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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,[1] 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)

NOTICE OF MOTION AND MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' SPECIAL MOTION TO ESTABLISH RIGHT TO DISCOVERY ON THE DEPARTMENT OF JUSTICE'S STANDARD FOR SUSPICIOUS ACTIVITY REPORTING

Hearing Date:	August 20, 2015
Time:	1:30 p.m.
Judge:	Hon. Richard Seeborg
Courtroom:	3, 17th Floor
Date of Filing:	July 10, 2014
Trial Date:	None Set

[1] In light of Ms. Lynch's swearing in as Attorney General on April 27, 2015, she is automatically substituted as a Defendant in this action in place of Eric Holder. *See* Fed. R. Civ. P. 25(d).

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NOTICE OF SPECIAL MOTION TO ESTABLISH RIGHT TO DISCOVERY

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on August 20, 2015, at 1:30 p.m., or as soon thereafter as the matter may be heard before the Honorable Richard G. Seeborg, in the District Court for the Northern District of California, in Courtroom 3—17th Floor, Plaintiffs will and hereby do move for an order affirming that they are entitled to obtain discovery from Defendants Loretta Lynch and Department of Justice ("DOJ") related to the DOJ's standards and systems for suspicious activity reporting. Pursuant to the parties' stipulation (Dkt. No. 48), the parties have agreed upon the following briefing schedule: Defendants' opposition shall be due on July 10, 2015, and Plaintiffs' reply in support of the above motion shall be due on July 30, 2015.

I. INTRODUCTION

Plaintiffs bring this motion at the Court's invitation to establish their entitlement to discovery on key allegations in this case—that Defendant Department of Justice ("DOJ") has adopted a standard for "suspicious activity reporting" in violation of several provisions of the Administrative Procedure Act. Defendants have resisted discovery on two grounds: (1) that the alleged standard does not exist; and (2) if it did exist, the correct course would be for Defendants to compile an administrative record, rather than respond to discovery. As explained below, Defendants are wrong on both counts.

Through the Nationwide Suspicious Activity Reporting Initiative ("NSI"), federal, state, local, and tribal law enforcement entities collect and share so-called "suspicious activity reports" or "SARs." The vague and broad standards used in this domestic surveillance program encourage racial and religious profiling and the targeting of First Amendment-protected activities. Using these broad standards, the government is stockpiling information about innocent Americans—including Plaintiffs—in vast counterterrorism databases, with no demonstrable benefit to the fight against terrorism. In this action, Plaintiffs challenge the standards issued by Defendants for the collection, maintenance, and dissemination of SARs because they violate the Administrative Procedure Act ("APA") in at least two ways. First, the SAR standards issued by the Program Manager for the Information Sharing Environment ("ISE") and the DOJ are arbitrary, capricious, and contrary to law because they conflict with and undermine requirements of a binding federal regulation, 28 C.F.R. Part 23. *See* 5 U.S.C. § 706. Second, the standards are legislative rules, but were issued without following required APA notice-and-comment procedures. *Id.* at § 553.

ISE Functional Standard 1.5 ("PM-ISE SAR standard") defines "suspicious activity" as "[o]bserved behavior *reasonably indicative* of pre-operational planning related to terrorism or other criminal activity." Compl., Dkt. No. 1 ¶ 44. The DOJ defines "suspicious activity" even more broadly, as "observed behavior that *may be indicative* of intelligence gathering or pre-operational planning related to terrorism, criminal or other illicit intention." *Id.* ¶ 54.[2] Both of

[2] Defendants claim the language quoted in the Complaint has been updated since the lawsuit began. Plaintiffs discuss the import of this alleged update in § III(A)(4) below.

these definitions conflict with 28 C.F.R. Part 23, which prohibits criminal intelligence systems that receive certain federal funding (including state and local systems that participate in the NSI) from collecting and maintaining intelligence information about individuals unless "there is reasonable suspicion that the individual is involved in criminal conduct or activity and the information is relevant to that criminal conduct or activity." 28 C.F.R. § 23.20(a). By issuing standards that conflict with and undermine a binding federal regulation, both agencies have engaged in action that is arbitrary, capricious, and not in accordance with law. *See* 5 U.S.C. § 706. Defendant DOJ's SAR standard runs afoul of a basic rule of administrative law, that an agency must follow its own regulations. *See, e.g.*, *Service v. Dulles*, 354 U.S. 363, 372 (1957) ("regulations validly prescribed by a government administrator are binding upon him as well as the citizen"), *citing United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954)).

Defendants contend that there is no DOJ SAR standard separate from the PM-ISE SAR standard and that Plaintiffs have not sufficiently alleged the separate existence of the DOJ SAR standard to trigger Defendants' obligation to respond to discovery. But this is simply a dispute with the facts alleged in Plaintiffs' well-pleaded Complaint, not a basis for Defendants to avoid their discovery obligations. Indeed, the purpose of discovery is to reveal evidence that allows the Court to resolve such disputes. Moreover, Plaintiffs' factual allegations related to the DOJ SAR standard are both sufficient and supported by public documents, including agency statements.

Defendants' next argument—that to the extent that a separate DOJ standard exists, the agency should be given the opportunity to compile an administrative record rather than respond to discovery—also fails. Having disclaimed the existence of a DOJ SAR standard, Defendants are precluded from creating a self-serving, *post hoc* administrative record for that disputed standard. The APA requires that the Court engage in a "substantial inquiry" and "thorough, probing, in-depth review" of the agency actions challenged in this case. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) ("*Overton Park*"), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). The Court should therefore direct Defendants to respond to requests that are reasonably calculated to lead to the discovery of admissible evidence in the litigation of Plaintiffs' APA claims related to the DOJ SAR standard.

