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 9 **UNITED STATES DISTRICT COURT**
 10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 11 **SAN FRANCISCO DIVISION**

13 ELECTRONIC FRONTIER FOUNDATION,)	Case No. 15-cv-03186-MEJ
14 Plaintiff,)	SUPPLEMENTAL BRIEF
15 v.)	
16 DEPARTMENT OF JUSTICE,)	Hon. Maria-Elena James
17 Defendant.)	

1 *Hamdan v. DOJ*, 797 F.3d 759 (9th Cir. 2015), does not affect EFF’s FOIA Exemption 7(E)
2 and segregability arguments.

3 With respect to Exemption 7(E), *Hamdan* holds that agencies must prove a circumvention
4 risk as to law enforcement *guidelines*, but not as to law enforcement techniques and procedures.
5 Here, the parties agree that the disputed records are guidelines. Therefore, *Hamdan* does not free
6 DOJ from its duty to prove a circumvention risk. Indeed, EFF assumed that DOJ did not mention
7 *Hamdan* in its papers because it knew that the case did not alter the existing law with respect to law
8 enforcement guidelines, and thus the records at issue here.

9 Nor did *Hamdan* materially alter the law with respect to segregability. The process outlined
10 in *Hamdan* is consistent with the one urged by EFF in its briefs.

11 **I. The holding in *Hamdan* – that an agency need not show a circumvention risk if the**
12 **record is not a guideline – is not relevant here because the records are guidelines.**

13 **A. *Hamdan* preserved the requirement that the agency prove a circumvention risk**
14 **in withholding law enforcement guidelines.**

15 Under *Hamdan*, if a disputed law enforcement record is a guideline, or is *both* a guideline
16 and a technique or procedure, then the agency must show a circumvention risk. The Ninth Circuit
17 drew a distinction among the kinds of records listed in Exemption 7(E),¹ holding that “the
18 qualifying phrase (‘if such disclosure could reasonably be expected to risk circumvention of law’)
19 modifies only ‘guidelines’ and not ‘techniques and procedures.’” *Id.* at 778. The court reasoned
20 that “the two alternative clauses that make up Exemption 7(E) are separated by a comma, whereas
21 the modifying condition at the end of the second clause is not separated from its reference by
22 anything at all,” showing that the qualifying phrase “modifies only the immediately antecedent

23 ¹ FOIA Exemption 7(E) reads as follows:

24 This section does not apply to matters that are . . . records or information
25 compiled for law enforcement purposes, but only to the extent that the
26 production of such law enforcement records or information . . . would disclose
27 techniques and procedures for law enforcement investigations or prosecutions, or
28 would disclose guidelines for law enforcement investigations or prosecutions if
such disclosure could reasonably be expected to risk circumvention of the law

27
28 5 U.S.C. 552(b)(7)(E).

1 ‘guidelines’ clause and not the more remote ‘techniques and procedures’ clause.” *Id.*²

2 **B. DOJ characterized the disputed records as guidelines throughout this litigation**
3 **and acknowledged its burden of proving a circumvention risk.**

4 The government consistently characterized the records at issue as guidelines, and attempted
5 to prove that, if disclosed, the documents posed a circumvention risk, as required by *Hamdan*.

6 DOJ’s final *Vaughn* index in February 2016 stated that 33 of the 34 records withheld by
7 DOJ under Exemption 7(E) contain “procedures and guidelines.” *See* Dkt. 22. This index also
8 asserted that disclosure of each one of these records would “help criminals tailor or adapt their
9 activities to evade apprehension,” among other circumvention risks. DOJ’s draft *Vaughn* index,
10 served in December 2015 as part of the meet-and-confer process but not filed, contained the same
11 statements and assertions. *See* Dkt. 20 at Exh. A (email transmitting draft index).

12 DOJ’s opening brief and supporting declaration in February 2016 likewise stated that
13 certain records withheld by DOJ under Exemption 7(E) are “procedures and guidelines.” *See* Dkt.
14 19 (brief) at 19; Dkt. 21 (declaration) at 16. They also stated that all of the withheld records, if
15 disclosed, could be used by criminals to circumvent the law, including to “evade apprehension,”
16 “attack facilities,” “disrupt enforcement operations,” and “obtain unauthorized access to
17 information.” *See* Dkt. 19 at 18-21; Dkt. 21 at 16-17.

18 Perhaps most clearly, DOJ’s closing brief in April 2016 stated:

19 All of the material withheld under Exemption 7(E) in this case pertains to a
20 single set of law enforcement techniques, procedure, guidelines – Hemisphere
21 and its use by law enforcement authorities to obtain access to telephone records
in the course of law enforcement investigations. Hemisphere and the use of
Hemisphere clearly qualify as law enforcement techniques and procedures, and
guidelines.

22 Dkt. 25 at 14. Moreover, DOJ again stated that the disputed records, if disclosed, would help
23 criminals “avoid apprehension.” *Id.* at 15, 16.

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26 ² EFF filed an *amicus* brief in *Hamdan* in support of *en banc* rehearing, arguing that this
27 panel opinion overlooked contrary Ninth Circuit precedent and legislative history. *See*
28 https://www.eff.org/files/2015/11/13/hamdan_eff_amicus_brief_filed.pdf. If this Court finds
Hamdan relevant to this case, despite EFF’s arguments herein to the contrary, then EFF preserves
its position that *Hamdan* was wrongly decided and should be overruled.

