No. 13-55172

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAJI JAWDAT HAMDAN, et al.,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,
Defendants-Appellees.

On Appeal from the United States District Court, Central District of California
No. CV 10-6149-DSF (JEMx)

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

There are no corporations involved in this case.

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INTRODUCTION

This appeal arises from U.S. citizen Naji Hamdan's continuing quest, five years after the fact, to obtain information about the U.S. government's role in the horrific human rights abuses he suffered in the United Arab Emirates. In 2008, United Arab Emirates (U.A.E.) State Security abducted Mr. Hamdan and took him to a black site where they tortured him over the course of three months. Mr. Hamdan suspects that the U.S. government played a role in the horrors he suffered for various reasons. To name a few: his abduction came just six weeks after two FBI agents from Southern California flew to the U.A.E. and interrogated him inside the U.S. embassy there; the U.A.E. released him from the black site without explanation just days after his family filed a *habeas* petition against the U.S. government alleging that it was responsible for his detention; during at least one torture session, he spoke with a man who was dressed as a westerner and had a native American accent; and, as a general matter, the U.S. government has acknowledged that it has used cooperating foreign governments to engage in "proxy detention," despite outcry from human rights groups who have documented the resulting abuses.

The Freedom of Information Act has long served as a critical tool in uncovering government abuse, just as Congress intended when it enacted FOIA nearly fifty years ago. Yet in this case the truth about the U.S. government's

involvement in Mr. Hamdan's horrific ordeal remains unknown because the relevant federal agencies have failed to comply with their FOIA obligations.

Plaintiffs now ask this Court to hold the government to the rigorous standards applicable under the letter and spirit of FOIA, so that Mr. Hamdan and the general public can gain a full understanding of this matter, of great personal and public significance.

STATEMENT OF JURISDICTION

The District Court had jurisdiction under, *inter alia*, 5 U.S.C. § 552(a)(4)(B). The District Court entered summary judgment for all Defendants on December 11, 2012. Excerpt of Record (hereinafter "ER") 1. [1] Plaintiffs timely appealed on January 25, 2013. ER 9. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court erred in holding that the FBI and DOS conducted an adequate search for responsive documents.

2. Whether the district court erred in holding that the FBI and DIA properly withheld documents under FOIA Exemptions 1, 3, and 7(E).

[1] Plaintiffs originally sued several other federal agencies, but declined to pursue further litigation against them, either at some stage before the district court or here.

3. Whether the district court erred in holding that the FBI, DIA, and DOS adequately produced and attested to the production of all non-exempt segregable information.

STATEMENT OF THE CASE

Two U.S. citizens - Naji Hamdan ("Mr. Hamdan" or "Naji") and his brother Hossam Hemdan ("Hossam") - as well as the American Civil Liberties Union Foundation of Southern California ("ACLU-SC") have brought this appeal to obtain information about the U.S. government's role in Mr. Hamdan's detention, interrogation, and torture in the U.A.E., as well as the U.S. government's surveillance of Mr. Hamdan and some of his associates (his brother Hossam, his business Hapimotors, and the former manager of Hapimotors, Jehad Suliman), for a span of almost ten years leading up to Mr. Hamdan's detention and torture. ER 2-7; 71; 699-700.

The Defendants on appeal are three federal agencies who have responsive information that they refuse to produce: the FBI, the DIA (a component of the Department of Defense), and the DOS.

Information about the events that gave rise to the FOIA request gives useful context to the arguments presented here.

I. Surveillance, Detention, Interrogation, and Torture of Naji Hamdan

Naji Hamdan is an American citizen. ER 682; 518. He was born in Lebanon, moved to this country in 1984, when he was 18, and settled in Southern California. ER 682. He studied engineering at Northrop University. ER 518; 682. After graduating he started a successful auto parts business called Hapimotors. ER 518; 682. Mr. Hamdan is also an observant Muslim and a founding member of the Islamic Center of Hawthorne, a Southern California mosque, where he frequently served as a volunteer imam. ER 518.

In the late 1990s, the FBI began surveilling Mr. Hamdan as well as others who attended his mosque. ER 24; 379-383. In December of 1999, FBI agents interrogated him at his home, asking for information about whether he was associated with any terrorist groups or knew of any imminent plots. ER 384-386; 516-522; 545-546; 693-694. Around this time, the FBI also began to appear at the home and workplace of Mr. Hamdan's brother Hossam, to question him about Mr. Hamdan and others at the mosque they attended.[2] ER 533-537; 698-699. FBI Agents also questioned Mr. Hamdan's friends, relatives, and business associates, including Hapimotors' manager Jehad Suliman, on several occasions. ER 337-340; 693-694.

[2] Naji Hamdan's brother Hossam is also an American citizen. He now resides in the Los Angeles area. ER 533-537. Over the years, FBI agents here repeatedly often questioned Hossam about his brother Naji. ER 533-537.

The FBI contacted Mr. Hamdan several more times over the following years. ER 518-519; 693-694. Mr. Hamdan always fully cooperated with them. ER 518-519. Nonetheless, the constant surveillance made life in the U.S. increasingly difficult for him and his family. In particular, air travel became very difficult, as he was frequently detained and questioned at airports. ER 518-519.

In August 2006, Mr. Hamdan relocated his family to the U.A.E., where he opened another auto parts business. ER 518-519. On the day of his departure, federal officers intercepted, detained, and interrogated him for several hours, forcing him to miss his flight. ER 518-519.

The FBI's interest in Mr. Hamdan apparently intensified after he relocated to the U.A.E. In March 2007, Mr. Hamdan returned to the United States on a one-week visit. ER 694. Upon arrival at LAX, federal agents questioned him for over four hours. ER 518-519. Throughout the duration of his week-long trip, federal agents followed him with an entourage of three to four cars, which were easily identifiable by Mr. Hamdan and the friends and associates with whom he met. ER 518-519. Many of the people with whom Mr. Hamdan met were subsequently visited by the FBI and questioned about their conversations with him. ER 547.

In 2007, Mr. Hamdan's wife and children moved to Lebanon to be closer to family. ER 519. Thereafter, Mr. Hamdan would fly regularly between the U.A.E. and Lebanon. ER 519. In January 2008, when he was *en route* back to the U.A.E.,

Lebanese intelligence officials arrested Mr. Hamdan at the airport in Beirut for no stated reason. ER 519. He was detained for one week while Lebanese officials interrogated him, accused him of terrorist involvement, and subjected him to inhumane, physically abusive treatment. ER 73-74; 302-312; 518-520. A Lebanese judge eventually reviewed Mr. Hamdan's case and stated that he knew of no reason Lebanese authorities detained Mr. Hamdan. ER 519. Shortly after Mr. Hamdan's release, two FBI agents contacted his brother Hossam in Los Angeles and questioned him about Mr. Hamdan's detention in Lebanon. ER 298-301. Mr. Hamdan later heard from a family friend who works in the Lebanese intelligence service that he was detained at the behest of a prominent foreign government. ER 519.

In July 2008, FBI agents contacted Hossam and asked if he could help arrange a meeting between them and his brother Naji at the U.S. Embassy in Abu Dhabi.[3] ER 298-301; 536-537. Hossam contacted Naji, who agreed to cooperate with the FBI as he had done before. ER 298-301. In July 2008, at least two FBI agents (one of whom was Joshua Stone) flew from Los Angeles to the U.A.E. and

[3] The documents produced by the FBI memorializing this conversation were drafted by "jps," whom Plaintiffs understand to be Joshua P. Stone. ER 298-301; 303. Hossam also recalls that the FBI agent in Los Angeles who contacted him was named Joshua Stone. ER 536.

interrogated Mr. Hamdan at the Embassy for several hours.[4] ER 313-319; 320-327; 329-335; 695. The FBI's Legal Attache Gary Price, stationed in Abu Dhabi, was also involved in the interrogation. ER 317.

Approximately one month later, on August 26, 2008, U.A.E. State Security abducted Mr. Hamdan outside his home without explanation. ER 519-532; 695. The officials blindfolded him, hand and foot-cuffed him, forced him into a vehicle, and took him to a "black site.".[5] ER 519-532; 695.

The U.A.E.'s State Security detained and tortured Mr. Hamdan in this secret location for the next three months. ER 519-532. They subjected him to horrific physical and psychological abuse in order to extract false confessions to an ever-changing array of alleged terrorist activities and affiliations. ER 519-532. The brutality was severe; Mr. Hamdan was "sure that they would kill [him]." ER 519-532. Among other horrific abuses, they locked him in a refrigerated, underground room with almost no clothing for hours; blindfolded and beat him on his back, legs, head, and the soles of his feet; kicked him in his liver with military boots despite (or perhaps because of) his disclosure that he had a liver condition; strapped him to an electric chair and told him that they would activate it unless he

[4] The documents produced by the FBI memorializing this interrogation also indicate that it was drafted by "jps." ER 303.

[5] Human rights groups, as well as the State Department, have extensively documented the unlawful arrest and torture practices of the U.A.E.'s State Security. ER 444; 500-512.

confessed; and threatened to abduct his wife and rape her in front of him unless he confessed. ER 81-92; 519-532.

During one of these torture sessions, a man with perfect English and a native American accent spoke to Mr. Hamdan. ER 520. Although Mr. Hamdan was blindfolded, he could see through the bottom of his blindfold that the man wore Western-style shoes and pants, unlike the other interrogators. ER 520. Mr. Hamdan begged this man for help, in English, but the man responded "do what they want or they will fuck you up!" ER 520.

