

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.: 14-11759-ADB
)	
DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	

**OPPOSITION TO ACLU’S CROSS-MOTION FOR
SUMMARY JUDGMENT AGAINST THE
FEDERAL BUREAU OF INVESTIGATION**

Defendant, the Department of Justice (“DOJ”), submits this opposition to Plaintiff American Civil Liberties Union Foundation of Massachusetts’ (“ACLU”) cross-motion for summary judgment [Doc. 60]. The only issue for purposes of the ACLU’s cross-motion and the DOJ’s opposition is whether the FBI properly claimed FOIA Exemption 7(E) within about 25 documents contained in approximately 1,300 pages of 1,849 responsive pages released to the ACLU. See 5 U.S.C. §552(b)(7)(E).

The FBI’s assertion of Exemption 7(E) is appropriate. The documents at issue relate either to (1) information on or about the amount of financial resources and personnel devoted to the FBI’s Join Terrorism Task Force (“JTTF”), and (2) the number of assessments and investigations that were open in the Boston Field Office in 2014. These documents go directly towards strategic decisions the FBI has made regarding financial resources and personnel of the JTTF, as well as the investigative docket of the Boston Field Office. Such information reveals

how the FBI deploys its resources in meeting its mission, and thus is properly protected under Exemption 7(E).

STATEMENT OF FACTS

The FBI relies on and incorporates by reference the Local Rule 56.1 Statement of Facts set forth in its Memorandum in Support of its Motion for Summary Judgment [Doc. 52]. The FBI generally does not dispute the additional facts contained in the ACLU's Local Rule 56.1 Statement of Undisputed Facts.¹ [Doc. 61 at 4].

ARGUMENT

I. The FBI Properly Withheld Documents Under FOIA Exemption 7(E).

Exemption 7(E) affords protection to law enforcement information that “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). The ACLU challenges the FBI's Exemption 7(E) withholdings for approximately 20 documents that the ACLU divides among four categories: (1) Case Statistics, (2) Staffing, (3) Composition, and (4) Budget Information. The FBI will address three of these four categories. Upon further review and consideration, the FBI will release the “Composition” information specifically identified by the ACLU as being improperly withheld under Exemption 7(E) in the documents referenced in

¹ There is at least one technical inaccuracy in the ACLU's Local Rule 56.1 Statement of Undisputed Facts. In paragraph (4), the ACLU claims that the FBI used Exemption 7(E) to withhold budget information about certain types of information. The type of budget information withheld on pages MASS JTTF 725 and 729 is not contained within the ACLU's description in paragraph (4).

footnotes 32-37 of the ACLU's memorandum.² Doc. 61 at 17-18. The FBI stands by the assertion of Exemption 7(E) as to the remaining categories and documents at issue.

A. The Documents at Issue Contain Non-Public Information about FBI Techniques or Procedures.

The ACLU claims that the FBI's withholdings do not constitute techniques or procedures under Exemption 7(E). The ACLU attempts to categorize information about case statistics, staffing, and budget information as mundane information that reveals little, if anything, about the FBI's investigative strategies. Within the responsive documents, however, Exemption (7)(E) has been applied to non-public investigative techniques and procedures utilized by the FBI to pursue its law enforcement and intelligence gathering missions, and also to non-public details about techniques and procedures that are otherwise known to the public. Hardy Decl. ¶ 48.

Specifically, the FBI asserted Exemption 7(E) to protect the allocation of resources and structure of the Massachusetts JTTF, statistical data regarding categories and types of investigations, internal FBI web addresses, sensitive FBI squads and/or units, and sensitive FBI file numbers. Hardy Decl. ¶ 48; see Durrani v. DOJ, 607 F. Supp. 2d 77, 91 (D.D.C. 2009) ("Exemption 7(E) affords categorical protection for techniques and procedures used in law enforcement investigations and prosecutions."). Armed with this information, criminals would have an idea as to where the FBI is focusing its limited resources. Hardy Decl. ¶¶ 47-53. Criminals could then plan and structure their activities to avoid the FBI's investigative strengths, exploit its weaknesses, and circumvent the law. Id. Therefore, this information is exempt from disclosure pursuant to Exemption 7(E).

