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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

WILEY GILL; JAMES PRIGOFF; TARIQ RAZAK; KHALID IBRAHIM; and AARON CONKLIN,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE; LORETTA LYNCH, in her official capacity as the Attorney General of the United States; PROGRAM MANAGER – INFORMATION SHARING ENVIRONMENT; KSHEMENDRA PAUL, in his official capacity as the Program Manager of the Information Sharing Environment,

Defendants.

Case No. 3:14-cv-03120-RS-KAW

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR RELIEF FROM NON-DISPOSITIVE PRETRIAL ORDER OF MAGISTRATE JUDGE

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I. INTRODUCTION

The government has failed to meet its heavy burden of demonstrating that the Magistrate Judge's opinion was clearly erroneous or contrary to law. This case involves a substantive and procedural challenge under the Administrative Procedure Act ("APA") to Defendants' adoption of a "Functional Standard" that underpins a nationwide surveillance program and sets forth a process for collecting, maintaining, and disseminating so-called "suspicious activity reports" or "SARs." Defendants compiled and certified an Administrative Record ("Record" or "AR") that includes some, but not all, documents related to the definition of "suspicious activity"; they excluded documents related to other aspects of the Functional Standard. The parties agree that the AR must consist of *all* documents and materials considered by the agency in making its *decision*. The Magistrate Judge found the AR did not meet that standard because it does not include *all* documents related to the agency decision. Accordingly, the Court ordered Defendants to revisit their compilation of the AR and to tailor it to the decisions actually challenged in this case. This ruling was correct, and was certainly not an abuse of discretion. Defendants also attack the Magistrate Judge's requirement of a privilege log and search declaration. Those rulings relied on cases from this District; Defendants have identified no contrary, controlling law.

II. BACKGROUND

Plaintiffs challenge the Functional Standard on two grounds.[1] First, they contend it conflicts with a federal regulation. *See* First Supp. Compl. ("FSC") at ¶ 162 (Dkt. No. 70). This claim challenges the Functional Standard's process for collecting, maintaining, and disseminating SARs, including the definition of suspicious activity utilized within that process. *See also* FSC at ¶¶ 42, 51, 161. Second, Plaintiffs contend that the Functional Standard was improperly issued without notice and comment. *Id.* at ¶ 168. This procedural claim is based on the issuance of the entire Functional Standard and is not confined to the definition of suspicious activity.

The briefing on Plaintiffs' motion to complete the Record raised several key issues:

1. Whether Defendants applied the correct legal standard in compiling the AR:

[1] Because one of the key issues before the Magistrate Judge was whether the Record was tailored to the decision challenged by Plaintiffs, Plaintiffs provide a brief summary of their claims.

Defendants certified a Record that contains "information considered in the development of the definition of suspicious activity." *See* Dkt. No. 52-1 at ¶ 3. The parties agreed on the legal standard governing compilation of the AR: "all documents and materials directly or indirectly considered by the agency in making its decision." Order at 9:4-5 (Dkt. No. 88).

Plaintiffs argued that Defendants used the wrong legal standard in compiling the AR because they should have included *all* (not only some) information considered, and information considered in the development of the *entire* Functional Standard (not just the definition of "suspicious activity"). *See* Pls.' Mot. at 10 (Dkt. No. 73 at 16). Defendants' opposition brief did not address the first argument, but asserted the AR was appropriately limited in scope to the definition of suspicious activity because, in their view, "[t]he only challenged ***decision*** here is to the PM-ISE's adoption of the 'reasonably indicative' standard." Defs.' Opp. at 9:18-19 (Dkt. No. 79 at 14) (emphasis in original). Plaintiffs replied that Defendants mischaracterized Plaintiffs' claims, which challenge the entire Functional Standard. Pls.' Reply at 2-7 (Dkt. No. 82 at 7-12).[2]

2. Whether Defendants must provide a privilege log: The parties cited conflicting authority on whether an agency must provide a privilege log to withhold materials from an AR. *Compare* Pls.' Mot. at 14 (Dkt. No. 73 at 20), *with* Defs.' Opp. at 14-15 (Dkt. No. 79 at 19-20).

3. Whether Defendants must provide a declaration explaining their search and results: Plaintiffs requested that the Magistrate order Defendants, in revisiting the AR, "to provide a declaration explaining [their search] and its results." *See* Pls.' Mot. at 14 (Dkt No. 73 at 20) (quoting *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, No. C-06-4884, 2007 WL 3049869, *6 (N.D. Cal. Oct 18, 2007)). Defendants did not respond to this request in their brief.

