

EXHIBIT 5



July 28, 2015

Via Electronic and First Class Mail

Mr. Paul Freeborne (Paul.Freeborne@usdoj.gov)
Mr. Kieran Gostin (Kieran.Gostin@usdoj.gov)
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20004

Re: Gill, et al. v. Dep't of Justice, et al.
N.D. Cal. Case No. 3:14-cv-03120 (RS)

Dear Counsel,

We have reviewed the administrative record (“Record” or “AR”) that Defendants produced on the ISE’s Functional Standard and believe that the Record is woefully incomplete. In particular, the Record lacks numerous documents that the agency has explicitly acknowledged (both in the Record and in other public documents) that it considered in formulating the Functional Standard. It also lacks documents bearing on a number of issues before the Court. Completion of the Record under these circumstances is appropriate and necessary for the Court to conduct the “thorough, probing, in-depth review” with which it is tasked under the APA. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). In an effort to avoid additional motion practice, we write to request that Defendants complete the Record by including all documents that were considered in the agency’s formulation of the Functional Standard but that are not included in the Record it certified. In addition, we request a privilege log for those documents so withheld from the Record and that Defendants remove the redactions from the Record.

BEVERLY TUCKER, CHAIRPERSON | AJAY KRISHNAN, GEORGE PEGELOW, SHALINI SWAROOP, MICHAEL WASHINGTON VICE CHAIRPERSONS
ABDI SOLTANI, EXECUTIVE DIRECTOR | CHRISTINE SUN, ASSOCIATE DIRECTOR/DIRECTOR OF LEGAL-POLICY DEPARTMENT | CHERI BRYANT, DEVELOPMENT
DIRECTOR
ALAN FRANCISCO-TIPGOS, CHIEF FINANCIAL OFFICER/DIRECTOR OF OPERATIONS | SHAYNA GELENDER, MANAGING DIRECTOR | REBECCA FARMER, COMMUNICATIONS
DIRECTOR
ALAN SCHLOSSER, SENIOR COUNSEL | NOVELLA COLEMAN, MARGARET C. CROSBY, MICAELA DAVIS, ELIZABETH GILL, LINDA LYE, JULIA HARUMI MASS, LINNEA NELSON,
MICHAEL RISHER, STAFF ATTORNEYS | PHYLLIDA BURLINGAME, NICOLE A. OZER, ANA ZAMORA POLICY DIRECTORS | STEPHEN V. BOMSE, GENERAL COUNSEL

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA

39 DRUMM STREET, SAN FRANCISCO, CA 94111 | T/415.621.2493 | F/415.255.1478 | TTY/415.863.7832 | WWW.ACLUNC.ORG

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Separately, we write to explore the possibility of entering into factual stipulations, in particular, stipulations that bear on standing, finality of agency action, and the applicability of 28 C.F.R. Part 23 to the Nationwide Suspicious Activity Reporting Initiative.¹ Defendants previously raised that possibility, and we would like to follow up on that invitation.

I. The Administrative Record Produced by the Agency Is Incomplete Because it Lacks Materials that Were Considered by Agency Decision-Makers

“The ‘whole’ administrative record... consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position.” *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (citation omitted). “All materials directly or indirectly considered” include materials that “literally pass[ed] before the eyes of the final agency decision maker[s],” *Clairton Sportsmen's Club v. Pa. Turnpike Comm'n*, 882 F. Supp. 455, 465 (W.D. Pa. 1995), as well as the documents, materials, and recommendations on which the agency decision-makers based their decision, *WildEarth Guardians v. U.S. Forest Serv.*, 713 F. Supp. 2d 1243, 1255-56 (D. Colo. 2010). But as is apparent from the agency's own certification of the Record, and further evidenced by documents contained in the Record and publicly available documents not contained in the Record, the administrative record prepared by Defendants is incomplete because it lacks numerous materials that were clearly considered by agency decision-makers.

