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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, ASIAN LAW CAUCUS, SAN FRANCISCO BAY GUARDIAN

Plaintiffs,

v.

FEDERAL BUREAU OF INVESTIGATION, DEPARTMENT OF JUSTICE,

Defendants.

Case No. 3:10-cv-03759-RS

**DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT**

Date: February 26, 2015
Time: 1:30 pm
Courtroom 3
Hon. Richard Seeborg

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# INTRODUCTION

Defendant has demonstrated in its motion for summary judgment that the Federal Bureau of Investigation ("FBI"), a component of the Department of Justice ("DOJ"), conducted an adequate search for records and released all reasonably segregable, non-exempt documents that were responsive to plaintiffs' Freedom of Information Act ("FOIA") request. Defendant also explained its withholdings with more than enough specificity to establish that the information withheld is exempt under FOIA. Plaintiffs' opposition and cross-motion for summary judgment do nothing to refute any of these points.

First, plaintiffs do not challenge the adequacy of the FBI's search. Further, although plaintiffs assert that they do not waive their right to challenge defendants' invocation of FOIA Exemptions 2 or 5, they offer no argument as to whether or why information was improperly withheld under these exemptions. Plaintiffs do challenge defendant's withholdings under Exemption 7, contending that defendant has failed to establish a rational nexus between enforcement of a specific federal law and the withheld documents. However, contrary to plaintiffs' assertions, where the records at issue consist of materials not associated with a specific investigation but rather with training, techniques, policies and procedures, it is sufficient to show, as the FBI has done, that they were compiled in furtherance of a general law enforcement mandate. As for plaintiffs' individual challenges to withholdings under Exemptions 7(A), 7(D), and 7(E), the FBI has amply demonstrated why the information at issue is exempt from disclosure, and cannot provide further details without revealing the very information it seeks to protect. For these reasons, as discussed at greater length below, the Court should deny plaintiff's cross-motion for summary judgment and grant defendant's motion for summary judgment.

# ARGUMENT

## I. The FBI Properly Withheld Information That is Exempt Under FOIA.

### A. The FBI Has Met the Threshold for Exemption 7.

Plaintiffs argue that a number of the documents withheld in part or in full by the FBI under Exemption 7 do not satisfy the threshold requirement that the documents have been compiled for a legitimate law enforcement purpose. Plfs' Cross-Mot. and Opp. (ECF No. 119) at

8-9; Exhibit 7 to the Declaration of Debra Urteaga ("Urteaga Decl.") (ECF No. 120-8). Specifically, plaintiffs contend that the FBI has not established a "rational nexus" between each of these documents and enforcement of a federal law because it has not identified "the specific law it is enforcing and the specific criminal activity suspected." Opp. at 9. However, this argument rests on a fundamental misreading of the "rational nexus" requirement.

Plaintiffs rely primarily on *Church of Scientology of California v. U.S. Dep't of Army*, in which the Ninth Circuit found that a Navy background investigation document did not meet the Exemption 7 threshold, noting that "there is no showing that the investigation involved the enforcement of any statute or regulation within the authority of the [Naval Investigative Service]." 611 F.2d 738, 748 (9th Cir. 1979). But this decision in no way establishes that a federal law enforcement agency must identify a specific statute or law being enforced or a specific investigation for any or all documents withheld under Exemption 7. Notably, *Church of Scientology* preceded the 1986 amendment to FOIA that eliminated any requirement that Exemption 7 be limited to investigatory records. As the D.C. Circuit has observed,

> Prior to 1986, Exemption 7 required a threshold showing that the materials in question were "investigatory records compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7) (1982). However, in 1986, Congress amended the exemption to protect "records or information compiled for law enforcement purposes," deleting any requirement that the information be "investigatory." … And the legislative history makes it clear that Congress intended the amended exemption to protect both investigatory and non-investigatory materials, including law enforcement manuals and the like. *See* S. Rep. No. 98-221, at 23 (1983) (expressing intent to protect "sensitive non-investigative law enforcement materials" and to broaden the exemption to include records "regardless of whether they may be investigatory or noninvestigatory"). Congress also amended Exemption 7(E) to permit withholding of "*guidelines* for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law," thus giving further indication that the statutory threshold was not limited to records or information addressing only individual violations of the law.

