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12  
13 **UNITED STATES DISTRICT COURT**  
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

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

17 Plaintiffs,

18 v.

19 DEPARTMENT OF JUSTICE, *et al.*,

20 Defendants.  
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No. 3:14-cv-03120 (RS)(KAW)

**DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' MOTION TO COMPLETE  
THE ADMINISTRATIVE RECORD**

Hearing Date: December 3, 2015  
Time: 11:00 a.m.  
Judge: Hon. Kandis A. Westmore

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## INTRODUCTION

1  
2 Plaintiffs bring Administrative Procedure Act (APA) claims challenging federal guidance  
3 provided to federal, state, and local law enforcement regarding the sharing of suspicious activity  
4 reports (SARs) in connection with the Nationwide SAR Initiative (NSI). The Program Manager  
5 for the Information Sharing Environment (PM-ISE), an appointed federal official, has issued  
6 several versions of a Functional Standard for Suspicious Activity Reporting over the past ten  
7 years. The current version of the Functional Standard encourages participants in the NSI to share  
8 SARs where the observed behavior is “reasonably indicative of pre-operational planning  
9 associated with terrorism or other criminal activity.” See Information Sharing Environment  
10 Functional Standard for Suspicious Activity Reporting Version 1.5.5 (ISE-FS 1.5.5.), AR at  
11 417.<sup>1</sup> Plaintiffs contend that this definition is arbitrary and capricious (and thus invalid under the  
12 APA) because it conflicts with 28 C.F.R. Part 23, a federal regulation that prohibits certain  
13 criminal intelligence systems from collecting and maintaining criminal intelligence unless there  
14 is “reasonable suspicion” of criminal conduct. Plaintiffs also assert that the “reasonably  
15 indicative” standard for sharing SAR information was promulgated without engaging in the  
16 formal notice-and-comment procedures required by the APA when an agency issues a legislative  
17 rule.

18 To facilitate adjudication of Plaintiffs’ challenge to the “reasonably indicative” standard,<sup>2</sup>  
19 Defendants filed a certified administrative record containing “information considered in the  
20 development of the definition of suspicious activity, including the behavior criteria related to that  
21 definition, used in the functional standard to provide guidance to participants regarding the  
22

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23  
24 <sup>1</sup> The administrative record was filed electronically at Dkt. No. 53. The referenced pages in the  
25 administrative record (AR) are to the bates-numbered pages in the lower right corner of each  
page.

26 <sup>2</sup> As explained in the Notice of Filing, Dkt. No. 52, Defendants do not agree that the Functional  
27 Standard is a rule subject to notice-and-comment rulemaking. Defendants nonetheless filed an  
28 administrative record so that this matter could be brought to a final resolution through summary  
judgment.

1 sharing of ISE suspicious activity reports through the [NSI].” Dkt. No. 52-1, ¶ 3. Plaintiffs  
2 challenge the completeness of that record and, in the alternative, assert that the Court should be  
3 permitted to consider certain extra-record evidence. But Plaintiffs have not met their heavy  
4 burden of demonstrating that the Court should depart from the fundamental rule that judicial  
5 review under the APA is based on the administrative record compiled by the federal agency.

6 Plaintiffs’ primary challenge to the completeness of the record is based on their mistaken  
7 belief that Defendants should have included all information directly or indirectly considered in  
8 the development of the entire Functional Standard, instead of just the information directly or  
9 indirectly considered in developing the “reasonably indicative” standard. The administrative  
10 record is required to include the available information that the federal agency considered in  
11 making the challenged decision; it does not include every scrap of paper that may have been  
12 considered by the agency in developing a broad administrative framework. Although Plaintiffs  
13 now claim that their challenge is to the entire Functional Standard, the Complaint does not  
14 provide any challenge other than to the “reasonably indicative” standard.

15 Plaintiffs are attempting to leverage a discrete APA challenge into general broad-based  
16 discovery into a national security initiative designed to facilitate the exchange of terrorism-  
17 related information. This is inappropriate. As the Court previously recognized in denying a  
18 prior discovery motion filed by Plaintiffs, “this remains an APA action,” Dkt. No. 60 at 3, and  
19 must be guided by APA principles. The Functional Standard has been developed and refined  
20 over a ten year period. Requiring the PM-ISE to compile all materials related to that process  
21 would be extremely onerous and unjustified in light of the limited nature of Plaintiffs’ challenge.  
22 It would also be inconsistent with APA principles, which do not permit programmatic challenges  
23 and limit review of agency action to an administrative record appropriately limited to the discrete  
24 decision that has been challenged.

25  
26 In addition to their primary challenge to the completeness of the administrative record,  
27 Plaintiffs also assert that the administrative record is incomplete because it does not include  
28 deliberative materials or provide a privilege log for any material withheld. But contrary to the

1 case law cited by Plaintiffs, the well-established rule is that deliberative material need not be  
2 included in the administrative record or listed in a privilege log. Absent a claim of bad faith or  
3 improper behavior (which is not alleged here), the subjective motivation of an agency decision-  
4 makers is immaterial as a matter of law to judicial review of agency action challenged as  
5 arbitrary and capricious. Moreover, because deliberative material is irrelevant as a matter of law  
6 to such an APA challenge, this material need not be logged in a privilege log.

7 Plaintiffs' alternative request—that extra-record evidence be considered in adjudicating  
8 the merits of their challenge to the definition of “suspicious activity”—should also be denied. In  
9 rare instances, pursuant to certain narrow exceptions, courts may consider extra-record evidence  
10 in resolving APA challenges. But the only exception referenced by Plaintiffs—a need to  
11 demonstrate that a relevant factor was not considered—is not applicable here because the  
12 administrative record establishes that the factor raised by Plaintiffs (the applicability of 28 C.F.R.  
13 Part 23 to databases collecting SAR information in connection with the NSI) was considered by  
14 the PM-ISE.