Meanwhile, on August 28, 2008, immediately upon learning that Mr. Hamdan had been abducted, his wife informed the U.S. Embassy in Abu Dhabi about her husband's arrest. ER 82-82; 388. Naji's brother Hossam also contacted the FBI in Los Angeles about the incident. ER 293-297.

Despite receiving this prompt notice, and despite the fact that the U.A.E. and U.S. are close allies who cooperate on a number of issues, ER 469-512, no consular official visited Mr. Hamdan for approximately three months after his abduction. ER 82; 388; 391; 697. In contrast, several weeks before that visit, the FBI's Legal Attache ("Legatt") stationed in Abu Dhabi communicated with U.A.E. officials about Mr. Hamdan's detention. ER 388. In addition, several documents produced by the DOS reveal that its Bureau of Political and Military Affairs also communicated about this matter. ER 113; 121 (one email describing

communication between consular officer Sean Cooper and "Abu Dhabi Pol/Mil," and another requesting Mr. Cooper to contact that office).[6] Mr. Cooper finally visited Mr. Hamdan at the black site on October 19, 2008, in a brief non-confidential session that was closely monitored by U.A.E. guards. ER 521.

One month later, because Mr. Hamdan was still detained at the black site, his wife and brother (represented by the ACLU) filed a habeas petition in Washington, D.C., alleging that the U.A.E. had detained Mr. Hamdan at the behest of the United States. *Mallouk v. Obama*, No. 08-2003, 2009 WL 2424307 (D.D.C. Aug. 4, 2009); ER 697.

One week later, on November 26, 2008, the U.A.E. released Mr. Hamdan from the black site, transferred him to a normal prison in Abu Dhabi, and brought vague terrorism-related charges against him.[7] ER 87-92; 697. Prior to his release from U.A.E. State Security, they forced him to sign a lengthy confession stating that he had engaged in various terrorist acts. *Id*. A U.A.E. court eventually convicted him of some unknown sub-set of the terrorism-related charges, without

[6] The contents of the communications between Mr. Cooper and Pol/Mil have never been identified or disclosed, and are part of the dispute in this appeal.

[7] After his release from the black site, the federal district court denied his habeas petition, and Mr. Hamdan declined to pursue an appeal. *Mallouk v. Obama*, 2009 WL 2424307.

ever explaining their specific nature, which is apparently common in the U.A.E.[8] *See* ER 112. The court sentenced him to "time served," and ordered him deported to Lebanon, ER 111-112., where he currently resides with his family. To this day, Mr. Hamdan has never been charged with any crime in the U.S., although he remains fearful of returning here.

II. Proxy Detention in Other Cases

Plaintiffs' interest in information concerning the U.S. government's involvement in Mr. Hamdan's detention and torture derives in part from the experiences of others subject to similar harm. In recent years, the U.S. government has increasingly engaged in 'proxy detention' to detain people abroad without providing them the legal protections they would receive here. ER 30-33; 416-498.

Human rights advocates and others have expressed deep concerns about the government's use of proxy detention, in part because it obstructs oversight by the judiciary and Congress. ER 416-498. However, the practice continues. For example, another American citizen - Yonas Fikre - was also detained and tortured in the U.A.E., in 2011.[9] ER 14-20; 30-36; 416-498. The FBI has even publicly

[8] The record before the district court contained additional information on abuse in the U.A.E.'s criminal system generally and on the particular absurdity of Mr. Hamdan's trial in the U.A.E. See ER 422-429; 436-441; 442-444.

[9] Mr. Fikre's case is remarkably similar to Mr. Hamdan's. Among the similarities between Mr. Fikre and Mr. Hamdan's case are that they both were targeted and questioned by FBI agents prior to their detention, both were arrested and held in a black site for months by U.A.E. State Security, both believe a western official was

acknowledged its involvement in proxy detention, stating in a news report that "information it has 'elected to share' with 'foreign law enforcement services' has 'at times' resulted in the 'detainment of an individual,'" and that "FBI agents have occasionally 'been afforded the opportunity to interview or witness an interview' with detainees abroad." ER 460-468.

III. Plaintiffs' FOIA Request and Government's Pre-Litigation Responses

On July 29, 2010 the ACLU-SC, Mr. Hamdan, and his brother Hossam filed a FOIA request (the "Request") seeking information from various federal agencies about, *inter alia*, the events described above.[10] ER 699; 722-738.

More than nine months after Plaintiffs served their Request, none of the agencies had provided adequate responses, and several had provided no substantive response at all. After exhausting administrative appeals, Plaintiffs filed suit. ER 542-567; 680. As of the filing of Plaintiffs' original complaint on August 18, 2010,

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present during their interrogations, and both suffered similar forms of torture while in detention. ER 30-33.

[10] The date listed on the FOIA Request contains a typographical error- the year of the Request was 2010, not 2009.

not a single Defendant in this appeal had produced any documents responsive to Plaintiffs' Request.[11] ER 739.

IV. District Court Proceedings and Further Agency Responses

After Plaintiffs filed suit, the parties entered into several stipulations governing when Defendants would provide final responses to the Requests. ER 640-642; 649-654; 666-677. The Defendant agencies provided responses over the next several months, with varying degrees of adequacy. *See* ER 542; 556-567.

Eventually, the Parties filed cross motions for summary judgment with regard to all Defendant agencies except DOS. ER 667; 752. Because DOS had not completed its production, it later filed a separate summary judgment motion.[12] ER 139-140; 568-570. The district court held no hearing on the motion, and then granted summary judgment for Defendants in a five-page decision that does not address many of the issues in any detail. *Compare* ER 2-7, *with Van Bourg, Allen, Weinberg & Roger v. NLRB*, 656 F.2d 1356, 1357 (9th Cir. 1981) ("When the

[11] Judge Jacqueline H. Nguyen was the presiding judge in the case from its inception until her appointment to this Court. The case was transferred to Judge Dale S. Fischer.

[12] On February 26, 2013, more than two months after the district court ruled, the DOS notified Plaintiffs that it had located approximately 270 additional documents that had not been timely forwarded to the FOIA office for processing and potential release. ER 8. After the parties met and conferred, the DOS produced a number of the documents along with a Vaughn index on July 9, 2013. ER 8. The parties have not addressed the sufficiency of that production before the district court.

district court's 'underlying holdings would otherwise be ambiguous or inascertainable, the reasons for entering summary judgment must be stated somewhere in the record.").[13]

Plaintiffs have narrowed this appeal to focus on information they believe most likely to shed light on the U.S. government's involvement in Mr. Hamdan's detention and torture. They appeal only certain aspects of the district court's rulings as to some of the Defendants, as set forth below.

STANDARD OF REVIEW

This Court reviews summary judgment orders in FOIA cases using a two-step process. *Lane v. Dep't of Interior*, 523 F.3d 1128, 1135 (9th Cir. 2008). The court first uses a *de novo* standard to determine whether an adequate factual basis

[13] The decision to grant summary judgment without holding any hearing was itself error. This Court has held that "in view of the language of Rule 56(c) and having in mind that the granting of such a motion disposes of the action on the merits, with prejudice, a district court may not, by rule or otherwise, preclude a party from requesting oral argument, nor deny such a request when made by a party opposing the motion unless the motion for summary judgment is denied." *Dredge Corp. v. Penny*, 338 F.2d 456, 462 (9th Cir. 1964); *Houston v. Bryan*, 725 F.2d 516, 518 (9th Cir. 1984) (court "admonish[ed] trial courts to grant oral argument on nonfrivolous summary judgment motions."). Plaintiffs were prejudiced by the District Court's decision in a number of ways. Most obviously, Plaintiffs would have had the opportunity at the hearing to address the new issues and evidence the DOS raised in its reply brief, *see* ER 37-53, which Plaintiffs never had the chance to do. Additionally, after the parties filed their motion papers, several new legal and factual developments arose which the Plaintiffs were not able to fully address. ER 10-13; 14-20; 68-69.

exists to support the district court's decisions. *Id*. If an adequate factual basis exists, "the district court's conclusions of fact are reviewed for clear error, while legal rulings, including its decision that a particular exemption applies, are reviewed *de novo*." *Id*. Likewise, the Court "review[s] *de novo* whether the [agency's] indices and supporting declarations constitute a sufficient Vaughn index." *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1328 (9th Cir. 1995).

SUMMARY OF ARGUMENT

Plaintiffs make three sets of arguments challenging the adequacy of Defendants' FOIA responses. *First*, the FBI and DOS failed to search sources of records that obviously must have responsive information. Neglected record sources include the Southern California FBI offices where the agents who surveilled and interrogated Mr. Hamdan worked, the email files of those same agents, and the files and emails of the FBI officers in the U.A.E. with whom DOS communicated. There should be no serious dispute that these sources contain additional responsive documents, because DOS has already produced records that refer to the existence of such documents. Yet the FBI and DOS have inexplicably refused to search for them in the sources where they are most likely to appearThe FBI and DOS must search these sources to comply with FOIA's requirements. *See infra* Section I.

Second, the FBI and DIA have withheld information that appears to be critically important, in light of when and by whom it was produced. This includes a number of documents concerning communication with foreign governments before and during Mr. Hamdan's detention and torture. The FBI also appears to have withheld information about proxy detention on the ground that it is a secret law enforcement "technique" or "procedure," even though the government's use of the practice is well-known. While the legal justifications for Defendants' arguments here vary, they share a common theme: an absence of meaningful explanation to justify their categorical withholdings, as this Court's FOIA law clearly requires. *See infra* Section II.