*Tax Analysts v IRS*, 294 F.3d 71, 79 (D.C. Cir. 2002) (emphasis in original). Thus, "under the amended threshold of Exemption 7, an agency may seek to block the disclosure of internal agency materials relating to guidelines, techniques, sources, and procedures for law enforcement investigations and prosecutions, even when the materials have not been compiled in the course of a specific investigation." *Id.* (citing *PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 250-51 (D.C. Cir. 1993)). By the same logic, it follows that an agency need not show that these types of documents were related to the enforcement of a particular law, since by their very nature they are broadly programmatic rather than case-specific—yet no less in service of a legitimate law enforcement purpose.[1]

Here, plaintiffs' requests sought not investigatory records but records related to FBI law enforcement training, techniques, and policies—precisely the kind of records that courts have found to be exempt under Exemption 7(E) without requiring a connection to a specific investigation or statute. *See, e.g., Electronic Frontier Found. v. U.S. Dep't of Justice*, No. 10-cv-4892 (N.D. Cal.), ECF No. 75, Order re Renewed Cross-Motions for Summary Judgment, at 9 (Nov. 1, 2013) (Seeborg, J.) (upholding FBI's application of Exemption 7(E) to documents discussing "going dark" surveillance problem); *see also Sack v. CIA*, 12-cv-244 (D.D.C.), ECF No. 35, Mem. Op., at 37-39 (Jul. 10, 2014) (upholding Defense Intelligence Agency 7(E) withholding of information detailing the use of polygraph technology in employment background investigations); *ACLU v. U.S. Dep't of Justice*, No. 12-cv-7412, 2014 WL 956303, *8 (S.D.N.Y. Mar. 11, 2014) (upholding DOJ's application of 7(E) to guidance memorandum distributed to criminal prosecutors). By contrast, the cases plaintiffs cite in support of their interpretation of the Exemption 7 threshold involved actual investigatory records and are therefore inapposite. *See Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 809 (9th Cir. 1995) (finding documents FBI had claimed to be compiled in the course of personnel investigations were in fact compiled for other reasons that bore no rational nexus to a plausible law enforcement purpose); *Wiener v. FBI*, 943 F.2d 972, 986 (9th Cir. 1991) (finding insufficient evidence to support legitimate law enforcement purpose for documents concerning investigation of John Lennon); *ACLU v. FBI*, No. 12-cv-3728 SI, 2014 U.S. Dist. LEXIS 130501, *17-18 (N.D. Cal. Sept. 16, 2014) (same re: investigatory records concerning FBI's response to tips and leads related to potential criminal conduct during the Occupy movement). The proper inquiry for whether non-investigatory records such as those at issue in this case meets the threshold for Exemption 7 does not turn on whether defendant can link each of the records to the enforcement of a specific law, but rather

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[1] Even the investigatory information the FBI has withheld under Exemption 7(A) consists of recompiled information located within "programmatic" records, such as training materials, rather than original investigatory records, and would therefore still meet the Exemption 7 threshold without identifying a specific criminal statute or investigation.

whether defendant has established that they were compiled in furtherance of a legitimate law enforcement purpose—or, put another way, that they bear a rational nexus to the agency's core law enforcement mission. As detailed below, the FBI has more than made this showing for each of the categories of documents challenged by plaintiffs.

**1. Domain Management and Assessments**

Plaintiffs assert that the FBI cannot withhold documents or information related to assessments and domain management under Exemption 7 because it has not established links between the withheld information and a specific law that was being enforced. But as discussed above, this is not the correct standard for the Exemption 7 threshold. The FBI's functions extend beyond limited investigations of discrete matters to include broader analytic and planning functions that nevertheless support a legitimate law enforcement purpose. Supplemental Declaration of David Hardy ("Supp. Hardy Decl.") ¶ 11. Under the Attorney General's Guidelines for Domestic FBI Operations ("AGG-Dom"), the FBI is not limited to solving particular crimes or obtaining evidence for use in particular prosecutions, but is authorized to compile information critical to broader analytical and intelligence needs in facilitating the solution and prevention of crime and protecting national security. *Id.* ¶ 13.

With respect to assessments, defendant notes that there are two different types of assessments described in the FBI's Domestic Investigations and Operations Guide ("DIOG"). The first type, discussed in Chapter 5 of the DIOG and cited by plaintiffs, *see* Opp. at 3-4, 10-12, is an investigative activity. The second type is discussed in Chapter 15, which concerns Intelligence Analysis and Planning, and is the type at issue here. Supp. Hardy Decl. ¶ 12. As noted in the DIOG, the Attorney General has authorized the FBI "to engage in intelligence analysis and planning to facilitate and support investigative activities and other authorized activities [including]: * * * [conducting r]esearch and analysis to produce reports and assessments (analytical products) concerning matters derived from or relevant to investigative activities or other authorized FBI activities[.]" DIOG (2011 ed.), § 15.2.1; Supp. Hardy Decl. ¶ 14. Pursuant to this authority, the FBI may collect information in order to improve or facilitate domain awareness and may engage in "domain management," the process by which the FBI develops domain awareness across its various criminal and national security programs and uses its knowledge to identify threats, vulnerabilities, and intelligence gaps, discover new opportunities for needed intelligence collection and prosecution, and provide advance warning of national security and criminal threats. Supp. Hardy Decl. ¶ 15. Effective domain management enables the FBI to identify significant threats, detect vulnerabilities within both a local and national domain, identify new sources and threat indicators, and recognize new trends that would not be apparent from investigation of discrete matters alone. *Id.* (citing DIOG (2011 ed.) §§ 15.1, 15.2.1). Plaintiffs' claim that the FBI must link each domain management document to a specific investigation is without merit, given that the very purpose of domain management is to develop the kind of situational awareness that cannot be obtained in a single investigation, and that domain management materials frequently analyze present or emerging trends, as well as potential threats and vulnerabilities. Supp. Hardy Decl. ¶ 17.[2]

