SOMNATH RAJ CHATTERJEE (CA SBN 177019)
SChatterjee@mofo.com
ANGELA E. KLEINE (CA SBN 255643)
AKleine@mofo.com
DEBRA URTEAGA (CA SBN 278744)
DUrteaga@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

JULIA HARUMI MASS (CA SBN 189649)
JMass@aclunc.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, California 94111
Telephone: 415.621.2493
Facsimile: 415.255.8437

NASRINA BARGZIE (CA SBN 238917)
nasrinab@advancingjustice-alc.org
ASIAN AMERICANS ADVANCING JUSTICE – ASIAN LAW CAUCUS
55 Columbus Avenue
San Francisco, California 94111
Telephone: 415.896.1701
Facsimile: 415.896.1702

Attorneys for Plaintiffs

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

REPLY IN SUPPORT OF PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT

Date: March 12, 2015
Time: 1:30 p.m.
Courtroom 3
Hon. Richard Seeborg

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. THE FBI HAS NOT SATISFIED THE THRESHHOLD REQUIREMENTS TO WITHHOLD DOCUMENTS UNDER EXEMPTION 7........ 3

A. The FBI Fails to Meet its Burden of Showing a Rational Nexus Between the Withheld Documents and the Enforcement of a Federal Law........ 3

1. The 1986 FOIA Amendment Did Not Eliminate the Threshold Rational Nexus Requirement. 3

2. The FBI Cannot Justify Withholding Documents About General Monitoring, Documents that Describe "Cultural Identifiers" and Stereotypes, and Similar Documents. 6

III. JUDGMENT SHOULD BE ENTERED FOR PLAINTIFFS ON THE DOCUMENTS WITHHELD UNDER EXEMPTION 7. 9

A. Exemption 7(A) – Pending Law Enforcement Proceedings 9

B. Exemption 7(D) – Confidential Sources 10

C. Exemption 7(E) – Investigative Techniques and Procedures 11

1. The Documents Regarding Publicly-Known Techniques Should Be Produced. 11

2. The FBI Cannot Justify Withholding the Culturally-Based Documents Under Exemption 7(E). 12

IV. THE FBI HAS NOT PROVIDED REASONABLY SPECIFIC DESCRIPTIONS OF WITHHELD DOCUMENTS. 13

V. THE FBI FAILED TO PROVIDE "REASONABLY SEGREGABLE" PORTIONS OF RESPONSIVE RECORDS, AS FOIA REQUIRES. 13

VI. CONCLUSION 14

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

CASES

Abdelfattah v. U.S. Dep't of Homeland Sec.,
488 F.3d 178, 187 (3d. Cir. 2007) 14

ACLU v. FBI,
No. C12-13728 SI, 2013 U.S. Dist. LEXIS 93079 (N.D. Cal. Jul. 1, 2013) 9, 11

ACLU v. FBI,
No. C 12-03728 SI, 2014 U.S. Dist. LEXIS 130501 (N.D. Cal. Sept. 16, 2014) .... *passim*

ACLU v. U.S. Dep't of Justice,
No. 12-cv-7412, 2014 WL 956303 (S.D.N.Y. Mar. 11, 2014) 5

Campbell v. U.S. DOJ,
164 F.3d 20 (D.C. Cir. 1998) 4

Church of Scientology v. U.S. Dep't of Army,
611 F.2d 738 (9th Cir. 1979) 3, 4

Davin v. U.S. Dep't of Justice,
60 F.3d 1043 (3d. Cir. 1995), ... 13

Dep't of Air Force v. Rose,
425 U.S. 352 (1976) 2

Elec. Frontier Found. v. U.S. Dep't of Justice,
No. 10-cv-4892, slip op. (N.D. Cal. Nov. 1, 2013) 5

Feshbach v. SEC,
5 F. Supp. 2d 774 (N.D. Cal. 1997) 12

Gordon v. FBI,
390 F. Supp. 2d 897 (N.D. Cal. 2004) 4

Judicial Watch, Inc. v. FDA,
449 F.3d 141 (D.C. Cir. 2006), ... 13

NLRB v. Robbins Tire & Rubber Co.,
437 U.S. 214 (1978) 2

Rosenfeld v. U.S. Dep't of Justice,
57 F.3d 803 (9th Cir. 1995) 4, 5, 6, 11

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Sack v. CIA
No. 12-cv-244 (D.D.C.), ECF No. 35 (Jul. 10, 2014) 5

