

1 BRIAN STRETCH (CABN 163973)
Acting United States Attorney
2 ALEX G. TSE (CABN 152348)
Chief, Civil Division
3 JAMES A. SCHARF (CABN 152171)
Assistant United States Attorney
4
5 150 Almaden Blvd., Suite 900
San Jose, California 95113
6 Tel: (408) 535-5044 / Fax: (408) 535-5081
7 Email: james.scharf@usdoj.gov

8 Attorneys for Defendant United States Department of Justice

9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12

13 ELECTRONIC FRONTIER FOUNDATION,

14 Plaintiff,

15 v.

16 DEPARTMENT OF JUSTICE,

17 Defendant.
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Case No. 15-cv-03186-MEJ

DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

Date: May 5, 2016
Time: 10:00 a.m.
Courtroom: SF Federal Courthouse,
Courtroom B, 15th Floor
Judge: Hon. Marina-Elena James

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NOTICE OF MOTION

TO PLAINTIFF:

PLEASE TAKE NOTICE that on May 5, 2016 at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom B, located on the 15th Floor of the Federal Building, 450 Golden Gate Avenue, San Francisco, California, Defendant U.S. Department of Justice (“Defendant”) will respectfully move this Court for summary judgment as to Plaintiff’s request for documents pursuant to the Freedom of Information Act (“FOIA”).

This Motion for Summary Judgment is brought pursuant to Federal Rule of Civil Procedure 56, on the grounds that the Defendant has responded sufficiently to Plaintiff’s FOIA request. Fed. R. Civ. P. 56(a). This Motion is based on this Notice and Motion, the accompanying Memorandum of Points and Authorities in support thereof, the Declaration of Katherine L. Myrick and attached exhibits, the Declaration of James A. Scharf and attached exhibits, the papers and pleadings on file herein, and on such oral arguments as the Court may permit. *Pursuant to the Case Management Order, Docket No. 17, Plaintiff’s Opposition/Cross Motion for Summary Judgment and supporting declarations are due on March 17, 2016.*

RELIEF REQUESTED

Defendant requests an order granting summary judgment on all of Plaintiff’s FOIA claims.

ISSUES TO BE DECIDED

1. Whether Defendant conducted adequate searches for responsive records.
2. Whether Defendant released all responsive non-exempt documents, while properly withholding documents that fell within an exemption.
3. Whether any of the withheld documents could have been reasonably segregable.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to the Freedom of Information Act (“FOIA”), Plaintiff Electronic Frontier Foundation (“Plaintiff” or “EFF”) requested records in the possession of the Drug Enforcement Administration (“DEA”), a component of the United States Department of Justice (“Defendant”), regarding the

1 “Hemisphere” program.

2 In response to Plaintiff’s FOIA request, Defendant conducted adequate searches for responsive
3 records, and properly withheld and properly redacted from the 305 responsive documents, pursuant to
4 FOIA Exemptions 5, 6, 7(A), 7(C), 7(D), 7(E) and 7(F).

5 Defendant has fully satisfied its obligations under the FOIA. The record establishes that
6 Defendant, after conducting an adequate search, properly withheld responsive records because the
7 material was protected by FOIA exemptions 5, 6, 7(A), 7(C), 7(D), 7(E), and 7(F). As there are no
8 genuine issues of material fact in dispute, Defendant respectfully submits that Defendant is entitled to
9 judgment as a matter of law on all issues in this case and requests that Defendant’s motion for summary
10 judgment be granted.

11 **II. FACTUAL BACKGROUND**

12 **A. Plaintiff’s FOIA Request to Defendant.**

13 By electronic mail and facsimile dated February 5, 2014, EFF Staff Attorney Hanni Fakhoury
14 transmitted correspondence with Defendant, requesting documents for the purpose of EFF’s
15 “Transparency Project,” “which works to obtain government records and make those records widely
16 available to the public.” Declaration of Katherine L. Myrick (“Myrick Decl.”) ¶7; *see* Exhibit A.
17 Defendant acknowledged receipt of EFF’s correspondence by letter dated February, 21, 2014, and
18 advised EFF that its request had been assigned case number “14-00257-F.” Myrick Decl. ¶8; *see*
19 Exhibit B. By letter dated March 19, 2014, Defendant informed EFF that its request did not meet the
20 requirements of the FOIA because it did not reasonably describe the records it sought and was not filed
21 in accordance with agency rules. Myrick Decl. ¶12; *see* Exhibit D. The letter informed EFF that no
22 further action would be initiated on EFF’s request in regards to #1 through #6, of seven items, until
23 Defendant received a reformulated request. Myrick Decl. ¶12.

24 By facsimile dated April 15, 2014, EFF submitted a reformulated request to Defendant. Myrick
25 Decl. ¶13; *see* Exhibit E. Defendant sent a letter to EFF dated May 13, 2014, advising EFF that the
26 FOIA Unit was in the process of gathering and reviewing documents related to its request. Myrick Decl.
27 ¶14; *see* Exhibit F. The letter assured EFF that its request was being handled as equitably as
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1 possible. Myrick Decl. ¶14. By letter dated April 7, 2015, Defendant released 176 pages to EFF and
2 withheld 132 pages. Myrick Decl. ¶15; *see* Exhibit M. The letter advised EFF that Exemptions (b)(5),
3 (b)(6), (b)(7)(A), (b)(7)(C), (b)(7)(D), (b)(7)(E), and/or (b)(7)(F) were applied to the withheld
4 material. Myrick Decl. ¶15.

5 **B. Defendant Conducted Reasonable Search for Responsive Documents.**

6 Defendant's search for records responsive to EFF's request was reasonably calculated to uncover
7 all records responsive to EFF's request.

8 As explained in greater detail in the Declaration of Katherine L. Myrick, Defendant identified six
9 offices at DEA Headquarters likely to have responsive records and tasked each of them with searching
10 for responsive records: DEA Intelligence Division, DEA Acquisition Management Section of the Office
11 of Acquisition & Relocation Management, Office of Chief Counsel, Office of Congressional and Public
12 Affairs, Office of Training, and Operations Division. Myrick Decl. ¶ 19. The FOIA Unit also tasked the
13 Los Angeles, San Diego, and San Francisco division offices with searching for responsive records and
14 searched the Investigative Reporting and Filing System Privacy Act System of Records. Myrick Decl. ¶
15 19.

16 These offices searched the locations within each office where responsive documents were likely
17 to be found and returned any responsive documents to the FOIA Unit. Myrick Decl. ¶¶ 23-27, 29-31.
18 Defendant also searched the Narcotics and Dangerous Drugs Information System (NADDIS), which is
19 the index to and the practical means by which DEA retrieves investigative reports and information from
20 the Investigative Reporting and Filing System, DEA's investigative and intelligence Privacy Act system
21 of records. Myrick Decl. ¶ 32.

22 Defendant thus "made a good faith effort to conduct a search for the requested records, using
23 methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S.*
24 *Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Furthermore, during the "meet and confer"
25 process, Plaintiff never challenged the reasonableness of the search. Declaration of James A. Scharf
26 ("Scharf Decl."), Exhibit B.

