IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS, *Plaintiff,* v. FEDERAL BUREAU OF INVESTIGATION; and CARMEN ORTIZ, UNITED STATES ATTORNEY FOR THE DISTRICT OF MASSACHUSETTS, *Defendants*.	Civil Action No. 14-11759-ADB ORAL ARGUMENT REQUESTED

ACLUM'S OPPOSITION TO FBI'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT AGAINST THE FEDERAL BUREAU OF INVESTIGATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

INTRODUCTION

Plaintiff American Civil Liberties Union Foundation of Massachusetts (ACLUM) filed a Freedom of Information Act (FOIA) request seeking (1) the number and type of investigations carried out by the Boston FBI Field office and (2) the structure and function of the Massachusetts Joint Terrorism Task Force (JTTF).[1] Consistent with "[t]he basic purpose of FOIA to ensure an informed citizenry, vital to the functioning of a democratic society . . . and to hold governors accountable to the governed," this request sought to inform the public about a secretive government program that impacts fundamental rights and liberties. *NLRB v. Robbins Tire & Rubber Co*, 437 U.S. 214, 242 (1978). In response, the FBI withheld 784 pages, released 903 pages in full, and released 162 pages in part. The FBI now seeks summary judgment, based on the view that all of the withheld information is exempt from disclosure under FOIA. It is not.

ACLUM does not challenge the FBI's assertion of FOIA Exemptions (b)(1), (b)(6) or (b)(7)(C). But for a substantial portion of the withheld information, the FBI has asserted FOIA Exemption (b)(7)(E). Exemption 7(E) protects techniques, procedures or guidelines for law enforcement investigations whose disclosure could reasonably be expected to risk circumvention of the law. 5 U.S.C. § 552(b)(7)(E). The FBI's reliance on this exemption to withhold (1) the number of open cases and investigations carried out by the Boston FBI, and (2) information about the staffing, composition and budget of the Massachusetts JTTF, is unlawful.

With respect to the first category, the FBI already released aggregate data about its investigations to the New York Times four years ago. That disclosure made sense. The current attempt to withhold similar information does not. The FBI fails to establish that Exemption 7(E)

[1] A third part of the request regarding Ibragim Todashev will be addressed at a later date. Dckt. Nos. 40, 43, 50.

applies to this information because it neither demonstrates that it constitutes a technique, procedure or guideline, nor establishes that its disclosure would risk circumvention of the law.

The FBI similarly fails to make the necessary showing to justify its withholding of staffing, composition and budget information. More fundamentally, its generic assertion that this information would reveal "where the FBI is focusing its limited resources" such that "criminals could then plan and structure their activities to [] avoid the FBI's investigative strengths, exploit its weaknesses and circumvent the law" proves too much. Gov't Memo at 19. The FBI invokes this line to withhold everything from the number of officers in the Massachusetts JTTF, to the agencies who attend Executive Board meetings, to the cost of a conference room table. If this reasoning applies to everything, then it is nothing but an argument against FOIA itself. As "a structural necessity in a real democracy," FOIA cannot be so easily dismissed. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-172 (2004).

ACLUM's request does not inquire about individual cases. It seeks general information about law enforcement agencies "to assist citizens in discovering 'what their government is up to.'" *Long v. U.S. Dep't of Justice*, 450 F.Supp.2d 42, 52-53 (D.D.C. 2006) (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). The only "procedure" this would disclose is that the FBI generally expends resources to fight crime; the only "circumvention" it would risk is that a would-be criminal could avoid apprehension by following the law. The "narrow compass" of FOIA's exemptions cannot stretch this far. *Milner v. Dep't of Navy*, 562 U.S. 562, 571 (2011) (internal quotation marks omitted). Withholding this information violates FOIA's fundamental precept "'to open agency action to the light of public scrutiny.'" *Church of Scientology Intern. v. U.S. Dep't of Justice*, 30 F.3d 224, 228 (1st Cir.1994) (quoting *Reporters Comm.*, 489 U.S. at 772). While acknowledging that FOIA can

"complicate[] the task of governing," the First Circuit emphasizes, "its goals are worthy, and we are bound to honor both its letter and its spirit." *Id.* at 229. The FBI's use of Exemption 7(E) honors neither. The Court should deny the FBI's motion and grant ACLUM's cross-motion for summary judgment.

BACKGROUND

For more than three decades, the federal government has implemented programs to coordinate federal, state and local law enforcement agencies in the form of JTTFs.[2] Formed under the FBI, [3] the stated purpose of the JTTFs is to conduct terrorism investigations and share counterterrorism intelligence.[4] Between 2001 and 2005, the number of participating officers across the country more than quadrupled to over 4,200.[5]

Despite the JTTFs' long history and recent expansion, their structure and function are still shrouded in secrecy. For example, there is no publicly available list of agencies that participate in the Massachusetts JTTF. The FBI has also failed to publish staffing policies or budgetary decisions, and it is unclear what protocols govern local police officers when they work with the JTTF. This is especially troubling because the last available DOJ review—now ten years old—found that despite the allocation of "considerable resources," the JTTFs suffered analytic, technical, and leadership problems and drained resources from other criminal investigations.[6]

In the midst of the JTTFs' dramatic growth, the FBI released new guidelines that relaxed the standards required to open investigations on individuals and groups, including what the FBI