U.S. Dep't of Def. v. Fed. Labor Relations Auth.,
510 U.S. 487 (1994) 3

U.S. Dep't of Justice v. Landano,
508 U.S. 165 (3d Cir. 1993) 10

U.S. Dep't of State v. Ray,
502 U.S. 164 (1991) 3

Weiner v. FBI,
943 F.2d 972 (9th Cir. 1991) 4, 5, 10

STATUTES

5 U.S.C.
§ 552(b)(7) 4, 9
§ 552(b)(7)(D) 10
§ 552(b)(7)(E) 11
§ 552(b)(9) 13

OTHER AUTHORITIES

John S. Pistole, Statement Before the Senate Select Committee on Intelligence, Washington D.C., FBI, Jan. 25, 2007, http://www.fbi.gov/news/testimony/implementing-the-intelligence-reform-and-terrorism-prevention-act 6

I. INTRODUCTION

The Court should grant Plaintiffs' cross-motion for summary judgment and deny the FBI's motion for summary judgment. As shown in the Plaintiffs' Cross-Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment (ECF No. 119) ("Opening Motion" or "OM"), the FBI's explanations for withholding the documents at issue suffer from concrete and disabling deficiencies. Plaintiffs have raised a narrow set of issues and provided specific reasons supporting the production of the documents described in the Opening Motion, as well as other similarly situated documents. In short, the FBI

(1) failed to show a rational nexus between (a) the documents it withheld under Exemption 7 and (b) the enforcement of a federal law;

(2) additionally failed to satisfy its burden for withholding many of those documents under the applicable subsections of Exemption 7;

(3) provided inadequate descriptions of numerous documents on its sampled index; and

(4) failed to meet its burden for withholding in full numerous additional documents.[1]

The FBI has failed to counter the Plaintiffs' showing. Instead, the FBI's Reply in Support of Motion for Summary Judgment and Opposition to Plaintiffs' Cross-Motion for Summary Judgment (ECF No. 123) ("Opposition" or "FBI Opp.") relies on a series of straw-man arguments, *non sequitors*, and conclusory assertions, which do not justify withholding the documents at issue. For example, the FBI claims that FOIA no longer requires an agency to show under Exemption 7 that a document relates to a pending investigation. This misstates Plaintiffs' argument and misses the point. The FBI must show that a document withheld under Exemption 7 has a rational nexus to the enforcement of a federal law, which the FBI has failed to do.

The FBI also takes the unsupportable position that general monitoring, information-gathering, "public education," and training based on "cultural factors" somehow constitute "law

---

[1] Contrary to the FBI's assertions (FBI Opp. at 1), these include challenges to the FBI's withholding of documents under FOIA Exemptions 2 and 5. (*See* OM Ex. 8 (ECF No. 120-15), challenging specific *Vaughn* index descriptions regarding Exemption 5; ECF Nos. 114-2 through 114-4 (the nearly 48,000 pages of documents withheld in full, which Plaintiffs challenge as including reasonably segregable information (OM at 23-24), including numerous documents withheld under Exemptions 2 and 5)).

1 enforcement purposes" under FOIA. For example, the FBI incorrectly claims that FOIA shields
2 documents related to monitoring and training based on community members' "Middle Eastern
3 background" because the documents allegedly relate to the agency's "law enforcement mandate."
4 But, as a matter of law, FOIA does not shield documents about general monitoring and
5 information gathering. And, the FBI makes no attempt to show that these documents have a
6 nexus with the enforcement of a federal law. Nor could it. These documents do not relate to the
7 enforcement of a federal law any more than any collection of stereotypes about any ethnic or
8 religious group could.

9 The FBI adds that its own guidelines give it permission to engage in the various
10 monitoring activities discussed, but again, that is beside the point. The issue is whether the
11 documents fall within Exemption 7, not whether the activities they describe fall within the FBI's
12 agency mandate. In addition, ignoring authority in the Opening Motion, the FBI asserts that it has
13 unilaterally determined that it cannot provide any more information about numerous documents
14 for which it provided vague and conclusory assertions in the *Vaughn* index. This self-serving
15 assertion fails to satisfy FOIA and should be rejected.

16 For these and other reasons set forth below and in the Opening Motion, the Court should
17 compel production of the documents at issue.

18 Compelling production is necessary to effectuate Congressional policy behind FOIA,
19 particularly in light of the FBI's deficient showing. In addition to ensuring an informed citizenry,
20 *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978), FOIA was designed to foster
21 public debate to improve government agency functions. As the Supreme Court explained, FOIA
22 "was designed to pierce the veil of administrative secrecy and to open agency action to the light
23 of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The issues raised in
24 Plaintiffs' motion—for example, "assessments" and FBI documents describing "cultural
25 background" of minorities in America—specifically focus on documents to inform the public
26 debate and to help improve law enforcement. For example, public debate about whether the FBI
27 is using gross stereotypes of ethnic and religious minorities, what those stereotypes are, and
28 whether the FBI should be using those or any other stereotypes, is precisely the type of discussion

Congress intended FOIA to foster. The same principle applies to information about whether the FBI is monitoring certain groups, *i.e.*, conducting "assessments" or "domain management." If the FBI is generally monitoring Americans, the public has a right to know and to debate the issue.