1 **C. Defendant Complied With FOIA by Justifying Disclosure and Non-Disclosure Using a**
2 **“Vaughn” Index and Met and Conferred with Plaintiff to Narrow the Issues in this Case.**

3 When an agency asserts a FOIA exemption, it “may prepare a *Vaughn* index that provides the
4 court with a method to analyze the propriety of the withholding in sufficient detail to show the
5 applicability of the exemption.” *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973). No precise form
6 for a *Vaughn* index is dictated. *Id.* The court may rely solely on government affidavits if the affiants
7 are knowledgeable about the information sought, contain reasonably detailed descriptions of the
8 documents, and allege facts sufficient to establish an exemption. *Lion Raisins, Inc. v. U.S. Dep’t of*
9 *Agric.*, 354 F.3d 1072, 1079 (9th Cir. 2004); *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987) (quoting
10 *Church of Scientology of Calif. v. Dep’t of the Army*, 611 F.2d 738, 742 (9th Cir. 1979)). The court may
11 rely independently on the *Vaughn* index to make a reasoned assessment of the claims, so long as the
12 index “provid[es] the court with a method to analyze the propriety of the withholding in sufficient detail
13 to show the applicability of the exemption.” *Vaughn*, 484 F.2d at 826-27.

14 Defendant made every effort to provide Plaintiff with all material of a non-exempt nature, in this
15 case disclosing the responsive documents, and informing Plaintiff of the documents that would be
16 withheld and the documents that would be released in part, under FOIA exemptions. Attached to the
17 Declaration of Katherine L. Myrick is a *Vaughn* index identifying and describing each document in
18 which information was withheld, specifying the particular exemption or exemptions under which the
19 information was withheld, and explaining more specifically how the exemption applies to the
20 information that was withheld. Myrick Decl. ¶ 34.

21 Additionally, in compliance with the Case Management Order, Docket No. 17, Defendant
22 provided Plaintiff with a draft *Vaughn* index months before the filing of this motion and met and
23 conferred with Plaintiff to narrow the issues in this case. Scharf Decl., Exhibit A. This meet and confer
24 process was partially successful. *Id.*, Exhibits B, C, D. Defendant’s Motion for Summary Judgment
25 focuses on the documents and information that Plaintiff still wishes to obtain.

26 By letter dated December 24, 2015, Defendant informed EFF that, upon further review, portions
27 of thirteen (13) pages previously withheld in full were being released at that time. Myrick Decl. ¶17; *see*
28 Exhibit N. During litigation review, Defendant determined that three pages, pages 98, 99, and 100, are

1 not responsive; EFF also no longer seeks these pages. Myrick Decl. ¶16; Scharf Decl. ¶4, Exhibits B, D.
2 Defendant advised EFF of this determination in its draft *Vaughn* index prepared as part of its “meet and
3 confer” with Plaintiff. Myrick Decl. ¶16.

4 **D. Pending Cases with Similar Requests for Hemisphere Documents.**

5 There are at least two pending cases in other courts pertaining to requests for records about
6 “Hemisphere” -- *Electronic Privacy Information Center v. Drug Enforcement Administration*, U.S. Dist.
7 Ct., Dist. of Columbia, Case No. 14-cv-317 (“the EPIC case”) and *Electronic Frontier Foundation v.*
8 *Office of the Attorney General*, San Francisco Superior Court, Case No. CPF-15-514385 (“the California
9 State Case”). The parties in the EPIC case have filed cross motions for summary judgment which have
10 been fully briefed but not yet adjudicated. On October 29, 2015, the San Francisco Superior Court
11 stayed the California State Case pending resolution of this case.

12 **III. ARGUMENT**

13 Defendant’s response to Plaintiff’s FOIA request satisfies the requirements of the FOIA.
14 Defendant’s adequate search, partial disclosure, and remaining non-disclosure invoking FOIA
15 exemptions (b)(5), (b)(6), (b)(7)(A), (b)(7)(C), (b)(7)(D), (b)(7)(E), and (b)(7)(F), entitle Defendant to
16 summary judgment.

17 **A. Legal Standard**

18 The movant is entitled to summary judgment by demonstrating that “there is no genuine dispute
19 as to any material fact.” Fed. R. Civ. P. 56(a); *see also Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134
20 (9th Cir. 2000). In a FOIA case, “federal jurisdiction is dependent on a showing that an agency has
21 (1) ‘improperly’ (2) ‘withheld’ (3) ‘agency records.’” *Kissinger v. Reporters Comm. for Freedom of*
22 *Press*, 445 U.S. 136, 150 (1980). A federal court can provide a remedy pursuant to the FOIA only “if
23 the agency has contravened all three components of this obligation.” *Yonemoto v. Dep’t of Veterans*
24 *Affairs*, 686 F.3d 681, 689 (9th Cir. 2012) (internal citation omitted). FOIA cases are properly decided
25 on motions for summary judgment. *Id.* at 688.

26 A defendant is entitled to summary judgment in a FOIA case when it demonstrates that no
27 material facts are in dispute, that it has conducted an adequate search for responsive records, and that
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1 each responsive record that it has located either has been produced to the plaintiff or is exempt from
2 disclosure. *Zemansky v. U.S. Env'tl. Prot. Agency*, 767 F.2d 569, 571 (9th Cir. 1985); *Kelly v. Census*
3 *Bureau*, No. 10-040507, 2011 U.S. Dist. LEXIS 100279, at *2 (N.D. Cal. Sept. 7, 2011); *Weisberg v.*
4 *Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980). Summary judgment may be granted solely on the
5 basis of declarations as long as the evidence offered “enables the court to make an independent
6 assessment of the government’s claim of exemption.” *Church of Scientology*, 611 F.2d at 742. Further,
7 if the declaration contains reasonably detailed descriptions of the withheld information and alleges facts
8 sufficient to establish an exemption, “the district court need look no further in determining whether an
9 exemption applies.” *Id.*; see also *Lewis*, 823 F.2d at 378; *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir.
10 2007) (“Ultimately, an agency’s justification for invoking a FOIA exemption is sufficient if it appears
11 ‘logical’ or ‘plausible.’”).

12 To withstand a motion for summary judgment, the non-movant must show that there are genuine,
13 material issues of fact that can only be resolved by the trier of fact. *Reese v. Jefferson Sch. Dist. No.*
14 *14J*, 208 F.3d 736, 738 (9th Cir. 2000). The non-moving party may not rely on the pleadings alone, but
15 must present specific facts in the record creating a genuine issue of material fact. Fed. R. Civ. P.
16 56(c)(1)(A); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Unsupported conjecture or conclusory
17 statements are insufficient to defeat summary judgment. See *Hernandez v. Spacelabs Med., Inc.*, 343
18 F.3d 1107, 1112 (9th Cir. 2003); *Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1103 (9th Cir. 2008).
19 In support of its motion, Defendant has submitted the Declaration of Katherine L. Myrick, the
20 Declaration of James A. Scharf, and a final *Vaughn* index, all of which are reasonably detailed, to
21 explain and justify its response to Plaintiff’s FOIA requests.