**2. Community Outreach**

Notwithstanding plaintiffs' assertions to the contrary, the FBI has clearly demonstrated a legitimate law enforcement purpose behind its efforts to establish cooperative working relationships with its community partners. These partnerships allow the FBI to educate members of the public on suspicious activities or potential threats while dispelling misunderstandings and building a network to help prevent criminal activity. Supp. Hardy Decl. ¶ 10. They have, among other things, helped communities protect themselves against fraud and cyber predators, hackers, economic espionage, violence, drugs and terrorism, and have also in turn provided the FBI tips and leads in active investigations. *Id.* But again, it is *not* necessary for the FBI to show that all the community outreach information it is withholding is associated with a specific investigation, only that it is rationally related to its law enforcement mandate. Given that this is information regarding how the FBI seeks to collaborate with members of the public to keep threats to the law

[2] Plaintiffs also cite document #386, a Counterintelligence Training Center ("CITC") computerized training course consisting of "an interview simulation designed to cover cultural and religious history as it relates to the country/group and provide intelligence information needed for a basic understanding of the country/group on which the FBI has placed its investigative focus," as an example of a document unmoored from any legitimate law enforcement purpose, speculating that the document is merely "racial profiling." Opp. at 11; Urteaga Decl., Ex. 10 at 91, 93-95. Nonetheless, whatever plaintiffs may suspect as to the contents of this document, there can be no doubt that as a training document designed to educate agents on the culture and history of people they may potentially be investigating, it bears a rational nexus to the FBI's law enforcement function.

and local and national security at bay, it plainly bears a rational nexus to the FBI's law enforcement mission.

**3. Informants/Confidential Human Sources**

Plaintiffs challenge the withholding of information relating to methods by which the FBI approaches, interviews, and recruits confidential human sources (CHSs), arguing that such information is not about law enforcement but rather "about subverting power in aid of a surveillance mission." Opp. at 13. However, such methods and techniques are an integral part of the FBI's law enforcement mission inasmuch as they are designed to persuade individuals to help stop criminal and other unlawful conduct. Although CHS-driven intelligence gathering efforts may not start out as full-fledged investigations, they still have the ultimate goal of assisting law enforcement against dangerous illegal activity. Supp. Hardy Decl. ¶ 20. And as discussed further below, disclosure of the information sought by plaintiffs could seriously jeopardize the FBI's ability to recruit and retain CHSs, and by extension, aid circumvention of the law. *Id.* ¶ 31.

**4. Training Materials**

The training materials withheld by the FBI were used in law enforcement training sessions for FBI Special Agents and other individuals involved in law enforcement. By definition, therefore, they meet the threshold for Exemption 7, as they were plainly created and compiled for a legitimate law enforcement purpose—making FBI and other law enforcement agents more effective at detecting and preventing illegal activity—and intended to advance the FBI's overall law enforcement mission. *See* Supp. Hardy Decl. ¶ 7. Nonetheless, plaintiffs cite Document #28, a PowerPoint presentation that "describes Arabic/Middle Eastern historical, cultural, and other investigative factors that FBI Special Agents should be knowledgeable of when conducting counterterrorism investigations that involve individuals from such backgrounds," as an example of a training document that lacks a nexus to criminal law enforcement. *See* Opp. at 14 and Urteaga Decl., Ex. 7-4. But successful investigation of individuals, as well as recruitment of assets, of Middle Eastern background requires a nuanced and well-informed understanding of that background in order to advance the FBI's law enforcement objectives, and the redacted information is designed to provide such an understanding. Indeed, plaintiffs' objections seem rooted not so much in the proposition that there is no rational law enforcement justification for training FBI agents on Middle Eastern culture (there clearly is) as their conviction that the FBI is not going about it correctly. However, mere suspicions on plaintiffs' part that *they* would not agree with the information being taught do not disprove its connection to a legitimate law enforcement purpose.