Indeed, FOIA reflects a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language" as "disclosure, not secrecy, is the dominant objective of [the] [FOIA]." *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994). For these reasons, there is a "strong presumption in favor of disclosure." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). The FBI's deficient responses have failed to overcome this presumption in favor of disclosure, and the Court should compel production.

II. THE FBI HAS NOT SATISFIED THE THRESHHOLD REQUIREMENTS TO WITHHOLD DOCUMENTS UNDER EXEMPTION 7.

A. The FBI Fails to Meet its Burden of Showing a Rational Nexus Between the Withheld Documents and the Enforcement of a Federal Law.

1. The 1986 FOIA Amendment Did Not Eliminate the Threshold Rational Nexus Requirement.

As discussed in the Opening Motion, a government agency may not withhold a document under Exemption 7 unless it meets the threshold requirement of "establish[ing] a 'rational nexus' between *enforcement of a federal law* and the document for which an exemption is claimed." (OM at 8, citing *Am. Civil Liberties Union of N. Cal. ("ACLU") v. Fed. Bureau of Investigation*, No. C 12-03728 SI, 2014 U.S. Dist. LEXIS 130501, at *12-18 (N.D. Cal. Sept. 16, 2014); *Church of Scientology v. U.S. Dep't of Army*, 611 F.2d 738, 748 (9th Cir. 1979)). Here, the FBI has failed to meet its threshold burden under Exemption 7 as to the withheld documents listed in Exhibit 7 to the Declaration of Debra Urteaga in support of the Opening Motion (ECF No. 120-8) because it has not shown a nexus between each of those documents and a legitimate law enforcement purpose. (OM at 6-13.)

The FBI responds with a non-sequitor by noting that Congress amended FOIA in 1986 to eliminate the requirement that a document be "investigatory" to qualify for Exemption 7. (FBI Opp. at 1-4.) Contrary to the FBI's assertions, Plaintiffs argued neither that Exemption 7 requires that documents be "investigatory," nor that the documents be produced because they are non-

1 investigatory. (*See* OM at 8-13.) Rather, Plaintiffs observed that an agency withholding
2 documents under Exemption 7 must establish a "'rational nexus' between (1) *enforcement of a*
3 *federal law* and (2) the document for which an exemption is claimed." (OM at 8-13, citing
4 *ACLU*, 2014 U.S. Dist. LEXIS 130501, at *12-18; *Weiner v. FBI*, 943 F.2d 972, 986 (9th Cir.
5 1991); *Rosenfeld*, 973 F.3d at 808.) Because the FBI has failed to do that, its summary judgment
6 motion as to documents withheld under Exemption 7 should be denied, and Plaintiffs' motion
7 should be granted.

8 Without citing any authority, the FBI erroneously claims that because FOIA Exemption 7
9 no longer requires that documents be "investigatory," then "[b]y the same logic, it follows that an
10 agency need not show that these types of documents were related to the enforcement of a
11 particular law." (FBI Opp. at 2-3.) That is wrong as a matter of law. The 1986 FOIA
12 amendment did not eliminate the requirements that a withheld document be related to the
13 enforcement of a federal law and be prepared for legitimate law enforcement purposes. *See*
14 5 U.S.C. § 552(b)(7). *After* the 1986 amendment, the Ninth Circuit and other courts across the
15 country have continued to apply the rational nexus test to require a rational nexus between the
16 withheld document and the enforcement of a federal law. *See*, *e.g.*, *Weiner*, 943 F.2d at 986;
17 *Rosenfeld*, 57 F.3d at 808; *ACLU*, 2014 U.S. Dist. LEXIS 130501, at *12-18; *Gordon v. FBI*,
18 390 F. Supp. 2d 897, 901 (N.D. Cal. 2004); *Campbell v. U.S. DOJ*, 164 F.3d 20, 32 (D.C. Cir.
19 1998). For the same reasons, this aspect of the holding in *Church of Scientology*, 611 F.2d at 748,
20 remains good law. *See*, *e.g.*, *Rosenfeld*, 57 F.3d at 808 (quoting *Church of Scientology*, requiring
21 the government to "establish a 'rational nexus' between *enforcement of a federal law* and the
22 document for which [a law enforcement] exemption is claimed") (emphasis added).