Finally, in the face of Defendants' inadequate responses, the district court effectively abdicated its responsibility to analyze whether Defendants had met their obligation to produce all "reasonably segregable information" in the responsive documents. Where Defendants withhold documents in full or redact large blocks of text within documents, the district court must analyze whether any of the redacted information could be "segregated" out and disclosed. The district court failed to do so here. *See infra* Section III.

ARGUMENT

I. The District Court Erred in Holding that the FBI and DOS Conducted Adequate Searches

The district court erred in holding that the FBI and DOS conducted adequate searches for two basic reasons. First, both agencies declined even to search sources of records that plainly must contain responsive documents. Second, both agencies' declarations fail to adequately justify their refusal to search in those sources.

A. The FBI and DOS Had a Duty to Search All Sources Reasonably Calculated to Uncover All Relevant Documents

At the most general level, an agency processing a FOIA request has a duty to conduct "a search reasonably calculated to uncover all relevant documents." *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 986 (9th Cir. 2009) (citations omitted). Where a requester asserts that an agency has failed to adequately search its records, the burden is on the agency to establish that it has conducted a reasonable search by providing "reasonably detailed, nonconclusory affidavits" justifying the adequacy of its search. *Id*. Even when it does so, "[t]he plaintiff may then provide 'countervailing evidence' as to the adequacy of the agency's search" and "if a review of the record raises substantial doubt, particularly in view of 'well-defined requests and positive indications of overlooked materials,' summary judgment is inappropriate." *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 313-14 (D.C. Cir. 2003) (citations omitted).

Because the adequacy of a search depends on "the facts of each case," *Zemansky v. U.S. EPA*, 767 F.2d 569, 571 (9th Cir. 1985) (citation omitted), FOIA caselaw eschews detailed requirements governing search adequacy that apply in all cases. However, this Court has identified a number of factors to assess whether an agency has adequately searched. *See Lane v. Dep't of Interior*, 523 F.3d 1128, 1139 (9th Cir. 2008) (holding that an affidavit that "explain[ed] the search[es] [] used, the staff [] members contacted, the files and emails examined, the time spent on various searches, and the 577 pages of documents sent to [plaintiff] in response to her request," was sufficiently "detailed" to allow the court to determine that the search was adequate); *see also Rosenfeld v. U.S. Dep't of Justice*, No. 07-03240, 2008 WL 3925633, at *14, *17 (N.D. Cal. Aug. 22, 2008) (rejecting FBI affidavit as insufficient and ordering it to submit a "more detailed declaration," with five categories of information, as well as "information about any written records created to document the search.").[14] As with other summary judgment issues, in determining the adequacy of the search, the court must construe "the facts in the

[14] The Court in *Rosenfeld* ordered the FBI to produce the following information to assess the adequacy of its search: "(1) the nature and scope of all databases and indices maintained by defendants, including a description of the data contained in the same; (2) which databases and indices were searched in response to [plaintiff's request], including case indices ...; (2) [sic] what terms were searched, or if a different mechanism for searching was used, to explain the same; (3) [sic] when the search was performed; (4) [sic] where the search was performed; and (5) [sic] which databases and indices were not searched and why not." *Rosenfeld*, 2008 WL 3925633, *14.

light most favorable to the requestor." *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1328 (9th Cir. 1995).

As explained below, the district court failed properly to apply these legal standards. Both the FBI and DOS refused to search sources that almost certainly contain responsive information.

B. The FBI Search Was Inadequate Because it Failed to Search Sources Likely to Have Records

The FBI's search was inadequate because it failed to search records systems and locations that are very likely to have responsive records. *Lahr*, 569 F.3d at 986. Specifically, the FBI failed to search files at the Los Angeles and Long Beach field offices – the home offices of the agents who were knowledgeable about and participated in the FBI's interrogation of Mr. Hamdan in the U.A.E. ER 298-335. failed to search the files of the FBI Legal Attache offices in the U.A.E. and Lebanon – even though DOS documents confirm that people there communicated about Mr. Hamdan's abduction; and failed to search the email accounts for several individuals who in fact communicated about Mr. Hamdan's detention – as confirmed by other documents Plaintiffs received.[15]

[15] With respect to this last category, the FBI unjustifiably failed to search the email and paper files of Joshua Stone from the Los Angeles field office, who communicated frequently about Mr. Hamdan's detention with his brother Hossam; Gary Price, the FBI Legatt in the U.A.E., who was involved in Plaintiff Hamdan's

Instead of searching these sources, the FBI searched only two central databases -- the Central Records System ("CRS") and, after Plaintiffs filed their summary judgment brief, the Electronic Surveillance record system ("ELSUR"). ER 256; 608-609. Given that the sources the FBI failed to search are likely – and in some cases, certain - to have responsive records, the FBI should have searched them. *See Schrecker v. U.S. Dep't of Justice*, 254 F.3d 162, 164-65 (D.C. Cir. 2001) (reversing grant of summary judgment in favor of FBI because it failed to search for tickler files, which could contain documents that "failed to survive in other filing systems or that include unique annotations"); *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327 (D.C. Cir. 1999) (holding that government's failure to search "a likely place where the requested documents might be located clearly raises a genuine issue of material fact as to the adequacy of the [government's] search"*); Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 28-29 (D.C. Cir. 1998) (holding that the FBI did not conduct an adequate search because it failed to search record systems likely to have responsive documents).

Plaintiffs believe that the FBI should have searched those records at the outset, but whether or not that is true, the FBI undoubtedly should have searched

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case from at least March 19, 2008 until he was deported to Lebanon; the files of any other FBI agents who interrogated Mr. Hamdan in the U.A.E; and Mr. Price's Assistant Legatt in the U.A.E., and their counterpart Legatt staff in Lebanon from the relevant period. These individuals obviously have a "close nexus" to the documents requested in this case. ER 286-301; 303-312; 333; 398.

them after being put on notice - by documents produced by DOS, as well as Plaintiffs - that these specific sources were likely to maintain responsive records. *See, e.g.*, ER 388 (State Department correspondence describing communication between Legal Attache and U.A.E. government officials about Mr. Hamdan's treatment in detention); ER 113 (State Department official stating that he "briefed Abu Dhabi Asst Legatt" about conversation with ACLU and Hossam regarding Naji); *see Campbell*, 164 F.3d at 28 (finding the FBI's search of the CRS inadequate "once the FBI discovered information suggesting the existence of documents that it could not locate without expanding the scope of its search," and holding that a "court evaluates the reasonableness of an agency's search based on what the agency knew at [the search's] conclusion rather than what the agency speculated at its inception."); *see also El Badrawi v. Dep't of Homeland Sec.*, 583 F. Supp. 2d 285, 302 (D. Conn. 2008) (holding that DOS declaration was insufficient because it failed to explain why the American Embassy in Beirut, Lebanon was not searched for responsive records when plaintiff met with officials at the American Embassy in Beirut, which likely resulted in the creation of records, and it had produced several documents that were generated in Beirut).

The Government may argue that these searches were unnecessary because the information contained in the documents is already encompassed in the FBI's central databases, but that is obviously incorrect for at least two reasons. First, but

the FBI's own declaration undermines that claim. While the Hardy declaration states that "[o]n or about October 16, 1995, the ACS system [for searching the CRS database] was implemented for all Field Offices, Legal Attaches ("Legats"), and FBIHQ," it also admits that "not all e-mails of all FBI personnel are uploaded into the ACS [the mechanism for searching CRS]." ER 257-258.

Second, the record here already contains dispositive proof that the FBI's central databases do *not* contain all responsive documents, because the DOS's searches revealed critical documents that the FBI's searches apparently did not, despite the fact that they would have surfaced if the central databases were indeed comprehensive. The "smoking gun" is the communication by consular officer Sean Cooper describing the FBI Legatt's communication with U.A.E. officials. ER 113; 388. However, it is not the only example. The DOS produced a number of emails between FBI personnel and DOS that the FBI apparently never found. ER 398. Other examples arise from the FBI's own production—the FBI produced documents that referenced communications between the FBI and DOS about Mr. Hamdan, but did not produce the referenced communications. ER 398. The FBI also produced documents referencing information that Hamdan had shared with DOS authorities, but failed to produce the underlying communications through which that information was shared with the FBI. ER 314-318. A search is inadequate where "the record itself reveals positive indications of overlooked

materials." *Valencia–Lucena*, 180 F.3d at 327 (citations omitted) (internal quotation omitted); *see also ACLU v. FBI*, No. C 12-03728SI, 2013 WL 3346845 at *3-*5 (N.D. Cal. July 1, 2013) (holding that FBI failed to conduct adequate search when it produced a document that referenced the FBI sharing intelligence "about 'Occupy' protestors targeting the Port of Oakland," but failed to produce the referenced intelligence).

Perhaps for this reason, courts considering the adequacy of the FBI's searches have not permitted it to exclude local office records, email accounts, and other non-centralized sources. *See, e.g.*, *Valencia-Lucena*, 180 F.3d at 327-28 (holding that the Coast Guard had an obligation to consult with the ship captain regarding the whereabouts of a missing logbook that he referred to at trial unless the agency could prove that an inquiry would be fruitless); *cf. Ancient Coin Collectors Guild v. U.S. Dept. of State*, 641 F.3d 504, 514-15 (D.C. Cir. 2011) (holding that the government failed to establish the adequacy of its search because its declarations failed to address the existence of employee's archived emails and backup tapes); *Schrecker*, 254 F.3d at 165 (D.C. Cir. 2001) (reversing summary judgment in favor of the FBI because it failed to search for tickler files and did not provide evidence that responsive documents had been destroyed or were too burdensome to locate).