First, the certification itself makes clear that the Record lacks materials considered by agency decision-makers. Basil Harris, Chief of Staff to the PM-ISE, states that the Record contains “information considered in the development of the definition of suspicious activity, including the behavior criteria related to that definition, used in the functional standard to provide guidance to participants regarding the sharing of ISE suspicious activity reports through the Nationwide Suspicious Activity Reporting Initiative.” ECF No. 52-1 at ¶3. Mr. Harris nowhere states that the Record contains “all” information considered. *But see Thompson*, 885 F.2d at 555 (“administrative record... consists of *all* documents and materials directly or indirectly considered”) (emphasis added) (citation omitted). To the contrary, Mr. Harris acknowledges that “[p]rivileged documents” have been withheld, but fails to identify the privilege(s) asserted, the factual basis supporting any such assertions, or provide a log of documents withheld.

¹ Although Plaintiffs' Special Motion to Establish Right to Discovery on the Department of Justice's Standard for Suspicious Activity Reporting is now pending before the Court, that motion does not address Plaintiffs' claims against the Program Manager for the Information Sharing Environment or Kshemendra Paul. The issues we raise in this letter therefore need to be addressed regardless of the Court's ruling on that motion.

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Moreover, the certification demonstrates that the ISE inappropriately limited the Record to materials considered in the development of the definition of suspicious activity. Plaintiffs, however, have challenged, *inter alia*, the entire Functional Standard. *See* Complaint ¶¶ 159-64, 167-68. While the definition of suspicious activity and behavior criteria related to that definition are central to the challenge, the Functional Standard addresses additional issues, such as the “ISE-SAR . . . Business Process,” which includes “Gathering and Processing,” “Analysis and Production,” “Dissemination,” and “Reevaluation” of SARs. *See* Complaint, Exh. D at 60-63; AR at 199; ECF 53-6 at 9-12. Plaintiffs’ Complaint makes explicit that they challenge not merely the definition of SARs, but also their collection, vetting, and dissemination pursuant to the process set forth in the Functional Standard. *See* Complaint at ¶¶ 156, 162, 165, 167. Materials considered by the agency in the formulation of the entire Functional Standard, not simply the definition of suspicious activity and related behavior criteria, must therefore be included in the Record.

Second, even a cursory review of the documents included in the Record illustrates its inadequacy. The Record consists of 42 documents totaling 474 pages. These documents fall into five general categories: (1) Functional Standards 1.0, 1.5, and 1.5.5, and materials related to their release, comprising almost half of the Record (216 pages); (2) select documents providing background on the SAR program and its origins (27 pages); (3) agendas of meetings of an ISE Committee and contact information for that committee (12 pages)²; (4) reports or other documents generated by the ISE or other government agencies (126 pages); and (5) documents pertaining to the ISE’s outreach to and feedback received from various privacy advocates, including the ACLU (93 pages).

In other words, of the 474 page Record, only 219 pages (the latter two categories) contain substantive information relating to considerations or recommendations about the Functional Standard. It strains credulity to believe that in formulating three versions of the Functional Standard over the course of a ten-year period to govern a highly complex nationwide program involving the collection, vetting, and dissemination of reports with a potential nexus to terrorism by federal, state, local, and tribal agencies, the agency only considered 219 pages of materials, and that approximately half of what it considered involved input from civil liberties advocates.

Third, the Record is plainly missing documents that were considered by the agency in formulating the Functional Standard. For example:

- According to the Record and publicly available documents, the Functional Standard arose out of a White House Memorandum instructing the ISE, consistent with the

² These 12 pages are entirely non-substantive; they do not include the materials reviewed by or generated by this ISE committee.