23 For the same reasons and under these decisions, the FBI's assertion that Exemption 7
24 shields from production any document "that is rationally related to [the agency's] law
25 enforcement mandate" is wrong. That is not the standard. Indeed, the FBI's argument proves too
26 much. Given that the FBI is a law enforcement agency, if Exemption 7 shielded any FBI
27 document that relates to its "law enforcement mandate," then the FBI could be immune from
28 FOIA requests. That is not the law. *See*, *e.g.*, *ACLU*, 2014 U.S. Dist. LEXIS 130501, at *11

1 (requiring that "[a]n agency which has a clear law enforcement mandate, such as the FBI" must
2 "establish a 'rational nexus' between enforcement of a federal law and the document for which an
3 exemption is claimed").

4 The FBI's cases (FBI Opp. at 2-3) are inapposite. *Electronic Frontier Foundation v. U.S.*
5 *Department of Justice* did not consider this threshold issue. Instead, that decision focused on
6 whether, under Exemption 7(E), specific "law enforcement techniques and procedures" were
7 "routine and widely known." No. 10-cv-4892 (N.D. Cal.), ECF No. 75, Order re Renewed Cross-
8 Motions for Summary Judgment, at 9 (Nov. 1, 2013). The Court neither held nor suggested that
9 the rational nexus test no longer applies, a proposition that would contradict Ninth Circuit
10 authority. *See id*. ("It is difficult to imagine what law enforcement techniques, procedures, or
11 guidelines [defendant] sought to protect from disclosure by this redaction."). Similarly, in
12 *ACLU v. U.S. Department of Justice*, the Southern District of New York held, after an *in camera*
13 review, that a particular memorandum did not fall within Exemption 7(E) because the topic of the
14 memorandum did not reveal any investigative techniques not generally known to the public.
15 No. 12-cv-7412, 2014 WL 956303, at *8 (S.D.N.Y. Mar. 11, 2014). As such, the court withheld
16 particular memorandum only because it was "relevant to an investigation or case." *Id*. Finally,
17 *Sack v. CIA* held that revealing polygraph practices could lead to circumvention of law
18 enforcement. No. 12-cv-244 (D.D.C.), ECF No. 35, Mem. Op. at 39 (Jul. 10, 2014). It did not
19 hold that it was unnecessary for the CIA to show that the practices are related to enforcement of a
20 federal law. *See id.*

21 The FBI's attempt to distinguish *Rosenfeld* and *Weiner* because the FOIA requests in
22 those decisions purportedly related to "investigatory" records is unpersuasive. (FBI Opp. at 3.)
23 Again, whether a document requested under FOIA is "investigatory" is beside the point. As
24 discussed above, the threshold question is whether there is a rational nexus between the withheld
25 document and the legitimate enforcement of a federal law. Further, the FOIA requests here relate
26 to both investigatory and non-investigatory records. (*See* OM at 4-5; OM Ex. 7-5 (ECF No. 120-
27 13); *see also Rosenfeld*, 57 F.3d at 810 (regarding Free Speech Movement documents).
28

1
2
2. The FBI Cannot Justify Withholding Documents About General Monitoring, Documents that Describe "Cultural Identifiers" and Stereotypes, and Similar Documents.

3 The FBI's arguments for withholding the specific documents discussed in the Opening
4 Motion (OM at 10-14) demonstrate that the FBI has not met its burden to withhold these
5 documents.

6 **"Assessment" and "Domain Management"**: The FBI does not dispute that the
7 "assessment" and "domain management" documents, discussed at length in the Opening Motion,
8 relate to general monitoring and information gathering that is based, in part, on "cultural
9 identifiers," rather to than the enforcement of a federal law. (OM at 10-12; FBI Opp. at 4.)
10 Indeed, the FBI has failed to provide any facts that would show that the "assessment" and
11 "domain management" documents at issue have any purpose other than general monitoring and
12 information gathering. Under controlling law, however, Exemption 7 does not permit an agency
13 to withhold documents regarding general "monitoring" and "information gathering," unconnected
14 to the enforcement of a federal law. *See*, *e.g.*, *ACLU*, 2014 U.S. Dist. LEXIS 130501, at *12
15 (collecting authority); *Rosenfeld*, 57 F.3d at 809. On this ground alone, the assessment and
16 domain management documents must be produced.