**B. The FBI Has Properly Withheld Information Pursuant to Exemption 7(A).**

Exemption 7(A) authorizes the withholding of information "compiled for law enforcement purposes" where release "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). Plaintiffs complain that as to several documents withheld under 7(A), the FBI has made "only conclusory assertions that the documents would interfere with ongoing investigations" or intelligence gathering matters. Opp. at 14-15; Ex. 7 to Urteaga Decl (chart). However, the FBI has reviewed the specific documents identified by plaintiffs and concluded that it cannot release any further details about the operations they implicate—particularly given the vast amount of information already released in response to plaintiffs' requests for these documents—without potentially alerting the subjects to the fact that they are being targeted, as well as the source of the FBI's intelligence on their activities. Supp. Hardy Decl. ¶ 24. In making this determination, the FBI has consulted the relevant personnel as well as the Chief Division Counsel in the field offices involved, and confirmed that any disclosure of the withheld information would harm present and ongoing operations because the information is intertwined with other related pending counterterrorism, counterintelligence, and domain management assessments. *Id.* As such, it remains protected under Exemption 7(A).

**C. The FBI Has Properly Withheld Information Pursuant to Exemption 7(D).**

Information may be withheld under Exemption 7(D) if it "could reasonably be expected to disclose the identity of a confidential source," or was furnished by a confidential source and "compiled by a criminal law enforcement authority in the course of a criminal investigation." 5 U.S.C. § 552(b)(7)(D). The exemption applies if the agency establishes that the source has provided the information under either an express or implied assurance of confidentiality. *See U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 172 (1993). The FBI has properly applied Exemption 7(D) based on both types of assurances.

**1. Express Grant of Confidentiality**

With respect to a number of the documents that the FBI has claimed are protected by an express grant of confidentiality, plaintiffs contend that it has provided "no probative evidence" of such a grant. Opp. at 16. In particular, plaintiffs assert that Mr. Hardy's testimony on this point should be discounted because he "lacks personal knowledge" of the grant. *Id.* Yet none of the cases cited by plaintiffs support such a conclusion; rather, they discuss lack of personal knowledge by the declarant as a basis for requiring more specific and detailed explanations why a particular document sufficiently demonstrates an express grant of confidentiality. *See Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 34-35 (D.C. Cir. 1999); *Akin v. Q-L Invs., Inc.*, 959 F.2d 521, 530 (5th Cir. 1992); *ACLU v. FBI*, No. 12-cv-3728, 2013 Dist. LEXIS 93079, *25 (N.D. Cal. (July 1, 2013). To that end, courts have held that caveats, notes, or instructions on the face of the document are sufficient to establish an express assurance of confidentiality. *See, e.g.*, *Hodge v. FBI*, 703 F.3d 575, 581 (D.C. Cir. 2013); *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1186 (D.C. Cir. 2011). In his supplemental declaration, as summarized below, Mr. Hardy has provided some additional information regarding evidence within the challenged documents of an express assurance of confidentiality, which supports their continued retention under Exemption 7(D).

a. <u>MC-943</u>

In its original *Vaughn* narrative for this page, the FBI described the information it was protecting as provided by a source under an implied assurance of confidentiality. *See* FBI *Vaughn* Index (Ex. II to Def's Mot., ECF No. 114-3) at 219-20. The information is singular in nature and would reveal the source's cooperation with the FBI to the criminals on whom the source is providing information. Since these criminals could use this information, if released, to identify and extract revenge on this source, the FBI determined that the source would only have provided information to the FBI on an implied understanding that the FBI would not disclose his/her identity or information. However, further review has also revealed that the source was identified as "CHS" on this page, indicating that he or she was actually recruited as an official FBI CHS and would therefore have been given an express assurance that his or her identity and relationship with the FBI would remain confidential. Supp. Hardy Decl. ¶ 26(f).[3]

[3] When an individual becomes an official FBI CHS, FBI policy requires that certain assurances must be provided to him or her, including the assurance that the government will strive to protect his or her identity. *See* Supp. Hardy Decl. n.10 (citing CHS Policy Manual §§ 1.2, 4.1). In other words, a source is not designated as a CHS unless the FBI has determined that his or her identity must be kept confidential and provided assurances of such confidentiality.

b. MC-989-1001

These pages consist of official source reporting documents within which sources were described as "CHSs" (Confidential Human Sources) and identified by FBI source symbol numbers, which are assigned to persons who report information to the FBI on a regular basis and are used as an administrative tool to protect their real identities. Such markings confirm that these individuals had entered into official, confidential relationships with the FBI and, pursuant to standard FBI policy, given an express assurance that their identity and the information they provided the FBI would be kept in strict confidence. Supp. Hardy Decl. ¶ 26(a).