---

[2] U.S. DEPT. OF JUSTICE, THE DEPARTMENT OF JUSTICE'S TERRORISM TASK FORCES 15 (2005), *available at* https://oig.justice.gov/reports/plus/e0507/final.pdf.
[3] *Joint Terrorism Task Forces*, FBI.GOV (last visited Aug. 23, 2015), https://www.fbi.gov/about-us/investigate/terrorism/terrorism_jttfs.
[4] TERRORISM TASK FORCES, *supra* note 2, at 16.
[5] *Id.* at 18.
[6] *Id.* at 130-42.

termed "assessments." Assessments authorize the FBI to gather information on individuals—via physical surveillance, informants, and surreptitious interview—without any factual indication of wrongdoing or threat to national security. The FBI retains information on assessment targets even if the investigation reveals no evidence of wrongdoing.[7] The most recently-disclosed data show that the FBI opened 82,325 assessments between 2009 and 2011.[8]

These issues have taken on special significance in Massachusetts in the wake of the Boston Marathon bombing. The ACLU filed the underlying FOIA request because the FBI's failure to disclose basic facts about its assessment policy and the JTTFs has stymied the public's ability to hold its government accountable.

LOCAL RULE 56.1 STATEMENT OF UNDISPUTED FACTS

ACLUM does not dispute the FBI's Local 56.1 statement and adds the following specific facts about the FBI's use of FOIA Exemption (b)(7)(E) (Exemption 7(E)). The FBI relies solely on Exemption 7(E) to withhold three pages containing the personnel count for,[9] and the list of participating Law Enforcement Agencies in,[10] the Massachusetts JTTF. Dckt. No. 53-1, Ex. K (*Vaughn* Index), pg. 69 of 87. With respect to the documents withheld in part, the FBI indicates which exemption applies to each redaction by listing on the face of the documents a specific exemption next to each redaction. Dckt. No. 53 (Hardy Decl.) ¶ 22-23. The FBI relies solely on Exemption 7(E) to redact the following from various documents: [11]

[7] Charlie Savage, *FBI Focusing on Security Over Ordinary Crime*, N.Y.TIMES, (Aug. 23, 2011), attached as Rossman Decl. Ex. 25.
[8] *Id.*; Letter from David Hardy, Section Chief of FBI Record/Information Dissemination Section, to Charlie Savage, N.Y. Times (Aug. 11, 2011) (releasing numbers of FBI assessments and investigations), attached as Rossman Decl. Ex. 26.
[9] Rossman Decl. Ex. 2 (Cover Letter Withholding JTTF 720).
[10] Rossman Decl. Ex. 1 (Cover Letter Withholding JTTF 1-2).
[11] ACLUM does not contest the use of Exemption 7(E) to redact non-public web addresses, sensitive squads and/or units, and sensitive file numbers. Hardy Decl. ¶ 50-51, 53.

(1) *Statistical information* reflecting the number of assessments; enterprise, preliminary and full investigations; and open cases in the FBI Boston Office.[12]

(2) *Staffing information* reflecting the number of participating federal and state officers, and overtime budgets for the Massachusetts JTTF.[13]

(3) *Composition information* reflecting the total number of JTTFs and states, participating agencies, and agencies attending Executive Board Meetings.[14]

(4) *Budget information* reflecting the amount of, and rates for, telephone & internet lines, secure video teleconference lines, telephones, GPS units, laptops, vehicle emergency lights, LCD televisions, digital cameras, and conference room table and chairs.[15]

The FBI refers to the first as (b)(7)(E)-4, or "statistical data regarding categories and types of investigations (preliminary/full) or assessments," and the final three collectively as (b)(7)(E)-1, or "allocations of resources and structure of the Massachusetts JTTF." Hardy Decl. ¶ 24.

STANDARD OF REVIEW

On cross-motions for summary judgment, a court "evaluate[s] each motion independently and determine[s] whether either of the parties deserves judgment as a matter of law on facts that are not disputed." *Matusevich v. Middlesex Mut. Assur. Co.*, 782 F.3d 56, 59 (1st Cir. 2015) (internal quotation marks omitted). In a FOIA action, "the burden under the statute is on the agency to demonstrate the applicability of a claimed exemption" to win as a matter of law. *Maine v. U.S. Dep't of Interior*, 298 F.3d 60, 65 (1st Cir. 2002) [*Maine II*]; *Reilly v. EPA*, 429 F.Supp.2d 335, 341 (D. Mass. 2006); see also *Feshbach v. SEC*, 5 F.Supp.2d 774, 787 (N.D. Cal. 1997) (granting plaintiff's cross motion for summary judgment where government did not establish applicability of Exemption 7(E), noting plaintiffs "need only point to the insufficiency