4. Whether the AR omits documents the agency actually considered: Plaintiffs identified 20 documents or categories of documents that—as demonstrated by the AR itself—Defendants considered but excluded from the AR. *See, e.g.*, Pls.' Mot. at 16-23 (Dkt. No. 73 at 22-29); Order at 5-6 (summarizing documents) (Dkt. No. 88). Defendants entirely failed to address these document-specific concerns. *See* Pls.' Reply at 9-10 (Dkt. No. 82 at 14-15).

[2] At the hearing, Plaintiffs indicated their willingness to meet and confer over the scope of the Record. Transcript of Oral Argument at 35:7-14, *Gill v. Dep't of Justice, et al*. (Dec. 3, 2015).

III. STANDARD OF REVIEW

A non-dispositive ruling by a magistrate judge may be set aside by the District Court only if found to be "clearly erroneous" or "contrary to law." *See* 28 USC § 636(b)(1)(A); FRCP Rule 72(a); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1414 (9th Cir. 1991). "This standard is not easily met because it affords the magistrate judge significant deference." *PersonalWeb Techs., LLC v. Google Inc.*, No. 5:13-CV-01317 EJD, 2014 WL 5422933, at * 1 (N.D. Cal. Oct. 24, 2014). "An order is contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure." *Id.* (quoting *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F. Supp. 2d 70, 74 (N.D.N.Y. 2000)). "The reviewing court may not simply substitute its judgment for that of the deciding court." *Grimes v. City & Cnty. of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991).

IV. ARGUMENT

A. The Court Did Not Abuse Its Discretion in Requiring Defendants to Revisit the Administrative Record and Apply the Correct Legal Standard

The Magistrate Judge correctly ruled that Defendants must revisit their compilation of the AR because they used the wrong legal standard in compiling the Record. The Record must consist of all materials directly or indirectly considered by the agency in making the challenged decision. *See* Order at 9; *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). Defendants failed to meet this standard because, as their certification attests, they did not compile *all* documents they considered. Order at 9-10.

The Court below carefully laid out the framework governing a motion to complete: a certified record is presumed complete, and Plaintiffs can only rebut this presumption by meeting a "clear evidence" standard. Order at 8; *accord* Defs.' Mot. at 2-3 (Dkt. No. 94 at 4-5). The Court also correctly held—relying on three cases, including one from this District—that Plaintiffs met this burden because Defendants used the wrong legal standard in compiling the record, as evidenced by the certification. Order at 10 (citing *Winnemem Wintu Tribe v. U.S. Forest Serv.*, No. 2:09-CV-01072-KJM-KJ, 2014 WL 3689699, at *11 (E.D. Cal. July 24, 2014) ("The application of an incorrect standard constitutes 'reasonable, non-speculative grounds for the belief that the documents were considered by the agency and not included in the record'") (citation

omitted)); *Trout Unlimited v. Lohn*, No. C05-1128C, 2006 WL 1207901, at *3 (W.D. Wash. May 4, 2006) (ordering agency to re-assess record that had been compiled pursuant to directive that was "considerably narrower than permitted by this circuit"); *People of State of Calif. ex rel. Lockyer v. U.S. Dep't of Agric.*, No. C05-03508 EDL, 2006 WL 708914, at *3-4 (N.D. Cal. March 16, 2006) (granting motion to complete where agency "applied the wrong standard in compiling the record")).

Defendants contend the cases relied upon by the Magistrate Judge only apply if the agency uses "a completely erroneous standard" to compile the record. Defs.' Mot. at 3 (Dkt. No. 94 at 5). But even if that interpretation were correct, it would still apply to Defendants' compilation of the record here, under a standard that is at least as erroneous as the standard the agency used in *Lockyer*. In that case, the agency certified that the record contained "all documents considered by the decision-maker." The court, however, concluded that "materials that were *indirectly* considered were not included in the record" and that the agency therefore had applied the wrong standard. *Lockyer*, 2006 WL 708914, at *2-3 (emphasis omitted). In any event, Defendants' omission of "all" from the certifications has great import: inclusion of only *some* but not *all* documents is a standard that is "considerably narrower than permitted by this circuit." *Trout Unlimited*, 2006 WL 1207901, at *3. Defendants had the opportunity but failed to cure the defect in their amended certification, belying their contention that the difference is merely semantic.[3] The Magistrate Judge thus correctly concluded that Plaintiffs rebutted the presumption of completeness because Defendants used the wrong legal standard in compiling the Record, as evidenced by their certification.[4]

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[3] The initial certification stated that the AR includes "information considered in the development of the definition of suspicious activity." Cert. of AR at ¶ 3 (Dkt. No. 52-1). After Plaintiffs raised the "all" versus "some" issue (Pls.' Mot. at 12 (Dkt. No. 73 at 18)), Defendants filed an amended certification stating the Record includes "non-privileged information considered," Am. Cert. of AR at ¶ 6 (Dkt. No. 79-1), but making no reference to having included "all" documents.