Mr. Hardy's declaration could also arguably be read to state that any emails or files at local offices not uploaded to CRS have been destroyed, but, if the district court did in fact adopt that interpretation of his declaration, it would have been error for at least two reasons. First, the declaration does not explicitly state that these records have not been preserved. ER 258. (explaining that "the FBI's search of the CRS would have located any responsive emails subject to FOIA" because FBI personnel are responsible for deciding "whether a particular message is appropriate for preservation or upload" and will upload the email into the FBI's electronic record keeping system "[i]f an email is determined to be a record"). As the D.C. Circuit has found, "generalized claims of destruction or non-preservation cannot sustain summary judgment." *Valencia-Lucena*, 180 F.3d at 328.

Second, Mr. Hardy's declaration admits that CRS only allows retrieval of documents that have been properly indexed. ER 606-608. The decision to index names other than subjects, suspects, and victims (like the decision to deem a record "important") is itself a discretionary decision, *id*., and hardly one that the district court could have relied on to sustain summary judgment. Indeed, it appears that the government did not treat Mr. Hamdan himself as a "subject" of any investigation after the year 2000, even though agents repeatedly questioned his brother about him and then flew to the U.A.E. to interrogate him. ER 546. (noting that the investigation of Plaintiff Hamdan was closed in 2000). If the agency did not deem

Mr. Hamdan (or his brother Hossam or business manager Mr. Suleiman) as "subjects" of any open investigation during most of the relevant time period, it is highly unlikely that a CRS search of documents indexed to their "subject" files would have retrieved all responsive documents.

For all of these reasons, the district court erred in finding that the FBI searched adequately, given that it failed to search the L.A. and Long Beach field offices' files, the individual email files of FBI personnel with a close nexus to this case (including the agents who flew to the U.A.E. to interrogate him), and failed to search the files of the FBI's Legal Attaches, even though DOS documents reveal that documents from the attaches must exist.[16] ER 298-319.

C. The District Court Erred in Holding that the DOS Conducted an Adequate Search Because It Failed to Search Records from the Bureau of Political-Military Affairs

The district court also erred in concluding that DOS's search was adequate, even though it failed to search the files of the Bureau of Political-Military Affairs, even though other records produced by DOS make clear that individuals in that

[16] The U.A.E. Legatt, Gary Price, appears to have had a particularly strong interest in Mr. Hamdan. When Mr. Hamdan was scheduled to be deported from the U.A.E., Mr. Price wrote an email to Mr. Cooper from the State Department expressing "hope" that the U.A.E. would deport Mr. Hamdan to the U.S., because "then we'll fix a flight direct to Atlanta or D.C.," no doubt to interrogate him further. ER 398. We know this only because the State Department produced that document. The FBI cannot plausibly argue that it should not have searched the Legatt's files for responsive records.

bureau communicated about Mr. Hamdan's case.[17] As discussed above, a search is inadequate if the record contains evidence that responsive documents could have been located through expansion of the search. *See, e.g.*, *Campbell*, 164 F.3d at 28; *Valencia–Lucena*, 180 F.3d at 327.

At least two documents produced by DOS make clear that consular officials communicated with officials in the Bureau of Political-Military Affairs about this case. See ER 113; 121. (one email describing communication between consular officer Sean Cooper and "Abu Dhabi Pol/Mil," and another requesting Mr. Cooper to contact that office). Although an agency is not required to blindly search every office, record system, and bureau in response to a general request, "[it] cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Campbell*, 164 F.3d at 28.

Accordingly, the district court erred in finding that the DOS search was adequate absent a search of its Bureau of Political-Military Affairs.

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[17] According to the Declaration of Margaret P. Grafeld, the Bureau of Political-Military Affairs "provides policy direction in the areas of international security," among other areas. Plaintiff Hamdan appears to have been subject to proxy detention, which is intimately related to international security. Accordingly, it is highly likely that a search of PM would yield responsive documents. ER 56.

II. The District Court Erred in Finding that the DIA and FBI Adequately Justified Their Withholdings under Exemptions 1, 3, or 7(E)

The district court erred in finding that the DIA and FBI properly claimed Exemptions 1, 3, and 7(E) in withholding in full various records that pertain to Mr. Hamdan.[18]

The documents at issue in this portion of the case almost certainly contain extremely important information about the U.S. government's role in Mr. Hamdan's detention and torture in the U.A.E. The DIA located 27 responsive documents, all of which it entirely withheld. ER 587-599. But it provided information about these documents in its *Vaughn* index that suggests their critical importance. *Id*. The documents date from June 15, 2006 through July 16, 2010. *Id*. These facts alone are significant; they show that U.S. agencies were interested in

[18] Exemption 1 authorizes agencies to withhold records that are classified by Executive Order: records "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1) (2012). Exemption 3 provides similar authority for information specifically shielded from disclosure by statute (that is, a statute other than FOIA). *Id.* § 552(b)(3). Exemption 7(E) shields certain types of information disclosure of which would reveal certain techniques and methods. *Id.* § 552(b)(7)(E).

Mr. Hamdan from just before he was to move to the U.A.E. in August 2006 until well after his release from the black site. *Id.* at Document # V-9. They also show that these agencies continued to monitor Mr. Hamdan throughout the time he was living abroad, *Id*. (Document # V-6, #V-19), and, most disturbingly, during his black site detention. *Id*. (Document # V-10). Perhaps most important, one document that presumably mentions Mr. Hamdan (because the request seeks documents that mention him) is described as relating to "countries and international organizations" with which "DIA shared intelligence." *Id*. (Document # V-22: "Campaign Analysis Product: Network Analysis - United Arab Emirates: Al-Qaida-Affiliated Financial Networks," dated March 28, 2008). The public has a profound interest in knowing whether our government shared information about a United States citizen with the U.A.E., given its horrific human rights record. As explained below, Plaintiffs now challenge the district court's conclusion that these 27 critical documents must be withheld in full.

Similarly, the FBI also located but withheld responsive documents that almost certainly shed light on the U.S. government's involvement in Mr. Hamdan's detention and torture. The FBI located over 770 pages of documents, of which they withheld 251 pages *in full*. ER 563. The documents that the FBI did *not* withhold in full span over ten years, and reveal extensive FBI surveillance and investigation of not only Naji Hamdan but also a number of other Muslim-

Americans from his mosque. ER 378-383. However, none of the disclosed documents reveal the nature of the FBI's involvement in his detention and torture in the U.A.E., or why the U.A.E. chose to release him from its black site only after the habeas petition, filed against the United States, accused the FBI of causing his detention.

As explained below, Plaintiffs challenge the FBI's redactions and withholdings, in order to obtain that critical information. ER 275-277.

A. The Government Must Justify Its Withholdings With Detailed, Non-Conclusory Explanations

Though the purpose of FOIA is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed," *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (internal quotation marks omitted), FOIA recognizes that "some information may legitimately be kept from the public." *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 973 (9th Cir. 2009). The FOIA statute contains nine Exemptions, pursuant to which the government can withhold information. 5 U.S.C. § 552(b)(1)-(9) (2012).

"FOIA's 'strong presumption in favor of disclosure' means that an agency that invokes one of the statutory exemptions to justify the withholding of any requested documents or portions of documents bears the burden of demonstrating

that the exemption properly applies to the documents." *Lahr*, 569 F.3d at 973 (quoting *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)). Because of its overarching goal of public disclosure, FOIA "exemptions are to be interpreted narrowly." *Id.*

The agency may meet its burden by submitting a detailed affidavit showing that the information "logically falls within the claimed exemptions." *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992). In reviewing the agencies' claimed exemptions, "the district court [i]s required to accord 'substantial weight' to [the agency's] affidavits," but only to the extent that the affidavits "describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemptions, and show that the justifications are not controverted by contrary evidence in the record…" *Id.* In order for affidavits claiming exemptions to be sufficient for summary judgment purposes, they must be *both* "nonconclusory and not impugned by evidence of bad faith." *Zemansky v. U.S. EPA*, 767 F.2d 569, 573 (9th Cir. 1985).

The district court must conduct its own searching inquiry to assess and explain the sufficiency of those declarations.[19] *See Wiener v. FBI*, 943 F.2d 972,

[19] The district court rejected Plaintiffs' search deficiency claims as to all agencies with the following conclusory statement: "As the matter stands, the Court can see no place where Defendants have not adequately addressed Plaintiffs' objections to their searches." ER 3.

987-88 (9th Cir. 1991) (requiring more detailed affidavits, Vaughn index, and for "court on remand [to] make a specific finding that no information contained in each document or substantial portion of a document withheld is segregable"); *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 656 F.2d 1356, 1358 (9th Cir. 1981) (remanding for district court to make findings "as to each document in dispute" because "District Court decisions in FOIA cases must provide statements of law that are both accurate and sufficiently detailed to establish that the careful de novo review prescribed by Congress has in fact taken place."); *see also Kelly v. U.S. Census Bureau*, No. 11-17684, 2013 WL 5458984 (9th Cir. Oct. 2, 2013) (citing *Wiener* and *Van Bourg*, and vacating order granting summary judgment because it "failed to enter sufficiently detailed findings of fact and conclusions of law," and ordering " an explanation, for each individual request, as to why it concludes that [the government] conducted an adequate search").

