EXHIBIT 6

U.S. Department of Justice
Civil Division
Federal Programs Branch

Mailing Address
P.O. Box 883
Washington, D.C. 20044

Overnight Delivery Address
20 Massachusetts Ave., N.W.
Washington, D.C. 20001

Tel: (202) 353-0543
Fax: (202) 616-8470
paul freeborne@usdoj.gov

Linda Lye
ACLU Foundation of Northern California
39 Drumm Street
San Francisco, CA 94111
llye@aclunc.org

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RE: *Gill v. DOJ, et al.*, No. 3:14-cv-03120 (N.D. Cal.)

Dear Counsel,

Thank you for your letter. As an initial matter, we disagree with your characterization of the administrative record ("Record") as "woefully inadequate." As certified by the Chief of Staff to the Office of the Program Manager for the Information Sharing Environment ("PM-ISE"), the Record contains the "the 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." Your requests to supplement the record either seek deliberative information or information that is beyond the scope of the Complaint. This information, as discussed in more detail below, is not properly part of the Record in this Administrative Procedure Act ("APA") case.

I. The Administrative Record is Complete

In reviewing an agency decision, the reviewing court is to apply the APA's deferential standards of review, *see* 5 U.S.C. § 706(2), based on the administrative record that the agency compiles and submits to the court. *See generally Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005). "An agency's designation and certification of the administrative record is treated like other established administrative procedures, and thus entitled to a presumption of administrative regularity." *McCrary v. Gutierrez*, 495 F. Supp. 2d 1038, 1041 (N.D. Cal. 2007) (Seeborg, J.). "Accordingly, '[i]n the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties.'" *Id.* (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971)). That presumption applies equally here.

A. Certification of Administrative Record

You assert that the certification itself makes clear that the Record lacks materials considered by the agency decision-makers because (1) privileged documents have been withheld and (2) the Record is limited to materials considered in the development of the definition of suspicious activity. Contrary to your position, these limits on the scope of the Record are entirely appropriate and do not render it incomplete.

First, as Defendants' Notice of Filing explains, certain privileged information—in particular, pre-decisional and deliberative information—has been excluded from the Record. Deliberative documents, such as these, should not be designated as part of the Record because "the actual subjective motivation of agency decisionmakers is immaterial as a matter of law—unless there is a showing of bad faith or improper behavior." *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998). Moreover, "[s]ince deliberative documents are not part of the administrative record, an agency that withholds these privileged documents is not required to produce a privilege log to describe the documents that have been withheld." *Nat'l Ass'n of Chain Drug Stores v. U.S. Dep't of Health & Human Servs.*, 631 F. Supp. 2d 23, 27 (D.D.C. 2009). Accordingly, Plaintiffs' assertion that the Record is somehow incomplete because privileged documents have been excluded is baseless.

Second, the scope of the Record is appropriately limited to the definitions of suspicious activity used in the Functional Standard. While you are correct that Plaintiffs attached Functional Standard 1.5 (which references various aspects of the Nationwide SAR Initiative) to the Complaint, the only claims in the Complaint relate to the issuance of a purported "SAR standard"—which Plaintiffs assert constitutes a legislative rule subject to notice-and-comment rulemaking. Compl. ¶¶ 42–52, 159– 64, 167–68. Moreover, Plaintiffs specifically allege in the Complaint that this "SAR standard" is the definition of suspicious activity in the Functional Standard. *Id.* ¶ 44 ("[Functional Standard 1.5] sets forth the following standard for suspicious activity reporting: '[o]bserved behavior reasonably indicative of pre-operational planning related to terrorism or other criminal activity.'"). Because Plaintiffs' claims solely challenge the permissibility of this "reasonably indicative" standard, and its conformance with 28 C.F.R Part 23, the Record need not contain information relating to other aspects of the Functional Standard.

B. Size of Administrative Record

You assert that "[i]t 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." We disagree. As you note, the Record does not include privileged deliberative materials and is limited in scope to the definition of "suspicious activity" used in the Functional Standard. Moreover, as you acknowledge, the Record totals 473 pages. The 255 pages of the Record that you have disregarded include information directly bearing on the agency's reasons for its decision, which is the focus of any APA challenge. Among other things, the three versions of the Functional Standard

provide a detailed explanation of the definition of suspicious activity and guidance for its utilization. In short, the unsupported assertion that the size of the Record somehow "strains credulity" is meritless and not sufficient to establish a basis for requiring supplementation of the Record.

C. Documents Allegedly Considered by the PM-ISE

You have also referenced particular documents that you believe should be included in the record. The PM-ISE continues to maintain that the Record is complete in its current form, but address some of the specific documents you identified further below.

Guidelines Referenced in White House Memorandum. You assert that the Record should include Guidelines 1, 3, 4, and 5 set forth in a White House Memorandum relating to the Information Sharing Environment. The PM-ISE included additional information about Guideline 2—Develop a Common Framework for the Sharing of Information Between and Among Executive Departments and Agencies and State, Local, and Tribal Governments, Law Enforcement Agencies, and the Private Sector—because the Nationwide SAR Initiative was established in direct response to Guideline 2. While the Functional Standard is consistent with the other guidelines, none of them motivated the creation of the Nationwide SAR initiative, and thus, they are not part of the Record. Three of the other five Presidential Guidelines are, however, available in the Documents Library on the ISE.gov website.