II. BACKGROUND

A. Procedural History

Plaintiffs filed their Complaint in this matter on July 10, 2014, alleging in part that the ISE and DOJ had issued separate standards for SAR reporting, and that the DOJ's "may be indicative" SAR standard is even broader than the ISE's "reasonably indicative" Functional Standard 1.5. Compl., Dkt. No. 1 ¶¶ 44, 54-55. Plaintiffs sought declaratory and injunctive relief for arbitrary and capricious agency action and failure to observe required public notice-and-comment procedures in violation of the APA. *Id.* ¶¶ 34-37.

Defendants moved to dismiss the Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on October 16, 2014. Defendants conceded in the motion that "[t]here were initially two systems—called ISE Shared Spaces and eGuardian—that allowed sharing of ISE-SARs among NSI participants," but asserted that "the program was migrated to a single database, the SAR Data Repository maintained by the Federal Bureau of Investigation ('FBI') in its eGuardian Threat Tracking System ('eGuardian')." Defs.' Mot. to Dismiss, Dkt. No. 21 at 8-9. Defendants further contended that the FBI had released an "updated privacy impact assessment" that "uses the same definition of 'suspicious activity' as that in the current Functional Standard." *Id.* at 10, citing Privacy Impact Assessment for the eGuardian System (Jan. 4, 2013) ("2013 eGuardian PIA").[3] In denying Defendants' motion to dismiss, the Court acknowledged the factual dispute between the parties as to whether Defendants had employed differing SAR systems, standards, and protocols, but it concluded that the dispute was not relevant to the issues raised in the motion. *See* Order Denying Mot. to Dismiss, Dkt. No. 38 at 2.

The Court held a case management conference on March 12, 2015. Dkt. No. 41. At the conference, counsel for Defendants maintained that discovery on the merits of Plaintiffs' APA claims should be limited to the administrative record, and the Court ordered Defendants to provide an administrative record for the PM-ISE SAR standard within 90 days. *Id.* As to the DOJ SAR standard, counsel for Defendants represented that the DOJ had not issued a SAR standard

[3] For the Court's convenience, the 2013 eGuardian PIA is attached as Exhibit A to the Declaration of Hugh Handeyside ("Handeyside Decl."), filed herewith.

that differed from the PM-ISE SAR standard and therefore no administrative record existed. Plaintiffs stated that the government's position made immediate discovery on the DOJ SAR standard appropriate and necessary. In response, Defendants claimed that Plaintiffs had not alleged sufficient facts to create an obligation for Defendants to respond to discovery on the DOJ SAR standard. The Court invited Plaintiffs to address the dispute between the parties via an affirmative motion setting forth Plaintiffs' position as to their right to obtain discovery related to the DOJ SAR standard.[4]

Defendants answered Plaintiffs' Complaint on April 24, 2015. Dkt. No. 46-1. Defendants denied Plaintiffs' allegations that the DOJ, through the FBI, had issued a standard for SAR reporting that lacked a reasonable suspicion requirement and that was even broader than the PM-ISE SAR standard. *See* Answer, Dkt. No. 46-1 ¶¶ 53-55; Compl., Dkt. No. 1 ¶¶ 53-55. In denying Plaintiffs' allegations, Defendants referred the Court to the updated privacy impact assessment. Answer, Dkt. No. 46-1 ¶ 54.

B. Overview of ISE and DOJ Agency Actions Creating SAR Standards and SAR Sharing Systems[5]

The Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA") required the establishment of the Information Sharing Environment and designation of an individual to serve as its Program Manager. IRTPA, Pub. Law 108-458, 118 Stat. 3638 (2004). IRTPA charged the ISE Program Manager with issuing governmentwide "policies, procedures, guidelines, rules, and standards as appropriate to foster the development and proper operation of the ISE." *Id.* § 1016(f)(2)(A)(ii). Pursuant to that authority, the Program Manager issued Functional Standards

[4] Defendants conceded at the case management conference that discovery related to jurisdictional issues, such as standing, is appropriate in an APA case. The instant motion is confined to arguments related to the propriety of discovery on the merits of Plaintiffs' APA claim regarding the DOJ SAR standard and does not bear on whether discovery will be appropriate to supplement the administrative record on the PM-ISE SAR standard.

[5] The procedural posture of this motion is unusual, as Plaintiffs are asserting their rights to take discovery based on the allegations of the Complaint outside the typical motion to dismiss and discovery motion contexts. Plaintiffs refer to publicly available information and facts outside the Complaint to provide useful context, but stress that factual findings would be premature at this time. Plaintiffs reserve their right to seek future discovery on matters not raised in this motion and to present evidence not referenced herein as appropriate in later stages of this litigation.

to govern the maintenance and sharing of suspicious activity reports among law enforcement agencies across the country. A system called "Shared Spaces" was developed and implemented for the sharing of SARs under the ISE's Functional Standard.[6] During the same timeframe, the DOJ, through its components, launched a separate and parallel suspicious activity report sharing system with different SAR standards and privacy protections. Since that time, ISE and DOJ have repeatedly taken parallel—rather than joint—agency actions, using different language and announcing revisions to their respective SAR rules at different points in time.

The ISE Program Manager issued Functional Standard 1.0 in January 2008, defining suspicious activity as "observed behavior that may be indicative of intelligence gathering or pre-operational planning related to terrorism, criminal, or other illicit intention." Handeyside Decl., Exh. B at 2. The Program Manager issued a revised standard, Functional Standard 1.5, in May 2009. *See* Compl., Exh. D, Dkt. No. 1 at 53-88. Functional Standard 1.5 defined suspicious activity as "observed behavior reasonably indicative of pre-operational planning related to terrorism or other criminal activity." *Id.* at 58. That standard also expanded so-called "privacy fields" in Shared Spaces designed to limit the sharing of personally identifiable information. *Id*. at 64 (Functional Standard 1.5 § I(F), p. 12).