17 The FBI's failure is not surprising. By definition, these documents relate only to general
18 "assessment" of communities and groups and information gathering about particular "domains,"
19 *i.e.*, particular "geographic or substantive areas."[2] The FBI cannot connect such culturally-based
20 monitoring activities to the enforcement of a specific federal law, let alone a legitimate law
21 enforcement purpose, as FOIA requires.
22

23 [2] "Assessments," authorized under the FBI's Domestic Investigations and Operations Guide
24 ("DIOG"), "do not require a particular factual predication," and while they "cannot be arbitrary or groundless speculation," they require "less than 'information or allegation' as required for the
25 initiation of a preliminary investigation." "Domain assessments" "may be opened to obtain information that informs or facilitates the FBI's intelligence analysis and planning functions."
26 Such assessments are not "threat specific" and "no particular factual predication is required" for domain management assessments. (OM at 3-4.) "The domain management process is a
27 continuous, systematic approach designed to achieve a comprehensive understanding of a geographic or substantive area of responsibility."
28 http://www.fbi.gov/news/testimony/implementing-the-intelligence-reform-and-terrorism-prevention-act

1 The FBI's only response is an irrelevant boot-strap argument claiming that the Attorney
2 General's Guidelines for Domestic FBI Operations and the DIOG give the FBI permission to
3 conduct the activity described in the documents. (FBI Opp. at 4.) But whether the FBI is
4 operating within its agency guidelines is not the issue. The issue is whether the FBI has met its
5 burden as to the documents that it withheld under FOIA Exemption 7. Because the FBI has not
6 rationally connected each assessment and domain management related document with the
7 enforcement of a federal law, FOIA Exemption 7 cannot shield these documents from disclosure.
8 (*See* OM at 10-12.)

9 **Training:** Similarly, the FBI fails to dispute that the training materials it withheld relate
10 to general "cultural factors," history, and psychology, rather than to the actual enforcement of a
11 federal law. (*See* OM 13-14; FBI Opp. at 6.) Indeed, it is difficult to understand how the FBI's
12 asserted efforts at "cultural" "understanding" could possibly relate to a legitimate law
13 enforcement purpose. If that were true, then the entire Middle Eastern Studies collection at U.C.
14 Berkeley could fall under Exemption 7. The FBI's assertion is particularly problematic where
15 training documents already produced, albeit in a highly redacted form, show that such training is
16 based on gross cultural stereotypes. These include training FBI agents that, for example, (i)
17 Westerners are "rational" thinkers, but Arabs are "emotion based;" (ii) "Western cultural values"
18 seek to "identify problems and solve them through logical decision-making," while "Arab cultural
19 values" are "facts colored by emotion and subjectivity;" (iii) "Westerners think, act, then feel,"
20 while "Arabs feel, act, then think;" and (iv) Arabs have "no concept of privacy" or "constructive
21 criticism." (OM at 4-5 (collecting documents).) This purported "understanding" of "Arab
22 cultur[e]" has no rational nexus to the enforcement of a federal law, as the FOIA requires, and so
23 the challenged training documents should be produced. Like many of the other categories of
24 documents at issue in this motion, the content of these records highlights the public's interest in
25 transparency regarding the FBI's activities, among other reasons, to foster public debate about
26 improving law enforcement.

27 **"Community Outreach"**: The FBI's attempt to defend its withholding of community
28 outreach documents should also be rejected. The FBI argues that "[t]hese partnerships allow the

FBI to educate members of the public . . . ." (FBI Opp. at 5.) That may be a worthy goal, but, again, this misses the point. General public "educat[ion]" is not enforcement of a federal law, and so it does not justify withholding such documents under Exemption 7. (*See* OM at 12.)

Information Regarding Recruitment: Documents regarding general efforts to recruit informants for use in potential future law enforcement activity also do not qualify for Exemption 7 for the same reasons. (OM at 13.) The FBI admits that it identifies potential future informants unconnected to any "full-fledged investigation[]," but insists generally that its "intelligence gathering efforts . . . still have the ultimate goal of assisting law enforcement." (FBI Opp. at 6.) Again, that may be true, but the narrow legal question here is whether the FBI has met its burden of demonstrating that each of the documents it withheld under Exemption 7 bears a rational nexus to the enforcement of federal law. (*See* OM at 6-8 (collecting authority).) And, again, this argument proves too much. As an enforcement agency, the FBI's work ought to always have the "ultimate goal of assisting law enforcement." (FBI Opp. at 6.) That does not mean that FOIA shields every document the FBI produces. Moreover, the FBI does not explain how its law enforcement mission would be harmed by innocent community members knowing how and why they might be recruited as potential informants.

The FBI argues that confidential human source ("CHS") documents have the "goal of assisting law enforcement against dangerous illegal activity" and that disclosing the documents would "seriously jeopardize the FBI's ability to recruit and retain CHS." (*Id.*) Plaintiffs do not dispute the FBI's goal, but the FBI does not and cannot explain how disclosure of these documents would jeopardize anything. If a potential recruit wants to be an informant, he or she will do so. The FBI cannot explain how disclosure of the methods for recruiting a recruit would prevent a recruit from being recruited. The FBI's position is illogical and unsupported.