Even when an agency has properly described the withheld material, the district court has the ultimate obligation to ensure that the agency correctly concluded that the documents in question meet the criteria for classification. *See generally Church of Scientology v. IRS*, 792 F.2d 153, 167 n.6 (D.C. Cir. 1986) ("Congress clarified in the 1974 amendments that district court judges . . . need not defer to the agency's decision to label a document classified."). As this Court has held in the national security FOIA context, "[t]hough an executive agency's

classification decisions are accorded substantial weight, the FOIA permits challenges to Exemption 1 withholdings, requires the district court to review the propriety of the classification, and places the burden on the withholding agency to sustain its Exemption 1 claims." *Wiener*, 943 F.2d at 980; *see also Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987) ("the district court is now required to conduct a de novo review of the classification decision, with the burden on the agency claiming the exemption").

In fulfilling that obligation, the district court may examine the documents at issue *in camera*. There is no requirement that the district court conduct *in camera* review, but it may do so whenever "the court finds the affidavits or testimony submitted too generalized to establish eligibility for an exemption" *See Church of Scientology*, 611 F.2d at 742; *see also Ray v. Turner*, 587 F.2d 1187, 1193 (D.C. Cir. 1978) ("While in camera examination need not be automatic, in many situations it will plainly be necessary and appropriate.") (quoting from S. Rep. No. 93-1200 (1974)); *Quiñon v. FBI*, 86 F.3d 1222, 1227 (D.C. Cir. 1996) (noting that in camera review may be required where the affidavits "are conclusory, merely reciting statutory standards, or if they are too vague or sweeping"). The district court may conduct such review both to ensure that the information withheld is properly classified and also to ensure that there are no reasonably segregable non-

exempt portions that could have been released. *See Physicians for Human Rights v. U.S. Dep't of Defense*, 675 F. Supp. 2d 149, 172 (D.D.C. 2009); *infra* Section III.[20]

With respect to exemptions arising in the national security context in particular, FOIA requires district courts to independently determine that defendants have satisfied *both* the procedural and the substantive requirements to maintain information as classified. The agency's declarations showing that the information was classified pursuant to the procedures set forth in the applicable Executive Order (for Exemption 1) or withholding statute (for Exemption 3), and then must show that the information is in fact properly classified or protected by the statute. "[J]udicial deference for an agency's justifications under Exemption 1 is only warranted when the agency's affidavits are first found, at a minimum, to contain sufficient detail to forge the logical connection between the information [withheld] and the claimed exemption." *Physicians for Human Rights*, 675 F.Supp.2d at 167 (internal quotation marks omitted) (quoting *Oglesby v. U.S. Dep't of the Army*, 79 F.3d 1172, 1178 (D.C. Cir. 1996)). It follows from these rules that "an agency is in no way excused from its burden to properly describe the withheld material that is claimed to be protected by Exemption 1," *id.*, and also, therefore, that an agency

[20] As explained further below, Plaintiffs challenge both the district court's conclusion that the FBI and DIA had adequately justified their withholdings and redactions, and, alternatively, the district court's failure to conduct an *in camera* review of the withheld documents, given the paucity of the agencies' declarations in support of their withholdings.

cannot satisfy its burden simply by stating the information withheld relates to national security in a general way. *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 76-77 (D.C. Cir. 1987) (even in the face of national security related exemption claims, courts must not relinquish their independent responsibility to assess the propriety of the agency's justifications).[21]

As explained below, the district court failed to apply these standards, and therefore erred in concluding that the FBI and DIA had justified their withholdings under Exemptions 1, 3, and 7(E).

B. The District Court Erred in Finding that the DIA and FBI Properly Withheld Records Under Exemption 1

The district court erred in finding that the DIA and FBI properly withheld documents based on Exemption 1. Contrary to the district court's finding that "the classification claims are sufficiently supported by the declarations," ER 4, neither the DIA nor FBI declarations provide more than conclusory, boilerplate statements. These declarations lack the requisite detail needed to determine

[21] Both the DIA and the FBI withheld documents under Exemption 1 as classified under Executive Order No 13,526. ER 578-584; 612-620. The Executive Order authorizes the classification of if it falls within one of the categories of information listed in section 1.4 of the Order and if "the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security… and the original classification authority is able to identify or describe the damage." Exec. Order. No. 13526, 3 C.F.R. 298, §§ 1.1(4), 1.4 (2009).

whether the documents are in fact properly classified pursuant to the Executive Order claimed. Indeed, in *Wiener* this Court rejected declarations that contained precisely the same sort of boilerplate language unconnected to the specific documents at issue as those submitted here. *Wiener*, 943 F.2d at 978-79.

The district court disagreed, stating (in full, on this subject) that "the DIA and FBI also properly claim Exemption 1 for classified material responsive to the FOIA requests. The Court finds that the classification claims are sufficiently supported by the declarations and there is no reason to doubt the veracity or good faith of the declarants." ER 4. As this quotation makes clear, the district court failed to cite or apply *Wiener*'s requirement that the explanation for withholding be tailored to the specific document withheld, *Wiener*, 943 F.2d at 979. This Court should reverse as to both agencies' reliance on Exemption 1.

The DIA's support for their Exemption 1 withholdings is plainly deficient. The DIA's Vaughn index uses the identical boilerplate language to justify invocation of Exemption 1 for all 27 documents. ER 589-599. For each of the 27 documents, the DIA asserts that "[r]elease of this information would reveal intelligence sources and methods and compromise the intelligence information collection mission effectiveness of the intelligence community" without any further information as to how or why the withheld information would reveal

intelligence sources and methods or compromise their mission. ER 589-599. The DIA makes no attempt to explain why the contents of the documents withheld are classified or "to tailor the explanation to the specific document withheld." *Wiener*, 943 F.2d at 979. The failure is particularly glaring in this case, given that another Defendant – the State Department, did provide individualized descriptions of the documents that it withheld under Exemption 1. ER 152-153; 179-226. In contrast, the DIA's explanations obviously do not "contain sufficient detail to forge the logical connection between the information [withheld] and the claimed exemption." *Physicians for Human Rights*, 675 F. Supp.2d at 167 (internal quotation marks omitted) (quoting *Oglesby*, 79 F.3d at 1178).[22]

This Court found such cursory explanation insufficient in *Wiener*, 943 F.2d at 979 (finding FBI's declarations and Vaughn index inadequate where the Vaughn index "provide[d] no information about particular documents and portions of documents that might be useful in contesting nondisclosure" and where the

[22] The DIA also withheld a single document under sections 1.4(b) and (d) -- which pertain to "foreign government" and "foreign relations" information -- by asserting that the document "contains information provided by a foreign government." ER 593. "Foreign government information" is defined as "information provided to the United States Government by a foreign government . . . with the expectation that the information, the source of the information, or both, are to be held in confidence." Exec. Order No. 13,526, 3 C.F.R. 298, § 6.1(s) (2009). However, the DIA's declaration fails to state whether the information was provided with the "expectation" that it would be "held in confidence;" instead it asserts that all information has that status *if* obtained "through diplomatic channels," but nowhere says that this particular was so obtained.

declarations "ma[d]e no reference to any particular document at all."). Other courts have repeatedly found the same. *Physicians for Human Rights*, 675 F.Supp. 2d at 171 (finding DIA's declaration "clearly deficient with respect to claiming non-disclosure under Exemptions 1 and 3, as they do not 'provide specific information sufficient to place the documents within the exemption category.'");[23] *see also Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1050 (3rd Cir. 1995) ("[A] categorical approach, without the inclusion of specific factual information that correlates the claimed exemptions to the withheld documents, is not a sufficient *Vaughn* index."); *King v. U.S. Dep't of Justice*, 830 F.2d 210, 224 (D.C. Cir.1987) ("[c]ategorical description[s] of redacted material coupled with categorical indication of anticipated consequences of disclosure [was] clearly inadequate"); *ACLU v. Office of the Dir. of Nat'l Intelligence*, No. 10 Civ. 4419, 2011 WL 5563520, at *11 (S.D.N.Y. Nov. 15, 2011) ("the Hardy Declaration makes little effort to describe the documents at issue or explain why they reflect intelligence

[23] That case apparently involved the same DIA declarant—Alesia Williams. *See Physicians for Human Rights*, 675 F. Supp. 2d at 171 ("This Court finds that Williams' submissions are clearly deficient with respect to claiming non-disclosure under Exemptions 1 and 3, as they do not provide specific information sufficient to place the documents within the exemption category"). Some courts have also rejected Mr. Hardy's declarations for the FBI as insufficient. *See also ACLU*, 2011 WL 5563520, at * 11 ("the Hardy Declaration makes little effort to describe the documents at issue or explain why they reflect intelligence 'methods,' 'activities,' or 'capabilities'"); *ACLU of Wash.*, 2011 WL 887731, at *3-4 (finding Hardy declaration insufficient).

'methods,' 'activities,' or 'capabilities'"); *ACLU of Wash. v. U.S. Dep't of Justice*, No. C09-0642, 2011 WL 887731, at *3-4 (W.D. Wash. Mar. 10, 2011).