1 **C. The disputed records are guidelines.**

2 The disputed records are indeed guidelines. While FOIA and *Hamdan* do not define the
3 term “guideline,” the Merriam-Webster Dictionary defines it as “an indication or outline of
4 policy.” See <http://www.merriam-webster.com/dictionary/guideline>.

5 The disputed records here indicate or outline policy regarding Hemisphere for its users.
6 Many records are training materials about how to use Hemisphere, which clearly indicate and
7 outline Hemisphere policy for its users. For example, the “Hemisphere introduction and request
8 tutorial” includes slides with instructions about available data, the request process, official
9 language to use, and how to interpret results. See Dkt. 22 (final *Vaughn* index) at No. 26. See also
10 *id.* at Nos. 5, 8-12, 14, 17-18, 22-23, 28 (other instructions about how to use Hemisphere, including
11 forms, model language, and protocols). Other disputed records are communications among
12 government officials about various aspects of Hemisphere, including its use, capabilities, ways to
13 obtain information, and controls to prevent misuse. *Id.* at Nos. 1, 2, 4, 6-7, 25, 27, 30-32. These
14 indicate policy. So do reports about aggregate Hemisphere data. *Id.* at No. 16, 19.³

15 **D. Even if the records are not guidelines, *Hamdan* reaffirmed the Ninth Circuit’s
16 rule that DOJ cannot withhold publicly known techniques and procedures.**

17 *Hamdan* also reinforces EFF’s argument in this case that DOJ cannot withhold well-known
18 or publicly known law enforcement techniques or procedures used in Hemisphere generally or in
19 any particular Hemisphere investigation. Dkt. 23 (EFF Mot.) at 16.

20 *Hamdan* explicitly reaffirmed the Ninth Circuit’s holding in *Rosenfeld v. DOJ* that
21 “Exemption 7(E) only exempts investigative techniques not generally known to the public.”
22 *Hamdan*, 797 F.3d 759, 777 (quoting *Rosenfeld*, 57 F.3d 803, 815 (9th Cir. 1995)). *Hamdan* also
23 reaffirmed that *Rosenfeld*’s limitation extends to records that describe the specific application of
24 publicly known techniques to particular investigations. *Id.*

25 Indeed, EFF has shown that the specific techniques and procedures used in Hemisphere are
26 publicly known. See Dkt. 23 (EFF Mot.) at 2; Dkt. 23-1 (Lynch Decl.) at Exs. 1-2. They include

27 ³ DOJ fully redacted two five-page Hemisphere records and vaguely described them as a
28 “proposal” and a “summary.” See Dkt. 22 at Nos. 29, 43. This is not enough to independently
determine whether they are guidelines. DOJ should be held to its position that they are guidelines.

1 conducting complicated phone call pattern analysis to map social networks, identify multiple phone
2 numbers used by a single person, and determine a caller's location. *Id.* Thus, DOJ must show "for
3 each specific withholding" how the withheld information "goes beyond a generally known
4 technique." *EFF v. CIA*, 2013 WL 5443048, *23 (N.D. Cal. 2013). DOJ has failed to do so.

5 **II. *Hamdan* did not modify DOJ's burden to demonstrate that it has segregated and
6 disclosed non-exempt material, a standard it has failed to meet in this case.**

7 Although *Hamdan* clarified the district court's role in reviewing an agency's segregability
8 showing, that clarification does not alter the conclusion that DOJ has failed to meet its burden.

9 Synthesizing *Wiener v. FBI*, 943 F.2d 972, 988 (9th Cir. 1991) and *Pacific Fisheries, Inc. v.*
10 *U.S.*, 539 F.3d 1143, 1150 (9th Cir. 2008), the *Hamdan* panel stated that although a district court
11 need not "take on the role of document clerk, reviewing each and every document an agency
12 withholds," it "must take seriously its role as a check on agency discretion." 797 F.3d at 779. The
13 *Hamdan* panel then held that "a district court is not required to conduct an independent *in camera*
14 review of each withholding unless an agency declaration lacks sufficient detail or bears some
15 indicia of bad faith by the agency." *Id.* Conversely, "[a]gency affidavits that are sufficiently
16 detailed are presumed to be made in good faith and may be taken at face value." *Id.*

17 This process, as described in *Hamdan*, is consistent with the process urged by EFF in its
18 briefs. That is, EFF has previously asked the Court to review the documents *in camera* because the
19 DOJ's declarations lack sufficient detail and indicia of good faith. EFF has shown that DOJ's bare
20 statements regarding segregability fell far short of the detailed explanation required by *Wiener*,
21 *Pacific Fisheries*, and *Hamdan*. Dkt. 22 (EFF Mot.) at 21-23; Dkt. 30 (EFF Reply) at 12-13.
22 Moreover, given that the DOJ withheld 119 pages in full and almost completely redacted another
23 164 pages, the agency did not provide the court "with any evidence of its good faith" in attempting
24 to release all non-exempt portions of the records to EFF. *Hamdan*, 797 F.3d at 781. *Compare* Dkt.
25 23-10 (Lynch Decl.) Ex. 9 (a heavily redacted statistical report about Hemisphere in which DOJ
26 redacted 14 pages in their entirety and redacted another 8 pages to the point that they only disclose
27 the titles of slides), *with* Ex. 10 (the same statistical report released by a state agency that contains
28 much lighter redactions).

Conclusion

For the reasons above and in EFF’s earlier briefs, EFF respectfully asks this Court do grant its motion for summary judgment, deny DOJ’s motion for summary judgment, and order DOJ to disclose the disputed records.

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Respectfully submitted:

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