22 **B. FOIA Framework**

23 FOIA is designed to achieve a workable balance between the right of the public to know and the
24 need of the government to keep information in confidence to the extent necessary without permitting
25 indiscriminate secrecy. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (citation
26 omitted). FOIA’s basic purpose thus reflects a general philosophy of full agency disclosure unless
27 information is exempted under clearly delineated statutory language. *Id.* (citations omitted).

1 Enacted to facilitate public access to Government documents, FOIA requires federal agencies to
2 release non-exempt records responsive to a request for production. *Lahr v. Nat'l Transp. Safety Bd.*, 569
3 F.3d 964, 973 (9th Cir. 2009); *see* 5 U.S.C. § 552(a)(3)(A). However, this right is not absolute as
4 Congress recognizes that public disclosure is not always in the public interest. *CIA v. Sims*, 471 U.S.
5 159, 166-67 (1985). As such, FOIA balances the public's right to know with the government's
6 legitimate interest in keeping certain information confidential by containing nine enumerated
7 exemptions allowing the government to withhold documents or portions of documents. *Ctr. for Nat'l*
8 *Sec. Studies v. DOJ*, 331 F.3d 918, 925 (D.C. Cir. 2003) (citing *John Doe Agency*, 493 U.S. at 152; 5
9 U.S.C. § 552(b)(1)-(9)). A district court may compel an agency to disclose only those agency records
10 that do not fall under one of the exemptions. *Minier v. CIA*, 88 F.3d 796, 803 (9th Cir. 1996).

11 The court may grant summary judgment in favor of the government based entirely on the
12 information set forth in the affidavit. *Lane v. Dep't of the Interior*, 523 F.3d 1128, 1135-36 (9th Cir.
13 2008); *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). Defendant satisfied its legal
14 obligations by responding to Plaintiff's request, conducting an adequate search for responsive records,
15 and releasing some records in full, releasing some records in part, or withholding some records in full, in
16 accordance with the *Vaughn* index requirements and pursuant to FOIA exemptions, 5, 6, 7(A), 7(C),
17 7(D), 7(E), and 7(F). Myrick Decl.

18 **C. Defendant Properly Withheld Records Under Applicable FOIA Exemptions**

19 **1. Defendant properly withheld privileged inter- or intra-agency communications under** 20 **FOIA Exemption 5.**

21 Defendant properly withheld privileged inter- or intra-agency communications pursuant to FOIA
22 Exemption 5. Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or
23 letters which would not be available by law to a party ... in litigation with the agency." 5 U.S.C. §
24 552(b)(5). A record of this kind is exempt from disclosure if it would be "normally privileged in the
25 civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Exemption 5 thus
26 incorporates the privileges that are available to an agency in civil litigation, including the attorney-client
27 privilege, the attorney work-product doctrine, and the deliberative process privilege. *Id.* at 148-49.

1 **Attorney-Client Privilege.** The attorney-client privilege protects confidential communications
 2 made between clients and their attorneys when the communications are for the purpose of securing legal
 3 advice or services. *See In re Sealed Case*, 737 F.2d 94, 98–99 (D.C. Cir. 1984)¹. A government agency,
 4 like a private party, “needs . . . assurance of confidentiality so it will not be deterred from full and frank
 5 communications with its counselors.” *In re Lindsey*, 148 F.3d 1100, 1105 (D.C. Cir. 1998). Defendant
 6 properly withheld documents protected by the attorney-client privilege pursuant to Exemption 5.

7 **Attorney Work-Product Doctrine.** “The work-product doctrine protects from disclosure
 8 materials ‘prepared in anticipation of litigation or for trial by or for another party or its representative . . .
 9 .’” *Williams & Connolly v. SEC*, 662 F.3d 1240, 1243 (D.C. Cir. 2011) (quoting Fed. R. Civ. P.
 10 26(b)(3)(A)); *see also Judicial Watch, Inc. v. Dep’t of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005); *Tax*
 11 *Analysts v. IRS*, 117 F.3d 607, 620 (D.C. Cir. 1997). The doctrine is “interpreted broadly.” *Judicial*
 12 *Watch, Inc.*, 432 F.3d at 369 (citing *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947)). “Although work
 13 product protection may be overcome for cause in civil cases, any materials disclosed for cause are not
 14 ‘routinely’ or ‘normally’ discoverable and, for that reason, are exempt under FOIA.” *Williams &*
 15 *Connolly*, 662 F.3d at 1243 (citations omitted). “If a document is covered by the attorney work-product
 16 privilege, the government need not segregate and disclose its factual contents.” *Pac. Fisheries, Inc. v.*
 17 *United States*, 539 F.3d 1143, 1148 (9th Cir. 2008); (quoting *Maricopa Audubon Soc’y v. U.S. Forest*
 18 *Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997)).

19 **Deliberative Process Privilege.** The purpose of the deliberative process privilege is to
 20 encourage frank discussion of legal and policy issues within the government, and to protect against
 21 public confusion resulting from disclosure of reasons and rationales that were not ultimately the basis
 22 for the agency’s action. *See, e.g., Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993);
 23 *Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *Montrose Chem. Corp. of Cal.*

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¹ Because the United States District Court for the District of Columbia is the only court in which venue for a FOIA action is
 always proper, 5 U.S.C. § 552(a)(4)(B), a significant number of FOIA cases are filed in that court, and courts around the
 country turn to the D.C. Circuit for guidance when presented with FOIA issues. *See Hiken v. Dep’t of Defense*, 872 F. Supp.
 2d 936, 943 & n.18 (N.D. Cal. 2012) (“[D]ecisions of the District of District of Columbia with regard to FOIA are entitled to
 considerable deference.”).

1 *v. Train*, 491 F.2d 63, 70 (D.C. Cir. 1974). The privilege applies when “disclosure of [the] materials
2 would expose an agency’s decision making process in such a way as to discourage candid discussion
3 within the agency and thereby undermine the agency’s ability to perform its functions.” *Maricopa*
4 *Audubon Soc’y*, 108 F.3d at 1093 (quoting *Assembly of the State of Cal. v. U.S. Dep’t of Commerce*, 968
5 F.2d 916, 920 (9th Cir. 1992)). Additionally, where either the disclosure of the manner of selecting or
6 presenting facts would expose the privileged deliberative process, or where facts are “inextricably
7 intertwined” with “policy-making processes,” the material is exempt from disclosure. *National Wildlife*
8 *Federation v. United States Forest Service*, 861 F.2d 1114, 1119 (9th Cir. 1988) (quoting *Ryan v.*
9 *Department of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980); *see also Lead Industries Association, Inc. v.*
10 *OSHA*, 610 F.2d 70, 83 (2d Cir. 1979); *Soucie v. David*, 448 F.2d 1067, 1078 (D.C. Cir. 1971). It is
11 possible that the factual portions of the documents be “so interwoven with the deliberative material that
12 [they are] not [segregable].” *Kowack v. United States Forest Serv.*, 766 F.3d 1130, 1135 (9th Cir. 2014)
13 (quoting *United States v. Fernandez*, 231 F.3d 1240, 1247 (9th Cir. 2000); *see also Binion v. United*
14 *States Dep’t of Justice*, 695 F.2d 1189, 1193 (9th Cir. 1983)).