[12] Rossman Decl. Ex. 3 (Boston FO 1); Ex. 4 (Boston FO 3-55).
[13] Rossman Decl. Ex. 5 (JTTF 5); Ex. 6 (JTTF 11); Ex. 7 (JTTF 712); Ex. 8 (JTTF 717); Ex. 9 (JTTF 723); Ex. 10 (JTTF 725, 727); Ex. 11 (JTTF 729, 733); Ex. 12 (JTTF 734).
[14] Rossman Decl. Ex. 5 (JTTF 4); Ex. 7 (JTTF 710); Ex. 8 (JTTF 714); Ex. 9 (JTTF 721); Ex. 10 (JTTF 726); Ex. 13 (JTTF 745-46); Ex. 14 (JTTF 747-48); Ex.15 (JTTF 750-51); Ex. 16 (JTTF 754-56); Ex. 17 (JTTF 758-60); Ex. 18 (JTTF 761-63); Ex. 19 (JTTF 765-67); Ex. 20 (JTTF 769-70); Ex. 21 (JTTF 771-73); Ex. 22 (JTTF 784); Ex. 23 (JTTF 787); Ex. 24 (JTTF 943).
[15] Rossman Decl. Ex. 10 (JTTF 725-27); Ex. 11 (JTTF 729-33).

of the [government's] evidence"). "When faced with a FOIA claim, a district court makes a *de novo* determination of the validity of an agency's claim of exemption, and it should resolve any doubts it has over the exemption claim 'in favor of openness.'" *Maine v. U.S. Dep't of Interior*, 124 F. Supp. 2d 728, 736 (D. Me. 2000) (quoting *Providence Journal Company v. U.S. Dep't of the Army*, 981 F.2d 552, 557 (1st Cir. 1992)) [*Maine I*].[16]

"An agency's burden of establishing a FOIA exemption is significant, and conclusory assertions of privilege by a defendant agency regarding an exemption claim will not fulfill its burden of proof in a FOIA action." *Id.* at 736-37. Instead, the government must "supply 'a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.'" *Church of Scientology*, 30 F.3d at 231 (quoting *Krikorian v. Dep't of State*, 984 F.2d 461, 467 (D.C. Cir. 1993) (emphasis omitted)). The contents of the submissions must be sufficiently detailed to afford "the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding[.]" *King v. U.S. Dep't of Justice*, 830 F.2d 210, 217-18 (D.C. Cir. 1987); see also *Church of Scientology*, 30 F.3d at 231; see also *id.* at 233 (good faith by government "does not relieve it of its obligation . . . to provide enough information to enable the adversary process to operate in FOIA cases"). *Vaughn* indexes and declarations that "merely parrot the language of the statute and are drawn in conclusory terms" do not meet this standard. *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 90 (D.D.C. 2009) (internal quotation marks omitted).

[16] *Maine II* reversed in part, holding that *Maine I* applied an incorrect definition of attorney work-product. 298 F.3d at 68. However, *Maine II* affirmed the ruling that the government's *Vaughn* Index and declarations were insufficient to establish any FOIA exemption. *Id.* at 69-70, 72. The Circuit Court also affirmed the lower court's decision to order immediate disclosure without providing the government an opportunity to revise its submissions. *Id.* at 73.

ARGUMENT

"[D]isclosure, not secrecy, is the dominant objective of [FOIA]." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). ACLUM does not challenge the FBI's use of FOIA Exemptions (b)(1), (b)(6) or (b)(7)(C) to withhold some of the requested information. But "[t]he burden of proof is always on the agency to demonstrate that it has *fully* discharged its [FOIA] obligations." *McKinley v. FDIC*, 807 F. Supp. 2d 1, 4 (D.D.C. 2011) (emphasis added). The FBI does not do so here. It fails to establish that Exemption 7(E) applies either to the number of cases, assessments and investigations conducted by the Boston FBI, or to Massachusetts JTTF staffing, composition or budget information. As a result, this Court should grant summary judgment to ACLUM and order the disclosure of the case statistic, staffing, composition and budget information improperly withheld under Exemption 7(E).

I. FOIA Statutory Structure.

Under FOIA's broad disclosure mandate, the government can withhold information only by demonstrating that "a specific exemption, narrowly construed, applies." *Church of Scientology*, 30 F.3d at 228. To properly invoke Exemption 7(E), the government must demonstrate that the withheld information (1) was compiled for law enforcement purposes, (2) contains law enforcement techniques, procedures or guidelines that are generally unknown to the public, and (3) can reasonably be expected to risk circumvention of the law if disclosed. 5 U.S.C. § 552(b)(7)(E); *American Immigration Council v. U.S. Dep't of Homeland Security*, 950 F.Supp.2d 221, 245 (D.D.C. 2013) [*AIC*]. The government must satisfy its burden for all three requirements. *AIC*, 950 F.Supp.2d at 245.

With respect to the first requirement, the First Circuit has held that records and information compiled by law enforcement agencies are "inherently . . . compiled for 'law

enforcement purposes' within the meaning of Exemption 7(E)." *Irons v. Bell*, 596 F.2d 468, 475 (1st Cir. 1979). Here, ACLUM does not dispute that the FBI is a law enforcement agency.