In January 2009—a year after the Program Manager issued Functional Standard 1.0—DOJ component FBI launched eGuardian, an unclassified version of the FBI's preexisting Guardian program for collecting and reviewing SARs. *See* Privacy Impact Assessment for the eGuardian Threat Tracking System ("2008 eGuardian PIA"), Compl., Exh. E, Dkt. No. 1 at 91. The 2008 eGuardian PIA stated that eGuardian's purpose is to make SARs "accessible to specially-vetted representatives of other federal law enforcement partners and SLT [state, local,

[6] The development and implementation of the Information Sharing Environment and ISE's Shared Spaces servers are described in a number of government documents, including documents prepared by the ISE Program Manager. *See, e.g.*, *Nationwide Suspicious Activity Reporting Initiative Concept of Operations* (Dec. 2008) at 21 ("ISE Shared Spaces are networked data and information repositories used to make standardized terrorism-related information, applications, and services accessible to all ISE participants . . . . [A]lthough accessible by other authorized ISE individuals and organizations, the Shared Space remains under the management and control of the organization submitting the terrorism-related information—in the particular case of the NSI, ISE-SARs"). An excerpt of this document is attached to the Handeyside Declaration as Exhibit Q.

and tribal] law enforcement partners." *Id.* For the collection and sharing of SARs via eGuardian, the FBI adopted the definition of "suspicious activity" from ISE Functional Standard 1.0: "observed behavior that may be indicative of intelligence gathering or pre-operational planning related to terrorism, criminal or other illicit intention." *Id.* at 95. The FBI did not revise its definition of "suspicious activity" in the 2008 eGuardian PIA for at least four years, despite the ISE Program Manager's issuance of Functional Standard 1.5 in 2009. Defendants assert that the FBI issued the 2013 eGuardian PIA in 2013 and adopted an additional update in 2014. Answer, Dkt. No. 46-1 ¶ 54. As set forth in detail below, the 2013 eGuardian PIA appears on its face to include a SAR standard broader than the ISE Functional Standard 1.5.[7]

III. ARGUMENT

Plaintiffs are entitled to discovery as to the existence and scope of the DOJ's SAR standard. Defendants deny that the DOJ SAR standard exists, but they cannot foreclose discovery simply by disputing the well-pleaded allegations of the Complaint. Those allegations—which the Court has already ruled sufficient to withstand Defendants' motion to dismiss—expressly allege that the DOJ has a standard for vetting SARs that exists separately from the PM-ISE SAR standard, and they provide ample detail on the DOJ's standard and the eGuardian SAR system. These allegations are drawn from publicly-available information illustrating the parallel but separate agency actions the ISE and DOJ have taken to create and implement SAR standards and sharing systems.[8] Factual details related to the content, adoption, and promulgation of the DOJ's SAR standard are the subject of dispute between the parties and are relevant to Plaintiffs' claims.

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[7] According to Defendants, the ISE Program Manager has updated the Functional Standard since the filing of this litigation. Answer, Dkt. No. 46-1 ¶ 42. Functional Standard 1.5.5, issued in March 2015 and after this litigation was filed, defines "suspicious activity" as "[o]bserved behavior reasonably indicative of pre-operational planning *associated with* terrorism or other criminal activity," which differs from the wording from the 2013 eGuardian PIA definition: "observed behavior reasonably indicative of pre-operational planning *related to* terrorism or other criminal activity." Handeyside Decl., Exhs. C at 4 and A at 3 (emphasis added in both excerpts).

[8] As explained *infra* § III(A)(4), even the 2013 eGuardian PIA to which Defendants have referred the Court supports Plaintiffs' allegations that the standard departs from, and is broader than, the ISE Functional Standard. Moreover, even if DOJ adopted the *same* SAR standard as the ISE Functional Standard, the DOJ's agency action adopting that rule would be subject to judicial scrutiny under the APA.

Discovery is necessary for the resolution of these disputes.

Defendants will likely argue, as they have with respect to the PM-ISE SAR standard, that judicial review of the DOJ standard should be limited to the administrative record. But this nonsensical position would entail the DOJ assembling, *post hoc* and in response to a litigation challenge, a record for a rule it denies exists. The general rule limiting review of agency action to an administrative record plainly does not apply in this instance.

A. Plaintiffs Are Entitled to Discovery on the DOJ SAR Standard.

1. The Complaint Explicitly Alleges a DOJ SAR Standard that Is Separate from, and Broader than, the PM-ISE SAR Standard.

Defendant DOJ's SAR standard is subject to discovery for the straightforward reason that Plaintiffs have sufficiently alleged the existence of a separate standard and those allegations are relevant to Plaintiffs' claims. Defendants contend that no separate DOJ standard exists and that Plaintiffs therefore are not entitled to discovery related thereto, but this factual dispute is precisely why discovery is necessary and appropriate.