c. MC-1561

In the slides on this page, located in a PowerPoint training presentation that uses a real-life FBI investigation as an example for trainees, the FBI protected a source who was designated as a "CHS" and described in the slides as having undergone recruitment as an official FBI CHS. Again, these are the hallmarks of an official, confidential relationship with the FBI, which included an express assurance that the FBI would keep the source's identity and the information he or she provided to the FBI confidential. Supp. Hardy Decl. ¶ 26(b).

d. MC-1738-1903

On page MC-1806, the FBI redacted information provided by sources who were explicitly identified as "CHS." This designation, as well as references to the FBI investigative file serials in which the information was originally reported, are strongly indicative of an express grant of confidentiality. Moreover, the protected information, being highly singular, would disclose these CHSs' identities and relationships with the FBI. Supp. Hardy Decl. ¶ 26(c).

e. MC-2805-2808, MC-2896-2930

These pages consist of PowerPoint training presentations that use real-life FBI investigations as examples for trainees and contain descriptions of sources and how they were recruited as official FBI CHSs. Supp. Hardy Decl. ¶¶ 26(d), (e). As noted above, FBI policy requires that CHSs be given express assurances that their identities and relationships with the FBI will remain confidential.

**2. Implied Assurance of Confidentiality**

For assertions of implied confidentiality, the withholding agency must describe circumstances that can provide a basis for inferring confidentiality. *Davin v. U.S. Dep't of*

*Justice*, 60 F.3d 1043, 1063 (3d Cir. 1995). Plaintiffs contend that the FBI's descriptions of these circumstances are insufficiently specific and amount to an inference that *all* FBI criminal investigative sources are confidential. Opp. at 17-18. To the contrary, however, the FBI only applied 7(D) when it found that sources met the standard established in *Landano*. Supp. Hardy Decl. ¶ 29. As discussed below, the FBI's *Vaughn* narratives for each of the documents challenged by plaintiffs provide more than sufficient explanation of the particular circumstances under which the protected information was provided to the FBI and why those circumstances led the FBI to conclude that the information could only have been provided contingent upon an implied assurance of confidentiality. *See Landano*, 508 U.S. at 179-81.

a. <u>MC-1194-1202</u>

These pages consist of a PowerPoint training presentation that uses a real-life FBI counterintelligence investigation as an example for trainees and describes an actual source of information for the FBI. This source took great risk in informing on certain investigative subjects. Since release of this source's identity or information would pose a risk of great harm to him or her, the FBI reasonably determined that the source would not have sought FBI contact had he or she not believed that the FBI would not keep their communications and relationship strictly confidential. Supp. Hardy Decl. ¶ 29(g).

b. <u>MC-1738-1903</u>

On page MC-1808, the FBI has protected information provided by a source regarding a violent individual connected with extremist organizations. The information is highly singular and, if disclosed, could identify the source to a violent individual and a violent criminal organization, and thus expose him or her to retaliation. Based on this risk, as noted in the original *Vaughn* description, the FBI can infer that this individual only gave this information to the FBI under an implied assurance of confidentiality. *See* FBI *Vaughn* Index at 392. Additionally, on pages MC-1820-24 and MC-1830-42, the FBI has protected sensitive intelligence documents related to violent criminal gangs that were provided by state and local law enforcement agencies. *Id.* at 388-89. As described in its *Vaughn* narrative, release of this information would cause backlash against these agencies and damage to their investigations. *Id.* at 393. Thus the FBI reasonably concluded that the agencies would not have provided this information had there not been an implied understanding that the FBI would keep it confidential. Supp. Hardy Decl.

¶ 29(h).

c. MC-1945-1946

These pages describe a sensitive investigative program utilized by other federal, state, and local law enforcement agencies. Again, as described in its *Vaughn* narrative, release of this information by the FBI would cause backlash and damage to these agencies' investigations, again leading the FBI to the reasonable conclusion that they would not have provided this information had there not been an implied understanding that the FBI would keep it confidential. FBI *Vaughn* Index at 432-33; Supp. Hardy Decl. ¶ 29(i).