Because FOIA does not define the second requirement, courts have relied on the dictionary to define its terms. See, *e,g., Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec.*, 626 F.3d 678, 682 (2d Cir. 2010) [*Allard II*]; *ACLU v. Dep't of Homeland Security*, 973 F.Supp.2d 306, 319 (S.D.N.Y. 2013). Citing Webster's Third New International Dictionary, *Allard II* explained that within the context of Exemption 7(E), "techniques and procedures" refer "to how law enforcement official go about investigating a crime," whereas "guidelines" refer to "resource allocation." 626 F.3d at 682. Information that does not meet these limited definitions does not qualify for Exemption 7(E), regardless of whether its disclosure could reasonably be expected to risk circumvention. *Living Rivers v. U.S. Bureau of Reclamation*, 272 F.Supp.2d 1313, 1321 (D. Utah 2003) (holding Exemption 7(E) did not apply where BOR failed to establish that the maps qualified as techniques, procedures or guidelines and not reaching circumvention); see also *ACLU*, 973 F.Supp.2d at 318-19 (holding Exemption 7(E) did not apply because government failed to establish that data in an unidentified criminal record was a technique, procedure, or guideline and not reaching circumvention).

With respect to the third requirement, "*any* information about past law enforcement practices could theoretically give would-be criminals help that they would not otherwise have," but not just any information is sufficient to invoke this exemption. *Families for Freedom v. U.S. Customs and Border Protection*, 837 F.Supp.2d 287, 300 (S.D.N.Y. 2011) (emphasis in original) [*Families II*]. Instead, "Congress has made clear" that the government must establish "a *reasonable* increased risk of circumvention of the law." *Id.* (emphasis in original). When it fails to do so, Exemption 7(E) does not apply. See *id.*; *Strunk v. U.S. Dep't of State*, 845 F.Supp.2d

38, 47 (D. D. C. 2012); *Hussain v. U.S. Dep't of Homeland Sec.*, 674 F.Supp.2d 260, 271-272 (D.D.C. 2009); *Pub. Employees for Envtl. Responsibility v. EPA*, 978 F.Supp. 955, 962 (D. Colo. 1997) [*PEER*]; *Riser v. U.S. Dep't of State*, No. 09-32732010, WL 4284925, *6 (S.D. Tx. 2010) (unpub. op).

II. The FBI improperly applies Exemption 7(E) to withhold case statistics.

The FBI's reliance on Exemption 7(E) to withhold the number of open cases at the Boston FBI on January 17, 2014,[17] and the number of assessments and investigations the Boston FBI conducts for different, undefined, categories of cases,[18] is improper for two reasons.

First, "[s]uch statistics are neither 'techniques or procedures' nor 'guidelines' such that they could be properly exempt under 7(E)." *Families for Freedom v. U.S. Customs and Border Protection*, 797 F.Supp.2d 375, 391 (S.D.N.Y. 2011) [*Families I*]; see also *Long v. U.S. Dep't of Justice*, 450 F.Supp.2d 42, 79 (D.D.C. 2006). These criteria are satisfied only when the FBI is asked to disclose numbers containing detailed information that actually reveals how law enforcement conducts an investigation. See, *e.g.*, *Smith v. Executive Office for U.S. Attorneys*, 69 F. Supp. 3d 228, 241 (D.D.C. 2014) (codes "indicat[ing] the classification of the violator(s), the types and amount of suspected drugs involved, the priority of the investigation and the suspected location and scope of the investigation" properly redacted under Exemption 7(E)). Numbers that lack this degree of detail are not exempt from disclosure.

Arrest statistics are insufficiently detailed to meet these definitions, and thus are subject to disclosure. *Families I*, 797 F. Supp. 2d at 391. So too are codes that identify, in each case referred to the U.S. Attorney's Office, the type of criminal activity subject to investigation. *Long*,

[17] Rossman Decl. Ex. 3 (Boston FO 1).
[18] Rossman Decl. Ex. 4 (Boston FO 3-55).

450 F. Supp. 2d at 79.[19] The numbers sought here are *even less* detailed. They are the total number of open cases 18 months ago and the total number of assessments, and enterprise, preliminary and final investigations for different, undefined, categories of cases. "[G]iven the narrow construction courts must give to FOIA's exemptions," the FBI fails to establish how these numbers "would disclose techniques and procedures" or "would disclose guidelines." *Living Rivers*, 272 F. Supp. 2d at 1321 (internal quotation marks omitted) (alterations in original).

Second, redaction under Exemption 7(E) is improper because releasing such information does not risk circumvention of the law. The FBI must demonstrate a reasonable—not just a theoretical—increased risk. *Families II*, 837 F. Supp. 2d at 300. It falls far short of that standard.

In *Families I*, the court held that releasing arrest statistics did not pose a reasonable increased risk of circumvention, explaining that the information would help the public understand law enforcement activities without disclosing "comparative strengths and weaknesses" of the law enforcement agency. 797 F. Supp. 2d at 391. The same is true here. Revealing the number of open cases on January 1, 2014, would "enable the public to understand the role" of the Boston FBI office without undermining its activities. *Id.* Indeed, neither the Hardy Declaration nor the *Vaughn* Index attempts to explain how disclosing this information could plausibly, let alone reasonably, increase the risk of circumvention of the law.