Once a plaintiff has alleged a claim for relief that is plausible on its face and meets the requirements of Federal Rule of Civil Procedure 8, the plaintiff is entitled to discovery on "any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1); *see also Republic of Arg. v. NML Capital, Ltd.*, --- U.S. ---, 134 S. Ct. 2250, 2254 (2014) (quoting Rule 26(b)(1) as "[t]he general rule in the federal system"). The definition of "relevant" in the context of discovery has "been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

Here, Plaintiffs allege in the Complaint that "Defendant DOJ, through its components, has issued a standard for SAR reporting" that—unlike 28 C.F.R. Part 23—does not require reasonable suspicion of criminal activity. Compl., Dkt. No. 1 ¶ 53. Plaintiffs also allege that "DOJ's 'may be indicative' SAR standard is even broader than PM-ISE's 'reasonably indicative' Functional Standard 1.5." *Id.* ¶ 55. In support of the allegation that the DOJ SAR standard is broader than the ISE standard, Plaintiffs cite to a 2013 report on the NSI by the Government Accountability Office

("GAO").[9] *See infra* § III(A)(2)(a). In addition, the Complaint provides numerous examples of documents issued by DOJ components that describe as "suspicious," behavior that is *not* covered by the ISE's categories of suspicious behavior. Compl., Dkt. No. 1 ¶¶ 56-58, Exhs. F-J; *see infra* § III(A)(2)(b). Plaintiffs also allege that the DOJ, through its components, "trains participants in the NSI about DOJ's SAR Standard," and "reinforces [the DOJ's] broader standard through the trainings," again providing details and support through citation to the GAO Report. Compl., Dkt. No. 1 ¶¶ 59, 64. Furthermore, Plaintiffs alleged, again citing the GAO Report, that the DOJ set forth its SAR standard in the FBI's 2008 eGuardian PIA and reinforced its standard for SAR reporting through training materials and publications. *Id*. ¶¶ 65-67.

Given these allegations, discovery is plainly warranted under the familiar Rule 26 standard. No matter how vigorously they may dispute Plaintiffs' well-pleaded allegations, Defendants cannot deprive Plaintiffs of discovery on the DOJ SAR standard merely by denying that it exists. Discovery as to the creation and implementation of the DOJ SAR standard, including records related to DOJ's consideration (or lack of consideration) of 28 C.F.R. Part 23 in its development of the standard, training on the standard to fusion centers and others, enforcement of the standard, and use of the standard by entities covered by 28 C.F.R. Part 23, among other issues, are all relevant to the ultimate determinations required in this case: whether the DOJ SAR standard is arbitrary, capricious, and contrary to law and whether the DOJ SAR standard is a legislative rule that was promulgated without notice and comment. At an even more basic level, discovery on the DOJ SAR standard bears on whether the agency took the challenged action at all. Defendants bear the "heavy burden" of demonstrating why discovery should be denied. *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990) (a party seeking to prevent discovery "carries the heavy burden of making a 'strong showing' why discovery should be denied") (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)).[10] They cannot

[9] United States Government Accountability Office, "Information Sharing: Additional Actions Could Help Ensure That Efforts to Share Terrorism-Related Suspicious Activity Reports Are Effective" (Mar. 2013), Handeyside Decl., Exh. D ("GAO Report").

[10] *See also Moua v. Int'l Bus. Machines Corp.*, No. CV 10-1070 EJD (PSG), 2013 WL 1165025, at *1 (N.D. Cal. Mar. 20, 2013). In that case, the defendant resisted plaintiff's attempt to propound discovery by arguing that the court should not allow "conclusory allegations in her

meet that burden here. Plaintiffs have provided detailed allegations supported by government records, and the Court has already ruled that Plaintiffs' allegations are sufficient to survive Defendants' motion to dismiss. *See* Order Denying Mot. to Dismiss, Dkt. No. 38. Moreover, as set forth in greater detail below, publicly available documents, including Defendants' own agency statements, support Plaintiffs' allegations.

2. The Complaint Incorporates by Reference Government Documents that Support the Allegations Regarding the Existence of a Separate DOJ SAR Standard.

As summarized above, Plaintiffs' allegations regarding the existence of a separate DOJ SAR standard are supported by government documents, which are incorporated by reference into the Complaint.[11]

a. GAO Report

In March 2013, the GAO issued a report of its audit of the NSI. Handeyside Decl., Exh. D. The report recognized throughout that the ISE Functional Standard and the DOJ SAR standard differ, and that the Shared Spaces and eGuardian SAR systems exist separately. *See* Compl., Dkt. No. 1 ¶¶ 54-55, 63-64.

The report explained that, "[a]ccording to FBI officials, the FBI uses the criteria in the eGuardian Privacy Impact Assessment (dated November 25, 2008) and the FBI's Domestic Investigations and Operations Guide to determine if SARs have a potential nexus to terrorism." Handeyside Decl., Exh. D at 6 n.10; cited at Compl., Dkt. No. 1 ¶ 54.[12] Moreover, the report

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complaint to 'unlock the doors of discovery.'" *Id.* The court rejected that argument, recognizing that the plaintiff "is not defending her complaint in this court; she is seeking discovery on that complaint." *Id.* The court therefore concluded that its obligation was to "assess whether . . . [plaintiff's] requests are relevant to the claims in her complaint, not to determine beforehand the merit of those claims." *Id.* Here, as in *Moua*, Defendants should not be permitted to evade discovery by attempting to recast the nature of the inquiry and shift the burden of proof onto Plaintiffs.

[11] "[M]aterial which is properly submitted *as part of the complaint* may be considered on a motion to dismiss … if the complaint specifically refers to the document and if its authenticity is not questioned." In addition, "a court ruling on a motion to dismiss may consider the full texts of documents which the complaint quotes only in part." *Cooper v. Pickett*, 137 F.3d 616, 622-23 (9th Cir. 1997) (internal quotation marks, citation omitted).