**D. The FBI Has Properly Withheld Information Pursuant to Exemption 7(E).**

The vast majority of plaintiffs' challenges to the FBI's withholdings are to those covered by Exemption 7(E). *See* Opp. at 18-22; Ex.7 to Urteaga Decl. This is unsurprising, as most of the documents responsive to plaintiffs' requests necessarily contain highly sensitive information about FBI investigative and intelligence-gathering techniques and procedures. As such, they clearly fall under 7(E), which protects against release of information that "would disclose techniques and procedures for law enforcement investigations or prosecutions" or "would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E).[4]

**1. Publicly Known Law Enforcement Techniques**

Plaintiffs contend that the FBI improperly withheld certain information under Exemption 7(E) because it involved techniques that are generally known to the public, notwithstanding the FBI's attestation that the precise circumstances in which the techniques are used or presented in

[4] Plaintiffs interpret the phrase "if such disclosure could reasonably be expected to risk circumvention of the law" as extending to "techniques and procedures" as well as "guidelines." Opp. at 8. Although the courts are split on this issue, *see Asian Law Caucus v. U.S. Dep't of Homeland Sec.*, No. C 08-cv-00842 CW, 2008 WL 5047839, *3 (N.D. Cal. Nov. 24, 2008) (discussing split and noting that the Ninth Circuit has not "squarely addressed" it), the better reasoned decisions recognize that providing categorical protection to "techniques and procedures" (i.e., not requiring a showing that "disclosure could reasonably be expected to risk circumvention of the law") is consistent with both the plain meaning of the statute and the history of the amendments to exemption 7(E) in 1986. *See, e.g., Allard K. Lowenstein Int'l Human Rights Project v. U.S. Dep't of Homeland Sec.*, 626 F.3d 678, 681 (2d Cir. 2010); *Durrani v. U.S. Dep't of Justice*, 607 F. Supp. 2d 77, 91 (D.D.C. 2009) (quotation and citation omitted). In this case, the withheld information encompasses both "techniques and procedures" and "guidelines." However, even assuming *arguendo* that plaintiffs' interpretation of 7(E) is the correct one, the FBI has demonstrated that disclosure of every category of withheld information could reasonably be expected to risk circumvention of the law.

the withheld documents are *not* known. Opp. at 19. Plaintiffs rely principally on the Ninth Circuit's decision in *Rosenfeld*, which rejected the assertion of 7(E) over a specific application of a known law enforcement technique (the pretext phone call), and Judge Ilston's decisions in the Occupy case, which also relied heavily on *Rosenfeld* in denying 7(E) protection for a wide range of investigative documents. See *Rosenfeld*, 57 F.3d at 815; *ACLU v. FBI*, No. 12-cv-3728 SI, 2013 U.S. Dist. LEXIS 93079 at *38-39; 2014 U.S. Dist. LEXIS 130501 at *29-30. However, whether the circumstances, context, or application of a generally known technique are protected under 7(E) is necessarily case-specific. Other courts within the Ninth Circuit, while acknowledging *Rosenfeld*, have nonetheless found that public knowledge of the existence of any one technique or procedure does not mean that further, more detailed information about it should be disclosed. *See, e.g., Asian Law Caucus*, 2008 WL 5047839 at *4 ("Knowing about the general existence of government watchlists does not make further detailed information about the watchlists routine and generally known."); *see also Electronic Frontier Found. v. U.S. Dep't of Homeland Sec.*, No. 12-cv-5580 PJH (N.D. Cal.), ECF No. 36, Order re Cross-Motions for Summ. J,, at 10 (March 31, 2014) ("[W]hile some capabilities of drones may be known, that does not make further detailed information about drones routine and generally known.") (citing *Asian Law Caucus*).

Here, the Hardy declarations and *Vaughn* narratives have established that even where techniques disclosed in the documents may be known in general terms to the public, the manner or context in which they are used in the documents is *not* known and cannot be revealed without risking serious harm to the FBI's ability to employ these techniques effectively. *See* Hardy *Vaughn* Decl. ¶¶ 79-82; Supp. Hardy Decl. ¶ 30; *see also ACLU of New Jersey v. Dep't of Justice*, No. 11-cv-2553, 2012 WL 4660515, *10-11 (D.N.J. Oct. 2, 2012) (upholding assertion of 7(E) as to investigative techniques and procedures in case seeking documents related to FBI's collection, mapping and use of New Jersey communities' racial and ethnic information, noting that "[w]hile the public may know that some of these techniques and procedures exist, it does not know the manner in which the FBI uses them."), *aff'd on other grounds*, 733 F.3d 526 (3d Cir. 2013); *ACLU of Michigan v. FBI*, No. 11-cv-13154, 2012 WL 4513626, *9-11 (E.D. Mich. Sept. 30, 2012) (upholding 7(E) assertion over DIOG materials containing information on devices, methods, and tools used in surveillance, monitoring, and mapping, training materials, documents analyzing information for investigatory purposes, and guidelines as to application of particular investigative techniques, again noting that "the fact that some of the information may have been generally known to the public is not dispositive"), *aff'd on other grounds*, 734 F.3d 460 (6th Cir. 2013). Plaintiffs once again refer to Document #28, a training presentation on cultural and behavioral analysis techniques. *See* Opp. at 19; Urteaga Decl., Ex. 10 at 21-23. As the *Vaughn* description for this document explains, revealing the details of what and how such cultural factors are utilized would undermine the efficacy of these techniques in FBI operations and, by extension, risk circumvention of the law by individuals who would thus become cognizant of the FBI's precise tactics.