Releasing the total number of assessments, as well as enterprise, preliminary and final investigations for different categories of cases, also would not reasonably increase the risk of circumvention. The best indication is the government's own behavior: the FBI *already* revealed the total number of assessments and preliminary/final investigations opened for both potential

[19] On reconsideration, *Long* allowed the redaction of criminal charges from ongoing *terrorism* investigation files, but affirmed the rest of the order. 479 F. Supp. 2d 23, 28-29 (D.D.C. 2007).

terrorist activity and ordinary crimes between March 25, 2009, and March 31, 2011. Rossman Decl. Exs. 25, 26. ACLUM's request also asks for the number of assessments and investigations to be broken down by case category if possible (referred to as "case classification codes" in the FBI's chart), but this does not change the analysis. The FBI does not disclose what kind of case each code represents, so this subdivision presents no added risk to FBI. Even if the codes were defined, they would indicate only the general kind of case involved. Revealing the FBI's overall numbers of assessments and enterprise, preliminary and final investigations, for general categories of cases, does not pose a reasonable increased risk of circumvention. Cf. *Long*, 450 F. Supp. 2d at 74-78.[20]

The government nevertheless argues that revealing this information would somehow allow individuals to tailor their behavior to circumvent the law:

> [T]he information withheld, when referenced in connection with actual investigations and not in general discussion, pertains to the type of investigation, whether it is a "preliminary" or "full" investigation or an assessment and the date it was initiated. Disclosure of this information would allow individuals to know the types of activities that would trigger a full investigation as opposed to a preliminary investigation, and the particular dates that the investigation covers, which would allow individuals to adjust their behavior accordingly. Moreover, the knowledge that a specific activity in general warrants investigation could likewise cause individuals to adjust their conduct to avoid detection.

Hardy Decl. ¶ 52; see also *Vaughn* Index, pg 87 of 87; Gov't Memo at 19. It goes on to assert that disclosing the numbers would reveal where the FBI is focusing its limited resources, which would enable criminals to "plan and structure their activities to that [sic] avoid the FBI's investigative strengths, exploit its weaknesses, and circumvent the law." Hardy Decl. ¶ 52.

[20] The FBI should at least provide the same aggregate data previously provided to the New York Times. See 5 U.S.C. § 552(b) ("Any reasonably segregable portion of the record shall be provided[.]"); *Families I*, 797 F.Supp.2d at 391 (government can create a separate document to disclose segregable information while withholding nondisclosable information if it "finds it simpler . . . than to conduct extensive redactions").

The problem with this argument is that the redacted numbers would not reveal this information. This is unlike *Smith*, where the redacted information attached to individual cases, that, if disclosed, would have revealed the "'priority given to narcotic investigations, [the] types of criminal activities involved, and violator ratings," such that criminals could "change their pattern of drug trafficking" accordingly. 69 F. Supp. 3d at 241 (internal quotation marks omitted). The information here is not connected to individual investigations. It does not reveal specific dates or activities. It is aggregate data on the *total* number of assessments, preliminary investigations and full investigations conducted for different general categories of cases.[21] This information cannot be withheld under Exemption 7(E).

III. The FBI improperly applies Exemption 7(E) to withhold Massachusetts JTTF staffing, composition and budget information.

The FBI also improperly relies on Exemption 7(E) to withhold Massachusetts JTTF staffing, composition and budget information. The *Vaughn* index and Hardy Declaration are insufficiently detailed to allow an adequate basis to either challenge or evaluate the exemption's applicability. Cf. *Maine I*, 124 F. Supp. 2d at 733, 737-38; see also *Church of Scientology*, 30 F.3d at 233 ("A court . . . cannot discharge its *de novo* review obligation unless that explanation is sufficiently specific."). The Court can, and should, order disclosure on this basis alone. *Maine II*, 298 F.3d at 72-73. Alternatively, even if the documents are sufficiently detailed to enable de novo review, under that review their contents fail to satisfy the government's burden of establishing the applicability of Exemption 7(E). See *Maine I*, 124 F. Supp. 2d at 733, 738.

[21] ACLUM's understanding of the limited content of the document is based on the face of the document itself, which lists only three columns: case classification code, case category (divided into assessments, enterprise, preliminary or full investigations, and total), and main case count. Rossman Decl. Ex. 4 (Boston FO 3-55). Notwithstanding this description, if document happens to contain information beyond this aggregate data, the FBI could—and must—redact the nondisclosable information so that it can release the segregable information. See *supra* n.20.

A. The Vaughn Index and Hardy Declaration are insufficiently detailed to allow this Court to evaluate the applicability of Exemption 7(E).

The government can use groupings and cross references to explain its redactions, but not to the point that it hinders its ability to "supply a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant" for each piece of information. *Church of Scientology,* 30 F.3d at 231 (internal quotation marks and emphasis omitted).

Here, the FBI combines all of its Exemption 7(E) redactions related to staffing, composition or budget information into one group, which it labels "b(7)(E)-1." Hardy Dec. ¶ 24. This broad group is cited in nearly 40% of the entries in the *Vaughn* Index,[22] and encompasses everything from the total number of JTTFs nationally to the price of tables and chairs for the Boston office. To justify all of these redactions, the FBI offers: (1) a single repeated line in the *Vaughn* Index that "releasing this information could reveal the resources provided to operate the Massachusetts JTTF,"[23] (*Vaughn* Sentence) and (2) two paragraphs in the Hardy Declaration.[24] The first addresses overtime information, the second address all of the remaining information:

> This JTTF has been assembled to pursue specific investigative goals, revealing this this type of information would reveal the very scope of the structure, methods, techniques, and/or capabilities of this JTTF. Providing criminals with the level of focus the FBI is applying to these types of the structure, techniques, methods and capabilities would provide criminals with an idea as to where the FBI is focusing its limited resources. Criminals could then plan and structure their activities to that [sic] avoid the FBI's investigative strengths, exploit its weaknesses, and circumvent the law[.].