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Intelligence Reform and Terrorism Prevention Act (“IRTPA”), to issue and implement five Information Sharing Guidelines. *See, e.g.*, AR at Doc. 1. While the Record contains Guideline 2, AR at Doc. 2, none of the other Guidelines set forth in the White House Memorandum are included, even though those were clearly the origin of the Functional Standard and hence considered in its formulation.³

- The Functional Standard “creates guidance for the recommendations in the NSIS [National Strategy for Information Sharing (NSIS)] and aligns the operational process descriptions within the NSI CONOPS [Concept of Operations].” *See* Final Report: Information Sharing Environment (ISE-) Suspicious Activity Reporting (SAR) Evaluation Environment.”⁴ Because the Functional Standard implements recommendations in the NSIS and aligns process descriptions in the NSI CONOPS, these documents must have been considered in its formulation, but are missing from the Record.
- As part of the process for developing the Functional Standard, the PM-ISE established a SAR Working Group in November 2006 to “review current SAR processes, identify issues and impediments and develop a common framework for improving the development, distribution, and access of terrorism suspicious activity reports across the ISE.” AR at Doc. 3, Bates 28. The Record does not contain the information considered or documents and analyses produced by this Working Group, even though the Record makes clear that the Working Group was integral to the process of formulating the Functional Standard.⁵
- The Functional Standard was developed “[c]onsistent with” the ISE Privacy Guidelines, which must therefore have been considered in formulating the Functional Standard. AR at Doc. 7, Bates 83. But the ISE Privacy Guidelines and documents related to their development and implementation are not included in the Record.

³ *See, e.g.*, AR at Doc. 1, Bates 2 (Guideline 1 is “Define Common Standards for How Information is Acquired, Accessed, Shared, and Used Within the ISE”); AR at Doc. 4, Bates 42 (Common Terrorism Information Sharing Standards “supports the essential activities of acquiring, accessing, producing, retaining, protecting, and sharing terrorism information consistent with Presidential Guideline 1”); AR at Doc. 6, Bates 71 (noting that Functional Standard 1.0 was released “in accordance with the President’s Guidelines directing the development and issuance of common standards governing how terrorism information is acquired, accessed, shared, and used within the ISE”).

⁴ http://nsi.ncirc.gov/documents/NSI_EE.pdf

⁵ The Record contains 7 documents related to a committee alternatively referred to as the “ISE-SAR Steering Committee” and the “ISE-SAR Governance Panel.” (Documents 8-11, 16, 22, and 25). It is not clear if this is the same committee as the SAR Working Group. In any event, the 7 documents in the record consist only of agendas for the group’s meetings and a contact list, but not any of the substantive materials considered or generated by the Committee.

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- The NSI was piloted in an “Evaluation Environment,” and at the conclusion of the Evaluation Environment, the ISE issued in January 2010 a “Final Report: Information Sharing Environment (ISE-) Suspicious Activity Reporting (SAR) Evaluation Environment.”⁶ The purpose of the Evaluation Environment was to evaluate the implementation of the SAR environment with a few participating agencies before taking the program nationwide. *See id.* At vii. The Final Report sets forth “lessons learned and recommendations relating to the gathering, processing, and sharing of terrorism-related suspicious activity.” *Id.* Yet the report and documents related to the Evaluation Environment are not contained in the Record.
- The Record lacks numerous categories of documents that were explicitly considered by the agency in formulating Functional Standard 1.5.5, including but not limited to: (1) “comments made by state and local analysts/investigators and supervisors regarding the ISE-SAR assessment process,” in light of which the agency added “descriptive examples for each behavioral category and criteria,” AR at Doc. 39, Bates 336; (2) “guidance and input on proposed language changes” from the “Office of the Director of National Intelligence, the Department of Homeland Security (DHS), the Department of Justice, the Federal Bureau of Investigation (FBI), and the NSI Program Management Office,” AR at Doc. 40, Bates 406; (3) “[a] number of substantive nontechnical updates...during this round” by the FBI and DHS that the agency considered but decided not to include in the update to Functional Standard 1.5, AR at Doc. 40, Bates 406; and (4) “advisory comments” provided by the Privacy and Civil Liberties Oversight Board on the June 2014 draft version of the Functional Standard 1.5.5 update, AR at Doc. 40, Bates 406.

