criteria for "suspicious activity reporting," which it has already chosen to do.[8]

C. The FBI Has Not Met Its Burden Of Withholding Information On National Security Grounds

As Plaintiffs previously explained, the FBI's submission of an *in camera* declaration "does not permit effective advocacy." *Wiener*, 943 F.2d at 979; Pls.' Br. at 23-24. The FBI has not explained why it was appropriate to submit for *in camera* review a declaration describing the document, rather than the document itself.

III. CONCLUSION

For the foregoing reasons, the Court should grant summary judgment for Plaintiffs. After submitting four public declarations, the agency has still not met its burden. Although Plaintiffs believe the appropriate course at this juncture is for the Court to order the information disclosed, Plaintiffs do not object to *in camera* review of the underlying documents.

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[8] The FBI's cases are distinguishable. In *Asian Law Caucus v. United States Dep't of Homeland Sec.*, 2008 WL 5047839 (N.D. Cal. Nov. 24, 2008), the public was aware of the "mere[] … existence" of government watchlists, but the criteria for inclusion on a watchlist was not known. *Id.* at *4 ("specific topics" used to question individuals entering country not known). Nor do Plaintiffs make a blanket argument that they are entitled to "all details" about the FBI's counter-terrorism techniques "simply because some aspects of them are known to the public." *Barnard v. Dep't of Homeland Sec.*, 598 F. Supp. 2d 1, 23 (D.D.C. 2009). Rather, Plaintiffs contend that where the federal government has chosen to publish criteria for suspicious activity reporting, it cannot argue that disclosure risks revealing those already-public criteria. In *Light*, the FBI did not raise and the record did not contain evidence about the government's criteria for including information in counter-terrorism databases. Instead, *Light* merely accepted the FBI's conclusory assertions that disclosure would reveal national security techniques, FBI file numbers, and FBI units, 2013 WL 3742496, at *11, arguments this Court has already rejected. Order at 14-16.

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Respectfully submitted,

By: /s/
Linda Lye

Michael T. Risher
Linda Lye
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