For similar reasons, this Court should find that the FBI also failed to justify its 34 pages of redactions and withholdings under section 1.4(c) of E.O. 13,526. ER 614-619. The FBI's declaration also contains only boilerplate language: that the withholdings contain "detailed intelligence activities information gathered or compiled by the FBI on a specific individual or organization of national security interest." ER 615. The FBI's declaration, like the DIA's, reflects that "no effort is made to tailor the explanation to the specific document withheld," *Wiener*, 943 F.2d at 979, and instead "read[s] more like a policy justification for [the Executive Order], while barely pretending to apply the terms of that section to the specific facts of the documents at hand." *Halpern v. FBI*, 181 F.3d 279, 293 (2d Cir. 1999).

The paucity of the Hardy declaration left the district court with insufficient information to conduct a meaningful review of the FBI's withholdings. As noted above, this Court rejected similar affidavits when submitted by the FBI in *Wiener*—a FOIA case involving assertions of national security, *see supra* pp. 34-37, and the Second Circuit did largely the same in *Halpern*, 181 F.3d at 293 (rejecting FBI declarations for "giv[ing] no contextual description either of the documents subject to redaction or of the specific redactions made to the various

documents," and noting similar rulings from the First, Third, Ninth, and D.C. Circuits).

Moreover, the FBI argument here is arguably weaker than in *Wiener*, insofar as its declaration is not supported by a Vaughn index or any form of explanation that would make it possible for Plaintiffs or the court to evaluate whether the documents were properly withheld. Whether through a Vaughn index or some other mechanism, the FBI was required to provide the requisite detail necessary to properly evaluate its Exemption 1 claims; its cursory, boilerplate language fails to do so. *King v. U.S. Dep't of Justice*, 830 F.2d 210, 221 (D.C. Cir 1987) ("[t]o carry its burden of demonstrating the propriety of the classification decisions supporting its Exemption 1 position, the FBI must describe with reasonable specificity the material withheld, and identify the damage to the national security expected to attend its disclosure.").[24]

A review of the documents the FBI did produce serves only to further undermine its representations made in further of its withholdings. To give but one example, the FBI has redacted a large block of a document based on its assertion

[24] For reasons virtually identical to those set forth above concerning the documents withheld in full, Plaintiffs also challenge both agencies' failure to attempt to reasonably segregate withheld portions of documents, and the FBI's large block redactions based on Exemption 1. Neither the FBI's nor the DIA's declarations explain why the classified information, if in fact it was properly classified, could not have been protected with more targeted redactions. ER 615; 617; 622; *see infra* Section III.

that the document contains "detailed information provided by human intelligence sources." ER 380; 617. The Hardy declaration contains boilerplate language that the information "is specific in nature and reflects a specific vantage point from which the sources are reporting and if disclosed, would identify the intelligence sources." ER 617. However, a review of the document in question strongly suggests that it contains only a single "source" for the information, which calls into question whether Mr. Hardy recycled standard language regarding "sources" more generally for his declaration. *See Miller v. U.S. Dep't of Justice*, 562 F. Supp. 2d 82, 105 (D.D.C. 2008) (describing affidavit by Mr. Hardy using identical language). Regardless, the declaration fails to provide any explanation for why the specific information would tend to reveal the source's "vantage point," and does not explain why such extensive redactions are necessary to protect the source's identity.

For these reasons, neither the FBI nor the DIA have provided sufficiently detailed declarations to justify their withholdings under Exemption 1. This Court should reverse the district court's summary judgment order on this basis.

C. The District Court Erred in Finding That the DIA Properly Withheld Records Under Exemption 3

The district court also erred in permitting the DIA to withhold 12 of the 27 documents on an alternative basis – that they are shielded by Exemption 3 under

either of two different statutes, 10 U.S.C. § 424 (2012) or 50 U.S.C. § 403-1 (2006).[25] ER 587-599 (asserting that documents V-7 to V-9 and V-19 to V-27 in the DIA's Vaughn index are exempt under 10 U.S.C. § 424); ER 227-231 (government argument in reply brief that these documents are also protected under 50 U.S.C. § 403-1(i)).[26] The district court relied only on 10 U.S.C. 424, holding in its brief decision that the statute "prevents the disclosure of DIA activities and organization." ER4. In fact, neither statute supports the DIA's position.

At the outset, Plaintiffs should make clear that they do not seek all of the information DIA withheld. For example, the DIA's Vaughn index reveals that it redacted the names, phone numbers, and email addresses of DIA offices and employees. However, Plaintiffs do seek a very narrow set of information from the DIA documents – information about "which countries DIA . . . share[d] specific intelligence with," if that intelligence concerned Mr. Hamdan – an American. The rationale for the limitation is obvious: plaintiffs want to know if the U.S.

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[25] 50 U.S.C. § 403-1 has been transferred. *See* 50 U.S.C.S. § 3024 (2013).

[26] As this Court has explained, "Exemption 3 covers records that are specifically exempted from disclosure by other federal statutes provided that such statute affords the agency no discretion on disclosure, establishes particular criteria for withholding the information, or refers to the particular types of material to be withheld." *Minier v. CIA*, 88 F.3d 796, 800-01 (9th Cir. 1996) (citations omitted) (internal quotation marks omitted). Here, Plaintiffs do not contest that 10 U.S.C. § 424 and 50 U.S.C. § 403-1(i) are statutes that authorize the withholding of some types of information for purposes of Exemption 3. The only dispute here is whether the information at issue here "falls within the scope of the statute." *Id.* at 801.

government in any way cooperated with or encouraged Mr. Hamdan's abduction and torture at the hands of the U.A.E.

The structure of 10 U.S.C. § 424 and caselaw construing it make clear that it does not permit the DIA to keep such critical information secret. Section 424(a) contains two provisions. The first specifically prevents disclosure of "the organization or any function of an organization of [*inter alia*, the DIA];" while the second prevents disclosure of "the name, title, or other professional identifying information about people employed by the Defense Intelligence Agency ..." *See also In re Guantanamo Bay Detainee Litig*., No. 08-00442, 2011 WL 2133772, at *10 (D.D.C. May 12, 2011); *Physicians for Human Rights v. U.S. Dep't of Defense*, 778 F. Supp. 2d 28, 36 (D.D.C. 2011) (10 U.S.C. § 424 is intended to prevent disclosure of information that would disclose the function, composition or role of DIA personnel).

The DIA reads the words "organization or any function" in Subsection (1) broadly, to shield from disclosure the identities of countries with which the DIA communicates. But this is wrong for at least four reasons. First, it ignores the fact that Subsection (2) specifically shields the identities and functions of a narrower group of people – those employed by the DIA. Reading the first prong of Section 424(a) so broadly thus renders the second prong meaningless. If the DIA's "organization or any function" includes virtually everything that all its personnel

are or do, including with whom they communicate, then Section 424(a)(2) serves no purpose. "The Government's reading is thus at odds with one of the most basic interpretive canons, that a 'statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant'" *Corley v. United States*, 556 U.S. 303, 314 (2009).

Second, Defendants' reading of the statute ignores case law narrowly construing the parallel provision in the CIA's disclosure statute, 50 U.S.C. § 403g.[27] Section 403g shields from disclosure "the organization [and] functions" of CIA personnel, but the D.C. Circuit has held that this provision "creates a very narrow and explicit exception" and "[o]nly the specific information on the CIA's personnel and internal structure that is listed in the statute will obtain protection from disclosure." *Baker v. CIA*, 580 F.2d 664, 669 (D.C. Cir. 1978).

Third, that the DIA did or did not communicate with one particular country—the U.A.E., whose state security detained and tortured Mr. Hamdan—is simply not a "function" of the DIA. That the DIA *generally* communicates with foreign countries could perhaps be understood as one of its "functions," but the DIA has not hidden that it does so; indeed, its Vaughn index says that sharing intelligence with other countries is part of its mission. ER 592 The DIA cannot explain why simply revealing the names of countries and organizations with whom

[27] Although the relevant cases refer to 50 U.S.C. 403g, that provision has now been transferred. *See* 50 U.S.C.S. § 3507 (2013).

it shares information and the contents of their communications would result in "divulg[ing] an intelligence collection function" of the DIA.

Finally, even if the collection and dissemination of intelligence information is properly understood as a shielded DIA "function," the dissemination of directions or suggestions as to what foreign countries should do, particularly when they involve the potential abduction and torture of U.S. citizens, cannot be understood as a DIA intelligence function. Thus, at a very minimum, the documents at issue must be reviewed to determine if they contain any such information, as it could not be shielded under Section 424(a).

The district court's conclusion that Section 424 shielded the information at issue here was also erroneous because the DIA made "no effort ... to tailor the explanation to the specific document withheld." *Ctr. for Biological Diversity v. Office of Mgmt. & Budget*, No. C07-4997, 2008 WL 5129417, at *7 (N.D. Cal. Dec. 4, 2008) (denying summary judgment for FBI where it failed to provide adequate document by document justification for withholdings); *see also Physicians for Human Rights v. U.S. Dep't of Defense*, 675 F. Supp. 2d 149, 171 (D.D.C. 2009) (noting that an agency must "provide the connective tissue" between the document, the deletion, the exemption, and the explanation). The DIA's Vaughn index applies the same boilerplate language to each of the 12 contested documents withheld under Section 424. ER 587-599. Its declaration does

not even address any specific document withheld under Exemption 3. ER 584-586; *see also supra* n. 23 (noting Ms. Williams' declaration found insufficient in prior case). Because Exemption 3 "may not be applied to [certain types of documents] categorically," *Lawyers' Comm. for Civil Rights of S.F. Bay Area v. U.S. Dept. of the Treasury*, No. C 07-2590, 2008 WL 4482855, at *23 (N.D. Cal. Sept. 30, 2008), DIA's explanations for its Exemption 3 withholdings are insufficient.