² In addition to releasing the challenged 7(E) information in the "Composition" documents categorized by the ACLU, the FBI also will re-process MASS JTTF 1, 2, and 720. For these three pages, the FBI will release the categories or identities of participating JTTF agencies listed on those pages.

The type of information at issue here is of the type that courts have protected from disclosure under Exemption 7(E). Indeed, courts have construed Exemption 7(E) to encompass the withholding of a wide range of techniques and procedures, including:

- Funds expended in furtherance of an investigation. See, e.g., Frankenberry, 2012 U.S. Dist. LEXIS 39027, at *71 (M.D. Pa. Mar. 21, 2012)(protecting expenditures made by law enforcement authorities during investigation); Concepcion v. FBI, 606 F. Supp. 2d 14, 43-44 (D.D.C. 2009) (withholding amount of money used to purchase evidence).
- Information regarding certain databases used for law enforcement purposes. See Vazquez v. DOJ, 887 F. Supp. 2d at 114, 117-18 (D.D.C. 2012)(protecting FBI's National Crime Information Center transaction logs because release would alert wrongdoers as to whether and by whom their illegal activities are under investigation); Adionser v. DOJ, 811 F. Supp. 2d 284, 300 (D.D.C. 2011) (protecting techniques and procedures concerning "the identification and contents of [certain] FBI databases"); Asian Law Caucus, 2008 WL 5047839, at *4 (N.D. Cal. Nov. 24, 2008)(approving protection of database names that relate to watch lists).
- Portions of a law enforcement agency's investigations and operations manual. See, e.g., ACLU of Mich. v. FBI, No. 13154, 2012 WL 4513626, at *10 (E.D. Mich. Sept. 30, 2012)(withholding sections of FBI's Domestic Investigations and Operations Guide ["DIOG"] that would, if released, allow wrongdoers to undermine FBI's law enforcement activities); Elec. Frontier Found. v. Dep't of Def., No. 09-05640, 2012 WL 4364532, at *4-5 (N.D. Cal. Sept. 24, 2012)

(protecting portions of law enforcement handbook containing details of agency's use of internet and social networking websites for investigations); Muslim Advocates v. DOJ, 833 F. Supp. 2d 106, 109 (D.D.C. 2012)(protecting portions of FBI's DIOG that would reveal circumstances under which investigations are or are not approved, and which particular investigative activities are or are not allowed in context of particular investigations, because such information could allow wrongdoers to alter behavior to avoid detection by law enforcement officers).

- Law enforcement codes. See, e.g., Miller v. DOJ, 872 F. Supp. 2d 12, 28-29 (D.D.C. 2012) (agreeing with withholding of TECS and NADDIS numbers maintained by DEA because release could reveal law enforcement techniques or otherwise lead to legal circumvention); Abdelfattah v. ICE, 851 F. Supp. 2d 141, 145 (D.D.C. 2012) (protecting FBI "program codes")
- Details of the status of investigatory efforts. See, e.g., Council on Am.-Islamic Relations, Cal. v. FBI, 749 F. Supp. 2d 1104, 1116, 1123 (S.D. Cal. 2010)(finding that disclosure of bases for investigations, dates of initiation of investigations, and whether investigations are "preliminary" or "full field" would allow targets to avoid detection and circumvent law, and would impede FBI's investigative effectiveness).
- A list showing which select techniques and procedures were used by the FBI in a given case, along with the FBI's internal rating of the effectiveness of each of those techniques. See, e.g., Frankenberry, 2012 U.S. Dist. LEXIS 39027, at *68-69 (protecting portions of FBI FD-515 form used to rate effectiveness of

investigative techniques); Skinner v. DOJ, 744 F. Supp. 2d 185, 214-15 (D.D.C. 2010)(noting that release of such information could allow criminal targets to change their modus operandi to avoid detection); Tunchez v. DOJ, 715 F. Supp. 2d 49, 55-56 (D.D.C. 2010) (same), aff'd per curiam, No. 10-5228, 2011 WL 1113423 (D.C. Cir. Mar. 14, 2011); Span v. DOJ, 696 F. Supp. 2d 113, 122 (D.D.C. 2010)(same); Sellers v. DOJ, 684 F. Supp. 2d 149, 164-65 (D.D.C. 2010) (noting that multiple cases have upheld withholding of such records).

