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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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

20 Plaintiffs,

21 v.

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

26 Defendants.
27

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

**DECLARATION OF LINDA LYE IN
SUPPORT OF PLAINTIFFS' MOTION
TO COMPLETE THE
ADMINISTRATIVE RECORD**

Hearing Date: November 5, 2015
Time: 11:00 a.m.
Judge: Hon. Kandis A. Westmore
Date of Filing: July 10, 2014
Trial Date: None Set

1 I, Linda Lye, declare as follows:

2 1. I am a member of the bar of this Court and counsel for Plaintiffs in the above-
3 captioned matter. The information in this declaration is based upon my personal knowledge,
4 unless otherwise specified. If called upon to testify, I could and would competently testify
5 thereto.

6 2. On June 16, 2015, Defendants certified an Administrative Record (“AR” or the
7 “Record”). *See* Dkt. Nos. 52-53. I have personally reviewed the Record.

8 3. According to the certification, the Record contains “information considered in the
9 development of the definition of suspicious activity, including the behavior criteria related to that
10 definition, used in the functional standard to provide guidance to participants regarding the
11 sharing of ISE suspicious activity reports through the Nationwide Suspicious Activity Reporting
12 Initiative [(“NSI”).” *See* Dkt. No. 52-1 at ¶ 3. The certification acknowledged that “[p]rivileged
13 documents” had been withheld from the Record. *See id.* Defendants did not include a privilege
14 log with the Record.

15 4. The Record consists of 42 documents totaling 474 pages. Based upon my review,
16 these documents fall into five general categories: (1) Functional Standard 1.5.5 and its
17 predecessors (known as Functional Standard 1.0 and 1.5), and materials related to their release,
18 comprising almost half of the Record (216 pages); (2) select documents providing background on
19 the SAR program and its origins (27 pages); (3) agendas of meetings of an ISE Committee and
20 contact information for that committee (12 pages); (4) reports or other documents generated by
21 the ISE or other government agencies (126 pages); and (5) documents pertaining to the ISE’s
22 outreach to and feedback received from various privacy advocates, including the ACLU (93
23 pages). Only the last two categories of documents in the Record, consisting of 219 pages, contain
24 substantive information relating to consideration or recommendations about the Functional
25 Standard, and roughly half of that (93 pages) involves input from Plaintiffs’ counsel and other
26 civil liberties advocates (the other half involves reports or other documents generated by the ISE
27 or other government agencies). A chart that I personally prepared listing the documents and
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1 dividing them into these categories is attached as Exhibit 1 to this declaration.

2 **Process Leading to Development of Functional Standard**

3 5. According to the Record, the initial Functional Standard was the culmination of a
4 lengthy process commencing a decade ago and involving a wide variety of inter-agency working
5 groups and committees, and has since been repeatedly updated in light of “lessons learned” from
6 pilot evaluation projects and feedback from NSI participants. Based on the process for
7 formulating and updating the Functional Standard described in the Record, Defendants have
8 omitted from the Record many documents that the agency necessarily must have considered in
9 developing the Functional Standard, including the following:

10 6. December 2005 Presidential Memorandum: A review of the Record indicates that
11 the Functional Standard grew out of several information sharing “Guidelines” issued by the
12 President. The first document in the Record is a December 2005 Presidential memorandum titled
13 “Memorandum for the Heads of Executive Departments and Agencies” that sets forth, among
14 other things, several “Information Sharing Guidelines.” AR, Doc. 1 (Dkt. No. 53 at 3). Those
15 include “Guideline 1 – Define Common Standards for How Information is Acquired, Accessed,
16 Shared, and Used Within the ISE,” and “Guideline 2 – Develop a Common Framework for the
17 Sharing of Information Between and Among Executive Departments and Agencies and State,
18 Local, and Tribal Government, Law Enforcement Agencies, and the Private Sector.” *Id.* While
19 Defendants included a document related to Guideline 2 in the Record, they did not include any
20 documents related to any of the other information sharing guidelines in the President’s
21 memorandum.