The National Strategy for Information Sharing (2007) (NSIS). The NSIS set forth the Administration's general strategy for improving terrorism-related information sharing. While the Nationwide SAR Initiative was an outgrowth of that strategy, the NSIS does not provide any input on the appropriate definition of suspicious activity and was not considered by the PM-ISE in including the "reasonably indicative" definition of suspicious activity in the Functional Standard. Nonetheless, Defendants will not object if Plaintiffs cite this publicly available document to provide background about the Nationwide SAR Initiative in their summary judgment briefing.

Nationwide SAR Initiative Concept of Operations (NSI CONOPS). You have asked the PM-ISE to include in the Record the NSI CONOPS, a document which provided top-level operational guidelines to help implement the Nationwide SAR Initiative. As you note in your letter, the business process language in the Functional Standard 1.5 mirrors that in the NSI CONOPS, but the integration of this language into both of these documents does not mean that the PM-ISE considered the NSI CONOPS in issuing the Functional Standard. This change in the business process language, moreover, was not related to any change in the definition of suspicious activity that is challenged in this lawsuit. Accordingly, this document was not designated as part of the Record.

SAR Working Group. You have requested that the Record include certain documents relating to the SAR Working Group. The SAR Working Group was renamed the ISE-SAR Steering Committee in 2007. As you note, the meeting agendas of several ISE-SAR Steering Committee meetings are included in the Record. Meeting minutes and other documents related to these meetings were not designated for inclusion in the Record because they are deliberative materials, which are both privileged and not properly part of an administrative record.

ISE Privacy Guidelines. You assert that the Record should include the ISE Privacy Guidelines. Again, we disagree. The ISE Privacy Guidelines establish a framework to protect information privacy rights and provide other legal protections relating to civil liberties and the legal rights of Americans in the development and use of the ISE. While the Functional Standard was developed consistent with these Guidelines, they were not considered with respect to the Functional Standard's definition of suspicious activity. Accordingly, this publicly available document was not designated for inclusion in the Record.

Final Report: Information Sharing Environment (ISE) – Suspicious Activity Reporting (SAR). You have also asserted that the Record should include a Final Report on the design and development of the ISE-SAR Evaluation Environment. This report was released after the issuance of Functional Standard 1.5 and does not contain any recommendations for updating the Functional Standard. Accordingly, while this document discusses the definition of "suspicious activity" that was ultimately included in Functional Standard 1.5, the report was not considered by the PM-ISE in issuing Functional Standard 1.5 or in updating the Functional Standard to version 1.5.5.

In addition to referencing the above documents, you assert that there were additional documents considered by the PM-ISE that should be included in the Record. Without any further explanation, we cannot respond to such assertions.

II. Privilege Log

You have asked for a privilege log identifying pre-decisional and deliberative information that has not been included in the Record. However, as noted, "[s]ince deliberative documents are not part of the administrative record, an agency that withholds these privileged documents is not required to produce a privilege log to describe the documents that have been withheld." *Nat'l Ass'n of Chain Drug Stores*, 631 F. Supp. 2d at 27; *see also California v. U.S. Dep't of Labor*, No. 2:13-CV-02069-KJM, 2014 WL 1665290, at *13 (E.D. Cal. Apr. 24, 2014) ("[B]ecause internal agency deliberations are properly excluded from the administrative record, the agency need not provide a privilege log."). Accordingly, Defendants do not intend to provide a privilege log in this case.

You have also requested that Defendants remove redactions of certain personal information from the Record. With the exception of one redaction (to Bates 183), where deliberative material was removed, these redactions are of agency employees, the identities of whom are irrelevant to the claims in this case. Accordingly, consistent with the agencies' policies, we have redacted that information. If you continue to insist that we remove these redactions, please indicate why this information is relevant to a resolution of Plaintiffs' claims.

You have also asked us to remove redactions from two documents: Bates 120 and Bates 183. The redactions on Bates 120 were mistakenly included and will be removed. The redactions on Bates 183 removed deliberative material—which, as noted, is not part of the administrative record.

III. Stipulations

You have asked 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. While we are not opposed to entering into stipulations in principle, we are not currently willing to enter into the stipulations that you propose. Moreover, Defendants believe that the Record provides a sufficient basis for resolving this matter and are prepared to move for summary judgment.

With respect to your proposed stipulations relating to final agency action and the applicability of 28 C.F.R. Part 23, the stipulations that you propose are not factually accurate and simply ask Defendants to admit to certain incorrect legal conclusions. You ask Defendants to stipulate, for example, that the "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." The language tracks the applicability provision of 28 C.F.R. Part 23, but as you know, we contest that 28 C.F.R. Part 23 is applicable. While Defendants would still be willing to consider some factual stipulations in an effort to permit this case to move to a final adjudication, the stipulations would need to be more factual in content and more specific.

With respect to your proposed stipulations relating to standing, it is unclear what particular stipulations you are seeking and how those stipulations would be relevant to the questions of Plaintiffs' individual standing. While we may be in a position to agree upon certain generalized stipulations regarding the SAR process, and specifically who has access to SARs and the purposes for which SAR databases are queried and used, we would need more detail on specific stipulations before we can meaningfully consider the stipulations suggested in your letter.

Sincerely,

/s/ Paul G. Freeborne

Paul G. Freeborne
Senior Trial Counsel
Kieran G. Gostin
Trial Attorney
Civil Division—Federal Programs Branch
U.S. Department of Justice