**2. Investigation "Target" Documents**

Plaintiffs object to the FBI's redaction of information regarding investigation targets, such as "the date range of investigative activities, depth of information gathered on the targets, and the goals and strategies of the investigation," arguing that the FBI has not provided adequate explanation to justify exemption of this information under 7(E). Opp. at 19-20; Urteaga Decl., Ex. 10 at 40-46 (*Vaughn* narratives for documents #164-166). However, it is unclear just what additional explanation, beyond what is in the *Vaughn*, is necessary: the withheld information, on its face, reveals details regarding the FBI's investigation of specific targets, how, when, and why it investigated them, and what it learned in the process. Disclosure would certainly risk circumvention of the law by providing potential criminals with valuable information—indeed, a veritable playbook—on the FBI's investigative strategies and procedures. Information of this kind is therefore appropriately withheld under Exemption 7(E).[5]

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[5] Plaintiffs also contend that the redactions of target information are "inconsistent," in that it is sometimes redacted and sometimes not. Opp. at 20 n.13. But the fact that the FBI may have been able in some instances to disclose the target or scope of an investigation in one location or context without risk of harm to ongoing or prospective investigations or prosecutions, or an intelligence activity, says nothing about the risk posed by disclosing information about the same target at another location or in another context. For example, one field office may have officially disclosed that it is investigating a particular group or individual, whereas another may not want to tip off the group or individual that they have come under scrutiny in that location. In other instances, revealing the target of an investigation by a field office in conjunction with the scope of the investigation might demonstrate the level of investigative interest, priority, awareness, or resources that office places on thwarting that organizations' criminal activity within the field office's area of responsibility. The disclosure of information concerning targets of investigation must be analyzed in the context of each specific location, not with a "one size fits all" approach. Supp. Hardy Decl. n.13.

**3. "Assessment" Documents**

Plaintiffs contest the FBI's withholdings of information regarding assessments, domain management, community outreach, and geospatial surveillance, again on the grounds that the FBI provides only "conclusory justifications" for the application of 7(E) to this information. Opp. at 20. By way of example, plaintiffs point to document #160, a domain management assessment of a specific national security threat, asserting that "the FBI has not said what its assessments and mapping intelligence are used for, in what situations they are used, how the information relates to actual criminal investigations, or how more knowledge regarding such information would allow potential criminals to circumvent the law." *See id.*; Urteaga Decl., Ex. 10 at 34-36. However, there is simply no way for the FBI to answer these questions to plaintiffs' satisfaction without disclosing the very information that is protected under 7(E). The FBI has already explained how the domain management and assessment documents are integrally related to its law enforcement mission, *see supra* and Supp. Hardy Decl. ¶¶ 11-17; it follows that releasing specific information on how, when, and why the domain management and assessment techniques the documents describe are used would undermine their effectiveness by allowing criminal individuals and groups to anticipate and evade them. For these reasons, this information is exempt from disclosure pursuant to 7(E).[6]

**4. Information on Recruiting CHSs**

Plaintiffs additionally challenge the FBI's withholding of information regarding its recruitment of CHSs pursuant to 7(E), again primarily on the ground that the FBI has not sufficiently explained how disclosure of this information would result in circumvention of the law. Opp. at 21-22. Once again, this argument lacks merit. As discussed in Mr. Hardy's declarations and the *Vaughn* index, releasing information on the FBI's CHS recruiting techniques would help criminals predict who among their ranks are likely targets for recruitment and how the

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[6] Plaintiffs also suggest that Exemption 7(E) cannot apply where the investigative activities underlying the information are no longer pending, citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 235 (1978). *See* Opp. at 21. However, *Robbins Tire & Rubber Co.* does not support this argument; it rather held that where an agency "fails to demonstrat[e] that the . . . documents [sought] relate to any ongoing investigation or . . . would jeopardize any future law enforcement proceedings, Exemption <u>7(A)</u> would not provide protection to the agency's decision." 437 U.S. at 235 (emphasis added) (internal quotation marks omitted). Indeed, reading 7(E) in the manner adopted by plaintiffs would render it superfluous in light of 7(A).