Hardy Decl. ¶ 22 (Hardy Paragraph).

---

[22] 21 out of 54 entries list E(1) for these purposes. The FBI also lists tax/banking information — whose redaction ACLUM does not challenge—under this heading in an additional 14 entries.

[23] There are two slight variations, neither of which is substantive: "releasing this information would show the FBI's resources operating the Massachusetts JTTF which could allow criminals to circumvent the law," *Vaughn* Index pg. 69 of 87, and "revealing the dollar amount spent on various agencies would subsequently reveal the resources provided to operate the Massachusetts JTTF," *Vaughn* Index pg. 70 of 87.

[24] The government's brief does not specifically address these "b(7)(E)-1" redactions. Instead, it devotes a single page to discuss its Exemption 7(E) redactions b(7)(E)-1." Gov't Memo at 18-19.

"This vague conclusion coupled with the opaque descriptions in the *Vaughn* index does not show how the release of the requested information might create a risk of circumvention of the law." *Lazaridis v. Dep't of State*, 934 F. Supp. 2d 21, 39 (D.D.C. 2013) (internal quotation marks omitted). FOIA demands specificity, but the FBI improperly relies on a one-size-fits-all explanation to withhold all kinds of information, from the number of officers to agencies attending Executive Board meetings to the number of GPS units. Indeed, the generalized assertion that disclosing data could provide criminals with "an idea of where the FBI is focusing its limited resources" would apply to *every* FOIA request directed to a law enforcement agency. The government's proffered explanation is not a justification for a specific withholding, but, in effect, a rejection of FOIA itself. *Cf. Int'l Counsel Bureau v. U.S. Dep't of Defense*, 657 F. Supp. 2d 33, 42 (D.D.C. 2009) (rejecting government's argument that disclosure "would permit hostile entities to gain specific knowledge of operational methods employed in certain circumstances, which would provide them an opportunity to develop countermeasures or resistance to tactics").

Because the *Vaughn* Index and Hardy Declaration "treat the documents within various exemption categories as a group . . . and make broad statements essentially explaining that the documents were withheld because they contain the type of information generally protected by that particular exemption," they "fail to permit debate, or an informed judgment, about whether [the information] may be withheld." *Church of Scientology,* 30 F.3d at 230; see also *Campaign for Responsible Transplantation v. FDA.*, 219 F. Supp. 2d 106, 114-115 (D.D.C. 2002) (*Vaughn* index insufficiently detailed where cross-references "provide only vague conclusory statements that repeat the reasoning of withholding the document, but never precisely relate to the descriptions of the documents"). "Where the agency's affidavits or declarations merely parrot the language of the statute and are drawn in conclusory terms, as they are here, the Court's ability

to conduct its own review of the agency's determinations is severely frustrated." *Defenders of Wildlife*, 623 F.Supp.2d at 90 (internal quotation marks omitted). This Court should therefore order disclosure. See *Maine II*, 298 F.3d at 72-73.

B. The FBI fails to satisfy its burden to establish that Exemption 7(E) applies to staffing, composition and budget information.

To the extent the *Vaughn* Index and Hardy Declaration are sufficiently detailed to enable *de novo* review, they fail to satisfy the government's burden of establishing the applicability of Exemption 7(E) to withhold information about staffing, composition and budget.

1) ***Staffing:*** In several documents, the FBI relies on Exemption 7(E) to withhold staffing information falling into two categories. The first is the *number of officers* in the Massachusetts JTTF, both in total in 2014[25] and broken down by state, local and federal participants for FY 2012 and 2013.[26] The second is information about *overtime*, including: overtime budget constraints in 2003,[27] the maximum overtime pay allowed per officer in 2010 and 2011,[28] the number of officers entitled to receive overtime in 2012 and 2013,[29] and the average monthly charge for overtime and a request for enhancement of overtime funding in 2012.[30]

Most of this information does not qualify as a technique, procedure or guideline. *Families II*, 837 F. Supp. 2d at 299 ("Defendants have pointed to no instances in which a court has held that law enforcement [staffing] statistics are covered by Exemption 7(E)."). "The terms 'techniques' and 'procedures' refer to specific methods of law enforcement, not policy and budgetary choices about the assignment of personnel." *Id*. Even if the Court found that "current

[25] Rossman Decl. Ex. 2 (Cover Letter Withholding JTTF 720); *Vaughn* Index pg. 69 of 87.
[26] Rossman Decl. Ex. 10 (JTTF 726); Ex. 11 (JTTF 729).
[27] Rossman Decl. Ex. 6 (JTTF 11).
[28] Rossman Decl. Ex. 7 (JTTF 712); Ex. 8 (JTTF 717); Ex. 9 (JTTF 723).
[29] Rossman Decl. Ex 10 (JTTF 727); Ex. 11 (JTTF 733).
[30] Rossman Decl. Ex. 12 (JTTF 734).