15 In sum, an administrative record for a rulemaking generally includes records reflecting  
16 notice of the contemplated rulemaking, any input provided by third parties as well as any factual  
17 material considered by the agency, and the agency's explanation of its final decision. While  
18 Defendants dispute that the issuance of the Functional Standard constitutes a legislative rule  
19 subject to notice-and-comment rulemaking, the PM-ISE followed a similar public process and  
20 has compiled a record that contains substantially similar information to that included in a  
21 rulemaking record. That record is complete and ripe for judicial review.

## 22 **BACKGROUND**

### 23 24 **I. PLAINTIFFS CHALLENGE ONLY THE “REASONABLY INDICATIVE” 25 STANDARD IN THE FUNCTIONAL STANDARD**

26 The Functional Standard provides guidance regarding when law enforcement agencies  
27 participating in the NSI should share SAR information with other participating agencies. *See*  
28 *generally* ISE-FS 1.5.5., AR 414-473. Among other things, the Functional Standard instructs



1 that SAR information should only be shared in this manner if the observed behavior constitutes  
2 “suspicious activity,” which the Functional Standard defines as “observed behavior reasonably  
3 indicative of pre-operational planning associated with terrorism or other criminal activity.” *Id.* at  
4 417. Plaintiffs refer to this definition of suspicious activity as the SAR standard. *See* First Supp.  
5 Compl., Dkt. No. 70 ¶ 44 (“[Functional Standard 1.5] sets forth the following standard for  
6 suspicious activity reporting: ‘[o]bserved behavior reasonably indicative of pre-operational  
7 planning related to terrorism or other criminal activity.’”).

8 Plaintiffs contend that the PM-ISE acted arbitrarily and capriciously in issuing this  
9 definition of suspicious activity. Specifically, Plaintiffs allege that the “reasonably indicative”  
10 standard “conflict[s] with a duly promulgated regulation of [the] [Department of Justice] that  
11 prohibits the collection, maintenance, and dissemination of criminal intelligence information,  
12 unless there is a reasonable suspicion of criminal activity.” *Id.* ¶ 4 (citing 28 C.F.R. § 23  
13 (1993)); *see also id.* ¶¶ 159–164. Although Plaintiffs now contend in their motion that their  
14 APA claims broadly encompass a challenge to the entire Functional Standard, and have attached  
15 version 1.5 of the Functional Standard to the Complaint, Plaintiffs do not set forth any other  
16 substantive challenge to the Functional Standard in the Complaint other than to assert that the  
17 Functional Standard is arbitrary and capricious because the “reasonably indicative” is contrary to  
18 the reasonable suspicion standard articulated in 28 C.F.R. Part 23.

19 Other aspects of Plaintiffs’ Complaint confirm that Plaintiffs’ challenge is to the PM-  
20 ISE’s definition of suspicious activity. The harms alleged by each of the Plaintiffs stem from  
21 this challenge to the definition of suspicious activity as “observed behavior reasonably indicative  
22 of pre-operational planning related to terrorism or other criminal activity.” *See id.* ¶¶ 5-9, 80-  
23 152 (asserting harms based upon definition of “suspicious activity”). And the relief sought—a  
24 declaratory judgment and an injunction requiring that the PM-ISE use the reasonable suspicion  
25 standard in defining suspicious activity in the Functional Standard—seeks to enjoin the PM-  
26 ISE’s use of the reasonably indicative standard, *see id.*, Relief ¶ 4, and not to alter any other  
27 aspect of the Functional Standard.  
28

1 Indeed, Plaintiffs made clear to the Court in their portion of the initial case management  
2 statement filed in this case that the only specific claims they assert against the PM-ISE stem from  
3 the adoption of the “reasonably indicative” standard. As Plaintiffs explained in that statement:

4 Plaintiffs challenge Functional Standard for Suspicious Activity Reporting  
5 Version 1.5 (‘Functional Standard 1.5’), which was issued by Defendant PM-ISE.  
6 Functional Standard 1.5 defines “suspicious activity” as “[o]bserved behavior  
7 reasonably indicative of pre-operational planning related to terrorism or other  
8 criminal activity.” Activity does not need to give rise to reasonable suspicion of  
9 criminal activity in order to be deemed “suspicious” within the meaning of  
10 Functional Standard 1.5.

11 Dkt. No. 36 at 3. And, in considering the Complaint in connection with Defendants’ motion to  
12 dismiss, the Court observed that “Plaintiffs contend that . . . the [PM-ISE] ha[s] issued protocols  
13 utilizing an overly broad standard to *define* the types of activities that should be deemed as  
14 having a potential nexus to terrorism.” Dkt. No. 38 at 1 (emphasis added).

15 Plaintiffs also assert a procedural claim, arguing that the Functional Standard is a  
16 legislative rule that should have not have been issued without observing the APA’s notice and  
17 comment procedures. *See* First Supp. Compl., Dkt. No. 70, ¶¶ 167–68. Even that claim,  
18 however, focuses on the Functional Standard’s “reasonably indicative” standard. *See id.* ¶ 48  
19 (“Functional Standard 1.5 purports to define the scope of suspicious activity that should be  
20 reported for agencies participating in the NSI. The purpose of Functional Standard 1.5 is to  
21 standardize SAR reporting at the federal, state, and local levels.”). In other words, Plaintiffs’  
22 notice-and-comment claim rests on whether the PM-ISE’s decision to adopt the “reasonably  
23 indicative” standard constitutes a legislative rule subject to rulemaking.