The non-public information about FBI case statistics, staffing, and budget information constitute investigative techniques and procedures utilized by the FBI to pursue its law enforcement and intelligence gathering missions. As such, this information should be categorically protected from disclosure under Exemption 7(E).

B. The FBI's Non-Public Techniques and Procedures should be Categorically Protected.

Exemption 7(E) is comprised of two distinct clauses. The first clause permits the withholding of “records or information compiled for law enforcement purposes . . . [that] would disclose techniques and procedures for law enforcement investigations or prosecutions.” The first clause is separated from the second clause by a comma, and so would not appear to require a showing that disclosure of the technique or procedure could risk circumvention of the law. Courts have reached different conclusions on this point. See Riser v. U.S. Dep’t of State, No. 09-3273, 2010 U.S. Dist. LEXIS 112743, at *15 (S.D. Tex. Oct. 22, 2010) (noting that courts reach differing results on whether agencies must demonstrate risk of circumvention of law to withhold law enforcement techniques and procedures); Asian Law Caucus v. DHS, No. 08-00842, 2008 WL 5047839, at *3 (N.D. Cal. Nov. 24, 2008) (“The Courts that have reviewed Exemption 7(E) disclosures have come out on both sides of [this] issue.”).

Some courts have implicitly or explicitly found that the language concerning risk of circumvention is applicable to the first clause as well as the second clause of Exemption 7(E), thereby requiring a showing that disclosure of a law enforcement technique or procedure could risk circumvention of the law. See, e.g., Blackwell v. FBI, 646 F.3d 37, 42 (D.C. Cir. 2011) (applying, without analysis, “risk of circumvention” standard to law enforcement techniques and procedures); Catledge v. Mueller, 323 F. App’x 464, 466-67 (7th Cir. 2009) (per curiam) (requiring showing of risk of circumvention for techniques and procedures); Davin v. DOJ, 60 F.3d 1043, 1064 (3d Cir. 1995) (“Exemption 7(E) applies to law enforcement records which, if disclosed, would risk circumvention of the law.”)

Other courts that have expressly found that no showing of “risk of circumvention” is necessary when protection is sought under the first clause for techniques and procedures. See, e.g., Allard K. Lowenstein Int’l Human Rights Project v. DHS, 626 F.3d 678, 681-82 (2d Cir. 2010) (finding “no ambiguity” in Exemption 7(E)’s application of risk of circumvention standard to “guidelines” prong, but not “techniques and procedures” prong of Exemption 7(E)); Ahmed v. U.S. Citizenship & Immigration Serv., No. 11-6230, 2013 WL 27697, at *4 (E.D.N.Y. Jan. 2, 2013) (noting that Second Circuit precedent applies risk of circumvention clause to “guidelines,” but not “techniques and procedures” clause of Exemption 7(E)); ACLU of Mich. v. FBI, No. 11-13154, 2012 WL 4513626, at *9 (E.D. Mich. Sept. 30, 2012) (holding specifically that no showing of harm is required to withhold law enforcement “techniques and procedures”); McRae v. DOJ, No. 09-2052, 2012 WL 2428281, at *13 (D.D.C. June 27, 2012) (contrasting “techniques and procedures” prong of Exemption 7(E), which provides “categorical” protection, to “guidelines” prong of Exemption 7(E), which requires showing of risk of circumvention); Families for Freedom v. U.S. Customs & Border Prot., No. 10-2705, 2011 WL 6780896, at *5