To be clear, by these documents, Plaintiffs are not seeking the names of CHSs, but are seeking documents that relate to the methods used to recruit and work with them. (OM at 13.) These documents do not relate to any specific crime or investigation for which CHSs are supplying information, let alone any such specifics that would justify withholding the documents. And, the FBI has not shown how disclosing these documents would endanger any person or law

enforcement efforts. The documents should therefore be produced.

III. JUDGMENT SHOULD BE ENTERED FOR PLAINTIFFS ON THE DOCUMENTS WITHHELD UNDER EXEMPTION 7.

In addition to failing to meet the threshold requirements to withhold documents under Exemption 7, the FBI's attempts to withhold documents under specific subsections of Exemption 7 also fail for separate and independent reasons.

A. Exemption 7(A) – Pending Law Enforcement Proceedings

To withhold documents under Exemption 7(A), the FBI must show that the document "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7); (OM at 14.) In its opening brief and in its *Vaughn* indices, the FBI made only conclusory assertions that disclosure of particular documents would "jeopardize the pending investigations." (Defendant's Notice of Motion and Motion for Summary Judgment (ECF No. 114) at 14.) In its *Vaughn* index to Documents 307 and 322, for example, the FBI merely notes that it "has protected information concerning pending FBI operations/investigations and/or intelligence gathering efforts" and that it "has determined that a release of this nature in the midst of these active, on-going operations/investigations could trigger interference with these operations/investigations, intelligence gathering efforts, and/or prosecutions." (FBI's Motion for Summary Judgment ("FBI Mot."), Ex. II (ECF No. 114-3) at 422-23.) The FBI repeats the same phrasing in other *Vaughn* indices. (*See id.* at 433 (Index to Documents 310 and 315).)

Although Plaintiffs explained why this is insufficient under Exemption 7(A) (*see* OM at 14, Ex. 7), the FBI merely notes that it has re-reviewed the withheld documents and determined that its explanations for withholding documents are sufficient. (FBI Opp. at 7.) This still does not meet the FBI's burden: Plaintiffs and the Court "cannot make an assessment of the FBI's claim without any basis other than the FBI's bald assertion." *ACLU v. FBI*, No. C12-13728 SI, 2013 U.S. Dist. LEXIS 93079, at *22 (N.D. Cal. Jul. 1, 2013). The documents withheld under Exemption 7(A) should be produced for this additional reason.

B. Exemption 7(D) – Confidential Sources

The FBI withheld numerous documents under Exemption 7(D), which protects documents from production under FOIA if the documents "could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D). Plaintiffs challenged certain categories of these documents in their Opening Motion. (OM at 15.) The FBI asserts that these documents reflect information provided by CHSs to whom the FBI gave an express or implied grant of confidentiality. (FBI Opp. at 7-11.) To meet its burden to withhold such documents under Exemption 7(A), however, the FBI must "make an individualized showing of confidentiality with respect to each source; confidentiality cannot be presumed." *ACLU*, 2014 U.S. Dist. LEXIS 130501, at *30; *see also Wiener*, 943 F.2d at 980; (OM at 15).

First, as to the documents withheld under an asserted *implied* grant of confidentiality, the FBI fails to make the requisite showing. The FBI continues to focus on only a few documents and simply asserts, without explanation, that its general statements in the *Vaughn* indices are sufficient. (FBI Opp. at 10.) For instance, in the *Vaughn* index to Documents 212 and 213, the FBI makes general assumptions regarding each confidential source: "These individuals are considered to be confidential sources since they furnished information only with the understanding that their identities and the information provided will not be released outside the FBI." (FBI Mot., Ex. II (ECF No. 114-3) at 304.) Without more, the FBI concludes that the information the source furnished must be considered confidential because it purportedly "has learned" that is what a confidential source would want. (*Id.*)

That is not, as a matter of law, sufficient. (*See* OM at 17-18.) The FBI must show some specific circumstances that would support an inference of confidentiality, such as "the character of the crime at issue" or "the source's relation to the crime," which the FBI has failed to do. (*Id.* at 17, quoting *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 179 (3d Cir. 1993).)