## 24 **II. THE ADMINISTRATIVE RECORD IS APPROPRIATELY TAILORED TO 25 THE PENDING CHALLENGE**

26 To facilitate an adjudication of Plaintiffs’ challenge to the “reasonably indicative”  
27 standard, the PM-ISE filed a certified administrative record containing “information considered  
28 in the development of the definition of suspicious activity, including the behavior criteria related

1 to that definition, used in the functional standard to provide guidance to participants regarding  
2 the sharing of ISE suspicious activity reports through the [NSI].” Dkt No. 52-1 ¶ 3. That  
3 record consists of 474 pages, *see generally*, Dkt. No. 53, and includes, among other things, input  
4 from interested third-parties, including the views of advocates such as the ACLU, who suggested  
5 the adoption of the “reasonably indicative” standard now challenged.

6 The Functional Standard has been through three iterations, version 1.0, version 1.5, and  
7 most recently, version 1.5.5. *See* AR at 75-106 (version 1.0); 192-227 (version 1.5); and 414-  
8 473 (version 1.5.5), respectively. Prior to the issuance of version 1.5, on May 21, 2009, the PM-  
9 ISE sought and received input on the Functional Standard and obtained input as to the  
10 appropriate definition of “suspicious activity” from Michael German, Policy Counsel, ACLU,  
11 who suggested that the term be defined to include “behavior reasonably indicative of pre-  
12 operational planning related to terrorism or other criminal behavior.” AR at 158. That is the  
13 same definition that was included in the Functional Standard and is challenged by Plaintiffs here.  
14 *See, e.g.*, AR at 417 (defining “suspicious activity” to include “[o]bserved behavior reasonably  
15 indicative of pre-operational planning related to terrorism or other criminal activity); *see also id.*  
16 (defining “suspicious activity report” in the same manner).

17 The administrative record also reflects that consideration was given to whether the  
18 reasonable suspicion standard in 28 C.F.R. Part 23 is applicable to the NSI and thus should be  
19 adopted by the Functional Standard. By way of background, 28 C.F.R. Part 23 only applies to  
20 “criminal intelligence systems.” 28 C.F.R. § 23.3(b)(1). The PM-ISE considered whether an  
21 NSI SAR database, which is used to share a type of “tips and leads,” would constitute a criminal  
22 intelligence system, as defined in 28 C.F.R. Part 23. *See* AR at 161-174 (distinguishing criminal  
23 intelligence from “tips and leads data” regarding suspicious activity); *id.* at 181 (urging  
24 application of Part 23 to “tips and leads” data). The application of 28 C.F.R. Part 23 was also  
25 considered in the preparation of the most current standard, version 1.5.5, *see id.* at 330-335, 413.  
26 Indeed, each of the versions of the Functional Standard specifically references 28 C.F.R. Part 23.  
27  
28

1 See AR at 75, 192, and 414. It was ultimately determined that Part 23 was not applicable to the  
2 sharing of information regarding suspicious activity under the Functional Standard.

### 3 **III. THE PARTIES' MEET AND CONFER**

4 The parties have met and conferred with regard to Plaintiffs' assertion that the record  
5 must include information not pertaining to the "reasonably indicative" standard challenged, as  
6 well as Plaintiffs' contention that the record include deliberative materials and that the PM-ISE  
7 provide Plaintiffs with a privilege log for such material. As explained below, the PM-ISE  
8 appropriately limited the administrative record to information pertaining to the "reasonably  
9 indicative" standard because the decision pertaining to this standard is the only decision subject  
10 to challenge in this APA action. As also explained below, because deliberative material is not  
11 part of the administrative record in an agency action challenged as arbitrary and capricious, such  
12 material is not part of the record subject to review. And because deliberative material is  
13 immaterial as a matter of law to the APA challenge here, such material need not be logged in a  
14 privilege log. Plaintiffs disagree with each of these points, but they misapprehend the law.

## 15 **ARGUMENT**

### 16 **I. STANDARD OF REVIEW**

17 In reviewing an agency decision, the reviewing court is to apply the APA's deferential  
18 standards of review, *see* 5 U.S.C. § 706(2), based on the administrative record that the agency  
19 compiles and submits to the court. *See generally Lands Council v. Powell*, 395 F.3d 1019, 1030  
20 (9th Cir. 2005). "An agency's designation and certification of the administrative record is  
21 treated like other established administrative procedures, and thus entitled to a presumption of  
22 administrative regularity." *McCrary v. Gutierrez*, 495 F. Supp. 2d 1038, 1041 (N.D. Cal. 2007)  
23 (Seeborg, J.). "In the absence of clear evidence to the contrary, courts presume that [public  
24 officers] have properly discharged their official duties." *Id.* (quoting *Citizens to Preserve*  
25 *Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971)).

26 To establish that the administrative record is incomplete, and that additional documents  
27 should be added to it, Plaintiffs must "show by clear evidence that the record fails to include  
28

1 documents or materials considered by [the agency] in reaching the challenged decision.”  
2 *Wildearth Guardians v. U.S. Forest Serv.*, 713 F. Supp. 2d 1243, 1254 (D. Colo. 2010). This  
3 requires Plaintiffs to “clearly set forth” (1) “when the documents were presented to the agency”;  
4 (2) “by whom”; and (3) under “what context.” *Id.* Requiring Plaintiffs to carry this burden  
5 ensures that the Court conducts its primary task of reviewing “the record the agency presents to  
6 the reviewing court.” *Id.* (citing *Fla. Power & Light Co v. Lorion*, 470 U.S. 729, 743–44 (1985)  
7 (“The task of the reviewing court [in an APA challenge] is to apply the appropriate [APA]  
8 standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency  
9 presents to the reviewing court.”)).