[12] As explained above, the 2008 eGuardian PIA utilizes a definition of suspicious activity that is identical to ISE Functional Standard 1.0. *See* Compl., Exh. E, Dkt. No. 1 at 91. The GAO report did not specify which part of the Domestic Investigations and Operations Guide ("DIOG") the

made clear that the FBI elicited SARs that generally have a "potential nexus to terrorism," rather than being limited to the PM-ISE Functional Standard criteria:

> . . . FBI officials from headquarters and all seven JTTFs we interviewed said that they had concerns that the FBI may not be receiving all available terrorism-related information because some fusion centers may share only ISE-SARs with the FBI—that is, SARs that have been determined to have a potential nexus to terrorism consistent with the Functional Standard criteria. ***They explained that the Functional Standard criteria are not as broad as the FBI's guidelines for investigating terrorism-related information***. For example, FBI headquarters officials said that certain terrorism-related activities—such as those related to terrorist financing, known terrorism subject location, and past terrorism event information—currently are not among the behavior-based criteria in the Functional Standard but would meet the FBI's guidelines.

Handeyside Decl., Exh. D at 15 (emphasis added); *see also* Compl., Dkt. No. 1 ¶ 55. The GAO report also supports Plaintiffs' allegations that the FBI trains other law enforcement entities on its broader standard: "Officials from four of the [FBI Joint Terrorism Task Forces] we interviewed said that they had coordinated with the fusion centers in their jurisdictions to inform the fusion centers that they should provide all potentially terrorism-related information and not just ISE-SARs that met the Functional Standard." Handeyside Decl., Exh. D at 16; *see* Compl., Dkt. No.1 ¶ 64.

The GAO report provides evidence of vastly different outcomes depending on whether the DOJ or PM-ISE SAR standard is applied. One fusion center the GAO audited "had provided [the FBI] approximately 270 suspicious incident reports containing potentially terrorism-related information from June 2011 to October 2012, but only about 10 percent of them met the Functional Standard and were entered into Shared Spaces by the fusion center." Handeyside Decl., Exh. D at 16; cited at Compl., Dkt. No.1 ¶ 63. According to the report, the extent to which fusion centers submit SARs including all "potentially terrorism-related information" sought by the FBI or limit their SAR submissions to the PM-ISE SAR standard varied. *Id.* Thus, it was clear from the GAO's audit that the FBI and the ISE used and promoted substantively different

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FBI uses for "suspicious activity" and the DIOG itself does not reference that term. But it is notable that the DIOG allows the FBI to conduct investigative activity through "assessments" with "no particular factual predication," and thus sets a standard far lower than reasonable suspicion. Handeyside Decl., Exh. E (2011 DIOG § 5.1).

definitions of "suspicious activity" for the purpose of collecting, maintaining, and disseminating SARs.

b. Other DOJ Guidance Citing Suspicious Activity Outside the ISE Functional Standard

As further set forth in the Complaint, documents issued by DOJ components describe behaviors as "suspicious" and appropriate for reporting even though they are not included in the categories of suspicious behavior set forth in the PM-ISE SAR standard. For example, a "roll call release" dated July 26, 2010, bearing the seals of the Department of Homeland Security ("DHS") and the FBI defines the following behaviors, among many others, as "potential indicators of terrorist activity" in hotels:

- Not providing professional or personal details on hotel registrations—such as place of employment, contact information, or place of residence;
- Using payphones for outgoing calls or making front desk requests in person to avoid using the room telephone.

Handeyside Decl., Exh. F; Compl., Exh. F, Dkt. No. 1 at 116.[13] The FBI also issued a "Terrorism Quick Reference Card" that includes the following as suspicious behavior:

- No obvious signs of employment;
- Persons not fitting into the surrounding environment, such as wearing improper attire for the location;
- Persons exhibiting unusual behavior such as staring or quickly looking away from individuals or vehicles as they enter or leave designated facilities or parking areas;
- A blank facial expression in an individual may be indicative of someone concentrating on something not related to what they appear to be doing.

Handeyside Decl., Exh. G at 1, 4; Compl., Exh. G, Dkt. No. 1 at 118, 121. A "Communities Against Terrorism" flyer directed toward the general public that bears the seal of the Bureau of Justice Assistance—another DOJ component—includes "people acting suspiciously" and "people in places where they do not belong" among behaviors that should be considered suspicious. Handeyside Decl., Exh. H; Compl., Exh. H, Dkt. No. 1 at 128. Plaintiffs' Complaint specifically

[13] The documents referenced in this section are attached to the Complaint and incorporated therein by reference. For the Court's convenience, they are also attached as Exhibits to the Handeyside Declaration filed in support of this motion.

alleged that such activity is *not* included among the categories of behavior enumerated in the PM-ISE SAR standard. Compl., Dkt. No. 1 ¶¶ 56-58, 62.

3. Publicly Available Documents Illustrate a History of ISE and DOJ Maintaining Separate SAR Systems, Governed by Different Standards.

Plaintiffs' allegations and Defendants' denials as to those allegations suffice on their own to warrant discovery into the DOJ SAR standard, and Plaintiffs have no obligation to supplement those allegations. However, without prejudice to their ability to further develop facts and argument through discovery, Plaintiffs note that additional publicly-available information provides useful context for understanding the separate DOJ and PM-ISE SAR standards by showing that the DOJ SAR standard was created and implemented through the FBI's launch of a separate SAR system, through separate agency action.

