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15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 CAITLIN KELLY HENRY and JESSE
19 STOUT,

20 Plaintiffs,

21 v.

22 DEPARTMENT OF JUSTICE,

23 Defendant.

) Case No.: 13-cv-5924 DMR

) **PLAINTIFFS' MEMORANDUM OF LAW IN**
) **OPPOSITION TO DEFENDANT'S REQUEST**
) **FOR IN CAMERA REVIEW OF**
) **SUPPLEMENTAL DECLARATIONS**
) **REGARDING DIVS**

24 On February 26, 2015 the Court ordered both parties to submit two-page memoranda of law on
25 the issue of camera review. Defendant submitted a two-page memorandum and twenty-six pages of
26 affidavits setting forth limited factual basis regarding DIVS, but instead raising voluminous and new
27

1 legal arguments. Plaintiffs request that the court strike the non-conforming legal arguments contained in
2 Defendant's affidavits, or alternatively, grant leave for Plaintiffs to respond to the non-conforming
3 arguments.
4

5 **I. DEFENDANT FAILED TO PROVIDE SUFFICIENT DETAIL TO OVERCOME NINTH**
6 **CIRCUIT PRESUMPTION DISFAVORING *IN CAMERA*, *EX PARTE* DECLARATIONS**

7 “[E]x parte proceedings are anathema in our system of justice.” *U.S. v. Thompson*, 827 F.2d
8 1254, 1258-59 (9th Cir. 1987). *Ex parte* declarations are inconsistent with FOIA's disclosure mandate.
9 Courts may only rely upon *ex parte* FOIA declarations in the “‘exceptional case’ after ‘the government
10 has submitted as detailed public affidavits and testimony as possible.’” *Lion Raisins v. Dep't of Agric.*,
11 354 F.3d 1072, 1083 (9th Cir. 2004) (citing *Doyle v. FBI*, 722 F.2d 554, 556 (9th Cir. 1983)). This case
12 does not merit exception. Here, Defendant's redacted affidavits and testimony are insufficiently detailed
13 to overcome the strong presumption against secrecy.¹ In the instant case, damage to the adversarial
14 system caused by precluding scrutiny of the full affidavit outweighs the benefits of *in camera* review.
15

16 **II. DEFENDANT FAILS TO PROVIDE SUFFICIENT DETAIL TO SATISFY ITS FOIA**
17 **BURDEN OR SUCCESSFULLY INVOKE EXEMPTIONS (b)(1), (b)(3), AND (b)(7)(E).**

18 Mere statutory recitations and sweeping claims of national security bereft of facts should not
19 undermine FOIA's mandate that Defendant submit detailed affidavits for critique in adversarial
20 proceedings. Given the vague and conclusory nature of Defendant's arguments and references to generic
21 terms such as “law enforcement information,” the Court should decline Defendant's request for *in*
22 *camera* review. Courts need not afford absolute deference when the FBI invokes the specter of “national
23 security,” as “deference does not mean abdication.” *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981).
24 FOIA's “limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant
25 objective of the Act.” *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001)
26 (internal citations omitted). Congress fashioned FOIA to ensure “that courts act as an independent check
27 on challenged classification decisions.” *Goldberg v. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987).

28 CAITLIN KELLY HENRY, et al. v. DOJ; Case No.: C13-5924 DMR

[PROPOSED] ORDER

1 "Exemptions are specifically made exclusive . . . and must be narrowly construed." *Dep't of the Air*
2 *Force v. Rose*, 425 U.S. 352, 361 (1976). Here, Defendant fails to meet its burden to invoke exemption
3 (b)(3) because it did not indicate that, in this case, the Director of National Intelligence exercised its
4 authority pursuant to 50 U.S.C. § 403-1(i). Defendant may not invoke the statute on behalf of other
5 agencies. The Court's duty is to scrutinize classification decisions and publish the affidavits if
6 Defendant's claims of harm are unwarranted: "the court may order release of any portions of these *in*
7 *camera* affidavits that it determines will present no danger of unauthorized disclosure." *Founding*
8 *Church of Scientology, Inc. v. National Sec. Agency*, 610 F.2d 824, 833 (D.C. Cir. 1979).

9
10
11 Respectfully Submitted,

12 DATED: APRIL 20, 2015

13 /s/ _____
CAITLIN KELLY HENRY
Attorney for Plaintiff Jesse Stout

14 DATED: APRIL 20, 2015

15 /s/ _____
JESSE STOUT
Attorney for Plaintiff Caitlin Kelly Henry

16 _____
17 The Court should also publish the full affidavits to enable evaluation of the redacted portions because
18 of the un-redacted affidavits' flawed reasoning and non-responsiveness to the Court's order to provide
19 factual details about DIVS's functionalities. First, labeling a system an "analysis" tool as opposed to a
20 "records management" tool is unsound grounds to circumvent search, especially when the "analysis
21 tool" uses ECF, itself a FBI "records management" tool. It is specious to argue that records become
22 classified or risk harm when opened with different software. Second, Defendant should not evade
23 scrutiny by labeling DIVS "a sensitive investigative technique" and "an intelligence source and method"
24 without *describing* its operational parameters. The FBI does not explain *how* more efficiently searching
25 records from FBI datasets converts them into a "technique" or "source." Defendant lacks *factual* support
26 for the argument that using DIVS to access a FBI record creates articulable harm. Third, the FBI cannot
27 block access to an efficient search tool because it is *capable* of searching other agencies records. The
28 FBI never alleges it is difficult or impossible to filter and segregate FBI records from other agency
records. The FBI instead ignores the Court's order to provide *facts* about query structure, report
generation, and other operational architecture. Fourth, the FBI also disregards the Court's order to
estimate search times, including no *details* on whether a search would consume a minute, an hour, or a
day. The affidavits are devoid of *facts* comparing the search times of DIVS, ACS, ECF, and Sentinel. A
DIVS search may be time-consuming, yet expend less time than an ACS, ECF, or Sentinel search.
Furthermore, it is possible that DIVS could search ACS, ECF, and Sentinel at the same time, taking less
time than either search individually or combined. The FBI has failed to meet its obligation to estimate
burdensomeness. The Court need not defer to Defendant's conclusions devoid of supporting facts.