10 Plaintiffs may also ask the Court to consider extra-record material when there is a  
11 demonstrated need to consider the materials for the purpose of determining whether the agency  
12 has considered all relevant factors and has explained its decision. *S.W. Cntr. for Bio. Diversity v.*  
13 *United States Forest Servc.*, 100 F.F.3d 1443, 14450 (9th Cir. 1996). This limited exception,  
14 like others to the record-review rule, must be interpreted narrowly. *Ranchers Cattlemen Action*  
15 *Legal Fund United Stockgrowers of Am. v. U.S. Dept. of Agric.*, 499 F.3d 1108, 111 (9th Cir.  
16 2007). Accordingly, Plaintiffs bear the “heavy burden” of demonstrating that the record is  
17 inadequate and consideration of materials outside of the administrative record should be  
18 permitted. *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010).

19  
20 **II. PLAINTIFFS HAVE FAILED TO CARRY THEIR BURDEN OF SHOWING**  
21 **THAT THE CERTIFIED ADMINISTRATIVE RECORD IS INCOMPLETE**

22 Plaintiffs make three flawed arguments in support of their assertion that the  
23 administrative record is incomplete. First, they claim that the PM-ISE has failed to include  
24 several categories of documents that were considered in issuing the Functional Standard. This  
25 argument fails because Plaintiffs’ challenge is not to the Functional Standard as a whole but to  
26 the PM-ISE’s decision to use the reasonably indicative standard, and the PM-ISE has included in  
27 the record the non-deliberative documents that were considered in making that decision. Second,  
28 Plaintiffs request that the PM-ISE conduct additional searches for all documents (i) addressing

1 whether 28 C.F.R. Part 23 applies to SARs and the NSI and (ii) exploring whether the PM-ISE  
2 should have pursued formal notice and comment proceedings. But Plaintiffs have failed to meet  
3 their burden of demonstrating that the record is incomplete, and thus, these requests constitute  
4 nothing more than an attempt to obtain civil discovery, which is inappropriate in an APA action.  
5 Third, Plaintiffs assert that the administrative record should contain material reflecting the  
6 agency's pre-decisional deliberative process—or alternatively, that the PM-ISE should provide a  
7 privilege log indicating any such document that has been withheld—as in discovery. As  
8 explained below, this action is governed by APA, not discovery, principles.

9  
10 **A. The Record Is Properly Limited To Plaintiffs' Challenge to the "Reasonably  
Indicative" Standard**

11 Plaintiffs assert that the administrative record must include all documents directly or  
12 indirectly considered by the PM-ISE in issuing the Functional Standard rather than being limited  
13 to those documents directly or indirectly considered by the PMI-ISE in deciding to use the  
14 "reasonably indicative" standard that Plaintiffs challenge. *See* Pls. Br. at 14-23; *see also* Decl.  
15 of Linda Lye, ¶¶ 5-19 (setting forth the same). But this is incorrect. As Plaintiffs recognize  
16 elsewhere in their brief, "the administrative record consists of "all documents and materials  
17 directly or indirectly considered by the agency' in making its *decision*." Pls. Br. at 9 (quoting  
18 *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (emphasis added). The only  
19 challenged *decision* here is to the PM-ISE's adoption of the "reasonably indicative" standard, not  
20 to other aspects of the Functional Standard. Accordingly, the certified administrative record  
21 need only contain the non-deliberative documents that were directly or indirectly considered by  
22 the PM-ISE in adopting the "reasonably indicative" standard. *Wildearth Guardians*, 713 F.  
23 Supp. 2d at 1253 ("[The] burden to rebut the presumption of complete record initially rests with  
24 [plaintiffs] who must show by clear evidence that the record fails to included documents or  
25 materials considered by [the agency] in reaching the *challenged decision*") (emphasis added); *see*  
26 *also Thompson*, 885 F.2d at 555 (recognizing that "judicial review of agency action is limited to  
27 review of the record on which [the challenged] decision was based").  
28

1 The Functional Standard—the three versions of which were developed over  
2 approximately a decade—is a policy framework for the sharing of suspicious activity reports. It  
3 provides a variety of information about the technical aspects of sharing information through the  
4 NSI and describes in detail the process for collecting, maintaining, and sharing SAR information.  
5 AR 414–75. The “reasonably indicative” standard is just one piece of that overall framework for  
6 the sharing of information among NSI participants, and the question of its lawfulness is  
7 dispositive of all of Plaintiffs’ claims in the case. Requiring Defendants to collect each and  
8 every document produced during the development of the Functional Standard would be  
9 extraordinarily onerous and unjustified given that only one aspect of the Functional Standard is  
10 being challenged.

11 Plaintiffs’ only substantive claim in this action, as explained, arises from their assertion  
12 that the Functional Standard is arbitrary and capricious because the PM-ISE adopted a  
13 “reasonably indicative” standard to define suspicious activity rather than the “reasonable  
14 suspicion” standard articulated in 28 C.F.R. Part 23. The narrow scope of Plaintiff’s claims is  
15 apparent on the face of the Complaint and Plaintiffs’ own description of their claims throughout  
16 this litigation. *See supra* Background, Part I. And the Court has likewise interpreted Plaintiffs’  
17 claims in this manner. *See id.* While Plaintiffs now assert that the Complaint also makes  
18 reference to the collection, maintenance and dissemination of SAR information, Pls. Br. at 4, all  
19 of those allegations flow from their challenge to the “reasonably indicative” standard. Tellingly,  
20 Plaintiffs do not point to any paragraph of the Complaint that asserts claims unrelated to their  
21 challenge to the “reasonably indicative” standard.<sup>3</sup>

22  
23 The case law cited by Plaintiffs does not undermine the proposition that an administrative  
24 record is properly limited to the documents considered by the agency in making the challenged  
25 decision. Plaintiffs primarily rely upon *Winnemem Wintu Tribe v. U.S. Forest Serv.*, No. 2:09-

26  
27 <sup>3</sup> Plaintiffs’ description of their claims at pages 2 through 4 of their brief only serves to reinforce  
28 that the focal point of their challenge is to “reasonably indicative” standard and the applicability  
of Part 23. *See* Pls. Br. at 2-4.