After the ISE Program Manager developed the Functional Standard and Shared Spaces in 2007 and 2008—and despite the Program Manager's legislative mandate to issue "governmentwide" standards—the DOJ, through the FBI's eGuardian platform, created a separate suspicious activity reporting system with standards, processes, and privacy protections that differed from those that the Program Manager had promulgated. In September 2008 (nine months after ISE issued Functional Standard 1.0 and three months before ISE issued Functional Standard 1.5), the FBI announced plans to create eGuardian. The FBI's press release did not mention the NSI or the ISE, but instead described eGuardian as "a spin-off of a similar but classified tool called Guardian that we've been using inside the Bureau—and sharing with vetted partners—for the past four years." Handeyside Decl., Exh. I. In its promotional materials, the FBI presented eGuardian as an alternative and competing SAR sharing system. For example, one eGuardian brochure extols the benefits of eGuardian to participating agencies, explaining that eGuardian "differ[s] from other threat databases" because (1) eGuardian shares "potential terrorist threats, terrorist events, and suspicious activity information with state, local, tribal, and federal law enforcement agencies; state fusion centers; and your local FBI JTTF" and (2) "eGuardian is the only system that allows law enforcement partners to access unclassified data from Guardian." *Id.*, Exh. J at 3. Federal agency presentations to regional groups also presented the systems as

alternatives. For instance, an outline and cover email for a fusion center presentation in August 2009 referenced the choice particular fusion centers might make between "Shared Space *or* eGuardian." *Id.*, Exh. K (emphasis added); *see also id.*, Exh. L at 7 (powerpoint presentation showing eGuardian as SAR sharing system competing with Shared Space).

Moreover, although Congress charged the PM-ISE with creating consistent standards and procedures for federal, state, local, tribal, and private information sharing, *see* IRTPA § 1016(f)(2)(A)(iii), differences between the eGuardian and Shared Space platforms—namely privacy and retention policies—led some local jurisdictions to reject eGuardian in favor of the ISE's Shared Spaces system. Email messages obtained through Freedom of Information Act litigation show that several fusion centers and state and local law enforcement agencies resisted using eGuardian because of concerns over the lack of guidance for eGuardian SARs, the sufficiency of eGuardian privacy protections, and the FBI's lengthy retention of data. Handeyside Decl., Exh. M (email dated 10/1/09 to NSI Director regarding whether a particular local jurisdiction would participate in eGuardian absent privacy policy and considering option of limiting FBI access to SARs submitted to Shared Space by that jurisdiction); Exh. N (email from NSI Director dated 8/15/2011 documenting that state and local representatives walked out of a meeting when the FBI representative told them they should "send everything to the FBI without exercising any review, etc."); Exh. O (email dated 11/3/2011 from NSI Director reporting advancement in the business processes that govern "privacy, retention, and redress issues associated with SAR information being provided to the FBI Guardian system" in response to concerns raised by fusion centers). It is clear from these emails that differences between the FBI and ISE standards and policies were significant to state and local participants. *See id.*, Exh. P (email thread dated 1/7/2012 noting that authorities in several states were uncomfortable having SARs that they submit to Shared Spaces forwarded to eGuardian).

The GAO Report also set forth in detail how the existence of parallel but different SAR standards, privacy protections, and technical features of the Shared Spaces and eGuardian systems met different needs for different NSI participants.

According to PM-ISE officials, Shared Spaces was created in part based

> on fusion centers' feedback indicating that having control over the ISE-SARs they submit was essential for complying with state and local laws, regulations, and policies that are intended to protect the privacy rights of individuals in their jurisdiction. The officials added that eGuardian was not sufficient for providing that control.

Handeyside Decl., Exh. D at 20; *see also id.* at 19 fig. 2 (enumerating differences between the systems). According to the GAO Report, "PMO [ISE Program Management Office] officials said that Shared Spaces and eGuardian should both continue to exist since Shared Spaces provides fusion centers with exclusive control over the ISE-SARs they submit and eGuardian serves the FBI's investigative needs." *Id.* at 20. That the DOJ has long been aware of these formal differences between the FBI's and the ISE Program Manager's SAR systems is also clear from the GAO Report, which states, "representatives from the PM-ISE, DOJ, DHS, [and] FBI . . . have participated in efforts that formally recognize the two-system approach." *Id.* at 21.

Understanding that eGuardian was established as a parallel and separate system with different processes and privacy protections provides useful context for illustrating that—despite efforts toward harmonization—the DOJ, through its components, created and implemented a SAR standard different from, and broader than, the PM-ISE SAR standard. The two agencies have engaged in parallel but separate agency actions with respect to SAR sharing between federal, state, local, and tribal law enforcement agencies, including separate standards governing what SARs may be collected and shared.

4. FBI's 2014 eGuardian Privacy Impact Assessment Retains a Standard Different from and Broader than the ISE Functional Standard.

Defendants appear to concede that eGuardian, as a system for collecting and reporting SARs, existed separately from ISE's Shared Spaces. Defs.' Mot. to Dismiss, Dkt. No. 21 at 8. They nonetheless assert ambiguously that "the program was migrated to a single database, the SAR Data Repository maintained by the Federal Bureau of Investigation ('FBI') in its eGuardian Threat Tracking System ('eGuardian')," and that the FBI now "uses the same definition of 'suspicious activity' as that in the current Functional Standard." *See* Defs.' Mot. to Dismiss, Dkt. No. 21 at 8-9, 10. Even if these assertions were true, they would not undermine Plaintiffs'

entitlement to discovery. Indeed, the FBI did not update its eGuardian PIA for four years after the ISE issued Functional Standard 1.5. *See supra* § II(B). And even if DOJ had decided to adopt the PM-ISE SAR standard, Plaintiffs would still be entitled to discovery related to *that* agency action because Plaintiffs have alleged that the ISE standard conflicts with and undermines a binding DOJ regulation, and DOJ's adoption of it would violate the APA. Nonetheless, it is worth noting that the document to which Defendants refer the Court in support of these contentions—the 2013 eGuardian PIA—does not appear to bear them out.