or prospective staffing statistics" fall within the definition of 'guidelines," *id*., aside from the total number of officers in 2014, all of the withheld information is more than two years old. These "historical statistics" are not guidelines. *Id.*

Moreover, none of this information poses an increased risk of circumvention of the law. While almost "*any* information about past law enforcement practices could *theoretically* give would-be criminals help that they would not otherwise have," *Families II*, 837 F. Supp. 2d at 300 (second emphasis added), it is difficult to imagine how the total number of officers within the entire Massachusetts JTTF could help anyone circumvent the law. This simply does not meet the required "reasonable" standard. *Id.* Any potential risks associated with disclosing the number of state, local, and federal participants in the Massachusetts JTTF are "lowest in the context of historical information." *Id.* For this reason, *Families II* held that the government could not invoke Exemption 7(E) to redact two-year-old staffing information that disclosed "the number of agents devoted to particular types of duties." *Id.* at 299-300; see *Jordan v. U.S. Dep't of Justice*, No. 07-CV-02303-REB-KLM, 2010 WL 3023795, *9 (D. Colo. Apr. 19, 2010) (court unable to discern how disclosing the number of each type of employee at a prison would risk circumvention of the law).[31] The staffing information here, which reveals even less information, should similarly be produced.

The FBI's argument to redact overtime information is no more persuasive. It suggests that "[r]evealing the dollar amount spent on agencies [sic] overtime would subsequently reveal the importance of the JTTF investigating various crimes." Hardy Decl. ¶49. It goes on to state that "combined with other bits of information released to the public by the FBI this information could become a piece of a much larger understanding of the FBI's priorities and investigative

[31] This recommendation was adopted in 2010 WL 3023662 (D. Colo Aug 2, 2010). The staff lists were later held exempt under a different exemption in 668 F.3d 1188 (10th Cir. 2011).

efforts," which "would allow criminals to gauge how they should modify their behavior to avoid/exploit the most effective/ineffective FBI techniques." *Id.*

Critically, however, the redacted information would not provide details about the overtime for specific kinds of crime: it is limited to general information such as the maximum amount of overtime each officer can receive, the average monthly overtime, and the number of state and local officers entitled to receive overtime. It is difficult to understand how criminals could use this information, particularly as it is more than three years old. Adding this information to "other bits of information" does not change the analysis. The government gives no indication of the additional information it is referring to, nor does it explain how its combination with benign overtime details would assist criminals. Such vague assertions of hypothetical combinations do not satisfy the government's burden to establish a reasonable increased risk of circumvention of the law. Cf. *Long*, 450 F. Supp. 2d at 73-77 (hypothetical combinations do not satisfy exemption 7(A) obligation to establish articulable harm to law enforcement proceeding).

2) ***Composition:*** The government relies on Exemption 7(E) to withhold information relating to the overall composition of the JTTF, including: the total number of JTTFs nationally, including field offices, [32] the number of states covered by the Massachusetts JTTF,[33] the law enforcement agencies in the Massachusetts JTTF;[34] and the agencies attending JTTF Executive Board meetings in Boston,[35] a Bedford JTTF Executive Board meeting,[36] and a New Hampshire

[32] Rossman Decl. Ex. 7 (JTTF 710); Ex. 8 (JTTF 714); Ex. 9 (JTTF 721).
[33] Rossman Decl. Ex. 10 (JTTF 726).
[34] Rossman Decl. Ex. 1 (Cover Letter Withholding JTTF 1-2); *Vaughn* Index pg. 69 of 87; Ex. 5 (JTTF 4); Ex. 24 (JTTF 943).
[35] Rossman Decl. Ex. 13 (JTTF 745-46); Ex. 14 (JTTF 747-48); Ex. 15 (JTTF 750-51); Ex. 16 (JTTF 754-56); Ex. 17 (JTTF 758-60); Ex. 18 (JTTF 761-63); Ex. 19 (JTTF 765-67); Ex. 20 (JTTF 769-70); Ex. 21 (JTTF 771-73).
[36] Rossman Decl. Ex. 22 (JTTF 784).

Executive Board meeting.[37] "Conspicuously absent from" the government's arguments, "is any mention of how disclosure of the bare data" regarding the national number of JTTFs, the number of states covered by the Massachusetts JTTF, and the agencies at board meetings, "might reveal any technique, procedure, or technological method the FBI uses." *Bartko v. Dep't of Justice*, 62 F. Supp. 3d 134, 148-49 (D.D.C. 2014). None of this information meets the dictionary definitions of technique ("a technical method of accomplishing a desired aim"), procedure ("a particular way of doing or going about the accomplishment of something"), or guideline ("an indication or outline of future policy or conduct"). *Allard II*, 626 F.3d at 682-83 (quoting Webster's Third New Int'l Dictionary (1986)).