1 cv-1072, 2014 WL 3689699 (E.D. Cal. July 24, 2014), to assert that the record must include  
2 documents considered in issuing the Functional Standard regardless of whether those documents  
3 are relevant to Plaintiffs' challenge to the "reasonably indicative" standard. Pls. Br. at 10. But  
4 Plaintiffs misread that decision. In that case, the Court simply applied the noncontroversial  
5 proposition that the test for whether a document should be included in the administrative record  
6 is not whether it is *relevant* to the challenged decision, but whether it was *considered by the*  
7 *agency* in making the challenged decision. *Winnemem*, 2014 WL 3689699, at \*11.

8         Neither the Court in *Winnemem* nor the other cases cited by Plaintiffs hold that an agency  
9 is required to include materials in the record that the agency considered in making a decision that  
10 is not challenged by Plaintiffs. Indeed, such a requirement would result an inefficient use of  
11 agency resources and burden courts with unwieldy administrative records. To the contrary,  
12 these courts (and others) follow the baseline rule that the agency is required to include in the  
13 administrative record those documents that were directly or indirectly considered by the agency  
14 in making the challenged decision. *Id.* (ordering Defendants to produce "all documents directly  
15 or indirectly considered by agency decisionmakers . . . in connection with any action or decision  
16 at issue [in the case]."); *see also Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267,  
17 1276 (D. Colo. 2010) (holding that a party moving to complete the record must show with clear  
18 evidence the context in which materials were considered by decision makers in the "*relevant*  
19 *decision making process.*" (emphasis added)). In this action, the only decision-making process  
20 implicated by Plaintiffs' claims is the one relating to the development of the "reasonably  
21 indicative" standard (as opposed to the development of the entire Functional Standard).  
22 Defendants therefore appropriately limited the administrative record to the documents considered  
23 in making that decision.

24         Limiting the record to the discrete agency action challenged by Plaintiffs (*i.e.*, the  
25 issuance of the "reasonably indicative" standard), moreover, is consistent with APA principles.  
26 In *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004), plaintiffs sought to compel the  
27 Secretary of Interior to take additional actions with respect to off-road vehicle use, arguing that  
28



1 the failure to take such action amounted to “agency action unlawfully withheld or unreasonably  
2 delayed” under Section 706 of the APA. *Id.* In rejecting APA review in that case, the Court  
3 analyzed the definition of “agency action” in the APA and stressed that the five specific actions  
4 listed (“rule, order, license, sanction [and] relief”) all “involve circumscribed, discrete agency  
5 actions,” *id.* at 62, and consequently, “agency action” does not include a broad challenge to the  
6 manner in which an agency implements its programs, *id.* at 63-64. The Court thus concluded  
7 that challenges to “[g]eneral deficiencies in [agency] compliance . . . lack the specificity requisite  
8 for agency action.” *Id.* at 66.<sup>4</sup>

9 In short, courts are not empowered to entertain broad programmatic challenges. Plaintiffs  
10 assert that Defendants should compile an administrative record sufficiently broad for them to  
11 litigate a challenge to the entire Functional Standard and the administration of the NSI. Even if  
12 such a challenge were found in Plaintiffs’ Complaint, however, it would be impermissible under  
13 APA principles.

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17 <sup>4</sup> Although *Norton* arose in the context of agency action allegedly withheld under section 706(1)  
18 of the APA, the Court’s reasoning applies with equal force to agency action taken under section  
19 706(2). *See, e.g., Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 21 & n.9  
20 (D.C. Cir. 2006) (“Although the complainants in [*Norton*] sought to compel agency action  
21 allegedly withheld, *see* 5 U.S.C. § 706(1), the Court’s reasoning applies with equal force to  
22 claims regarding action taken under § 706(2). The Court stated that the requirement of discrete  
23 “agency action is the same regardless whether a plaintiff challenges alleged action taken or  
24 withheld.”) (citing *Norton*, 542 U.S. at 64–65); *In re Long-Distance Tel. Serv. Fed. Excise Tax*  
25 *Refund Litig.*, 751 F.3d 629, 634 (D.C. Cir. 2014) cert. denied sub nom., *Cohen v. United States*,  
26 135 S. Ct. 946, 190 L. Ed. 2d 889 (2015) (“Plaintiffs argue that here, unlike in *Norton*, the  
27 Service has already acted and therefore must correct its error. But that distinction—between  
28 acting and failing to act—is irrelevant under the APA. Courts review both types of ‘agency  
action’ the same way. A court’s authority to remedy either type of error depends entirely on the  
underlying statutory obligation of the agency. Here, the only statutory failure was of notice and  
comment. Absent a statutory duty to promulgate a new rule, a court cannot order it.”). *But see*  
*Pac. Coast Fed’n of Fishermen’s Ass’ns v. Nat’l Marine Fisheries Servs.*, 482 F. Supp. 2d. 1248,  
1263–64 (W.D.Wash.2007) (holding that *Norton* is not controlling where plaintiffs challenged a  
final agency action pursuant to § 706(2), and did not seek to “compel agency action unlawfully  
withheld”).

