UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

American Civil Liberties Union of Michigan, Plaintiff, v. Federal Bureau of Investigation, *et al*. Defendants.	Case No. 2:11-cv-13154 Honorable Lawrence P. Zatkoff

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

This Freedom of Information Act ("FOIA") lawsuit seeks to inform the public about the Federal Bureau of Investigation's ("FBI") use of Michigan communities' racial and ethnic information in targeting investigations and intelligence collection. The information is manifestly important to an ongoing debate about whether the FBI is using its authority to illegally profile communities on the basis of race, ethnicity, national origin, or religion. Defendants' refusal to segregate and disclose non-exempt, public-source information that would shed light on these issues is improper for the reasons set forth below.[1]

ARGUMENT

I. This Court Has Jurisdiction Over Plaintiff's Claims.

The FOIA statute is clear that a requester has constructively exhausted administrative remedies when the agency fails to substantively determine an appeal within twenty days. 5 U.S.C. § 552(a)(6)(A)(ii) (appeal must be decided within twenty working days); *id.* § 552(a)(6)(C)(i) (FOIA requester "shall be deemed to have exhausted" administrative remedies when the agency fails to comply with 5 U.S.C. § 552(a)(6)(A)(ii)). A FOIA requester therefore "may seek judicial review" when an agency has not decided an appeal within the required twenty days. *Oglesby v. U.S. Dep't. of Army*, 920 F.2d 57, 64 n.8 (D.C. Cir. 1990).[2]

Plaintiff itself timely appealed the FBI's failure "to make promptly available all records requested," "improper[] withholding [of] documents," and "improper[] redact[ion]" of information from the December 22, 2010 release. Decl. of Mark Fancher ("Fancher Decl.")

[1] Plaintiff does not challenge any withholdings in the records released with the filing of Defendants' reply brief. *See* Reply Br. in Supp. of Defs.' Mot. for Summ. J. and Opp'n to Pls.' Cross-Mot. for Partial Summ. J. ("Defs.' Reply") 3 n.2; Supp. Hardy Decl. Ex. A–B.

[2] Courts have found exhaustion in such circumstances. *See e.g.*, *Gibbs Int'l, Inc. v. Internal Revenue*, 129 F.3d 116, 1997 WL 698948, *1 (4th Cir. 1997) (per curiam); *Natural Res. Def. Council, Inc. v. EPA*, 581 F. Supp. 2d 491, 493, 495 (S.D.N.Y. 2008).

Ex. F at 2. Contrary to Defendants' contention, Defs.' Reply 2, Plaintiff's challenge to the FBI's failure to release "all records requested" necessarily contested the adequacy of the search. When this action was filed, Defendants had failed to decide the appeal, which had been pending for almost five months. Choudhury Decl. Ex. B (Compl. ¶ 43). Plaintiff thus constructively exhausted its claims, *see Oglesby*, 920 F.2d at 64, and the case should not be dismissed.[3]

II. Defendants Have Not Demonstrated that the FBI Conducted a Reasonable Search.

Plaintiff merits summary judgment on the search claim for two reasons. First, despite supplementation, Defendants' submissions describing the FBI's search continue to lack the required detail. They do not identify how headquarters components or the Detroit Field Office searched "database systems" or "paper or manual files" other than by sending an all-employee email requesting searches, and do not describe which paper or electronic files were actually searched by headquarters. *See* Mem. In Supp. of Pls.' Cross-Mot. for Partial Summ. J. and Opp'n to Defs.' Mot. for Summ. J. ("Opp'n Br.") 11–12; Supp. Hardy Decl. ¶¶ 4–10; *see, e.g.*, *Maydak v. DOJ*, 254 F. Supp. 2d 23, 39 (D.D.C. 2003) (denying agency summary judgment on search claim absent description of "various 'systems of records'" and record retrieval methods).[4]

Second, Defendants' search was substantively inadequate under the FOIA because Defendants' declarations describe search methods that were not reasonably calculated to retrieve

[3] Even if Plaintiff had not exhausted the search claim, this Court could resolve it because exhaustion is not jurisdictional, but "a prudential consideration." *Hull v. IRS*, 656 F.3d 1174, 1181 (10th Cir. 2011). Courts may review unexhausted claims where the "purposes of exhaustion have been served." *Id.* at 1183. That standard is met here because Defendants moved for summary judgment on the search claim and filed declarations describing the FBI's search, permitting the Court to evaluate it. Although Defendants cite an unpublished Sixth Circuit decision for the proposition that failure to exhaust a FOIA claim deprives a court of jurisdiction, Defs.' Reply 2, the Sixth Circuit has not decided the question and a "majority" of circuits have reached the contrary conclusion. *Hull*, 656 F.3d at 1181–82 (collecting cases).