(S.D.N.Y. Dec. 27, 2011) (noting that because certain information at issue constituted techniques and procedures rather than guidelines any circumvention risks were irrelevant under FOIA); Banks v. DOJ, 813 F. Supp. 2d 132, 146 (D.D.C. 2011) (noting that Exemption 7(E) provides for “categorical” protection of techniques and procedures under first clause of Exemption); ACLU v. DOJ, 698 F. Supp. 2d 163, 167-68 (D.D.C. 2010)(holding that “the first prong of Exemption 7(E) permits withholding of information that would disclose techniques and procedures for law enforcement investigations or prosecutions without [demonstrating a] risk of circumvention”); Keys v. DHS, 510 F. Supp. 2d 121, 129 (D.D.C. 2007) (stating that first clause of Exemption 7(E) “requires no demonstration of harm or balancing of interests”); Burke v. DOJ, No. 96-1739, 1999 WL 1032814, at *8 (D.D.C. Sept. 30, 1999) (holding that Exemption 7(E) “does not require the FBI to show that disclosure of [FBI Form FD-515] ratings [of effectiveness of investigative techniques] would cause any particular harm”); Coleman v. FBI, No. 89-2773, slip op. at 25 (D.D.C. Dec. 10, 1991) (“The first clause of this exemption . . . does not require a determination that harm . . . would be caused by disclosure of the records or information within its coverage.”), summary affirmance granted, No. 92-5040, 1992 WL 373976, at *1 (D.C. Cir. Dec. 4, 1992) (per curiam).

In a case recently decided by the Court of Appeals for the Second Circuit, the court stated that the statutory language had “no ambiguity” and that a basic analysis of the text and structure of Exemption 7(E) clearly indicates that the circumvention requirement does not apply to the “techniques and procedures” clause of the Exemption. Allard K. Lowenstein Int’l Human Rights Project v. DHS, 626 F.3d 678, 681 (2d Cir. 2010)(finding that “basic rules of grammar and punctuation dictate that the qualifying phrase [‘could reasonably be expected to risk circumvention of the law’] modifies only the immediately antecedent ‘guidelines’ clause and not

the more remote ‘techniques and procedures’ clause”).

This Court should adopt the categorical approach and find that no showing of “risk of circumvention” need be shown where protection is sought under the first clause for techniques and procedures. See, e.g., ACLU of Mich. v. FBI, 2012 WL 4513626, at *9 (finding that law enforcement techniques and procedures receive “categorical protection” from disclosure if such techniques and procedures are not well known to public); McRae, 2012 WL 2428281, at *13 (applying “categorical” protection for law enforcement techniques and procedures); Citizens for Responsibility & Ethics in Wash. v. DOJ, 870 F. Supp. 2d 70, 85 (D.D.C. 2012) (declaring that “longstanding precedent” supports categorical protection for law enforcement techniques and procedures); Skinner v. DOJ, 806 F. Supp. 2d 105, 116 (D.D.C. 2011) (“Law enforcement procedures and techniques are afforded categorical protection under Exemption 7(E)”); Durrani v. DOJ, 607 F. Supp. 2d 77, 91 (D.D.C. 2009) (“Exemption 7(E) affords categorical protection for techniques and procedures used in law enforcement investigations and prosecutions.”).

C. Disclosure of the Withheld Documents Could Create a Risk of Circumvention of the Law.

Even if this Court rejects the categorical approach, the documents at issue still should be protected under Exemption 7(E) because the FBI has demonstrated risk of circumvention of the law if the withheld information is released to the public. Exemption 7(E) “looks not just for circumvention of the law, but for a risk of circumvention; not just for an actual or certain risk of circumvention, but for an expected risk; not just for an undeniably or universally expected risk, but for a reasonably expected risk; and not just for certitude of a reasonably expected risk, but for the chance of a reasonably expected risk.” Mayer Brown LLP v. IRS, 562 F.3d 1190, 1193 (D.C. Cir. 2009). Thus, Exemption 7(E) sets a relatively low bar for the agency to justify withholding. Blackwell v. FBI, 646 F.3d 37, 42 (D.C. Cir. 2011). “Rather than requiring a

highly specific burden of showing how the law will be circumvented, exemption 7(E) only requires that the [agency] demonstrate logically how the release of the requested information might create a risk of circumvention of the law.” Id. Thus, as long as an agency can logically explain how the information could help criminal circumvent the law, the agency has met its burden and withholding is proper under 7(E).