15 The deliberative process privilege protects “predecisional communications.” *Sears, Roebuck, &*
16 *Co.*, 421 U.S. at 151. “A document may be considered predecisional if it was ‘prepared in order to assist
17 an agency decision maker in arriving at his decision.’” *Carter v. U.S. Dep’t of Commerce*, 307 F.3d
18 1084, 1089 (9th Cir. 2002) (citing *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168,
19 184 (1975); quoting *Assembly of the State of Cal.*, 968 F.2d at 921. The deliberative process privilege
20 applies to “documents reflecting advisory opinions, recommendations and deliberations comprising part
21 of a process by which governmental decisions and policies are formulated.” *Carter*, 307 F.3d at 1089
22 (quoting *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001)).

23 Defendant properly withheld seven (7) documents under Exemption 5.

24 **Document 1 (pages 1-12).** The first (Document 1, pages 1-12) are e-mails by Federal government
25 attorneys, including a Deputy Assistant Attorney General at the DOJ, to and among Federal government
26 employees containing preliminary assessments of issues related to features of the Hemisphere program.
27 Myrick Decl. ¶ 37. The messages are covered by the attorney-client privilege because they deliver
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1 confidential legal advice (albeit preliminary advice) regarding features of the Hemisphere program and
2 do not themselves establish final policy. Myrick Decl. ¶ 37. The messages are covered by the attorney
3 work-product doctrine because they were prepared by DOJ attorneys in anticipation of litigation relating
4 to features of the Hemisphere program and the use of Hemisphere in law enforcement. Myrick Decl. ¶
5 37. The messages are covered by the deliberative process privilege because they were intended to
6 facilitate or assist development of the agency's final position on features of the Hemisphere program and
7 the use of Hemisphere in law enforcement. Myrick Decl. ¶ 37.

8 **Document 4 (pages 16-27).** The second (Document 4, pages 16-27) is a draft memorandum
9 prepared by an attorney in the DEA Office of Chief Counsel analyzing legal issues regarding the
10 procedures used to obtain information through Hemisphere, intended to assist senior DEA management,
11 and containing comments added by the same attorney regarding the same topics. Myrick Decl. ¶ 38.
12 This draft memorandum is covered by the attorney-client privilege because it contains a draft of
13 confidential legal advice to the DEA and does not itself establish a final policy. Myrick Decl. ¶ 38.
14 This draft memorandum is covered by the attorney work-product doctrine because it was prepared by a
15 DEA attorney in anticipation of litigation relating to the use of Hemisphere in law enforcement. Myrick
16 Decl. ¶ 38. The draft memorandum is covered by the deliberative process privilege because it was
17 intended to facilitate or assist development of the agency's final position on policies and procedures
18 regarding use of Hemisphere and does not itself establish a final policy. Myrick Decl. ¶ 38.

19 **Document 6 (pages 31-34).** The third (Document 6, pages 31-34) is undated and concerns
20 Hemisphere, Hemisphere's capabilities, and how to use Hemisphere. Myrick Decl. ¶ 39. The pages of
21 document 6, read together, show that the pages are drafts. Myrick Decl. ¶ 39. The search for
22 responsive records did not locate a final version of these pages. Myrick Decl. ¶ 39. These pages are
23 covered by the deliberative process privilege because they were intended to facilitate or assist
24 development of the agency's final position on policies and procedures regarding use of Hemisphere and
25 do not themselves establish a final policy. Myrick Decl. ¶ 39.

26 **Document 7 (pages 35-36).** The fourth (Document 7, pages 35-36) is undated and concerns
27 how to use Hemisphere. Myrick Decl. ¶ 40. The final iteration of this document is part of Document
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1 10. Myrick Decl. ¶ 40. Document 7 is covered by the deliberative process privilege because it was
2 intended to facilitate or assist development of the agency’s final position on policies and procedures
3 regarding use of Hemisphere and does not itself establish a final policy. Myrick Decl. ¶ 40.

4 **Document 25 (page 110).** The fifth (Document 26, page 113) is an e-mail dated May, 2007
5 concerning legal issues related to the use of Hemisphere and subpoenas. Myrick Decl. ¶ 41. This
6 document is covered by the attorney work-product doctrine because its creation was initiated by a DEA
7 attorney in anticipation of litigation relating to the use of Hemisphere in law enforcement. Myrick Decl.
8 ¶ 41.

9 **Document 28 (pages 256-257).** The sixth (Document 28, pages 256-257) consists of internal
10 DEA e-mails dated November, 2007 entitled “Hemisphere Subpoenas” concerning Hemisphere and
11 subpoenas to and/or from DEA attorneys. Myrick Decl. ¶ 42. The e-mails are covered by the attorney-
12 client privilege because they contain confidential legal advice from DEA attorneys to the DEA. Myrick
13 Decl. ¶ 42.

14 **Document 33 (pages 270-271).** The seventh (Document 33, pages 270-271) consists of e-mails
15 dated June, 2008 entitled “DRAFT Operation Hemisphere Policy.” Myrick Decl. ¶ 43. The document is
16 covered by the deliberative process privilege because it was intended to facilitate or assist development
17 of the agency’s final position on policies and procedures regarding use of Hemisphere and does not itself
18 establish a final policy. Myrick Decl. ¶ 43.

19 All seven documents are protected by the attorney-client privilege, the attorney work-product
20 doctrine, or the deliberative process privilege, as discussed further above.

21 **2. Defendant properly withheld individuals’ names and personally identifying information**
22 **under FOIA Exemption 6.**

23 Defendant properly invoked FOIA Exemption 6, 5 U.S.C. § 552(b)(6), to withhold the names,
24 telephone numbers and e-mail addresses of individual core mission law enforcement, law enforcement
25 support, and individual personnel involved in the operation of Hemisphere. Myrick Decl. ¶ 45. In
26 determining whether information is properly withheld under Exemption 6, a court “must balance the
27 privacy interest protected by the exemptions against the public interest in government openness that
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1 would be served by disclosure.” *Lahr*, 569 F.3d at 973²; *see also Prudential Locations LLC v. United*
 2 *States HUD*, 739 F.3d 424, 433 (9th Cir. 2013).

3 Law enforcement officers and support personnel have a substantial privacy interest in not having
 4 their identities disclosed because disclosure of their identities can expose them to threats or harassment.
 5 *See, e.g., Baez v. U.S. Dep’t of Justice*, 647 F.2d 1328, 1339 (D.C. Cir. 1980); *Lesar v. U.S. Dep’t of*
 6 *Justice*, 636 F.2d 472, 487 (D.C. Cir. 1980); *Moore v. Bush*, 601 F. Supp. 2d 6, 14 (D.D.C. 2009)
 7 (approving withholding of names of an FBI Special Agent and an FBI support employee based on
 8 Exemption 6). Disclosure of these individuals’ identities would not enhance the public’s understanding
 9 of how Defendant performs its statutory duties. FOIA’s statutory purpose “is not fostered by disclosure
 10 of information about private citizens that is accumulated in various governmental files but that reveals
 11 little or nothing about an agency’s own conduct.” *Prudential Locations LLC*, 739 F.3d at 433 (quoting
 12 *Dept. Of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)).