**B. Granting Plaintiffs' Motion Would Be Tantamount to Granting Discovery**

In addition to Plaintiffs' assertion that they are entitled to all documents directly or indirectly considered in developing the Functional Standard, Plaintiffs also assert that the Court should order the PM-ISE to complete the record with all documents (i) addressing whether 28 C.F.R. Part 23 applies to SARs and the NSI and (ii) exploring whether the PM-ISE should have pursued formal notice-and-comment procedures. Pls. Br. at 13. These requests for information are unmoored from any analysis of whether particular documents related to these topics were considered by the PM-ISE and amount to little more than inappropriate discovery requests.

As explained, to establish that the administrative record is incomplete, and that additional documents should be added to it, Plaintiffs must "show by clear evidence that the record fails to include documents or materials considered by [Defendants] in reaching the challenged decision." *Wildearth Guardians*, 713 F. Supp. 2d at 1254. This requires Plaintiffs to "clearly set forth" (1) "when the documents were presented to the agency"; (2) "by whom"; and (3) under "what context." *Id.* Plaintiffs cannot simply assert that the PM-ISE should provide all documents related to the broad topics of 28 C.F.R. Part 23 and the use of notice-and-comment procedures. They must identify particular documents related to these topics that were considered by the agency but omitted from their record. But Plaintiffs have not done so.

Instead, these requests amount to an attempt to obtain discovery, which is inappropriate in an APA action. *McCrary*, 495 F. Supp. 2d at 1041 ("Because a court's review of an agency decision is limited to the administrative record, discovery is generally not permitted in APA cases.") (citing *Common Sense Salmon Recovery v. Evans*, 217 F. Supp. 2d 17, 20 (D.D.C. 2002)). "Judicial review may be expanded and discovery allowed . . . in [only] very limited circumstances." *Id.* (citing *Sw. Ctr. For Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996)). None of these circumstances exists here. Indeed, Plaintiffs (who have the burden of demonstrating that discovery is appropriate) have not even attempted to demonstrate that there is an applicable exception here to the fundamental rule that review in an APA action is limited to the administrative record. Plaintiffs may not use the vehicle of a motion to complete

1 the administrative record as an end-run around APA principles. The certified record is the focal  
2 point for judicial review. *Id.* at 1042.

3 **C. Deliberative Material Is Properly Excluded from the Administrative Record**

4 APA principles also preclude consideration of deliberative materials in a challenge such  
5 as this, where agency action is challenged as arbitrary and capricious. Contrary to Plaintiffs'  
6 assertion that the record must include internal deliberative materials, Pls. Br. at 12–13, it is well  
7 established that deliberative material is not part of the administrative record. *See e.g., San Luis*  
8 *Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26, 44-45 (D.C. Cir.  
9 1986) (*en banc*) (refusing to supplement the administrative record to consider transcripts of  
10 deliberative agency proceedings); *Norris & Hirshberg v. SEC*, 163 F.2d 689, 693 (D.C. Cir.  
11 1947) (“internal memoranda made during the decisional process . . . are never included in a  
12 record”). “When a party challenges agency action as arbitrary and capricious the reasonableness  
13 of the agency’s actions is judged in accordance with the stated reasons” set forth in the  
14 administrative record. *In re Subpoena Duces Tecum*, 156 F.3d 1279, 1279 (D.C. Cir. 1998).  
15 “Agency deliberations not part of the record are deemed immaterial” in an agency action  
16 challenged as arbitrary and capricious. *Id.* (citing *Camp v. Pitts*, 411 U.S. 138 (1973) and *United*  
17 *States v. Morgan*, 313 U.S. 409 (1941)). “That is because the actual subjective motivation of  
18 agency decision[-]makers is immaterial as a matter of law—unless there is a showing of bad  
19 faith or improper behavior.” *Id.* at 1279-1280. Because Plaintiffs allege neither bad faith nor  
20 improper behavior, Defendants acted in accordance with this law in excluding deliberative  
21 documents from the record.

22  
23 Moreover, “[s]ince deliberative documents are not part of the administrative record, an  
24 agency that withholds these privileged documents is not required to produce a privilege log to  
25 describe the documents that have been withheld.” *Nat’l Ass’n of Chain Drug Stores v. U.S.*  
26 *Dep’t of Health & Human Servs.*, 631 F. Supp. 2d 23, 27 (D.D.C. 2009); *see also California v.*  
27 *U.S. Dep’t of Labor*, No. 2:13-CV-02069-KJM, 2014 WL 1665290, at \*13 (E.D. Cal. Apr. 24,  
28 2014) (“[B]ecause internal agency deliberations are properly excluded from the administrative

1 record, the agency need not provide a privilege log.”); *Blue Ocean Inst. v. Gutierrez*, 503 F.  
2 Supp. 2d 366, 372 n.4 (D.D.C. 2007) (no need to claim privilege or provide a privilege log as to  
3 deliberative documents in an APA proceeding because such documents are not part of “the  
4 administrative record in the first place.”).

5 Plaintiffs fail to address this authority in their motion, instead relying on *California*  
6 *ex rel. Lockyer v. U.S. Dep’t of Agric.*, No. C05-3508, 2006 WL 708914 (N.D. Cal. Mar. 16,  
7 2006). But that court improperly analyzed this issue under the discovery procedures set forth in  
8 Federal Rule of Civil Procedure 26(b)(5), *id.* at \*4, which, as explained, are inapplicable to APA  
9 proceedings. Absent a showing that discovery is permitted (which has not occurred here), APA  
10 challenges are not governed by typical discovery rules. They are governed by APA principles—  
11 which do not require the production of a privilege log when the administrative record omits pre-  
12 decisional, deliberative material.