1. Information Regarding Staffing of the JTTF is Protected Under Exemption 7(E).

The information the ACLU seeks relates to the FBI’s resource allocation which, if publicly released, could allow criminals to circumvent the law. The FBI has limited resources and must strategically allocate to those investigative efforts it sees as a priority. The ACLU seeks information related to the strategic allocations and financial resources and personnel devoted to the JTTF over the course of several years. This information could reveal the priority of the JTTF and its mission as against other Boston Field Office investigative areas and/or other FBI priorities. Moreover, individuals could infer from the fluctuations in the resources devoted to the JTTF over the various years how FBI priorities shifted through the years, as well as certain matters of investigative interest that could have precipitated changes in resource allocation. Providing the public with information about the operating budget and personnel of the JTTF would also provide insight into the operational capabilities of the JTTF, as such capabilities are inherently limited by the amount of money and personnel with which the JTTF has to work. Public revelation of the funding resources and personnel on the JTTF could embolden an individual to commit, or attempt to commit, a criminal act if that person believes the resources dedicated to the JTTF is insufficient to prevent that person from committing a crime. See Declaration of David M. Hardy, Doc. 53 at ¶ 49.

The ACLU takes issues with Exemption 7(E) redactions in ten documents. Seven of these documents (JTTF 11, 712, 717, 723, 727, 733, and 734) focus on overtime pay, which is mostly a budgetary issue. As such, it is discussed in the Budget Section below. The other three documents (JTTF 720, 726, and 729) have redactions over the number of personnel assigned to the JTTF over the course of several years. This information goes directly toward how the FBI allocates its resources. The release of non-public information about allocation of resources could allow individuals to circumvent the law by attacking those areas where resources are thin. The information the ACLU seeks is not about how many administrative staff work in a particular office. The information the ACLU seeks goes to the number of personnel, including Special Agents and Task Force Officers, assigned to the JTTF, which in turn reveals information about the FBI's investigative priorities. This type of information is properly withheld under Exemption 7(E). Ortiz, 67 F. Supp. 3d at 123 (upholding the assertion of 7(E) over information that reflected the scope and size of agency resources dedicated to an investigative effort.).

2. Information Regarding JTTF Case Statistics is Protected Under Exemption 7(E).

The same is true regarding information the ACLU seeks on the number of open investigations and assessments in the Boston Field Office. As discussed more fully below, the information the ACLU seeks gives a breakdown of the number of full and preliminary investigations for particular types of criminal investigations. This would show what areas the Boston Field Office concentrated its investigative efforts on the most and the least. A criminal could manipulate this information to analyze Boston Field Office's relative strengths, weakness, and priorities. See Declaration of David M. Hardy, Doc. 53 at ¶ 52.

The ACLU takes issue with Exemption 7(E) withholdings related to "case statistics" in two documents – BOSTON FO 1 and BOSTON FO 3-55. The ACLU mischaracterizes

BOSTON 3-55 as providing “different, undefined, categories of cases.” The first row of the first column on BOSTON 3 is entitled “Case Classification Code.” The numbers provided in that column are FBI File Classification Numbers, many of which are publicly available. FBI file classification numbers reflect the type of investigation being conducted. For example, the second row under the “Case Classification Code” on BOSTON FO 3 provides the case classification code of “100.” According to the FBI’s website, the “100” classification is for Terrorist Enterprise Investigations. If the redacted information in that row were provided, the number of full investigations and preliminary investigations of Terrorist Enterprise Investigations in the Boston Field Office would be publicly available. Thus, this information is not “undefined categories of cases,” as the ACLU claims. Rather, it is a list of the different types of investigations being conducted in the Boston Field Office (many of which can be identified by consulting publicly available FBI File Classification Numbers), as well as the number of full and preliminary investigations within each type of investigation.