[4] Defendants now cite three out-of-district decisions – none of which they presented below – for the proposition that the wording of the certification is not dispositive. *See* Defs.' Mot. at 3 (Dkt. No. 94 at 5); Defs.' Opp. at iii-iv (Dkt. No. 79 at 3-4) (Table of Authorities). Defendants' citation to this Court of non-binding decisions never presented to the Magistrate Judge does not render that Court's decision to follow *Winnemem*, *Trout Unlimited*, and *Lockyer* an abuse of discretion. *Garcia v. Benjamin Grp. Enter. Inc.*, 800 F. Supp. 2d 399, 403 (E.D.N.Y. 2011) ("magistrate judges are thus afforded broad discretion"). Even if this Court were to choose, in the first

Finally, Defendants contend that the Magistrate Judge erred by failing to make a predicate finding that specific documents had been incorrectly omitted. Defs.' Mot. at 4 (Dkt. No. 94 at 6). But Plaintiffs identified 20 documents or categories of documents that Defendants omitted from the AR, even though Record evidence demonstrates that the agency considered them. *See* Pls.' Mot. at 14-23 (Dkt. No. 73 at 20-29). For example, Plaintiffs pointed to 10 documents that Defendants excluded but that the Functional Standard expressly cites. *See id.* at 16 (Dkt. No. 73 at 22). The case law is clear that documents cited in the agency's actual decision document must be included in the record. *Pinnacle Armor, Inc. v. United States*, 923 F. Supp. 2d 1226, 1241 (E.D. Cal. 2013). In light of its order requiring Defendants "to revisit their compilation of the AR," however, the Magistrate Judge declined to rule on "Plaintiffs' request for specific documents and categories of documents . . . as premature." Order at 12. Even so, as stated above, Plaintiffs have made the predicate demonstration regarding improper omission of specific documents necessary to complete the Record. Defendants offered no explanation below (or in this Court) why any of these documents were properly excluded, and have thus waived any argument that they were correctly omitted. *See Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011). Penalizing Plaintiffs for the Magistrate Judge's decision to reserve ruling on the specific documents makes no sense.

B. The Magistrate Judge Correctly Defined the Scope of the Administrative Record in Light of the Decisions Challenged in this Case

Defendants object to the portion of the Order requiring Defendants to include in the AR information considered in deciding not to provide notice and comment. But this portion of the Order appropriately ensures that the AR is tailored to the agency decisions at issue.

The Magistrate Judge held, and the parties agreed, that the AR must include all documents considered in making the agency *decision* at issue. Order at 9:4-5. In other words, the scope of the Record must reflect the challenged agency decision. *See* Defs.' Opp. at 9 (Dkt. No. 79 at 14).

The parties disputed the proper characterization of the challenged decision. While

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instance, to follow the out-of-district cases now cited by Defendants, "[t]he reviewing court may not simply substitute its judgment for that of the deciding court." *Grimes*, 951 F.2d at 241.

Defendants asserted that Plaintiffs only challenge the definition of suspicious activity, and that the scope of the AR should be limited accordingly, *id.*, Plaintiffs argued that they challenge the *entire* Functional Standard. *See* Pls.' Reply at 2-3 (Dkt. No. 82 at 7-8) (arguing that procedural challenge is directed at Functional Standard and substantive challenge focuses on process for collecting, maintaining, and disseminating SARs). Ultimately, the Magistrate Judge chose a middle path and ordered Defendants "to revisit their compilation of the AR to ensure that it includes all documents and materials considered by the agency in deciding (1) to adopt a standard that is broader than 28 C.F.R. Part 23 and authorizes the collection, maintenance, and dissemination of information even in the absence of reasonable suspicion of criminal activity, in conflict with 28 C.F.R. Part 23 and (2) to promulgate such a standard without public notice and comment." Order at 12.

The Court's articulation of the challenged agency decision—and the scope of the Record that must be compiled—struck a sensible balance between Defendants' characterization (only the definition of suspicious activity) and Plaintiffs' (the entire Functional Standard). It also closely tracked the substantive and procedural claims in the Complaint.[5] In particular, the requirement to include documents "considered by the agency in deciding . . . to promulgate . . . a standard without public notice and comment" reflects the fact that Plaintiffs challenge the issuance of the Functional Standard without notice and comment. *See* FSC at ¶¶ 168 (Dkt. No. 70) (Fourth Claim for Relief). Plaintiffs characterized this procedural claim as a challenge to the entire Functional Standard and argued for production of its entire administrative record. The Magistrate Judge ordered production of records narrowly focused on the agency action at issue in the procedural claim: the decision to issue the Functional Standard without notice and comment.

