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8
9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11 ELECTRONIC FRONTIER FOUNDATION,

Case No. 15-cv-03186-MEJ

12 Plaintiff,

**DEFENDANT’S SUPPLEMENTAL BRIEF RE
HAMDAN V. UNITED STATES DEPARTMENT
OF JUSTICE**

13 v.

14 DEPARTMENT OF JUSTICE,

15 Defendant.
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20 Pursuant to the Court’s Order Vacating Hearing and Ordering Supplemental Briefing, Dkt. No.
21 33, Defendant submits this supplemental brief regarding the impact of *Hamdan v. United States*
22 *Department of Justice*, 797 F.3d 759 (9th Cir. 2015) on FOIA Exemption 7(E) and segregability, and the
23 Second Supplemental Declaration of Katherine L. Myrick filed herewith.

24 **I. INTRODUCTION**

25 In *Hamdan*, plaintiffs brought a FOIA action against multiple federal agencies seeking records
26 about federal investigations related to one of the plaintiffs and about any United States government role
27 in his detention and torture by the United Arab Emirates government. The district court granted
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1 summary judgment to the government without making any findings as to whether there was non-exempt
2 information in the withheld records that could reasonably be segregated and disclosed. The Ninth
3 Circuit affirmed the district court’s rulings on the adequacy of the agencies’ searches and the invocation
4 of the challenged exemptions, including Exemption 7(E), but vacated the grant of summary judgment
5 and remanded the case to the district court for a segregability analysis. 797 F.3d at 766-67.

6 As explained below, *Hamdan* strengthens Defendant’s motion for summary judgment and
7 undermines Plaintiff’s cross motion for summary judgment on both the Exemption 7(E) and
8 segregability issues.

9 II. ARGUMENT

10 A. Exemption 7(E)

11 *Hamdan* strengthens Defendant’s Exemption 7(E) arguments in four separate ways. First, the
12 *Hamdan* court, citing *Rosenfeld v. U.S. Dep’t of Justice*, 57 F.3d 803, 815 (9th Cir. 1995), defined the
13 parameters of Exemption 7(E): “We have held that ‘Exemption 7(E) only exempts investigative
14 techniques not generally known to the public.’” 797 F.3d at 777. The investigative technique at issue in
15 *Rosenfeld* was law enforcement’s use of pretext phone calls that, the Ninth Circuit concluded, is “a
16 generally known law enforcement technique.” *Id.* Here, the investigative technique at issue is
17 “Hemisphere.” While the U.S. Department of Justice has publicly disclosed some general information
18 about Hemisphere, there is no evidence that “Hemisphere” is “a generally known law enforcement
19 technique” or is “generally known to the public.” For this reason alone, Defendant’s application of
20 Exemption 7(E) to certain Hemisphere information is appropriate.

21 Second, even if this Court were to determine that Hemisphere is a law enforcement technique
22 “generally known to the public,” under *Hamdan*, Defendant is entitled to withhold information
23 concerning the specific means of conducting Hemisphere that are not generally known to the public. In
24 *Hamdan*, the Ninth Circuit held that the FBI properly withheld records under Exemption 7(E) because
25 the withheld information related to the “specific means of conducting surveillance and credit searches
26 rather than an application” of a known technique, even though credit searches and surveillance are
27 publicly known law enforcement techniques. *Hamdan*, 797 F.3d at 778. In reaching this conclusion, the
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1 Ninth Circuit cited an earlier Ninth Circuit decision, *Bowen v. FDA*, 925 F.2d 1225, 1229 (9th Cir.
2 1991), which held that additional details of law enforcement techniques were exempt from disclosure
3 under Exemption 7(E) even where some information about those techniques had been previously
4 disclosed. *Hamdan*, 797 F.3d at 778. As in *Hamdan*, the information that Defendant withheld relates to
5 specific details about Hemisphere. This information is exempt under Exemption 7(E) even though the
6 Justice Department publicly disclosed some general information about Hemisphere.

7 Third, under *Hamdan*, Defendant need not show that disclosure of records containing
8 Hemisphere techniques and procedures would reasonably be expected to risk circumvention of the law.
9 Following *Allard K. Lowenstein Int'l Human Rights Project v. Dept't of Homeland Security*, 626 F.3d
10 678, 681 (2d Cir. 2010), the Ninth Circuit in *Hamdan* rejected plaintiffs' argument that the FBI must
11 show that disclosure of techniques and procedures would lead to a danger of future law breaking.
12 *Hamdan*, 797 F.3d at 778. "Plaintiffs' argument is an unpersuasive reading of the statutory text and
13 structure." *Id.* Similarly, Defendant need not show that disclosure of records containing Hemisphere
14 techniques and procedures would aid circumvention of the law.

15 Fourth, under *Hamdan*, Plaintiff's speculation that Hemisphere may be unconstitutional is
16 immaterial. In *Hamman*, the Ninth Circuit rejected plaintiffs' contention that Exemption 7(E) does not
17 apply because the FBI is seeking to conceal information about law enforcement techniques that are of
18 questionable legality. *Hamdan*, 797 F.3d at 778. The Ninth Circuit did not need to address whether
19 Exemption 7(E) was so limited because there was no indication that any of the techniques being
20 protected from disclosure were of questionable legality. *Id.* Similarly, this Court need not address
21 Plaintiff's argument because there is no evidence in the record that the Hemisphere techniques and
22 procedures are unlawful. As in *Hamdan*, Plaintiff has not shown that Defendant is acting in bad faith.

23 **B. Segregability**

24 *Hamdan* also strengthens Defendant's position on segregability. In *Hamdan*, the Ninth Circuit
25 clarified what constitutes a proper segregability analysis:

26 It is not reasonable to interpret our precedent to require the district court to take on the role of
27 document clerk, reviewing each and every document an agency withholds. A district court must
28 take seriously its role as a check on agency discretion, but this does not require a page-by-page
review of an agency's work.