The ACLU likens withholding of these statistics with the withholding of arrest statistics. As a general matter, arrests are of a public nature (i.e., a docket showing an arraignment, criminal complaint, indictment, etc.). Thus, arrest statistics are essentially a compilation of information that generally exists in the public domain. There is no such public aspect to the number of open assessments and investigations in a particular FBI field office. This is particularly true with assessments, which may or may not evolve into an investigation. The redaction on BOSTON FO 1 challenged by the ACLU shows the number of open assessments by the Boston Field Office. Exemption 7(E) can be used to withhold statistical reports that reflect investigative trend information. ACLU v. DOJ, 2011 WL 887731 (W.D. Wash. March 10, 2011).

3. Information Regarding JTTF Budget Information is Protected Under Exemption 7(E).

Courts have invoked Exemption 7(E) to protect from disclosure documents that reveal information about financial expenditures. See, e.g., Frankenberry, 2012 U.S. Dist. LEXIS 39027, at *71 (protecting expenditures made by law enforcement authorities during investigation); Concepcion v. FBI, 606 F. Supp. 2d 14, 43-44 (D.D.C. 2009) (withholding amount of money used to purchase evidence). This is the very information the ACLU seeks about the JTTF, and it should not be disclosed.

The ACLU challenges three documents for improperly withholding budget information under 7(E) – JTTF 721-24, 725-727, and 729-33. These documents set forth the operating budget for the JTTF for Fiscal Years 2011 through 2013. The ACLU also challenges withholdings of information related to overtime pay for JTTF members in the seven documents identified in the Staffing section above. Information related to monetary expenditures made by the FBI in furtherance of its mission is properly withheld under Exemption 7(E). Frankenberry v. FBI, 567 Fed. Appx. 120 (3d Cir. 2014); Amuso v. DOJ, 600 F. Supp. 2d 78 (D.D.C. 2009); Concepcion v. FBI, 606 F. Supp. 2d 14 (D.D.C. 2009).

Additionally, an issue unique to FOIA, as opposed to other civil litigation where access and dissemination of sensitive information can be controlled through a protective order, is that information released is available to the public at large. This means that the information can be reviewed by persons without nefarious intentions, but also by those with such intentions. Bassiouni v. CIA, 392 F. 3d 244 (7th Cir. 2004) (stating that information released via FOIA is available to anyone, even hostile entities.). Additionally, an agency's interests can be adversely impacted when the cumulative release of information via FOIA is read together. Catledge v. Mueller, 323 Fed. Appx. 464 (7th Cir. 2009) (finding that Exemption 7(E) justified withholding

where repeated FOIA requests by members of terrorists organization about whether a given individual had been the subject of a National Security Letter would allow the organization to “inspect their members and shift their operations to those not yet under government suspicion.”).

If the information about financial resources, personnel resources, and case statistics that the ACLU seeks is released, there could be future FOIA requests seeking similar information for all FBI Field Offices. If this type of information was allowed to be publicly released in each instance it is requested, it would provide an overview of financial and personnel resources devoted to the JTTF in every region of the country. It would likewise provide a breakdown of the types of investigations conducted in each field office. This cumulative information would prove a region by region breakdown of FBI resources and priorities that could suggest to criminals which region they should operate in. For example, if one FBI field office maintains a higher number of Terrorist Enterprise Investigations, terrorist may be persuaded to plan operations in a region that conducts fewer investigations on the assumption their operations may be more likely to be undetected and/or prevented. Similarly, terrorists may strategically choose to operate in regional areas where JTTF financial and manpower resources may be thinner on the assumption that such regions would be more vulnerable to attack.

CONCLUSION

For all of these reasons, the ACLU's cross-motion for summary judgment should be denied.

Respectfully submitted,

CARMEN M. ORTIZ
United States Attorney

By: /s/ Jennifer A. Serafyn
Jennifer A. Serafyn
Assistant United States Attorney
United States Attorney's Office
John Joseph Moakley U.S. Courthouse
1 Courthouse Way, Suite 9200
Boston, MA 02210
(617) 748-3188
Jennifer.Serafyn@usdoj.gov

Dated: October 9, 2015

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants.

/s/ Jennifer A. Serafyn
Jennifer Serafyn
Assistant United States Attorney

Dated: October 9, 2015