[4] Defendants' reliance on *Rugiero v. DOJ*, 257 F.3d 534, 548 (6th Cir. 2000), is unpersuasive. That court could assess the search claim because the Department of Justice ("DOJ") Tax Division's affidavit detailed *how* the agency organized its files. *Id.* Such detail is lacking here.

the requested legal memoranda and policy documents. *See* Opp'n Br. 12. The FBI failed to adequately search for these records in the Detroit Field Office, a location "likely to turn up the information requested." *Campbell v. DOJ*, 164 F.3d 20, 28 (D.C. Cir. 1999); *see* Opp'n Br. 12 n.10. Defendants do not dispute that the field office's search for these documents amongst intelligence products and maps was not "reasonably calculated to uncover" these records. *Weisberg v. DOJ*, 705 F.2d 1344, 1350–52 (D.C. Cir. 1983); *see* Defs.' Reply 5–6; Opp'n Br. 12. They argue that the search was nevertheless reasonable because headquarters' offices searched for these documents. FOIA, however, does not permit an agency to limit its search to certain record systems when others likely retain the requested records. *Campbell*, 164 F.3d at 28. This Court should thus grant summary judgment to Plaintiff on the search claim and order Defendants to conduct a thorough and expeditious search and to submit a detailed search description.[5]

III. Defendants Have Not Demonstrated That They Segregated and Disclosed All Non-Exempt Material From Documents Withheld under Exemptions 7A and 1.

Defendants' withholding of 105 documents in full and 40 documents in part under Exemptions 7A and 1 cannot be sustained because their declarations fail to show that they have disclosed all reasonably segregable information, including the discrete information Plaintiff seeks: publicly-available, racial and ethnic demographic information, including census data. Defendants make four overarching points. Plaintiff addresses each argument in turn.

1. Defendants ask the Court to defer to their segregability determinations because they state that the withheld information concerns investigations and intelligence gathering about organized crime, terrorist groups, and foreign governments. Defs.' Reply 8. Although courts

[5] Defendants contend that their search satisfies the FOIA because a less extensive DOJ Tax Division search in *Rugiero* was found to be reasonable. Defs.' Reply 6. But, unlike this case, the FOIA requester in *Rugiero g*enerally requested "any and all" information concerning him and did not show that DOJ failed to search for specific categories of records in places where they were reasonably likely to be located. *Rugiero*, 257 F.3d at 542, 548–49.

may accord deference to government declarations in national security-related FOIA cases, that deference is due only when the declarations "contain reasonable specificity of detail" and "are not called into question by contradictory evidence in the record." *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982).[6] Defendants' declarations fail to meet both requirements.[7]

First, Defendants concede that the documents contain public-source information, but the Hardy Declarations fail to provide the "factual recitation" required to justify the refusal to segregate and disclose such information. *Abdelfattah v. DHS*, 488 F.3d 178, 187 (3d. Cir. 2007); *see* Opp'n Br. 15–16 (all documents), 20 (Domain Intelligence Notes), 23–24 (Program Assessments), 25 (Electronic Communications ("ECs")), 27 (maps). Second, record evidence showing the release of publicly-available racial or ethnic information from documents similar to those in dispute here controverts Defendants' claim that no further information can be segregated and disclosed. *See* Opp'n Br. 16–17, 20, 24, 26–28. Defendants attempt to distinguish those disclosures on the ground that they concern closed investigations of the MS-13 gang. *See* Defs.' Reply 9–10. But, the record evidence also concerns other investigations, which Defendants have *not* indicated are closed. *See, e.g.*, Hardy Decl. Ex. K at DE-GEOMAP 484–85 (Michigan's Middle-Eastern and Muslim population), Choudhury Decl. Ex. J-K (San Francisco's Chinese and Russian populations), Ex. H at 1, 3 (Trinitario Street gang); Ex. L at 1–2 (Black Separatists).