13 Plaintiffs also rely upon *United Farm Workers v. Adm’r, U.S. Envtl. Prot. Agency*, No.  
14 C07-3750, 2008 WL 3929140 (N.D. Cal. Aug. 26, 2008) and *Ctr. for Biological Diversity v. U.S.*  
15 *Bureau of Land Mgmt.*, No. C-06-4884, 2007 WL 3049869 (N.D. Cal. Oct. 18, 2007), in  
16 purported support of their right to obtain deliberative documents in an APA proceeding. Pls. Br.  
17 at 13-14. Neither decision, however, compelled the production of deliberative documents.  
18 Plaintiffs reference the plaintiffs’ request in *United Farm Workers* for deliberative materials, *id.*  
19 at 13, but the court did not compel the production of any specific document that implicated  
20 deliberative materials because the record there was still being assembled by the agency. 2008  
21 WL 3929140, at \*2. Similarly, while the court in *Ctr. For Biological Diversity* required *in*  
22 *camera* consideration of deliberative materials, 2007 WL 3049869, at \*6, the court did not  
23 compel the release of any such deliberative documents. Neither case thus undermines the  
24 authority above precluding consideration of deliberative materials in an APA proceeding.  
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\* \* \*

1  
2 Plaintiffs' motion to complete the record should accordingly be denied. In accordance  
3 with APA principles, the PM-ISE submitted a proper record in this matter to address the agency  
4 action challenged. Plaintiffs have failed to carry their burden of presenting "clear evidence" that  
5 the record submitted with respect to the challenged decision is incomplete. *See Pinnacle Armor,*  
6 *Inc. v. United States*, 923 F. Supp. 2d 1226, 1241 (E.D. Cal. 2013) (holding that "mere reference  
7 in the administrative record" to a document is insufficient to carry Plaintiffs' burden to rebut the  
8 presumption of regularity that attaches to the record). Notwithstanding Plaintiffs' failure to carry  
9 their burden of rebutting the presumption of regularity that attaches to the record, the PM-ISE  
10 has reviewed each of the categories of documents identified in Plaintiffs' motion to determine if  
11 additional documents should be added to the record for review of Plaintiffs' challenge to the  
12 reasonably indicative standard. In doing so, the PM-ISE has identified two additional documents  
13 relevant to the PM-ISE's issuance of the definition of suspicious activity that were inadvertently  
14 omitted from the administrative record. Those two documents are submitted with this  
15 opposition, together with a revised certification provided by the PM-ISE. *See Decl. of Basil*  
16 *Harris, PM-ISE, Ex. 1.*<sup>5</sup> No additional documents are needed to complete the record, which is  
17 ripe for judicial review.

18  
19 **III. NO GROUNDS EXIST TO PERMIT CONSIDERATION OF EXTRA-RECORD**  
20 **EVIDENCE**

21 Plaintiffs are likewise incorrect that two versions of a government-funded report should  
22 be admitted for consideration by the Court even though they are outside the administrative  
23 record. Plaintiffs assert that this report should be considered by the Court because it contains a  
24 recommendation that agencies handling SAR information should "clearly articulate" when that  
25 information is subject to 28 C.F.R. Part 23. *Lye Decl., Ex. 3 at 9; see also Lye Decl., Ex. 2 at*

26  
27 <sup>5</sup> In addition, Defendants have filed certain corrected pages from the administrative record that  
28 were incorrectly reproduced or included mistaken redactions. *See Decl. of Paul G. Freeborne,*  
*Ex. 2.*

1 30; Lye Decl., Ex. 3 at 23. For this type of extra-record material to be admitted, Plaintiffs must  
2 demonstrate that material is needed for the Court to determine whether the agency decision-  
3 maker failed to consider a relevant factor—in this case, the applicability of 28 C.F.R. Part 23 to  
4 SAR information. Plaintiffs cannot satisfy that standard for the simple reason that the  
5 administrative record already reflects that the PM-ISE considered the applicability of 28 C.F.R.  
6 Part 23.

7 Plaintiffs may not satisfy their burden to establish that information outside the record  
8 should be considered by the Court by suggesting that the extra-record material reflects some  
9 nuanced argument that allegedly has not been adequately addressed by the agency or because a  
10 particular document has not been considered. To the contrary, the “relevant factors” exception  
11 only provides a basis on which to supplement the record if it is apparent that an entire subject  
12 matter has been entirely ignored. As explained in a decision cited by Plaintiffs:

13 [T]he “relevant factors” exception only applies when Federal Defendants fail to  
14 consider a general subject matter that is demonstrably relevant to the outcome of  
15 the agency’s decision, not when specific hypotheses and/or conclusions are  
16 omitted from consideration. To hold otherwise would allow Plaintiffs to drive a  
17 truck through what is supposed to be a narrow exception to the record review rule.

18 *In re Delta Smelt Consol. Cases*, No. 1:09-CV-1053 OWW DLB, 2010 WL 2520946, at \*5 (E.D.  
19 Cal. June 21, 2010); *see also Pinnacle Armor, Inc. v. United States*, 923 F. Supp. 2d 1226, 1234  
20 (E.D. Cal. 2013) (“[T]o satisfy the “relevant factors” exception, a plaintiff must establish more  
21 than just that the document is relevant. In fact, the document in question must do more than raise  
22 ‘nuanced points’ about a particular issue; it must point out an ‘entirely new’ general subject  
23 matter that the defendant agency failed to consider.”); *Organic Pastures Dairy Co., LLC v.*  
24 *Sebelius*, No. 1:12-CV-02019-SAB, 2013 WL 4648548, at \*5 (E.D. Cal. Aug. 29, 2013) (same).