In its reply brief to the district court, the DIA advanced a new argument that a different statute – the National Security Act – also supported its withholding of the information at issue here. ER 230-231 (citing 50 U.S.C. § 403-1(i)). Assuming it was not waived, this argument is also flawed, for two reasons. First, by its terms, Section 403-1(i) provides that "the Director of National Intelligence," not the DIA, "shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-1(i). In light of the fact that Congress expressly listed the Director of National Intelligence in that statute, while expressly listing the DIA elsewhere - in 10 U.S.C. § 424 - this Court should not read Section 403-1(i) to implicitly grant the DIA authority to shield information under its terms.

Second, even assuming arguendo that the DIA could invoke 50 U.S.C. § 403-1(i) as a withholding statute, it would not bar production of the information sought here, at least on this record. The DIA's declaration purporting to invoke Section 403-1(i) provided only a single boilerplate sentence to justify why the

withheld information falls within section 403-1(i), which is plainly insufficient. ER 266 (asserting, without explanation, that the withheld information "would illustrate with clarity which sources and methods are used to conduct the intelligence collection mission"); *see also* ER 273-274. Contrary to this statement, however, the names of the countries and organizations with which the DIA has shared information is not a "source or method" under any plausible reading of those terms, any more than they are a "function" under Section 424.[28]

D. The District Court Erred in Holding that the FBI Properly Withheld Records Under Exemption 7(E)

The district court also erred in finding that the FBI properly withheld alleged "techniques and procedures" under Exemption 7(E), because it failed even to apply the applicable standard for withholding that information. ER 4.[29] Exemption 7(E) permits the withholding of "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information… would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law

[28] In addition, as with its Exemption 1 withholdings, DIA's Vaughn index and declaration fail to adequately specify whether the information in each document allegedly exempt under Exemption 3 can be reasonably segregated from non-exempt material. *See infra* III.

[29] The district court mistakenly applied to the FBI's Exemption 7(E) withholdings the standard applicable to Exemptions 6 and 7(C), which balances any privacy interests against the public interest in disclosure. *Compare* ER 4, *with* 5 U.S.C. § 552(b)(7)(E).

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). Although agencies need not describe details of the techniques at issue to prevent their disclosure, "that does not excuse the agency from providing the Court with information sufficient for it to decide whether the material is properly withheld under exemption 7(E)." *Smith v. Bureau of Alcohol, Tobacco & Firearms*, 977 F. Supp. 496, 501 (D.D.C. 1997) (law enforcement agency "must provide greater detail as to why the release of the information deleted from the two documents at issue would compromise law enforcement."); *see also Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F. Supp. 2d 146, 181 (D.D.C. 2004) (agency must describe the general nature of the technique or procedure at issue, although it need not provide specific details).

In its order, the district court failed to cite this standard, let alone apply it. In fact, it would have been impossible for the district court to undertake the required analysis because the FBI's declarations did not provide sufficiently detailed information for either the district court or Plaintiffs to determine whether it had properly applied Exemption 7(E).

Plaintiffs challenged the FBI's Exemption 7(E) withholdings relating to techniques and procedures as to a discrete set of documents: internal FBI memoranda dealing with the FBI's efforts to interrogate Mr. Hamdan in the

U.A.E.; documents containing information relating to Mr. Hamdan's subsequent abduction and torture there; and documents containing information relating to the FBI's response to the assertion in the *habeas* petition that Mr. Hamdan's detention and torture in the U.A.E. was at the behest of the U.S. government. ER 276-277.

To justify withholding this information under Exemption 7(E), the FBI first broadly asserted its need to protect techniques and procedures related to "national security investigations," ER 636. After Plaintiffs challenged the sufficiency of this vague description, the FBI submitted a supplemental declaration describing the techniques and procedures at issue to include "surveillance and credit searches," as well as a "stratagem the details of which if revealed would preclude its use in future cases." ER 254; 258-259.

The FBI's justification for withholding the purported "techniques and procedures" at issue here fail to meet the Exemption 7(E) standards for at least three distinct reasons.

First, the FBI failed to provide the district court with sufficient information to determine whether the withheld information protects investigatory techniques that are not widely known to the public, or whose disclosure would reduce their effectiveness. This Court has made clear that Exemption 7(E) "only exempts investigative techniques not generally known to the public." *Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 815 (9th Cir. 1995) (finding pretext phone call

constituted an investigative technique generally known to the public); *Gerstein v. Dep't of Justice*, No. C-03-04893, 2005 U.S. Dist. Lexis 41276, at *39 (N.D. Cal. Sep. 30, 2005) (denying Exemption 7(E) withholding of information about use of delayed-notice warrants where their use was "common knowledge," and "disclosing [their] compilation would [not] reduce [their] effectiveness"). In *Rosenfeld*, this Court also rejected the argument that a specific application of a publicly known investigative technique could be exempt under 7(E). *Rosenfeld*, 57 F.3d at 815. Here, the U.S. government has publicly acknowledged many of the techniques and procedures at issue in this case – including both elaborate surveillance of Muslims and proxy detention. ER 460-468.

The FBI's claims that information about "surveillance and credit searches," as well as a "stratagem the details of which if revealed would preclude its use in future cases" ER 254; 258-259 are validly withheld under Exemption 7(E) is unsupportable based on the information set forth in the declaration. "[S]urveillance" and "credit searches" appear to be "precisely the type of commonly known investigative techniques which [Exemption 7(E)] was not meant to reach." *Dunaway v. Webster*, 519 F. Supp. 1059, 1083 (N.D. Cal. 1981) (denying 7(E) protection for information concerning "mail covers" and "use of post office boxes" because they are common knowledge). Further, while the FBI's asserted justification - that they are shielding a "stratagem" whose details, if

revealed, could preclude its future use - may with further explanation sufficiently describe a protected "technique" or "procedure," the FBI must also show that the revelation of that stratagem would allow people targeted for investigation to circumvent the law. *See infra*. pp. 53-55. That does not appear to be true of proxy detention generally, and the district court should have required more detailed explanation before accepting that claim here.

Further, as discussed above, documents that the FBI already produced reveal some of the specific "national security investigations" they now claim they are entitled to protect. For example, the FBI has already disclosed its intensive surveillance of the mosque that Mr. Hamdan attended in Hawthorne, California. ER 24. The FBI's documents also reveal that another man who attended that mosque – Ali Soussi- was interrogated by FBI agents while he was imprisoned in Libya. ER 25-29. Despite this, the FBI still seeks to withhold information about the incident under 7(E). That particular document is redacted as follows:

> At the request of the FBI, SOUSSI's hand cuffs and blind fold were removed and he was provided water and food. FBIHQ determined that this would be an [redacted] result, SOUSSI [redacted]. SOUSSI requested an attorney which the host nation did not provide at that time.

ER 27. As the context strongly suggests, the redacted information either references a "technique" of the host nation, which is not protected by 7(E), or as discussed *infra* pp. 52-53, it references "investigative techniques that are illegal or of

questionable legality," *Wilkinson v. FBI*, 633 F.Supp. 336, 349 (C.D. Cal. 1986), which also cannot be shielded under 7(E).

Additional evidence of the FBI's involvement in the U.S. government's openly acknowledged practice of proxy detention includes a recent incident involving another American detained and tortured in the U.A.E. ER 31-33. A detailed news report reveals that UAE state security interrogated and tortured American Yonas Fikre, asking "questions that were eerily similar to those posed to him not long before by FBI agents and other American officials who had requested a meeting with him" in connection with a terrorism investigation. ER 31. Like Mr. Hamdan, Mr. Fikre noticed a western interrogator in the room for parts of his interrogation, based on that person's style of dress. ER 33. Mr. Fikre was also tortured in ways similar to Mr. Hamdan, including being subject to "stress positions" and being "beat[en] on the soles of his feet, so as to not show marks." ER 33. The news report also highlights the FBI's own admission that it engages in proxy detention, including through the use of "its elite cadre of international agents (known as legal attaches, or legats) to coordinate the overseas detention and interrogation by foreign security services of American terrorism suspects." ER 32. ("Sometimes, that entails cooperating with local security forces that are accustomed to abusing prisoners."); *see also* ER 461-465. (the FBI has publicly acknowledged that "information it has 'elected to share' with 'foreign law

enforcement services' has 'at times' resulted in the 'detainment of an individual'" and that the "FBI agents have occasionally 'been afforded the opportunity to interview or witness an interview' with detainees abroad.")

Second, "Exemption 7(e) may not be used to withhold information regarding investigative techniques that are illegal or of questionable legality." *Wilkinson*, 633 F. Supp. at 349; *see also Freeman v. U.S. Dep't of Justice*, 723 F. Supp. 1115, 1123 (D. Md. 1988) (agency must "demonstrate that the files were generated during legitimate law enforcement activity"); *Kanter v. IRS*, 433 F. Supp. 812, 822 (N.D. Ill. 1977) ("FOIA does not shield materials relating to unauthorized or illegal investigative tactics."). "The agency can have no valid interest in preventing the public from discovering such techniques – indeed, there is a strong countervailing public interest in exposing such methods to public scrutiny, and in ensuring that agencies do not abuse their police power." *Wilkinson*, 633 F. Supp. at 349-50.