As an initial matter, the 2013 eGuardian PIA does not fully support the FBI's assertion that "the program" has been "migrated" to a single database. Rather, the PIA states that "interconnectivity with other systems for the purposes of sharing information outside of the eGuardian system is limited to the PM/ISE Shared Spaces and the FBI [classified] Guardian system," raising questions about the continued viability of the ISE Shared Spaces. Handeyside Decl., Exh. A at § 1(g). More fundamentally, the 2013 eGuardian PIA undercuts Defendants' contention that the FBI uses the same definition of "suspicious activity" that the Program Manager adopted in Functional Standard 1.5. The PIA states that for information to reported in eGuardian, it "must meet one of the following criteria:

> 1. It must be potentially related to a past activity associated with terrorism; or
>
> 2. It must be reasonably indicative of pre-operational planning related to terrorism or other criminal activity and have a potential nexus to terrorism. In this context, pre-operational planning describes activities associated with a known or particular planned operation or with operations generally (e.g. terrorist financing not necessarily tied to specific plots); or
>
> 3. It must exhibit reasonable suspicion that the subject of the information is involved in criminal activity and the information is relevant to that criminal conduct or activity. (28 C.F.R. Part 23)."

Id. at § 1(c). On its face, this standard appears broader than both the PM-ISE SAR standard and the prior, "may be indicative" standard that the FBI purportedly "updated" through the issuance of the 2013 eGuardian PIA. The first prong sets forth an expansive, ambiguous new category of suspicious activity—that which is "potentially related to past activity associated with terrorism"—as a sufficient basis for disseminating SARs independently of the Functional

Standard.[14] Moreover, even as it purports to incorporate the PM-ISE SAR standard in its second prong, it includes an example ("terrorist financing not necessarily tied to specific plots") that exceeds what is set forth in Functional Standard 1.5.[15] The third prong adopts the reasonable suspicion standard set forth in 28 C.F.R. Part 23 as an alternate criterion for suspicious activity reporting. Because the three prongs are framed in the disjunctive, inclusion of the third prong confirms that the FBI does not require participants in the NSI to satisfy the reasonable suspicion standard before sharing SARs related to terrorism if they meet either of the first two prongs.

Thus, the document Defendants cite in support of their contention that the DOJ uses the same definition of "suspicious activity" as the ISE Program Manager is ambiguous at best. Discovery regarding the DOJ SAR standard is required to ascertain the extent to which that standard continues to differ from the PM-ISE SAR standard, and the degree to which eGuardian incorporates policies and business practices that depart from those adopted by the ISE Program Manager.

Even if the DOJ and the ISE have harmonized the standards and processes governing their respective programs to varying degrees at various points in time, each has undertaken separate agency actions that Plaintiffs allege were arbitrary, capricious, and contrary law and lacked the necessary notice-and-comment procedures. In other words, whether or not the DOJ's current articulation of its standard is the same as the ISE Program Manager's, the DOJ has separately adopted a SAR standard and that standard undermines protections set forth in its own regulation. This adoption constitutes agency action subject to probing judicial scrutiny that should be aided by a full evidentiary record.

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[14] The 2013 eGuardian PIA also formalizes the FBI's policy, as revealed in the GAO Report, of receiving all SARs, regardless of whether they meet the PM-ISE SAR standard. *See* Handeyside Decl., Exh. A at § 1(b) ("Once an incident is SHARED or REPORTED the incident is sent to a FBI Supervisor to determine if a Guardian assessment will commence or not.")

[15] ISE Functional Standard 1.5.5 includes terrorist financing as a category of suspicious behavior but was not issued until March 2015, long after the DOJ finalized its 2013 eGuardian PIA. *See* Handeyside Decl., Exh. C. This suggests that DOJ may have prompted ISE's revisions in the most recent iteration, rather than the reverse. Under either circumstance, both agencies are engaged in separate agency actions and discovery is needed to uncover the details.

B. Discovery into the DOJ SAR Standard Is Necessary and Appropriate.

Based on Defendants' statements in the case management conference on March 12, 2015, Plaintiffs anticipate that Defendants will argue that if the Court holds that Plaintiffs have sufficiently alleged facts to support their claim that the DOJ adopted a SAR standard that conflicts with 28 C.F.R. Part 23, review should be limited to the "administrative record" for that agency action. While this is a common approach in many APA cases, it is not the right course here for several reasons. First, the facts presented here differ fundamentally from the typical APA case in which review of agency action includes an actual administrative record upon which the agency action is based. Second, Defendants have taken the position that no separate DOJ SAR standard exists, despite detailed allegations in the Complaint which are supported by government-issued reports and agency statements. Having disclaimed the existence of a DOJ SAR standard, Defendants should not have the opportunity to retrospectively compile a self-serving administrative record. Indeed, the APA does not allow the creation of a *post hoc* record in response to litigation. Finally, even if DOJ could have created an administrative record earlier in the proceeding, discovery should go nevertheless go forward at this point. Defendants have already delayed this litigation by disputing the well-pleaded allegations of the Complaint and seeking to avoid judicial scrutiny of the DOJ SAR standard. Defendants should not be allowed to compile a "record" of an agency action they claim never occurred and further delay prosecution of Plaintiffs' claims.