13 During the “meet and confer” with Plaintiff’s counsel, Plaintiff communicated that it no longer
 14 seeks the names, telephone numbers, and e-mail addresses of individual core mission law enforcement,
 15 law enforcement support, and individual personnel involved in the operation of Hemisphere. Scharf
 16 Decl. ¶ 4, Exhibits B, D. Although Defendant properly withheld this information under Exemption 6, it
 17 is no longer a matter of dispute between the parties.

18 **3. All of the materials Defendant withheld are “records or information compiled for law**
 19 **enforcement purposes” that meet the threshold requirement of FOIA Exemption 7.**

20 Defendant properly withheld law enforcement materials pursuant to FOIA Exemption 7.
 21 Exemption 7 permits withholding of “records or information compiled for law enforcement purposes”
 22 meeting certain specified criteria. 5 U.S.C. § 552(b)(7). “In assessing whether records are compiled for
 23 law enforcement purposes, . . . the focus is on how and under what circumstances the requested files
 24 were compiled, and ‘whether the files sought relate to anything that can fairly be characterized as an

25 _____
 26 ² *Lahr* involves Exemption 7(C), which protects law enforcement records whose disclosure “could reasonably be expected to
 27 constitute an unwarranted invasion of personal privacy.” Since the private and public interests in Exemption 7(C) and
 28 Exemption 6 are the same, “precedents that apply Exemption 7(C) are relevant to our analysis of Exemption 6 insofar as they
 identify cognizable public and private interests.” *Forest Serv. Emples. v. United States Forest Serv.*, 524 F.3d 1021, 1024-25
 n.2 (9th Cir. 2008); *see, e.g., U.S. Dep’t of Defense v. FLRA*, 510 U.S. 487, 496 n.6 (1994); *Rosenfeld v. U.S. Department of*
Justice, 57 F.3d 803, 812 n.7 (9th Cir. 1995), *cert. dismissed*, 516 U.S. 1103 (1996).

1 enforcement proceeding.” *Jefferson v. Dep’t of Justice*, 284 F.3d 172, 176–77 (D.C. Cir. 2002)
 2 (citations omitted). Defendant, as a law enforcement agency, is entitled to deference when it identifies
 3 material as having been compiled for law enforcement purposes under Exemption 7. *See Campbell v.*
 4 *U.S. Dep’t of Justice*, 164 F.3d 20, 32 (D.C. Cir. 1999). Provided this mandate, under Exemption 7,
 5 Defendant “need only establish a ‘rational nexus’ between enforcement of a federal law and the
 6 document for which [a law enforcement] exemption is claimed.” *Rosenfeld v. United States Dep’t of*
 7 *Justice*, 57 F.3d 803, 808 (9th Cir. 1995) (quoting *Church of Scientology*, 611 F.2d at 748). The records
 8 at issue in this litigation were compiled for law enforcement purposes within the meaning of Exemption
 9 7, because, as explained in the attached Declaration of Katherine L. Myrick, all the records responsive to
 10 the plaintiffs’ requests were compiled to support core mission DEA law enforcement officers and
 11 employees in the course of their official duties enforcing the Controlled Substances Act. Myrick Decl. ¶
 12 47.

13 **a. Defendant properly withheld records under FOIA Exemption 7(A) whose release could**
 14 **reasonably be expected to interfere with a law enforcement proceeding.**

15 FOIA Exemption 7(A) authorizes withholding of records compiled for law enforcement purposes
 16 to the extent that such records “could reasonably be expected to interfere with enforcement
 17 proceedings.” 5 U.S.C. § 552(b)(7)(A); Myrick Decl. ¶ 48; *see, e.g., Sussman v. U.S. Marshals Serv.*,
 18 494 F.3d 1106, 1114 (D.C. Cir. 2007) (explaining that “enforcement proceedings need not be currently
 19 ongoing; it suffices for them to be ‘reasonably anticipated’”); *Boyd v. Criminal Div., DOJ*, 475 F.3d
 20 381, 386 (D.C. Cir. 2007) (stating that government’s identification of targets of investigation satisfies
 21 the concrete prospective law enforcement proceeding requirement). “FOIA was *not* intended to function
 22 as a private discovery tool.” *Lewis*, 823 F.2d at 380 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437
 23 U.S. 214, 235 (1978)).

24 The applicability of Exemption 7(A) involves a two-step analysis: “(1) whether a law
 25 enforcement proceeding is pending or prospective; and (2) whether release of information about it could
 26 reasonably be expected to cause some articulable harm.” *Kay v. FCC*, 976 F. Supp. 23, 37 (D.D.C.
 27 1997). If a proceeding is not pending, “an agency may continue to invoke Exemption 7(A) so long as
 28 the proceeding is regarded as prospective.” *Id.* at 38; *See Ehringhaus v. FTC*, 525 F. Supp. 21, 23

1 (D.D.C. 1980) (quoting *Nat'l Public Radio v. Bell*, 431 F. Supp. 509, 514 (D.D.C. 1977)). To
2 demonstrate proper reliance on this exemption, “Defendant must make at least a minimum showing
3 concerning ‘the impact of the disclosures’ if the documents were disclosed.” *Barnard v. Dep't of*
4 *Homeland Sec.*, 598 F.Supp.2d 1, 17 (D.D.C. 2009). (quoting *Sussman*, 494 F.3d at 1114).

5 Congress “did not intend to prevent the federal courts from determining that, with respect to
6 particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records
7 while a case is pending would generally ‘interfere with enforcement proceedings.’” *Robbins Tire &*
8 *Rubber Co.*, 437 U.S. at 236. Furthermore, Defendant “need only make a *general* showing that
9 disclosure of its investigatory records would interfere with its enforcement proceedings.” *Lewis*, 823
10 F.2d at 380; *see also Barney v. Internal Revenue Serv.*, 618 F.2d 1268, 1272-73 (8th Cir. 1980). While
11 Defendant carries the burden of demonstrating why the requested documents are exempt, Defendant
12 “need not specify its objections [to disclosure] in such detail as to compromise the secrecy of the
13 information.” *Lewis*, 823 F.2d at 378 (quoting *Church of Scientology*, 611 F.2d at 742).

14 Within the Ninth Circuit, “an agency with a clear law enforcement mandate...need establish only
15 a ‘rational nexus’ between its law enforcement duties and the document for which Exemption 7 is
16 claimed.” *Binion v. United States Dep't of Justice*, 695 F.2d 1189, 1194 (9th Cir. 1983); *see also*
17 *Church of Scientology*, 611 F.2d at 748; *accord, Dunaway v. Webster*, 519 F. Supp. 1059, 1076 (N.D.
18 Cal. 1981).