As they did below, Defendants are likely to argue that Plaintiffs bear the burden of showing that "alleged Governmental impropriety might have occurred," in order to overcome their right to withhold certain techniques and methods under 7(E). *See* ER 19 (quoting *Nat'l Archives & Records v. Favish*, 541 U.S. 157, 174 (2004)) (relying on standard under Exemption 7(C)). Without conceding that this is the appropriate standard under 7(E), Plaintiffs have provided more than ample proof to meet that burden. As discussed above, there is significant evidence,

including the FBI's own public statements, that it participates in interrogation of terror suspects abroad. ER 461-468. Coupled with the FBI's close monitoring and interrogation of Mr. Hamdan in the weeks before his abduction and torture by a close ally of the U.S. with whom it cooperates on such matters (despite overwhelming evidence that the U.A.E. routinely engages in torture, ER 30-33; 422-429; 499-512) there is more than a sufficient showing that government "impropriety might have occurred here." *Favish*, 541 U.S. at 174, particularly given that the FBI made no showing to the district court to counter this evidence.

Finally, Defendants cannot meet their burden of showing that disclosure of the purported "techniques and procedures" at issue here "could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E).[30] To attempt to meet this burden, the FBI relied on purely boilerplate explanations, without discussion of the specific documents in question, which are inadequate to meet its burden. ER258-259; *see also Shearson v. Dep't of Homeland Security*, No. 1:06CV1478, 2007 WL 764026, at *6 (N.D. Ohio Mar. 9, 2007) ("absent any

[30] Defendants may argue that "techniques and procedures" are categorically exempt from disclosure under exemption 7(E), and thus the FBI need not show that disclosing them "could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). However, district courts in this Circuit have held agencies to an adequate "circumvention" showing. *See Feshbach v. SEC*, 5 F. Supp. 2d 774, 786 (N.D. Cal. 1997); *Asian Law Caucus v. U.S. Dep't of Homeland Security*, 2008 WL 5047839, *3 (N.D. Cal. Nov. 26, 2008) (declining to grant a categorical exemption, and applying "circumvention" analysis to determine whether "techniques and procedures" were properly withheld).

specific discussion of the document, the Court is left to guess as to how disclosure might" result in the claimed harm). The FBI failed to identify any law that would be circumvented if it discloses the information withheld under 7(E). *Cf. Coastal Delivery Corp. v. U.S. Customs Serv.*, 272 F. Supp. 2d 958, 963-64 (C.D. Cal. 2003) (advancing concrete examples of why disclosure of number of containers examined as Port of Long Beach could allow terrorists to discover the rate of inspection and then direct containers to vulnerable ports); *P.H.E., Inc. v. Dep't of Justice*, 983 F.2d 248, 251 (D.C. Cir. 1993) (addressing specific techniques that if not withheld could thwart investigations of obscenity violations).

Further, the FBI has not identified, and cannot identify, how disclosing details about surveillance that led to Mr. Hamdan's proxy detention in the U.A.E. – a mere application of the U.S. government's practice of proxy detention – would risk circumvention of the law here. *Cf. Bowen v. U.S. Food & Drug Admin.*, 925 F.2d 1225, 1229 (9th Cir. 1991) (upholding Exemption 7(E) where agency's affidavit specified prior disclosure, and "provid[ing] detailed assertions why disclosure of the requested information would present a serious threat to future law enforcement product-tampering investigations").

Because the FBI has failed to justify its withholdings under 7(E), the Court should order *in camera review* of the withheld material to determine whether it should be disclosed. *See, e.g., Ethyl Corp. v. U.S. EPA*, 25 F.3d 1241, 1250 (4th

Cir. 1994) (vacating summary judgment entered for government and remanding the case for further proceedings, including an *in camera* review of documents if the government fails to describe the documents withheld with greater specificity in its Vaughn index); *McGehee v. CIA*, 697 F.2d 1095 (D.C. Cir. 1983) (ordering the district court to undertake an *in camera* inspection of withheld documents where agency affidavits failed to establish the existence of an exemption); *Shearson*, 2007 WL 764026, at *6 (upon in camera review, the court held that "plaintiff is entitled to know that she was identified as a 'silent hit,'" and that the "names of the agencies contacted by CBP in the event an individual is detained is not exempt from disclosure."); *see also El Badrawi v. Dep't of Homeland Security*, 583 F. Supp. 2d 285, 313 (D. Conn. 2008); *Asian Law Caucus v. U.S. Dep't of Homeland Security*, 2008 WL 5047839, *3-*5 (N.D. Cal. Nov. 26, 2008).

III. The FBI, DIA, and DOS Failed to Meet their Obligation to Produce All Non-Exempt Segregable Information

The district court also committed reversible error in failing to address whether the FBI, DIA, or DOS satisfied their obligation to produce all reasonably segregable portions of fully or partially withheld documents.[31] *Wiener v. FBI*, 943 F.2d 972, 988 (9th Cir. 1991); *see also* 5 U.S.C. § 552(b). Courts must conduct

[31] In a footnote, the district court stated in passing that it was not required to undertake an independent segregability analysis as to withholdings under attorney-client or attorney work-product privileges. ER 6. The court said nothing about all of the other withheld information.

their own independent segregability analysis, and make a "specific finding that no information contained in *each document or substantial portion of a document* withheld is segregable." *Wiener*, 943 F.2d at 988 (emphasis added) (citation omitted) (internal quotation marks omitted) (holding that it is "reversible error for the district court to simply approve the withholding of an entire document without entering a finding on segregability, or the lack thereof, with respect to that document."); *Church of Scientology v. United States Dep't of Army*, 611 F.2d 738, 743-44 (9th Cir. Cal. 1979). Because the district court failed to do so, this Court must remand to require such findings, and to review the relevant withheld documents *in camera* to ensure disclosure of all non-exempt information. *Physicians for Human Rights v. U.S. Dep't of Defense*, 675 F. Supp. 2d 149, 172 (D.D.C. 2009).

Here, the DIA withheld 27 documents in full, ER 587-599, while the FBI withheld 14 documents in full, ER 275-277 and made unjustified block redactions in numerous other documents, ER 280-282; 293; 300; 303; 315-316; 321-323; 325-326; 329-331; 333; 337; 342-346; 348; 379-383. In response to Plaintiffs' challenge to DIA's dubious segregability showing below, ER 271-272; 274; *cf. Van Bourg, Allen, Weinberg & Roger v. NLRB*, 656 F.2d 1356 (requiring document by document segregability analysis), the DIA stood by its original boilerplate claim that it had released all reasonably segregable information. ER

266. The FBI likewise failed to make a particularized segregability showing for the information it withheld. ER 231. For each of the documents at issue, the agencies failed to attest that any non-exempt information withheld was "inextricably intertwined with exempt portions." *Willamette Indus., Inc. v. United States*, 689 F.2d 865, 867-68 (9th Cir. 1982) (citation omitted) (internal quotation omitted). Further, as to any non-exempt information, they "failed to provide … a description of 'what proportion of … [those] document[s] is non-exempt, and how that material is dispersed throughout the document[s]." *Lawyers' Comm. for Civil Rights of S.F. Bay Area v. Dep't of Treasury*, No. C 07-2590, 2008 WL 4482855, at *13 (N.D. Cal. Sept. 30, 2008) (citing *Mead Data Cent., Inc. v. Dep't of the Air Force*, 556 F.2d 242, 261 (D.C. Cir. 1977)).

Similarly, DOS withheld numerous documents either in full, or through large block redactions that are not justified under this Court's standards. *See, e.g.*, ER 75-86; 93-110. For the reasons discussed above, the DOS's blanket assertions as to many of its withheld documents that "[t]here is no additional information not subject to a FOIA exemption that may be segregated and released," ER 223, does not justify its segregability claims. *Lawyers' Comm. for Civil Rights*, 2008 WL 4482855, at *13; *see also Church of Scientology*, 611 F.2d at 744 (9th Cir. 1979)

(court may not "simply approve the withholding of an entire document without entering a finding on segregability").[32]

Thus, the district court's failure to conduct its own independent segregability analysis independently requires reversal.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's order and remand with instructions that it: (1) order the FBI and DOS to conduct the additional searches specified here, (2) order the FBI and DIA to provide adequate justifications for any withholdings under FOIA Exemptions 1, 3, and 7(E), and to conduct *in camera* review as necessary to determine whether the exemptions were properly applied. The Court should also order the district court to carry out an independent segregability analysis of all documents withheld by the FBI, DIA, and DOS in whole or in part, including if necessary through *in camera* review, to ensure disclosure of all reasonably segregable non-exempt information.

Dated: December 16, 2013

Respectfully Submitted,

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[32] Further, DOS failed to address segregability at all in regards to a number of documents ER 205-206; 217

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C), I certify that the attached opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 11,859 words.

Dated: December 16, 2013

s/ Laboni A. Hoq
LABONI A. HOQ
Counsel for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs-Appellants are not aware of any related cases currently pending before this Court.

Respectfully Submitted,

Dated: December 16, 2013

s/ Laboni A. Hoq
LABONI A. HOQ
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2013, I caused to be electronically filed the foregoing PLAINTIFFS-APPELLANTS' OPENING BRIEF, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Laboni A. Hoq
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