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[6] *See also Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987) (even in the national-security context, courts must not "relinquish[] their independent responsibility" to review an agency's withholdings).

[7] *Dickerson v. DOJ*, 992 F.2d 1426, 1433 (6th Cir. 1993), does not support deference to Defendants' segregability determination because in that case, the redaction of exempt material would have resulted in disclosure of only "useless," non-exempt information. In contrast, here, the release of even isolated words identifying the racial, ethnic, and national origin communities whose information is being collected and used by the FBI could shed critical light on which Michigan communities are impacted by the FBI's racial and ethnic mapping program.

In camera inspection is thus needed for "a responsible de novo determination" as to whether Defendants met their segregability burden. *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978) (per curiam); *see* 5 U.S.C. § 552(a)(4)(B). Additionally, three of the four factors guiding this Court's exercise of discretion to conduct *in camera* review weigh in favor of it here: there is a strong public interest in ensuring disclosure of the non-exempt information sought, the information will shed light on whether the FBI activities generating the requested records show illegal profiling, and Plaintiff has requested *in camera* review. *See Rugiero*, 257 F.3d at 543; *infra* 6–7; Opp'n Br. 17–18.[8]

2. Defendants claim that disclosure of publicly-available racial and ethnic information would result in harm under Exemption 7A for two reasons: 1) it would tip off targets of current investigations because "[n]ational security investigations often have ethnic aspects," and 2) it would reveal the use of a publicly-known law enforcement technique in "specific circumstances." Defs.' Reply 10. Neither argument is persuasive. Presumably, the FBI is targeting investigations based on some suspicion of wrongful conduct, and Plaintiff does not seek such information. Defendants do not adequately explain why, in the absence of disclosures of specific target descriptions or conduct-based information, the disclosure of the "particular" records sought—publicly-available racial and ethnic information—would cause harm by tipping off targets or revealing the use of racial or ethnic mapping in specific circumstances. *Campbell v. Dep't of Health & Human Servs.*, 682 F.2d 256, 259 (D.C. Cir. 1982); *see* Opp'n Br. 17–18, 21–22, 26, 28. Rather, the disclosure of this public-source information could show that *entire*

[8] The Sixth Circuit's observation in *Osborn v. IRS*, 754 F.2d 195, 197 (6th Cir. 1985), that "*in camera* reviews are not favored" involved entirely different circumstances where the district court erred in granting the agency summary judgment without first considering a *Vaughn* Index.

racial or ethnic communities are being subjected to law enforcement scrutiny, and it is precisely the kind of information that would not harm any *specific* investigation.

3. Defendants' own documents contradict their claim that disclosure of publicly-available racial and ethnic information would not shed light on FBI activities that are illegal or of questionable legality, Defs.' Reply 11. The Electronic Communication documenting the opening of a Type IV domain assessment of Michigan's Middle Eastern and Muslim populations is not "in accordance with the law," as Defendants contend. *Id.*[9] The assessment is based on the unjustified and erroneous assumption that Michigan's Middle Eastern and Muslim communities are receptive to "recruitment, radicalization, and fund-raising" by certain terrorist groups solely based on shared religion and national origin. Hardy Decl. Ex. K at DE GEOMAP 485; s*ee* Opp.'n Br. 17–18 (discussing the EC). Such reasoning epitomizes unlawful profiling because it ascribes criminal propensity to communities without any credible evidence to support reasonable suspicion. It also appears to violate the FBI's own policy. *See* Opp'n Br. 19 (discussing DOJ Guidance on Race and FBI Domestic Investigations and Operations Guide ("DIOG") § 4.3 (A)–(B)).[10] The opening of an FBI assessment into Michigan Christian communities simply because the Aryan Nations espouse extreme views of the Christian faith would be just as troubling.

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[9] Defendants trivialize the invasive nature of activities undertaken in domain assessments by describing them as involving only the "collection and analysis of demographic data." Defs.' Reply 11. But, the FBI's purpose in collecting and analyzing data about communities is to target further FBI investigative and intelligence activities. *See* John S. Pistole, Deputy Director, Federal Bureau of Investigation, Statement Before the Senate Select Committee on Intelligence, (Jan. 25, 2007), *available at* http://www.fbi.gov/news/testimony/implementing-the-intelligence-reform-and-terrorism-prevention-act ("domain management . . . provides the basis for investigative, intelligence, and management direction").