FBI would likely utilize them, thus increasing the risk not only of outing CHSs but preemptively eliminating or intimidating prospective CHSs. Supp. Hardy Decl. ¶¶ 18-22, 31. Such disclosures could thus significantly weaken the FBI's CHS program, and in so doing, enable criminals in evading the law. This information is accordingly protected by Exemption 7(E).

**II. <u>The FBI Has Provided Reasonably Specific Descriptions of All Withheld Documents.</u>**

Plaintiffs, in addition to challenging various withholdings under Exemption 7, have compiled a list of withheld documents that they assert are inadequately described in the FBI's *Vaughn* index. *See* Opp. at 22-23; Ex. 8 to Urteaga Decl. Virtually all of the documents identified in Exhibit 8 refer to specific investigative and intelligence-gathering techniques and methods currently in use by the FBI, which the FBI cannot describe in any greater detail without revealing the very information that is exempt. *See* Supp. Hardy Decl. ¶ 33. Plaintiffs also complain about the repetitiveness of the descriptions, but such repetitiveness is an inevitable consequence of individually indexing similar documents containing similar information, and does not, in itself, render a description inadequate. *See Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 147 (D.C. Cir. 2006) ("Especially where the agency has disclosed and withheld a large number of documents, categorization and repetition provide efficient vehicles by which a court can review withholdings that implicate the same exemption for similar reasons.").

**III. <u>The FBI Has Provided All Reasonably Segregable Portions of Responsive Records.</u>**

As explained in the FBI's motion and Mr. Hardy's declaration, the FBI not only reviewed all responsive documents but thoroughly *re*reviewed them and, in the process, identified additionally segregable information that was released to plaintiffs. These steps demonstrate the FBI's good faith and extraordinary efforts to segregate as much information as possible for disclosure. Yet plaintiffs would not have the FBI's good deed go unpunished, asserting that the additional releases suggest information remains improperly withheld,[7] and that the FBI has not

[7] The additional releases reflect the volume of the responsive records, which continued to pour in even as processing got underway, the multiple versions and duplicates of many of the records, and small changes in processing guidelines over the multi-year course of this litigation. Particularly with respect to training materials, plaintiffs requested all versions of each item, not merely the final versions, resulting in some human variations in processing that were later adjusted for consistency. In preparing the draft *Vaughn*, where duplicates of a page were detected, the FBI verified the duplicate, and where there were multiple items of a document the FBI provided the plaintiff with the most robust, complete version of the item possible. Supp. Hardy Decl. ¶ 32 and notes 15, 16.

offered a sufficiently specific factual recitation to show that it has met its segregation obligations. Opp. at 24; *see also* Urteaga Decl., Exs. 9 and 10. Their position is, however, as untenable as it is unreasonable.

As set forth in Mr. Hardy's declarations, the FBI has conducted a page-by-page, line-by-line review of all responsive information and released all segregable, non-exempt information on each page to plaintiffs. Hardy *Vaughn* Decl. ¶ 83-84; Supp. Hardy Decl. ¶¶ 34-35. Of the 98,554 pages of responsive documents, the FBI released 50,760 pages in full or in part, and, setting aside over 15,000 pages of duplicates, withheld only 32,212 pages in full—in other words, only one third of the responsive material, despite its sensitive nature—pursuant to FOIA's exemptions. Supp. Hardy Decl. ¶ 36. Apart from the duplicates, the FBI only withheld documents in full if release of any non-exempt information would result in no meaning, or if it was not technically feasible to segregate the exempt information from the nonexempt information due to the format of the record. Frequently the FBI would find, after devoting significant time and resources to its efforts to segregate nonexempt matter, that the resulting released pages provided only disjointed words and phrases with no real informational content. *Id.* ¶ 34. The proof of these labors is in the pudding: the FBI's massive production and detailed, nearly 600-page *Vaughn* index underscore that it is plaintiffs, not defendant, who have resorted to conclusory assertions as to whether defendant has met its burden.[8]

## CONCLUSION

For the foregoing reasons, the Court should grant defendant's motion for summary judgment and deny plaintiffs' cross-motion for summary judgment.

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[8] Plaintiffs suggest that the Court may conduct *in camera* review of the documents identified in Exhibits 7, 8, and 9 to the Urteaga Declaration, in order to resolve the parties' dispute over the propriety of the withholdings. While defendant does not believe that such review is necessary, it is ready, upon the Court's request, to provide copies of the documents that were released to plaintiffs. These were not attached to defendant's motion due to their volume; however, defendant submits that the Hardy declarations and *Vaughn* index should be read in conjunction with what was released to plaintiffs in order to provide context for the information that was withheld.

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Respectfully submitted,

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