22 7. Working Groups: A review of the Record indicates that many working groups
23 contributed to the Functional Standard. In response to “Guideline 2” of the December 2005
24 Presidential memorandum, Defendant Department of Justice (“DOJ”), with assistance from
25 Defendant Program Manager of the Information Sharing Environment (“PM-ISE”),
26 recommended the creation of various working groups, advisory groups, and implementation
27 teams to study identified issues and make recommendations regarding a proposed framework for
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1 information sharing. AR, Doc. 2 (Dkt. No. 53 at 8-9, 24-29). The Record makes clear that other
 2 working groups also made recommendations regarding the content of what ultimately became the
 3 Functional Standard. These groups include: the ISE SAR Working Group (AR, Doc. 3 (Dkt. No.
 4 53 at 31)), an interagency group led by the National Counterterrorism Center (“NCTC”) (*id.*); the
 5 Common Terrorism Information Sharing Standards (“CTISS”) Committee (AR, Doc. 4 (Dkt. No.
 6 53 at 64)); the ISE-SAR Governance Panel (also referred to as the ISE-SAR Steering Committee)
 7 (AR, Doc. 8 (June 17, 2008 agenda) (Dkt. No. 53-3 at 2), Doc. 9 (contact list for committee)
 8 (Dkt. No. 53-3 at 5-6), Doc. 10 (July 17, 2008 agenda) (Dkt. No. 53-3 at 8), Doc. 11 (September
 9 8, 2008 agenda) (Dkt. No. 53-4 at 3), Doc. 16 (October 7, 2008 agenda) (Dkt. No. 53-4 at 48),
 10 Doc. 22 (March 5, 2009 agenda) (Dkt. No. 53-5 at 23), and Doc. 25 (April 7, 2009 agenda) (Dkt.
 11 No. 53-5 at 33)); and the ISE Privacy Guidelines Committee, including its Legal Issues Working
 12 Group (AR, Doc. 15 (Dkt. No. 53-4 at 16)). These documents include one-page agendas for
 13 meetings of these committees on various dates in 2008 and 2009, as well as contact lists of
 14 committee members.

15 8. After several years of work by these working groups and committees, Defendant
 16 PM-ISE promulgated the initial Functional Standard in January 2008. AR, Doc. 7 (Dkt. No. 53-1
 17 at 9). Although the Record contains a handful of materials related to one of these committees
 18 (agendas for meetings and lists of committee participants for the ISE-SAR Governance Panel,
 19 which also appears to have been referred to as the ISE-SAR Steering Committee), it contains
 20 none of the underlying materials reviewed or prepared by these committees in making
 21 recommendations regarding the Functional Standard.

22 9. Updates to Functional Standard Based on Lessons Learned from Actual
 23 Implementation: The Record makes clear that the Functional Standard was never contemplated
 24 as a static document. In particular, the PM-ISE itself made clear that it would update the
 25 Functional Standard based on (1) feedback from the “user community,” that is, the federal, state,
 26 and local law enforcement agencies participating in the NSI, as well as (2) lessons gleaned from
 27 an “evaluation environment,” namely, pilot sites where implementation of the Functional
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1 Standard would be tested. Key documents providing recommendations from the “user
2 community” and summarizing the results of the Evaluation Environment, however, are not
3 included in the Record.

4 10. SAR Support and Implementation Project Team: As the PM-ISE explained in
5 issuing Functional Standard 1.0, “[t]his initial version of the functional standard will continue to
6 be tested and evaluated by the user community. Any resulting refinements...will be incorporated
7 into future versions.” AR, Doc. 6 (Dkt. No. 53-1 at 3). The Functional Standard itself states that
8 the “PM-ISE ... will... [w]ork with ISE participants ... to develop a new or modified ISE-SAR
9 Functional Standard.” AR, Doc. 7 (Dkt. No. 53-1 at 8-9).

10 11. Later in 2008, a project team composed of the Major Cities Chiefs Association
11 (“MCCA”) and various federal agencies issued an official report titled “Findings and
12 Recommendations of the Suspicious Activity Report (SAR) Support and Implementation
13 Project.” A true and correct copy of the June 2008 version of this report, which I obtained from
14 the following website ([http://online.wsj.com/public/resources/documents/mccarecommendation-
15 06132008.pdf](http://online.wsj.com/public/resources/documents/mccarecommendation-06132008.pdf)), is attached as Exhibit 2 to this declaration. A true and correct copy of the
16 October 2008 version of this report, which I obtained from the following website
17 ([https://it.ojp.gov/GIST/103/Findingccis-and-Recommendations-of-the-Suspicious-Activity-
18 Reporting--SAR--Support-and-Implementation-Project](https://it.ojp.gov/GIST/103/Findingccis-and-Recommendations-of-the-Suspicious-Activity-Reporting--SAR--Support-and-Implementation-Project)), is attached as Exhibit 3 to this
19 declaration.