19 It is clear from the responsive records that Hemisphere is a law enforcement tool used by various
20 law enforcement agencies. Scharf Decl. ¶ 7, 8, Exhibits E, F. For example, a redacted Hemisphere
21 request form shows that, to use Hemisphere, one is asked for a “master case number” and “sub-case
22 number,” “case name,” “drug type associated with investigation,” “lead case agent phone number,” and
23 the like. Scharf Decl. ¶ 7, Exhibit E. This information reveals the scope of Hemisphere and
24 demonstrates that Hemisphere is used to support existing investigations. Further, responsive records
25 also show that Hemisphere involves the issuance of subpoenas. Scharf Decl. ¶ 8, Exhibit F. A subpoena
26 is issued when seeking information that is believed to be relevant or material to an investigation. *See* 18
27 U.S.C. 2701 in conjunction with 21 U.S.C. 876. The release of information about the scope of
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1 Hemisphere could reasonably be expected to assist targets who could then use this information to evade
2 law enforcement.

3 In evaluating the potential impact of disclosing information, Defendant relied upon the
4 experience and expertise of DEA personnel who are familiar with the use of Hemisphere in law
5 enforcement, current enforcement efforts, and existing law enforcement strategies to determine what
6 records should be withheld under Exemption 7(A). Myrick Decl. ¶ 48.

7 **b. Defendant properly withheld individuals' names and personally identifying information**
8 **under FOIA Exemption 7(C).**

9 Defendant properly withheld individuals' names and personally identifying information under
10 Exemption 7(C). Exemption 7(C) authorizes withholding of information compiled for law enforcement
11 purposes if release of the information "could reasonably be expected to constitute an unwarranted
12 invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). If the records at issue were compiled for law
13 enforcement purposes, the exemption "is subject to a balancing test, pitting public interest in disclosure
14 against the individual's right to privacy." *George v. IRS*, No. C05-0955 MJJ, 2007 U.S. Dist. LEXIS
15 36525, at *33 (N.D. Cal. May 14, 2007); *see also Reporters Comm. for Freedom of the Press*, 489 U.S.
16 at 776; *SafeCard Services Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991); *L&C Marine Transport,*
17 *Ltd. v. U.S.*, 740 F.2d 919, 922 (11th Cir. 1984). For FOIA, statutory purpose is not "fostered by
18 disclosure of information about private citizens that accumulated in various government files but reveals
19 very little or nothing about an agency's own conduct." *George*, No. C05-0955 MJJ, 2007 U.S. Dist.
20 LEXIS 36525, at *33-34 (quoting *Reporters Comm. for Freedom of the Pres.*, 489 U.S. at 772-773).

21 Defendant applied FOIA Exemption 7(C) to the following categories of information: names,
22 telephone numbers, and e-mail addresses of individual core mission law enforcement, law enforcement
23 support, and individual personnel involved in the operation of Hemisphere. Myrick Decl. ¶ 51. During
24 the "meet and confer" with Plaintiff's counsel, Plaintiff communicated that it no longer seeks this
25 information. Scharf Decl. ¶ 4, Exhibits B, D. Although Defendant properly withheld this information
26 under Exemption 7(C), as the individuals named or otherwise identified in the withheld materials have
27 significant privacy interests in preventing disclosure of the information, this information is no longer a
28 matter of dispute between the parties.

1 **c. Defendant properly withheld information identifying private-sector companies**
2 **instrumental in the operation of Hemisphere under Exemption 7(D).**

3 Defendant properly relied on Exemption 7(D) to withhold information naming or otherwise
4 identifying private-sector companies that are instrumental in the operation of Hemisphere. Myrick Decl.
5 ¶ 54.

6 Exemption 7(D) authorizes the withholding of information compiled for law enforcement
7 purposes if release of the information “could reasonably be expected to disclose the identity of a
8 confidential source, including a State, local, or foreign agency or authority or any private institution
9 which furnished information on a confidential basis.” 5 U.S.C. § 552(b)(7)(D). “Unlike Exemptions 6
10 and 7(C), Exemption 7(D) requires no balancing of public and private interests. If . . . production of
11 criminal investigative records ‘could reasonably be expected to disclose the identity of a confidential
12 source’ or ‘information furnished by’ such a source, that ends the matter. . . .” *Roth v. U.S. Dep’t of*
13 *Justice*, 642 F.3d 1161, 1184–85 (D.C. Cir. 2011) (citation omitted). Exemption 7(D) applies if the
14 source provided information under an express assurance of confidentiality. *Id.* at 1184. “An express
15 grant of confidentiality is virtually unassailable.” *Wiener v. FBI*, 943 F.2d 972, 986 (9th Cir. 1991).
16 Defendant “need only establish the informant was told his name would be held in confidence.” *Id.*
17 Exemption 7(D) also applies if the source provided information under an implied assurance of
18 confidentiality, meaning that the source provided information under circumstances that “support the
19 inference” of confidentiality. *Id.* (quoting *U.S. Dep’t of Justice v. Landano*, 508 U.S. 165, 179 (1993)).

20 As explained in the Declaration of Katherine L. Myrick, the information Defendant withheld
21 under Exemption 7(D) identifies private-sector companies that are instrumental in the operation of
22 Hemisphere and whose role in the operation of Hemisphere entails providing information to the
23 Government. Myrick Decl. ¶ 54. The declaration explains, based on information from DEA personnel
24 familiar with Hemisphere, that the companies provide information to law enforcement with the express
25 expectation that both the source and the information will be afforded confidentiality and under
26 circumstances where confidentiality can be inferred because providing the information can lead to
27 retaliation against the companies. Myrick Decl. ¶ 54.

1 **d. Defendant properly withheld information about Hemisphere and its use in law enforcement**
2 **under FOIA Exemption 7(E).**

3 Defendant properly withheld information about Hemisphere and its use in law enforcement
4 under Exemption 7(E). Exemption 7(E) authorizes withholding of information compiled for law
5 enforcement purposes if release of the information “would disclose techniques and procedures for law
6 enforcement investigations or prosecutions, or would disclose guidelines for law enforcement
7 investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of
8 the law.” 5 U.S.C. § 552(b)(7)(E).

9 Using a two-prong test, under Exemption 7(E), documents may be withheld when (1) the records
10 were compiled for a law enforcement purpose, and (2) the records reveal law enforcement techniques or
11 guidelines that, if disclosed, ‘could reasonably be expected to risk circumvention of the law.’” *Gordon*
12 *v. FBI*, 388 F.Supp.2d 1028, 1035 (N.D. Cal. 2005); *see also Kubik v. United States Fed. Bureau of*
13 *Prisons*, No. 10-6078-TC, 2011 U.S. Dist. LEXIS 71300, at *33 (D.Or. July 1, 2011). Congress
14 intended that Exemption 7(E) protect from disclosure techniques and procedures used to prevent and
15 protect against crimes, as well as techniques and procedures used to investigate crimes after they have
16 been committed. *See, e.g., PHE, Inc. v. Dep’t of Justice*, 983 F.2d 248, 250–51 (D.C. Cir. 1993)
17 (holding that portions of an FBI manual describing patterns of violations, investigative techniques, and
18 sources of information available to investigators were protected by Exemption 7(E)). “[T]he exemption
19 is written in broad and general terms” to avoid assisting lawbreakers. *Mayer Brown LLP v. IRS*, 562
20 F.3d 1190, 1193 (D.C. Cir. 2009). Furthermore, the D.C. Circuit has stressed that the risk-of-
21 circumvention requirement sets a “low bar.” *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011); *see also*
22 *Mayer Brown*, 562 F.3d at 1193 (noting that, read properly, the terms of the statute require only “the
23 chance of a reasonably expected risk” of circumvention).