Even if it did, the number of JTTFs throughout the country or the number of states covered by the Massachusetts JTTF simply does not provide criminals with any information that they could use to circumvent the law. Nor does the list of agencies participating in the Massachusetts JTTF or the Executive Board meetings. The redacted lists do not reveal the *details* of any agency's activities. Compare with *Barnard v. Dep't of Homeland Sec.*, 598 F. Supp. 2d 1, 22 (D.D.C. 2009) (upholding exemption of incident reports detailing methods of interagency coordination); *Anderson v. U.S. Dep't of Justice*, 518 F. Supp. 2d 1, 12 (D.D.C. 2007) (upholding exemption of DEA manual excerpts detailing "specific restrictions and limitations on activities of state and local task forces). They are just participation and attendance lists. Revealing this identification information does not risk circumvention of the law. See, *e.g.*, *Allard I*, 603 F. Supp. 2d at 363 (ordering government to provide the identification of agencies participating in Operation Frontline); *Electronic Frontier Foundation v. Dep't of Defense*, No. 09-05640, 2012 WL 4364532, *8 (N.D. Cal. Sept. 24, 2012) (unpub. op.) ("[D]isclosing that

[37] Rossman Decl. Ex. 23 (JTTF 787).

certain [FBI] divisions are involved in or supervise the use of social networking sites in investigations does not disclose exactly how the FBI is expending its resources in this area").

3) Budget: Finally, the FBI also relies on Exemption 7(E) to redact JTTF budgetary information.[38] Even courts that impose the lowest possible hurdle to Exemption 7(E)'s circumvention requirement mandate that the government demonstrate some kind of logical connection between the information and a risk of circumvention. See, *e.g., Blackwell v. FBI*, 646 F.2d 37, 42 (D.C Cir. 2011); *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193-1194 (D.C. Cir. 2009). The FBI's explanation to redact the amount of, and rates for, telephone & internet lines, secure video teleconference lines, telephones, GPS units, laptops, vehicle emergency lights, LCD televisions, digital cameras, and conference room table and chairs, does not meet this standard.[39]

The FBI relies on the Hardy Paragraph and *Vaughn* Sentence to justify these redactions, but it cannot carry its burden with such bald assertions "as if the risk of circumvention of the law were self-evident." *Riser*, 2010 WL 4284925 at *6; see *Ferri v. Bell*, 654 F.3d 1213, 1224 (3d Cir. 1981) (*de novo* review implicitly rejects deferring to agency's "bald assertion"). This is particularly true where, as here, the redacted information is "predictable and hardly of the sort that would assist potential law violators in circumventing the law." *PEER*, 978 F.Supp. at 962.

Indeed, Exemption 7(E) typically does not cover techniques and procedures that are "already well known to the public." *Ferri*, 654 F.3d at 1224 (quoting Senate Conf. Rep.No.93-1200, 93d Cong., 2d Sess. (1974), reprinted in U.S. Code Cong. & Ad. News 6285, 6291). The FBI's possession of items such as televisions, telephones, tables and chairs is indisputably "well known." To redact such information under Exemption 7(E), the government must explain how it reveals specific details, beyond its mere use, that would "reduce or nullify" its efficacy.

[38] Rossman Decl. Ex. 9 (JTTF 721-24); Ex. 10 (JTTF 725-727); Ex. 11 (JTTF 729-33).
[39] Rossman Decl. Ex 10 (JTTF 725-27); Ex. 11 (JTTF 729-33).

American Immigration Lawyers Ass'n v. U.S. Dep't of Homeland Security, 852 F.Supp.2d 66, 78 (D.D.C. 2012); see, *e.g.*, *Showing Animals Respect & Kindness v. U.S. Dep't of Interior*, 730 F.Supp.2d 180, 200 (D.D.C. 2010) (affirming withholding of surveillance documents, even though surveillance in National Wildlife Refuges generally known, because the government established that documents would reveal "the location and timing of such surveillance").

The FBI does nothing of the sort here, which is especially problematic given the nature of these particular redactions. It is inconceivable how criminals could circumvent the law by using the number or cost of televisions, tables and chairs. "Other than accepting the agency's summary conclusion on its face"—which it cannot do—this Court has "no basis to determine, as it must under exemption 7(E) whether . . . the release of the information could reasonably be exempted to risk circumvention of the law." *Defenders*, 623 F. Supp. 2d at 90 (quotations marks omitted).

CONCLUSION

Plaintiff respectfully requests that the Court deny Defendant's motion for summary judgment and grant Plaintiff's cross-motion for summary judgment, or, in the alternative, order the FBI to supplement its Declaration or submit the documents for *in camera* review.

Dated: August 24, 2015

Respectfully submitted,

/s/ Jessie J. Rossman

Jessie J. Rossman (BBO No. 670685)
Matthew R. Segal (BBO No. 654489)
Laura Rótolo (BBO No. 665247)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS
211 Congress Street
Boston, MA 02110
(617) 482-3170
msegal@aclum.org
lrotolo@aclum.org
jrossman@aclum.org

– and –

William D. Dalsen (BBO No. 689334)
PROSKAUER ROSE LLP
One International Place
Boston, MA 02110-2600
Telephone: (617) 526-9600
Facsimile: (617) 526-9899
wdalsen@proskauer.com

CERTIFICATE PURSUANT TO LOCAL RULE 7.1

I hereby certify that counsel for Plaintiff has conferred with counsel for Defendants concerning this motion, and that Defendants oppose this motion.

/s/ Jessie J. Rossman
Jessie J. Rossman (BBO No. 670685)

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was filed via the Court's CM/ECF system and that and a copy will be sent automatically to all counsel of record on August 24, 2015.

/s/ Jessie J. Rossman
Jessie J. Rossman (BBO No. 670685)