The documents discussed above are a small sampling of the documents that were clearly considered by the agency in formulating the Functional Standard but that are missing from the Record. In the interest of brevity, we do not delineate them all in this letter but provide the above snapshot to convey our concern that the record is demonstrably incomplete. We request that Defendants complete the record by including all documents and materials that were “directly or indirectly considered by agency decision-makers.” *Thompson*, 885 F.2d at 555 (citation omitted).⁷

⁶ http://nsi.ncirc.gov/documents/NSI_EE.pdf

⁷ Document 30 in the Record contains an Appendix E (Bates 299-300), which is too small to read. We request that Defendants produce legible pages.

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II. Defendants Should Produce a Privilege Log and Remove Redactions from the Administrative Record

Defendants acknowledge that pre-decisional and deliberative information has been withheld from the Record. *See* ECF No. 52 at 2. We request a privilege log.

Defendants also acknowledge that names and personal information of certain individuals have been redacted, but cite no authority for these redactions. We request that Defendants remove these redactions.⁸

III. Potential Stipulations May Eliminate the Need for Motion Practice over Supplementing the Record

Plaintiffs would ordinarily seek discovery, particularly as to facts that pertain to three issues raised by Defendants in their motion to dismiss: standing, finality of agency action, and the applicability of 28 C.F.R. Part 23. Discovery is appropriate for several reasons, not only because the record is so obviously incomplete, but also because many of the topics are jurisdictional. *See, e.g., NW. Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527-28 (9th Cir. 1997) (court in APA action considered extra-record evidence “to determine whether petitioners can satisfy a prerequisite to this court’s jurisdiction.”); *Central Sierra Env'tl. Res. Ctr. v. U.S. Forest Serv.*, 916 F. Supp. 2d 1078, 1086 (E.D. Cal. 2013) (court “consider[ed] extra-record evidence that allows plaintiffs to establish standing”). At the case management conference and in subsequent conversations, Defendants raised the possibility of stipulating to certain facts to streamline the issues before the Court. We write to follow up on this discussion and, specifically, to inquire whether Defendants would be willing to stipulate to facts bearing on standing, finality of agency action, and the applicability of 28 C.F.R. Part 23.

With respect to the applicability of the regulation, for example, would Defendants be willing to stipulate that (1) arrangements, equipment, facilities, and procedures used for the receipt, storage, interagency exchange or dissemination, and analysis of Suspicious Activity Reports operate through support under the Omnibus Crime Control and Safe Streets Act of 1968, and (2) arrangements, equipment, facilities, and procedures used for the receipt, storage, interagency exchange or dissemination, and analysis of Suspicious Activity Reports operate through support from funding provided by the Office of Justice Programs?

⁸ We also note that the redactions that appear on Bates 120 appear to have been mistakenly applied. In addition, there are redactions on Bates 183 that block out what appear to be two paragraphs of text in an email string. This redaction appears to go beyond the scope of any redaction for personally identifying information. Accordingly, the redactions on Bates 120 and 183 should be removed on these grounds, as well.

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With respect to finality of agency action, would Defendants be willing to stipulate that (1) the Functional Standard is a definitive statement of the agency's position, (2) Defendants expect compliance with the Functional Standard, (3) the Functional Standard has an immediate effect on the day to day operations of NSI participants, (4) if agencies choose to participate in the NSI, they must abide by the Functional Standard, and (5) the Functional Standard cabins Defendants' own discretion as to whether to upload a SAR to eGuardian or any other database?

With respect to standing, stipulations pose more of a challenge because Plaintiffs need additional information about the uses to which SARs are put. Would Defendants be willing to provide Plaintiffs with information about (1) the persons and entities that have access to SAR databases, and (2) the purposes for which SAR databases are queried and used?

The proposed stipulations and areas of inquiry listed above are not intended to be comprehensive but to present Defendants with a sampling of the issues on which we propose stipulations. Please advise if more detailed discussions are likely to be fruitful.

* * *

Please let us know if Defendants are amenable to completing the administrative record with all documents and materials that the agency directly or indirectly considered, but that are currently missing from the Record, and to entering into stipulations along the lines set forth above. In addition, please provide a privilege log and remove the redactions from the documents provided to date. We look forward to your prompt response.

Sincerely,



Linda Lye