24 All of the material withheld under Exemption 7(E) in this case pertains to a single set of law
25 enforcement techniques and procedures—Hemisphere and its use by law enforcement authorities.
26 Myrick Decl. ¶ 13. The Department of Justice has publicly disclosed some general information about
27 Hemisphere, but many details of the program have not been disclosed and remain sensitive. Myrick
28 Decl. ¶ 56. None of the information that Defendant has withheld under Exemption 7(E) has previously

1 been disclosed by the Department of Justice and is not widely known to the public. Myrick Decl. ¶ 56.
2 Accordingly, the information remains protected under Exemption 7(E)—the exemption applies even
3 when the identity of the techniques has been disclosed, but the manner and circumstances of the
4 techniques are not generally known, or the disclosure of the details could reduce their effectiveness. *See*
5 *Blanton v. U.S. Dep’t of Justice*, 63 F. Supp. 2d 35, 49–50 (D.D.C. 1999); *Coleman v. FBI*, 13 F. Supp.
6 2d 75, 83 (D.D.C. 1998). Also, while Hemisphere has attracted media attention, along with public
7 discussion and speculation, that does not affect the applicability of Exemption 7(E). *See Muslim*
8 *Advocates v. U.S. Dep’t of Justice*, 833 F. Supp. 2d 92, 104 (D.D.C. 2011) (holding that limited
9 disclosure of withheld material outside law enforcement and news articles purportedly discussing law
10 enforcement techniques did not prevent application of 7(E)).

11 For purposes of further describing the information withheld, Defendant divided the information
12 into eight categories, all of which fall squarely within the protection of Exemption 7(E). Following the
13 “meet-and-confer,” EFF is no longer requesting information that falls within one of these categories and
14 some of the information that falls within another category (this will be addressed below). Scharf Decl.
15 ¶4, Exhibits B, D.

16 First, Defendant withheld telephone and fax numbers, locations, and email addresses associated
17 with the Hemisphere program. Myrick Decl. ¶ 58.a. EFF is currently only interested in obtaining
18 location information (city and state) associated with the Hemisphere program. Scharf Decl. ¶4, Exhibits
19 B, D. This contact information could be used by criminals to disrupt law enforcement operations or
20 obtain unauthorized access to information about such operations. Myrick Decl. ¶ 58.a.

21 Defendant also withheld the names, telephone numbers, locations and email addresses of
22 individual core mission law enforcement, law enforcement support, and individual personnel involved in
23 the operation of Hemisphere. Myrick Decl. ¶58.h. Criminals could use these individuals’ names or
24 contact information to make threats against these individuals, disrupt or gather information about law
25 enforcement operations by impersonating these individuals, or by contacting them or feigning
26 familiarity with them. EFF is no longer requesting the information that falls within this category.
27 Scharf Decl. ¶4, Exhibits B, D.

1 Defendant withheld information naming or otherwise identifying private-sector companies that
2 are instrumental in the operation of Hemisphere. Myrick Decl. ¶ 58.f. Criminals could use this
3 information to evade detection or disrupt Hemisphere’s operations. Myrick Decl. ¶ 58.f.

4 Defendant also withheld technical details about how Hemisphere works and the specific
5 capabilities and limitations of Hemisphere. Myrick Decl. ¶ 58.c. Disclosing information about the
6 technical workings, capabilities, and limitations of law enforcement tools and methods obviously
7 increases the risk that criminals will be able to evade or compromise those tools and methods. *See, e.g.,*
8 *Blackwell*, 646 F.3d at 42 (upholding application of Exemption 7(E) to “‘details about procedures used
9 during the forensic examination of a computer’ by an FBI forensic examiner”); *Soghoian v. U.S. Dep’t of*
10 *Justice*, 885 F. Supp. 2d 62, 75 (D.D.C. 2012) (upholding withholding of details of electronic
11 surveillance methods and observing that “[k]nowing what information is collected, how it is collected,
12 and more importantly, when it is *not* collected, is information that law enforcement might reasonably
13 expect to lead would-be offenders to evade detection”); *Kurdyukov v. U.S. Coast Guard*, 657 F. Supp. 2d
14 248, 257 (D.D.C. 2009) (“law enforcement surveillance, methods, and tactics”); *Boyd v. Bureau of*
15 *Alcohol, Tobacco, Firearms & Explosives*, 570 F. Supp. 2d 156, 158–59 (D.D.C. 2008) (“method of
16 installing monitoring equipment”).

17 Additionally, Defendant withheld details of internal procedures and guidelines for making
18 Hemisphere requests or otherwise using Hemisphere, including sample text for completing request
19 forms, associated subpoenas, and other documents used in connection with Hemisphere requests; and
20 other details of internal procedures and guidelines for making Hemisphere requests or otherwise using
21 Hemisphere. Myrick Decl. ¶ 58.b. Knowledge about what information is needed (or not needed) to
22 make a Hemisphere request, and what particular procedures are used to make Hemisphere requests,
23 would help criminals understand when and how law enforcement authorities are able to use Hemisphere
24 against them and thereby help criminals tailor or adapt their activities to evade apprehension. Myrick
25 Decl. ¶ 58.b. Similarly, knowledge or internal guidelines and restrictions for the use of Hemisphere
26 would help criminals tailor or adapt their activities to evade apprehension. Myrick Decl. ¶ 58.b; *see,*
27 *e.g., Miller v. U.S. Dep’t of Justice*, 562 F. Supp. 2d 82, 124 (D.D.C. 2008) (upholding application of
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1 Exemption 7(E) to a blank law enforcement form based on the risk that information about “the exact
2 nature and type of information” requested on the form could help criminals avoid detection); *PHE, Inc.*,
3 983 F.2d at 251 (FBI manual containing details of law enforcement techniques, including “restrictions
4 for the employment of” a law enforcement technique).

5 Defendant withheld details regarding how Hemisphere requests are routed and processed and
6 how resources are organized and deployed, including the specific terminology used to refer to certain
7 Hemisphere resources and personnel. Myrick Decl. ¶ 58.d. Information about the resources allocated to
8 Hemisphere and the manner in which those resources are organized and deployed would help criminals
9 tailor or adapt their activities to evade apprehension. Myrick Decl. ¶ 58.d. Courts have approved
10 withholding of this type of administrative and organizational information in light of its potential to aid
11 criminals seeking to evade law enforcement. *See, e.g., Vazquez v. U.S. Dep’t of Justice*, 887 F. Supp. 2d
12 114, 118 (D.D.C. 2012) (upholding application of Exemption 7(E) to information about queries of a law-
13 enforcement database, including information about “how they are executed . . . and who has
14 authorization to run such queries”); *Skinner v. U.S. Dep’t of Justice*, 744 F. Supp. 2d 185, 214 (D.D.C.
15 2010) (information regarding the “timing of certain actions and the placement of certain agency
16 resources in the implementation” of a law enforcement technique”); *Gilman v. U.S. Dep’t of Homeland*
17 *Sec.*, Civil Action No. 09-0468 (BAH), 2014 WL 984309, at *11 (D.D.C. Mar. 14, 2014) (information
18 that could identify “areas patrolled by fewer agents” and information regarding “assignment coverage”);
19 *Pons v. U.S. Customs Serv.*, No. 93-2094 (TFH), No. 93-2189 (TFH), 1998 U.S. Dist. LEXIS 6084, at
20 *20 (D.D.C. Apr. 23, 1998) (“information that concerns the cooperative arrangements between Customs
21 and other law enforcement agencies”).