Second, for documents withheld pursuant to an asserted *express* grant of confidentiality, for the first time in its Opposition, the FBI states that the five applicable documents discussed in Plaintiffs' Opening Motion contains a "CHS" identification, which under FBI policy must mean that the FBI gave the source an express assurance of confidentiality. (FBI Opp. at 8.) Based on

1 that new showing, Plaintiffs do not challenge those five documents. Plaintiffs request that the
2 FBI determine whether the remaining CHS documents it withheld pursuant an asserted express
3 grant of confidentiality contain the same "CHS" designation. And if they do not, the FBI should
4 be required to produce those documents.

5 **C. Exemption 7(E) – Investigative Techniques and Procedures**

6 The majority of documents the FBI has withheld pertain to FOIA Exemption 7(E), which
7 permits an agency to exclude from production information that "would disclose techniques and
8 procedures for law enforcement investigations or prosecutions" or "would disclose guidelines for
9 law enforcement investigations or prosecutions" *if* either disclosure could reasonably be expected
10 to risk circumvention of the law. 5 U.S.C. § 552(b)(7)(E).

11 **1. The Documents Regarding Publicly-Known Techniques Should Be**
12 **Produced.**

13 As noted in the Opening Motion, many documents are not properly withheld under
14 Exemption 7(E) because they relate to publicly-known law enforcement techniques. (OM at 18-
15 19, citing *Rosenfeld*, 57 F.3d at 815.) The FBI admits that these documents relate to publicly-
16 known techniques but asserts generally that the documents relate to "non-public details about
17 techniques and procedures that are otherwise known to the public." (Declaration of David Hardy
18 ¶ 80 (ECF No. 114-1).) That sort of conclusory justification is not enough under Ninth Circuit
19 law to justify withholding documents. (OM at 19, citing *Rosenfeld*, 57 F.3d at 815 ("If we were
20 to follow such reasoning, the government could withhold information under Exemption 7(E)
21 under any circumstances, no matter how obvious the investigative practice at issue, simply by
22 saying that the 'investigative technique' at issue is not the practice but the application of the
23 practice to the particular facts underlying that FOIA request."); *ACLU*, 2013 U.S. Dist. LEXIS
24 93079, at *39; *ACLU*, 2014 U.S. Dist. LEXIS 130501, at *29-30.)

25 The FBI suggests that whether a document can be classified as publicly-known is "case-
26 specific," citing a few slip opinions for the proposition that generally known documents may still,
27 under specific circumstances, qualify for being withheld under Exemption 7(E). (FBI Opp. at
28 12.) This, again, does not address the dispositive legal issue. The FBI bears the burden of

demonstrating the specific circumstances that justify keeping a document secret. Here, the FBI has not met its burden, so these documents should be produced.

2. The FBI Cannot Justify Withholding the Culturally-Based Documents Under Exemption 7(E).

For the remaining documents withheld under Exemption 7(E), including documents regarding targets, assessments, and recruiting confidential human sources (*see* OM at 19-22), the FBI surrenders and asserts that its conclusory justifications will have to do because it is unable to provide any "additional explanation." (FBI Opp. at 13-15.) For instance, the FBI is unable to answer how the public knowing about the FBI's routine "assessment" and "mapping" of cultural groups within the United States, divorced from any criminal investigation or enforcement, would risk circumvention of any law. (*See id*. at 13.)

The FBI claims that "revealing the details of what and how such cultural factors are utilized" would undermine the use of those techniques. (*Id*. at 13.) This conclusory claim does not withstand scrutiny. How can disclosing the FBI's purported understanding of its "utilization" of "cultural factors" help anyone circumvent the law? The FBI's assertion appears to be nothing more than an admission that it uses stereotypes of broad religious and ethnic groups. As discussed above, the FBI's documents describe such "cultural factors" regarding Arab Americans in gross stereotypes, such as "Religion central to life; Society-family/tribe most important; . . . Concept of time is less rigid," Arabs do not "solve" "problems through logical decision making," and Arabs have "no concept of privacy" or "constructive criticism." (*See* OM Ex. 4 (ECF No. 120-4) at 52.) While the public has a strong interest in knowing how these supposed "cultural factors" influence the FBI, that disclosure would not undermine any legitimate law enforcement effort or help anyone circumvent the law.

Indeed, FOIA requires the withholding agency to provide sufficient information to establish that disclosure of certain documents would risk circumvention of the law supported by specific, "non-conclusory" facts. *Feshbach v. SEC*, 5 F. Supp. 2d 774, 787 (N.D. Cal. 1997). It is not enough for the agency to state that producing particular documents will risk circumvention of the law without explaining how such circumvention will result. (*See* OM at 19-22 (collecting

1 authority).) Accordingly, the FBI's motion for summary judgment with respect to the documents
2 withheld under 7(E) should be denied, and Plaintiffs' motion regarding these documents should
3 be granted.