"Generally, judicial review of an agency decision is limited to the administrative record *on which the agency based the challenged decision*." *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010) (emphasis added). Here, the agency has disclaimed making a decision, so there is no record upon which that non-decision could have been based. In fact, Defendants' disclaimer of responsibility for the DOJ SAR standard bolsters Plaintiffs' notice-and-comment claim. DOJ, through its components, adopted and implemented a rule without going through the rulemaking process that the APA requires to promote government transparency and accountability.[16] Plaintiffs' Third Claim for Relief challenges Defendants' avoidance of the very

[16] In addition to rulemaking challenges, one of the most common types of APA challenges is the

APA notice-and-comment process that would have created an administrative record for the Court to review with respect to the substance of the DOJ SAR standard. Compl., Dkt. No. 1 ¶ 166.

The Eighth Circuit considered a similar situation in *Iowa League of Cities v. Environmental Protection Agency*, 711 F.3d 844 (8th Cir. 2013). There, the plaintiff challenged the EPA's informal implementation of expectations for water treatment processes that conflicted with both the Clean Water Act and previously-promulgated EPA regulations, based on the agency's failure to comply with the APA's notice-and-comment requirements. Like Defendants here, the EPA disclaimed the effect of its agency action. *See id.* at 864 ("The EPA asks us to believe that the June 2011 letter did not flatly prohibit [particular conduct]" because of ambiguity in the letter despite other agency communications implementing the prohibition as a rule governing water treatment). In considering a motion to supplement the administrative record in that case, the court noted that where "rulemaking masquerading as explication is alleged, the informality of the agency's decisionmaking process makes the possibility of a sparse 'contemporaneous administrative record' more likely." *Id*. at 864 n.13. The court noted that the rationale for limiting review to the administrative record was not supported in such a case and questioned, without deciding, whether the general rule would apply.

Here, permitting discovery on the DOJ's SAR standard is the only reasonable way to proceed. Remand to the agency to produce the administrative record would be inappropriate because, as discussed above, Defendants maintain that the DOJ has not promulgated a SAR standard through agency action. Without agency action, there can be no administrative record and Defendants cannot now attempt to create one. It is axiomatic that the "focal point for judicial review [of challenged agency action] should be the administrative record *already in existence*, not some new record made initially with the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam) (emphasis added). Indeed, any affidavits or other materials that Defendants

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challenge to an agency adjudication. These also typically generate an administrative record upon which judicial review can be based. *See* 5 U.S.C. § 554(a) (agency adjudication "to be determined on the record after opportunity for an agency hearing") *and* 5 U.S.C. § 554(c) (requiring agency to provide interested parties opportunity for submission and consideration of facts for adjudicatory action).

would seek to create for purposes of this litigation would be nothing more than "'post hoc' rationalizations," which courts have found to be an inadequate basis for review. *Overton Park*, 401 U.S. at 419.

Thus, Plaintiffs maintain that Defendant DOJ cannot retroactively create an administrative record for an agency action it disclaims. Nonetheless, assuming Defendants seek such an opportunity, Plaintiffs also oppose it on efficiency grounds. There are important exceptions to the general rule limiting judicial review of agency action to the administrative record produced by the agency. *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988).[17] Given the complicated history between the ISE and the DOJ summarized in this motion, the ever-changing SAR standards both agencies continually adopt without adherence to formal rule-making procedures, and DOJ's improper insistence that it could avoid judicial review by disputing well-pleaded allegations in the Complaint, Plaintiffs would likely seek to supplement any administrative record Defendants would create for the DOJ SAR standard. In order to do so, Plaintiffs need discovery to uncover information necessary to allow the Court to engage in the "substantial inquiry" and "thorough, probing, in-depth review" it must perform when reviewing challenged agency action. *Overton Park*, 401 U.S. at 416.[18] Because Defendants cannot compile

[17] Such circumstances include situations where, as here, "there is 'such a failure to explain administrative action as to frustrate effective judicial review.'" *Public Power Council v. Johnson*, 674 F.2d 791, 793 (9th Cir. 1982) (quoting *Camp*, 411 U.S. at 143); *see also Asarco, Inc. v. U.S. Envtl. Prot. Agency*, 616 F.2d 1153, 1159 (9th Cir. 1980) (courts may consider evidence outside the administrative record as necessary to explain agency action). "The notion is not that an inadequate explanation is grounds for *de novo* review by the court, but that further evidence—new evidence not in a previously compiled administrative record—may be necessary for a reviewing court to make a decision based on the whole record." Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 Admin. L. Rev. 333, 345 (1984). *See also Overton Park*, 401 U.S. at 415 (where the "bare record" at hand may not disclose the factors that the Secretary considered or his construction of the evidence, testimony from the administrative officials who participated in the decision may be required for effective review).

[18] In an APA challenge to agency action, the court looks for a "rational connection between the facts found and the choice [the agency] made." *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003). Although the court cannot substitute its judgment for the agency's, it must nonetheless be certain that the agency acted within the scope of its authority, and determine whether the "decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Overton Park*, 401 U.S. at 416; *see also Ocean Advocates v. Army Corps of Eng'rs*, 402 F.3d 846, 858–59 (9th Cir. 2005) (explaining review under

an administrative record for an action they claim did not occur, and because Defendants' unreasonable litigation positions have already delayed prosecution of Plaintiffs' claims, Plaintiffs seek the opportunity to proceed with discovery without further delay.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs seek an order affirming that they are entitled to obtain discovery from Defendants Loretta Lynch and Department of Justice related to the DOJ's standards and systems for suspicious activity reporting.

Date: June 4, 2015

Respectfully submitted,

/s/ Julia Harumi Mass

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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 NOTICE OF MOTION AND MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' SPECIAL MOTION TO ESTABLISH RIGHT TO DISCOVERY ON THE DEPARTMENT OF JUSTICE'S STANDARD FOR SUSPICIOUS ACTIVITY REPORTING. 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: June 4, 2015

By */s/Nicole R. Sadler*
Nicole R. Sadler