The scope of the Record flows directly from the characterization of the decision(s)

[5] Defendants take no issue with the Magistrate Judge's articulation of the first decision: "to adopt a standard that is broader than 28 C.F.R. Part 23 and authorizes the collection, maintenance, and dissemination of information even in the absence of reasonable suspicion of criminal activity, in conflict with 28 C.F.R. Part 23." Order at 12. The Court's articulation appropriately reflects Plaintiffs' substantive APA challenge: "Because the Functional Standard is broader than 28 CFR Part 23 and authorizes the collection, maintenance, and dissemination of information even in the absence of reasonable suspicion of criminal activity, it conflicts with 28 CFR Part 23." FSC ¶ 162 (Dkt. No. 70) (Second Claim for Relief).

challenged in this case, and the Magistrate Judge's characterization of Plaintiffs' procedural claim fell "within the range of permissible decisions." *Garcia*, 800 F. Supp. 2d at 403.[6]

C. The Magistrate Judge Appropriately Exercised Discretion in Requiring a Search Declaration and Privilege Log

The Magistrate Judge ordered Defendants to explain their search and provide a privilege log. Defendants contend no legal authority *requires* such items. Defs.' Mot. at 4 n.1 & 5-6 (Dkt. No. 94 at 6-8). But Defendants mistake their burden. *See Perry*, 268 F.R.D. at 348 (magistrate's order regarding privilege log was not "contrary to law" where "no rule prevent[ed]" it).

The Court's decision on both issues was consistent with case law in this District. *See Ctr. for Biological Diversity*, No. C-06-4884, 2007 WL 3049869, at *6 (requiring agency "to conduct further inquiries and to provide a declaration explaining that inquiry and its results"); *Lockyer*, No. C05-03508, 2006 WL 708914, at *4 (granting motion to complete record and ordering agency to provide privilege log if it seeks to withhold documents from record); Pls.' Reply at 11-12 (Dkt. No. 82 at 16-17) (citing other decisions and DOJ guidance requiring privilege log). Defendants have identified no controlling authority to the contrary. *See Garcia*, 800 F. Supp. 2d at 405 (affirming magistrate's order that was not "contrary to . . . the caselaw in this Circuit").

V. CONCLUSION

Defendants' motion for relief from the Magistrate's Order should be denied.

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[6] Defendants contend that only materials considered by the agency in making its *substantive* decision are to be included in the Record. Defs' Mot. at 5 (Dkt. No. 94 at 7). But "the Record should include material relevant to the *process* of making [the agency's] final determination." *Miami Nation of Indians v. Babbitt*, 979 F. Supp. 771, 776 (N.D. Ind. 1996) (emphasis added). Courts routinely look to procedural documents in the record in evaluating notice-and-comment challenges. *See, e.g., North Carolina Growers Assn., Inc. v. United Farm Workers*, 702 F.3d 755, 765 (4th Cir. 2012) (concluding that challenged rule was legislative rule subject to notice and comment in light of procedural documents reflecting the "Department's own conduct . . . and . . . view[s] on whether it was engaged in 'rule making'"); *Mobil Oil Corp. v. United States Env. Prot. Agency*, 35 F.3d 579, 584 (D.C. Cir. 1994) (to promulgate rule, agency must either provide notice and comment or satisfy APA's "good cause" exception: "Such a finding . . . must be made by the agency and supported in the record; it is not self-evident."). Defendants cite *National Association of Chain Drug Stores v. U.S. Department of Health & Human Services*, 631 F. Supp. 2d 23 (D.D.C. 2009), but that case is not to the contrary. That court, logically, did not require the record to include procedural documents because the plaintiffs did not challenge the agency's procedure for adopting its rule (the agency there provided for public comment). Defendants have identified no controlling authority that prohibits the inclusion of procedural materials in a Record. *See Perry v. Schwarzenegger*, 268 F.R.D. 344, 348 (N.D. Cal. 2010) (magistrate judge's order not "contrary to law" where "no rule prevent[ed]" it).

Dated: January 29, 2016

By: */s/ Linda Lye*

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FILER'S ATTESTATION

I, Nicole R. Sadler, am the ECF user whose identification and password are being used to file this PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR RELIEF FROM NON-DISPOSITIVE PRETRIAL ORDER OF MAGISTRATE JUDGE. Pursuant to L.R. 5-1(i)(3), I hereby attest that concurrence in the electronic filing of this document has been obtained from each of the other signatories.

Dated: January 29, 2016 By */s/ Nicole R. Sadler*
Nicole R. Sadler