[10] Defendants contend that the opening of the assessment is lawful because it comports with the DIOG provision authorizing the collection and use of racial or ethnic information in domain management activities. *See* Defs.' Reply 11–12. But, the DIOG is not law—it is the FBI's interpretation of permissible policy. And Plaintiff seeks information under the FOIA precisely in order to determine whether this policy is resulting in the violation of civil rights and liberties.

4. Defendants assert Exemption 1 claims over only "portions" of certain records. Defs.' Reply 13–14; *see* Opp'n Br. 22 (seventeen Domestic Intelligence Notes), 25 (ten Program Assessments), 26–27 (twelve ECs), 28–29 (six maps). They concede that these documents contain public-source information, Opp'n Br. 20, 23, 27, but fail to address with specificity whether that information falls within their discrete Exemption 1 withholdings and, if so, why it cannot be segregated and disclosed, or why it constitutes withholdable intelligence sources or methods or foreign relations information, *see id*. at 22–23, 25–29. Because public-source information does not "logically fall[]" under Exemption 1, Defendants' declarations do not merit deference on this issue, *Gardels*, 689 F.2d at 1104, and Defendants' reliance on *Larson v. Dep't of State*, 565 F.3d 857, 867 (D.C. Cir. 2009), is unpersuasive.[11] Absent this independent basis for withholding, Defendants cannot withhold under Exemption 1 public-source information demonstrating illegal FBI activity. *See* Opp'n Br. 18–19.

The Court should therefore review *in camera* unexpurgated versions of the documents to determine what segregable, non-exempt information exists and must be disclosed.

IV. Defendants' Submissions Do Not Adequately Justify the Withholding of DIOG Training Materials Under Exemption 7E.

Defendants fail to justify their withholding under Exemption 7E of DIOG training scenarios concerning the protection of civil rights and civil liberties. *See* Opp'n Br. 29–31. They argue that disclosure would permit a would-be criminal to avoid detection. Defs.' Reply 16. But, to the extent that the teaching scenarios identify investigative activities that are "illegal" or "of questionable legality," Exemption 7E does not apply and "strong" public interest favors

[11] *See* Defs.' Reply 14. Contrary to Defendants' characterization, Defs.' Reply 12, Plaintiff does not argue that Defendants have waived through official acknowledgement otherwise valid Exemption 1 claims over publicly-available census data and demographic information. It argues that this information is undeniably and "truly public" and therefore may not be withheld in the first instance. *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999).

disclosure. *Wilkinson v. FBI*, 633 F. Supp. 336, 349–50 (C.D. Cal. 1986). Additionally, Defendants' explanation is conclusory because it is insufficiently "tied to the content" of the specific scenarios. *Davin v. DOJ*, 60 F.3d 1043, 1051 (3d. Cir. 1995); Opp'n Br. 30–31.[12] Although Defendants contend that providing a more detailed explanation for their Exemption 7E withholding would itself risk harm by revealing investigative techniques, Defs.' Reply 16, courts reject such arguments where the government's explanations are conclusory, as they are here. *See, e.g.*, *Smith v. ATF*, 977 F. Supp. 496, 501 (D.D.C. 1997). This Court should thus order disclosure of the training scenarios or conduct *in camera* review.[13]

V. The Court Should Adjudicate Defendants' Possible Invocation of FOIA Section 552(c) Through a Glomar-Like Procedure.

Plaintiff seeks adjudication of Defendants' possible reliance on 5 U.S.C. § 552(c)(3) ("Section 552(c)(3)") through a Glomar-like procedure, which is familiar to courts and litigants around the country and affords meaningful judicial review and public access to judicial opinions when the government has asserted a secrecy interest in the existence of the requested documents. Opp'n Br. 31. Defendants object and ask for *in camera*, *ex parte* review of their declaration. Defs.' Reply 18. This Court should adopt Plaintiff's proposal for four reasons.