22 Defendant also withheld details about how Hemisphere results and output are delivered to and
23 presented to law enforcement, including sample results displays. Myrick Decl. ¶ 58.g. Knowledge of
24 this information could help criminals tailor or adapt their activities to evade apprehension. Myrick
25 Decl. ¶ 58.g. Courts have approved withholding of such material in numerous cases. For example, in
26 *Blackwell v. FBI*, 646 F.3d 42 (D.C. Cir. 2011), the D.C. Circuit upheld the FBI’s withholding of
27 information under Exemption 7(E) to protect “methods of data collection, organization and presentation
28

1 contained in ChoicePoint reports.” *Id.* at 42. As explained in the district court’s opinion in that case,
2 “ChoicePoint is a subscription database used by the FBI” that “contains information derived from public
3 sources.” *Blackwell v. FBI*, 680 F. Supp. 2d 79, 92 (D.D.C. 2010), *aff’d*, 646 F.3d 42 (D.C. Cir. 2011).
4 The D.C. Circuit noted that the FBI’s declaration explained that “the manner in which the data is
5 searched, organized and reported to the FBI is an internal technique, not known to the public,” and that
6 the “method was developed by ChoicePoint to meet the specific investigative needs of the FBI.”
7 *Blackwell*, 646 F.3d at 42. It accepted the FBI’s explanation that disclosure of details about the manner
8 in which FBI received data could help criminals avoid detection. *Id.* Similarly, disclosure of details
9 about the manner in which Hemisphere results are reported to law enforcement could help criminals
10 avoid detection. *See also Concepcion v. U.S. Customs & Border Prot.*, 907 F. Supp. 2d 133, 142–43
11 (D.D.C. 2012) (upholding application of Exemption 7(E) to database query results); *Skinner v. U.S.*
12 *Dep’t of Justice*, 806 F. Supp. 2d 105, 115–16 (D.D.C. 2011) (upholding application of Exemption 7(E)
13 to a screen printout of output from a law enforcement database).

14 Finally, Defendant withheld information that could reveal what specific law enforcement
15 agencies have access to Hemisphere apart from the DEA. Myrick Decl. ¶ 58.e. Because every law
16 enforcement agency has its own individual focus and sphere of authority, knowing which particular law
17 enforcement agencies have access to Hemisphere would help criminals tailor or adapt their activities to
18 evade apprehension. Myrick Decl. ¶ 58.e; *see, e.g., Light v. Dep’t of Justice*, 968 F. Supp. 2d 11, 29
19 (D.D.C. 2013) (upholding application of Exemption 7(E) to withhold information regarding the identity
20 and expertise of investigating law enforcement units); *Pons*, No. 93-2094 (TFH), No. 93-2189 (TFH),
21 1998 U.S. Dist. LEXIS 6084, at *20 (“information that concerns the cooperative arrangements between
22 Customs and other law enforcement agencies”).

23 **e. Defendant properly withheld individuals’ names and contact information under FOIA**
24 **Exemption 7(F).**

25 Defendant properly withheld names, telephone numbers, locations and email addresses of
26 individual core mission law enforcement, law enforcement support, and individual personnel involved in
27 the operation of Hemisphere under FOIA Exemption 7(F). “[N]on-conclusory reasons why disclosure of
28 each category of withheld documents would reasonably be expected to endanger the life or physical

1 safety of any individual” are proper to withhold documents under Exemption 7(F). *L.A. Times*
2 *Communs., LLC v. Dep't of the Army*, 442 F.Supp.2d 880, 898 (C.D. Cal. 2006). Exemption 7(F)
3 provides broad protection for the identities of law enforcement officers and related personnel. *Blanton v.*
4 *U.S. Dep't of Justice*, 182 F. Supp. 2d 81, 87 (D.D.C. 2002).

5 Revealing these individuals’ names could make them targets of threats; revealing their contact
6 information could lead to discovery of their individual identities and thereby expos them to possible
7 threats. Myrick Decl. ¶ 61. During the meet-and-confer process, EFF withdrew its request for the
8 information falling within Exemption 7(F).

9 **4. Defendant processed and released all reasonably segregable information from the**
10 **responsive records.**

11 The FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any
12 person requesting such record after deletion of the portions which are exempt under this section.” 5
13 U.S.C. § 552(b). Stated differently, all “non-exempt portions of a document must be disclosed unless
14 they are inextricably intertwined with exemption portions.” *Mead Data Central, Inc. v. U.S. Dept. of*
15 *Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). District courts have an affirmative obligation to consider
16 the issue and make segregability findings. *See Trans-Pacific Policing Agreement v. Custom Serv.*, 177
17 F.3d 1022 (D.C. Cir. 1999).

18 Defendant processed the responsive records in accordance with FOIA and withheld certain
19 information pursuant to FOIA exemptions 5, 6, 7(A), 7(C), 7(D), 7(E), and 7(F), as explained in detail
20 above, in the attached final *Vaughn* Index, in the attached Declaration of Katherine L. Myrick and in
21 the attached Declaration of James A. Scharf.

22 The Declaration of Katherine L. Myrick describes Defendant’s justifications for withholding
23 information. All responsive records, 305, were examined to determine whether any reasonably
24 segregable information could be released after applying exemptions to each record while
25 considering the foreseeable harm that release could pose to interests protected by such exemptions.
26 Myrick Decl. ¶ 63. Defendant properly invoked these exemptions, and Defendant processed and
27 released all reasonably segregable information from the responsive records, indicated where
28

1 material was redacted, and marked each redaction with the reasons for the redaction. Myrick Decl.
2 ¶ 63. A total of nine (9) pages were released in full and an additional 175 pages were released in
3 part. Myrick Decl. ¶ 63. After applying one or more exemptions to each page, only blank pages, or
4 pages with incomprehensible words and phrases, would remain. Myrick Decl. ¶ 63. The release of
5 that information would not contribute to the understanding of how the DEA or the United States
6 conducts business either in general or specifically related to the matters requested by Plaintiff.
7 Myrick Decl. ¶ 63. The final *Vaughn* index provides additional explanation for the materials
8 withheld from disclosure in response to EFF's request.

9 **IV. CONCLUSION**

10 Because Defendant conducted a reasonable search, processed and released all reasonably
11 segregable information, and withheld information only where authorized by a statutory exemption, the
12 Court should grant summary judgment in favor of Defendant.

13
14 Respectfully submitted,

15 Dated: February 18, 2016

BRIAN STRETCH
ACTING UNITED STATES ATTORNEY

17 /s/ James A. Scharf
18 JAMES A. SCHARF
Assistant U.S. Attorney