20 12. The purpose of the report was to make “recommendations ... [to] facilitate the
21 improved sharing of SAR information.” Ex. 3 at 5. The recommendations were based on site
22 visits at four major police departments, at which “promising [SAR] practices ... were identified.”
23 *Id.* at 6. The report “identified several key areas regarding the implementation of the SAR
24 process”—such as “[p]rivacy and [c]ivil [l]iberties [p]rotections” and “[g]athering, [p]rocessing,
25 [r]eporting, [a]nalyzing, and [s]haring of Suspicious Activity”—then “examine[d] each of these
26 issues ... and present[ed] SAR process implementation recommendations.” *Id.* The June 2008
27 version of the report “was presented for review to the MCCA, which is composed of the 64
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1 largest police departments in the United States and Canada, and was unanimously approved.” *Id.*
2 The report was also “unanimously approved” by the Criminal Intelligence Coordinating Council
3 (“CICC”) and the Global Advisory Committee (“GAC”). *Id.* According to the following website
4 (http://www.iir.com/WhatWeDo/Information_Sharing/CICC/), the CICC is made up of “law
5 enforcement and homeland security agencies from all levels of government” that advocate the
6 “shar[ing] of criminal intelligence.” According to the following website
7 (<https://www.it.ojp.gov/global/gac-membership>), the GAC consists of organizations appointed by
8 the Attorney General to provide input on interjurisdictional information sharing issues. A final
9 version of the report (Exhibit 3) was issued in October 2008. Defendants have not included either
10 version of the report in the Record.

11 13. *Evaluation Environment*. In issuing Functional Standard 1.0, the PM-ISE also
12 stated that it would “facilitate[e] the operation of ... evaluation environments,” which were
13 intended to be pilot projects that would allow the “test[ing] of the ISE-SAR Functional Standard
14 in an operational environment and to identify any refinements or changes to the SAR business
15 process and data elements that may be necessary. In addition, a privacy assessment will be
16 performed in the operational environment to identify privacy issues that may arise in
17 implementing the initial ISE-SAR Functional Standard and information flow.” AR, Doc. 6 (Dkt.
18 No. 53-1 at 5).

19 14. The PM-ISE, in partnership with several other federal agencies with terrorism-
20 related responsibilities and state and local law enforcement agencies, pioneered an “Evaluation
21 Environment.” In January 2010, these agencies published a “Final Report: Information Sharing
22 Environment (ISE)-Suspicious Activity Reporting (SAR) Evaluation Environment” (“Evaluation
23 Environment Final Report”). A true and correct copy of the Evaluation Environment Final
24 Report that I obtained from the following website (https://nsi.ncirc.gov/documents/NSI_EE.pdf)
25 is attached as Exhibit 4 to this declaration. This document is not in the Record.

26 15. Several agencies volunteered to participate as test sites. *See* Ex. 4 at v. “[B]ased
27 upon the lessons learned from the Evaluation Environment,” the Evaluation Environment team
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1 made “key recommendations.” *See id.* at 5. According to the Record, “the next version of the
2 ISE-SAR Functional Standard will be modified to reflect any changes in process and data format
3 that are identified as necessary in the course of testing the ISE-SAR Functional Standard at the
4 various Evaluation Environment sites.” AR, Doc. 15 (Dkt. No. 53-4 at 25).

5 16. The PM-ISE engaged in extensive communications with test sites over the
6 Evaluation Environment. The PM-ISE and DOJ’s Bureau of Justice Assistance (“BJA”)
7 evaluated implementation using an “ISE-SAR EE Privacy and Civil Liberties Assessment Survey
8 Questionnaire” and documented the test sites’ responses to the questionnaire through assessments
9 prepared by PM-ISE staff. AR, Doc. 30 (Dkt. No. 53-10 at 27). The Record contains a July 2010
10 report that contains “Observations of EE Participating Sites During the ISE-SAR EE,” which is
11 derived from the assessments. *Id.* (Dkt. No. 53-10 at 27). Neither these assessments nor any
12 other documents reflecting communications between the PM-ISE and Evaluation Environment
13 test sites are included in the Record.

14 17. In apparent recognition of the key role the Evaluation Environment played in the
15 updates to the Functional Standard, Defendants included in the Record the “Initial Privacy and
16 Civil Liberties Analysis” prepared as part of the Evaluation Environment, and an updated version
17 of that report prepared after its conclusion. AR, Docs. 15 and 30 (Dkt. No. 53-4 at 15-46 and
18 Dkt. No. 53-10 at 2-38). Defendants, however, did not include any other documents related to the
19 Evaluation Environment, such as the Evaluation Environment Final Report or documents
20 reflecting communications between the PM-ISE and Evaluation Environment test sites.

21 18. *Input on Functional Standard 1.0, 1.5, and 1.5.5.* The PM-ISE has twice updated
22 the Functional Standard. It issued Functional Standard 1.5 in May 2009 (AR, Doc. 28 (Dkt. No.
23 53-6 at 5)), and Functional Standard 1.5.5 in February 2015 (AR, Doc. 41 (Dkt. No. 53-15 at 7)).