First, Defendants' proposed *ex parte*, *in camera* proceedings would not permit meaningful judicial review by this Court or on appeal. Such proceedings deprive the Court of the benefit of briefing from *both* parties concerning whether the requested records, if they exist, fall within Section 552(c)(3)'s statutory language. And the bare court order that Defendants

[12] Defendants claim that their release of other slides from the same training presentations satisfies their Exemption 7E burden. Defs.' Reply 16. But, the release of such information fails to address why Exemption 7E applies to teaching scenarios that specifically concern FBI agents' compliance with the Constitution and privacy rights. *See* Opp'n Br. 30.

[13] *See Fitzgibbon v. U.S. Secret Service*, 747 F. Supp. 51, 60 (D.D.C. 1990) (ordering *in camera* review of Exemption 7(E) claim).

propose the Court issue following its review—one stating that Defendants' reliance on a FOIA exclusion provision, if any, was proper—does not permit meaningful appellate review or provide enough information for Plaintiff to determine whether to appeal. *See* Opp'n Br. 35 & n.26.

Second, Defendants overstate any negative results from use of a Glomar-like procedure. They contend that they would always need to respond affirmatively to the question of whether they interpret a FOIA request to seek records that, if they exist, would fall under the FOIA's exclusion provision, in order to prevent disclosing when an exclusion is (or is not) at play. Defs.' Reply 18. Defendants would not need to respond affirmatively, however, when it is unreasonable to interpret a FOIA request as seeking records that fall under Section 552(c)'s statutory language due to the subject matter of the request or the type of records requested.[14]

Third, Defendants incorrectly argue that in a Glomar-like procedure, their briefing would be limited to "parrot[ing] the language of the exclusion provision" lest they reveal secret information. Defs.' Reply 18. But the briefing would be nearly identical to Glomar briefing: it would concern the specifics of the FOIA request and whether FOIA allows the government to refuse to answer it.[15] Precisely because the briefs would address these issues *whether or not the requested records exist*, they would not disclose any secret information.

Fourth, Defendants' proposal fails to protect even their own asserted secrecy interest. If the Court were to determine after *in camera*, *ex parte* review that any reliance on Section 552(c) was improper, then issuing *any* type of public order to that effect would reveal that Defendants had invoked an exclusion. For example, a public order parallel to the one Defendants propose in

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[14] As in the Glomar context, use of a Glomar-like procedure to adjudicate Section 552(c) claims *may* result in *some* litigation when no responsive records exist or no exclusion is at play. But, it is preferable because it would protect the interests of the Court and litigants. *See supra* at 10; Opp'n Br. 34–35.

[15] *Cf. Wilner v. NSA*, 592 F.3d 60, 75 (2d Cir. 2009) (discussing parties' briefing concerning whether Exemption 6 precludes acknowledgment of existence of requested records).

the event of a favorable decision—"a full review of the claim was had and, if any exclusion was in fact employed, it was *not* justified"—would necessarily reveal that Defendants had relied on Section 552(c). So would "Judgment for Plaintiff."[16] A Glomar-like procedure, however, would protect Defendants' secrecy interest no matter which party prevails. *See* Opp'n Br. 34–35. [17]

This Court should thus follow the proposed Glomar-like procedure and, as the first step, order Defendants to make a public court filing indicating whether they interpret all or part of Plaintiff's FOIA request as seeking records that, if they exist, would be excludable under Section 552(c), and that therefore, Defendants have not processed those portions of the Request.

CONCLUSION

For the foregoing reasons and those expressed in Plaintiff's moving brief, Plaintiff respectfully requests that the Court grant Plaintiff's partial cross-motion for summary judgment and deny Defendants' motion for summary judgment.

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[16] A sealed opinion and judgment would also disclose Defendants' reliance on Section 552(c) because there would be no need for sealing unless Defendants had so relied and the Court ruled against them. A sealed judgment and opinion would also be contrary to the First Amendment and common law presumption of public access to judicial opinions. *See, e.g., Press-Enter. Co. v. Super. Ct. of Cal.*, 464 U.S. 501, 510 (1984); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978); *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006).

[17] Defendants' reliance on Section 552(c), if any, would only be disclosed in the event that an adverse ruling by this Court were affirmed on appeal.

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2012, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to counsel of record.

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