1 The district court may rely on an agency's declaration in making its segregability determination.
2 Agency affidavits that are sufficiently detailed are presumed to be made in good faith and may
3 be taken at face value. In short, a district court is not required to conduct an independent *in*
camera review of each withholding unless an agency declaration lacks sufficient detail or bears
4 some indicia of bad faith by the agency.

5 ***

6 An agency must describe the document or information being withheld in sufficient detail to
7 allow the plaintiffs and the court to determine whether the facts alleged establish the
8 corresponding exemption. We have not held that the manner of that description must take any
9 particular format, so long as it is sufficiently detailed.

10 *Hamdan*, 797 F.3d at 779-80 (citations omitted).

11 To add further guidance, the Ninth Circuit then examined three examples. 797 F.3d at 780. The
12 first was by the State Department ("DOS"), the second was by the FBI, and the third was by the Defense
13 Intelligence Agency ("DIA"). The DOS provided an individualized explanation and cited the
14 corresponding objection for each record. *Id.* In some (but not all) cases, the DOS even noted that the
15 "withheld portions are so inextricably intertwined with the non-exempt portion, that any segregable
16 material would not be meaningful." *Id.* Good faith was shown by evidence supporting their careful
17 review of the documents, in one instance releasing a document with all but a single sentence redacted.
18 *Id.*

19 The FBI provided less detailed declarations but they were sufficient to allow the district court to
20 take them at face value, having identified the documents by number and providing specific reasons why
21 disclosure would be harmful. *Id.* The FBI stated that "[n]o reasonably segregable, nonexempt portions
22 were withheld from plaintiffs." *Id.* This was supported by the partially redacted documents released.

23 In contrast, the DIA's showing was found to be insufficient. The DIA's declarations "lack[ed]
24 sufficient detail to allow the district court to determine that the claimed exemptions apply throughout all
25 of the documents." *Id.* The problem stemmed from little individualized information about the
26 documents. In all cases, the same reason was given and the documents were entirely withheld, even
27 though the documents varied in length and level of classification. *Id.* at 781. Moreover, the DIA's
28 declarations and *Vaughn* Index contained inconsistent reasons for the exemptions. *Id.*

Here, Defendant's *Vaughn* and declarations are like the DOS and FBI submissions that the Ninth
Circuit approved in *Hamdan*. In support of its motion for summary judgment, Defendant submitted a

1 detailed *Vaughn* index and the declaration of Katherine L. Myrick, the Chief of the FOIA Unit. Like the
2 DOS submission, Defendant's Declaration and one hundred eleven-page *Vaughn* index described each
3 document, cited the Exemptions applied, and then provided individualized explanations for the
4 withholdings for each claimed Exemption.

5 Ms. Myrick explained in her initial declaration that all responsive records (305 pages) were
6 examined to determine whether any reasonably segregable information could be released after applying
7 exemptions to each record while considering the foreseeable harm that release would pose to interests
8 protected by such exemptions. As a result, ten pages were identified for release in full because it was
9 determined that DEA would not apply any FOIA exemption to them. An additional 177 pages were
10 released in part. Given the application of one or more exemptions, 118 pages were withheld in full. After
11 applying one or more exemption to each page, only blank pages, or pages with incomprehensible words
12 and phrases, would remain. The release of that information would not contribute to the understanding of
13 how the DEA or the United States conducts business either in general or specifically related to the
14 matters requested by Plaintiff. Myrick Decl. at paragraph 63.

15 In her Second Supplemental Declaration filed herewith, Ms. Myrick explained further that a
16 team consisting of higher-level (in terms of pay grade and responsibility) FOIA Unit staff, program
17 office staff, and Office of Chief Counsel staff examined each of the responsive records word by word.
18 In doing so, the team's goals included releasing the maximum information possible, being consistent
19 regarding the information being released and redacted, and determining whether any reasonably
20 segregable information could be released after applying exemptions to each record while considering the
21 foreseeable harm that release would pose to interests protected by such exemptions. When the team had
22 a question about whether information could be released or needed to be redacted, the team asked for
23 input from more senior DEA personnel.

24 Unlike the DIA's submissions criticized in *Hamdan*, Defendant's good faith in conducting the
25 word-by-word review, making release-redaction decisions, and engaging in the segregability analysis is
26 shown by a review of the 177 pages released in part. Those pages show the surgical precision the DEA
27 team used in its word-by-word review and analysis, release-redaction decisions, and segregability
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1 analysis such that, for example, small portions of sentences, as opposed to entire sentences, are redacted
2 whenever possible. Thus, under *Hamdan*, Defendant’s submissions “are presumed to be made in good
3 faith and may be taken at face value” *Hamdan*, 797 F.3d at 779-80.

4 **III. CONCLUSION**

5 Defendant thanks the Court for bringing to the parties’ attention the Ninth Circuit’s recent
6 decision in *Hamdan v. United States Department of Justice*, and for affording the parties the opportunity
7 to brief its impact on the pending cross motions for summary judgment. As *Hamdan* confirmed, an
8 agency’s “justification for invoking a FOIA exemption is sufficient if it appears logical or plausible.”
9 *Hamdan*, 797 F.3d at 774. As Defendant’s justifications are both logical *and* plausible, Defendant
10 respectfully requests the Court to grant its motion for summary judgment and deny Plaintiff’s cross
11 motion for summary judgment. *Hamdan* erases any doubt that this is the legally correct result in this
12 case.

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14 Respectfully submitted,

15 Dated: June 1, 2016

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17
18 /s/ James A. Scharf _____
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19 Assistant U.S. Attorney
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