24 19. The Record describes the process that the PM-ISE followed in issuing the most
25 recent update to the Functional Standard. It states that the PM-ISE obtained extensive feedback
26 from “key federal NSI stakeholders,” including the Office of the Director of National
27 Intelligence, the Department of Homeland Security, the Department of Justice, the Federal
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1 Bureau of Investigation, the NSI Program Management Office, the Privacy and Civil Liberties
2 Oversight Board, and the Information Sharing and Access Interagency Policy Committee over the
3 course of “five major rounds of review.” AR, Doc. 40 (Dkt. No. 53-14 at 26). The agency also
4 obtained feedback from the President of the National Network of Fusion Centers, the Chair of the
5 CICC, and the chair of the Global Privacy Committee. AR, Doc. 39 (Dkt. No. 53-12 at 2).
6 Functional Standard 1.5.5 was also updated in response to comments “made by state and local
7 analysts/investigators and supervisors regarding the ISE-SAR assessment process.” *Id.* None of
8 these comments are included in the Record, nor are any comments on drafts of Functional
9 Standard 1.0 or Functional Standard 1.5.

10 **The Parties’ Efforts to Meet and Confer**

11 20. After reviewing the Administrative Record, Plaintiffs shared with Defendants their
12 concerns that the Record was incomplete.

13 21. On July 28, 2015, Plaintiffs sent Defendants a detailed letter outlining their
14 concerns. A true and correct copy of this letter is attached as Exhibit 5 to this declaration.

15 22. By way of letter dated August 25, 2015, Defendants provided a written response, a
16 true and correct copy of which is attached as Exhibit 6 to this declaration.

17 23. By way of letter dated August 30, 2015, Plaintiffs provided a further written
18 response, a true and correct copy of which is attached as Exhibit 7 to this declaration. Plaintiffs
19 requested a final position from Defendants as to whether they would agree to complete the
20 Record by September 10, 2015.

21 24. On September 8, 2015, the Court issued a case management order instructing the
22 parties to continue meeting and conferring on their disputes over the Record and referring any
23 disputes that could not be resolved through those efforts to a magistrate judge. *See* Dkt. No. 72.
24 This matter was then referred to this Court, Magistrate Judge Westmore.

25 25. After receiving no response to their August 30, 2015 letter, Plaintiffs on
26 September 24, 2015, contacted Defendants via email, reiterated their concerns that the Record
27 was incomplete, and requested a telephonic meet and confer. A true and correct copy of that
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1 email (without attachments) is attached as Exhibit 8 to this declaration.

2 26. Defendants responded in writing by way of letter dated September 28, 2015. A
3 true and correct copy of that letter is attached as Exhibit 9 to this declaration.

4 27. On September 29, 2015, the parties met and conferred telephonically.

5 28. The parties remaining disputes can be summarized as follows:

6 (a) *First*, Plaintiffs contend that Defendants inappropriately narrowed the
7 scope of the Record. Rather than providing information considered in the development of the
8 Functional Standard, Defendants limited the record to information considered in the development
9 of only a discrete portion of the Functional Standard, *viz.*, the definition of suspicious activity.
10 Plaintiffs challenge, however, not only the definition of suspicious activity, but also the
11 collection, maintenance and dissemination of SARs pursuant to the process set forth in the
12 Functional Standard. Moreover, Defendants only included *some* information that the agency
13 considered; they admittedly did not include *all* documents directly or indirectly considered, as
14 evidenced by their express acknowledgment that unspecified “[p]rivileged documents” were
15 withheld. Dkt. No. 52-1 at ¶ 3. Defendants insisted on limiting the scope of the Record to the
16 definition of suspicious activity used in the Functional Standard and refused to comply with
17 Plaintiffs’ request for a privilege log. *See* Ex. 6 at 2; Ex. 9 at 2.

18 (b) *Second*, Plaintiffs identified 55 categories of documents that the agency
19 plainly considered in formulating the Functional Standard, but that were missing from the Record.
20 *See* Ex. 7, Appendix. Defendants agreed to include in the Record five pages pertaining to one of
21 the categories of documents. *See* Ex. 9 at 3. As to the remaining 54 categories of documents,
22 Defendants either failed to address the documents, refused to agree the documents were
23 considered by the agency, asserted the documents were privileged, or claimed that the documents
24 were considered in formulating some aspect of the Functional Standard but not the definition of
25 suspicious activity.¹

26 _____
27 ¹ As to the National Strategy for Information Sharing, Defendants contended that it was not
28 considered by the agency in formulating the definition of “suspicious activity” and that
Defendants would not object to Plaintiffs’ citation of this document on summary judgment for