4 5 **IV. THE FBI HAS NOT PROVIDED REASONABLY SPECIFIC DESCRIPTIONS OF WITHHELD DOCUMENTS.**

6 The FBI has failed to provide adequate descriptions of the withheld documents identified
7 in Exhibit 8 to the Urteaga Declaration in support of the Opening Motion (ECF No. 120-15).
8 (OM at 22-23.) The FBI argues that "virtually" all of these documents refer to investigative or
9 intelligence-gathering techniques, and, thus, the FBI cannot disclose more information. (FBI
10 Opp. at 15.) Devoid of context and repeating legal conclusions, the FBI's opening and opposition
11 briefs fail to meet the agency's burden of providing sufficient information to "understand the
12 withheld information" or ascertain the "merits" of the claimed exemptions, as is required to shield
13 these documents from public disclosure. (OM at 22, citing *Judicial Watch, Inc. v. FDA*, 449 F.3d
14 141, 150 (D.C. Cir. 2006).) The FBI should be required to either produce the documents in
15 Exhibit 8, or provide an adequate *Vaughn* index of these documents so that the parties and the
16 Court may assess whether the FBI has properly withheld the documents under FOIA. (*See id.*)

17 18 **V. THE FBI FAILED TO PROVIDE "REASONABLY SEGREGABLE" PORTIONS OF RESPONSIVE RECORDS, AS FOIA REQUIRES.**

19 The FBI has failed to provide the "reasonably segregable portion of" records listed in
20 Exhibit 9 to the Urteaga Declaration in support of the Opening Motion (ECF No. 120-16), as
21 FOIA, 5 U.S.C. § 552(b)(9), requires. (OM at 23-24.) Specifically, in order to withhold a
22 document in full, rather in redacted form, the FBI must address what proportion of the document
23 contains non-exempt, segregable information, how such information is dispersed through each
24 document, and why this information cannot be segregated and disclosed. (*See id.*) Without this
25 required "factual recitation" regarding each document, the FBI fails to carry its segregability
26 burden. (OM at 24, citing *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1052 (3d. Cir. 1995).)
27 As discussed in the Opening Motion, the few additional documents that the FBI produced while
28 preparing its *Vaughn* index suggest that the FBI has likely failed to produce reasonably

segregable portions of documents in the other nearly 48,000 pages it has withheld in full. (*See* OM at 23-24.)

In reply, the FBI merely complains that it is being "punished" for the "good deed" of producing a few additional documents, and asserts that it has now unilaterally "reviewed" documents and concluded that it has complied with FOIA. (FBI Opp. at 15.) This motion is neither about punishment nor reward, but about compliance with the law. The FBI's response does not satisfy the FBI's segregability burden under FOIA. The FBI has continued to fail to provide the required factual explanations for why the materials withheld in full are not reasonable segregable and "what proportion of the information [therein] is non-exempt and how that material is dispersed throughout the document." (OM at 23-24, citing *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 488 F.3d 178, 187 (3d. Cir. 2007).) Plaintiffs' motion with respect to the documents identified in Exhibit 9 should be granted, and the FBI's motion regarding these documents should be denied.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the FBI's motion for summary judgment and grant Plaintiffs' cross-motion for summary judgment.

Dated: January 14, 2015

By: */s/ Somnath Raj Chatterjee*

SOMNATH RAJ CHATTERJEE
SChatterjee@mofo.com
ANGELA E. KLEINE
AKleine@mofo.com
DEBRA URTEAGA
DUrteaga@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

JULIA HARUMI MASS
JMass@aclunc.org
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, California 94111
Telephone: 415.621.2493

Facsimile: 415.255.8437
NASRINA BARGZIE
nasrinab@advancingjustice-alc.org
ASIAN AMERICANS ADVANCING JUSTICE –
ASIAN LAW CAUCUS
55 Columbus Avenue
San Francisco, California 94111
Telephone: 415.896.1701
Facsimile: 415.896.1702

Attorneys for Plaintiffs

THE AMERICAN CIVIL LIBERTIES UNION OF
NORTHERN CALIFORNIA, ASIAN
AMERICANS ADVANCING JUSTICE – ASIAN
LAW CAUCUS

ATTESTATION OF E-FILED SIGNATURE

I, Debra Urteaga, am the ECF User whose ID and Password are being used to file this Reply In Support of Plaintiff's Cross-Motion for Summary Judgment. In compliance with General Order 45, X.B., I hereby attest that Julia Harumi Mass, Nasrina Bargzie, S. Raj Chatterjee, and Angela Kleine have concurred in this filing.

Dated: January 14, 2015

/s/ Debra Urteaga
Debra Urteaga

sf-3489962