25 The extra-record report cited by Plaintiffs does not meet that requirement because it does  
26 not show that the PMI-ISE failed to consider a relevant subject matter. Plaintiffs assert that both  
27 versions of the report should be admitted because they “address the question of whether the  
28

1 agency considered the relevant factor of the applicability of 28 C.F.R. Part 23 to SARs.” Pls. Br.  
 2 at 24. The administrative record, however, already reflects that Defendants considered the  
 3 applicability of 28 C.F.R Part 23. *See supra* Background, Part III. Among other things, prior to  
 4 the most recent update of the Functional Standard, civil liberties advocates recommended that the  
 5 Functional Standard should require that 28 C.F.R. Part 23’s reasonable suspicion standard be  
 6 satisfied for participating agencies to collect, retain, or disseminate SARs containing personally  
 7 identifiable information. A.R. at 413. The PM-ISE explicitly acknowledged that concern in an  
 8 Executive Summary of the Functional Standard, but explained that he declined to adopt the  
 9 reasonable suspicion standard for a variety of reasons—including that the information-sharing  
 10 systems subject to the Functional Standard are not the type of “criminal intelligence systems” to  
 11 which 28 C.F.R. Part 23 applies. *Id.*

12 Plaintiffs may disagree with that determination, but that disagreement does not permit the  
 13 admission of extra-record evidence that Plaintiffs believe supports their positions. *See San Luis*  
 14 *& Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014) (holding that extra-  
 15 record evidence may not be used to “judge the wisdom” of the agency’s action). The  
 16 applicability of 28 C.F.R. Part 23 was indisputably considered by the PM-ISE, as is reflected in  
 17 the administrative record. Accordingly, Plaintiffs’ motion to supplement that record should be  
 18 denied.

### CONCLUSION

20 For the foregoing reasons, Plaintiffs’ motion should be denied.

21  
 22  
 23 October 22, 2015

Respectfully submitted,

24 BENJAMIN C. MIZER  
 Principal Deputy Assistant Attorney General

25 ANTHONY J. COPPOLINO  
 26 Deputy Branch Director

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*Attorneys for Federal Defendants*



**CERTIFICATE OF SERVICE**

I hereby certify that on October 22, 2015, I filed the above pleading and its attachments with the Court’s CM/ECF system, which will send notice of such filing to all parties.

Date: October 22, 2015

/s/ Kieran G. Gostin  
KIERAN G. GOSTIN

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11 *Attorneys for Federal Defendants*

12  
 13 **UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA**

14 WILEY GILL; JAMES PRIGOFF; TARIQ  
 15 RAZAK; KHALID IBRAHIM; and AARON  
 CONKLIN,  
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 Plaintiffs,  
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 v.  
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 DEPARTMENT OF JUSTICE, *et al.*,  
 19  
 20 Defendants.  
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No. 3:14-cv-03120 (RS)

**AMENDED CERTIFICATION OF THE  
 ADMINISTRATIVE RECORD**

22  
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 28

1 Basil N. Harris, pursuant to 28 U.S.C. § 1746, deposes and says as follows:

2 1. I am Chief of Staff to the Office of the Program Manager for the Information  
3 Sharing Environment (PM-ISE), Office of the Director of National Intelligence. I have been  
4 employed in that capacity for approximately 9 years.

5 2. During that time I have been involved in the development of the ISE functional  
6 standard associated with the Nationwide Suspicious Activity Reporting Initiative. There are  
7 three versions of the functional standard—versions 1.0, 1.5, and 1.5.5. The current version of the  
8 standard, 1.5.5, went into effect on February 23, 2015.

9 3. On June 16, 2015, I certified the administrative record in this case, which I  
10 understand from counsel was filed electronically at Dkt. No. 52-1. I understand from counsel  
11 that the index of the administrative record was filed electronically at Dkt. No. 52-2, and the  
12 administrative record was filed at Dkt. No. 53.

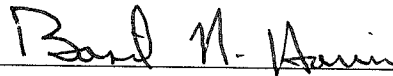
13 4. Since providing my certification, PM-ISE was provided with Plaintiffs' letters  
14 dated July 28, 2015 and August 31, 2015, and Plaintiffs' recent motion to complete the  
15 administrative record, Dkt. No. 73. Plaintiffs assert in their letters and at pages 16-23 of the  
16 motion that certain materials were omitted from the record. I have reviewed those materials and  
17 determined that two documents were inadvertently omitted from the administrative record.

18 5. The first document is an ISE Privacy and Civil Liberty Advocacy Group  
19 Roundtable held on May 20, 2010 (bates 475) and the second document is a sign-in sheet for that  
20 roundtable (bates 476-79). Attached hereto as Exhibit A are fair and accurate copies of those  
21 documents. Attached hereto as Exhibit B is a revised index of the administrative record that  
22 includes these documents.

23 6. I hereby certify that the supplement to the administrative record submitted  
24 herewith, along with the administrative record previously submitted, reflect to the best of my  
25 knowledge the non-privileged information considered in the development of the definition of  
26 suspicious activity, including the behavior criteria related to that definition, used in the  
27  
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1 functional standard to provide guidance to participants regarding the sharing of ISE suspicious  
2 activity reports through the Nationwide Suspicious Activity Reporting Initiative.

3  
4 I certify under penalty of perjury that the foregoing is true and accurate. Executed in  
5 Washington, D.C. on October 22, 2015.

6 

7 Basil N. Harris  
8 Chief of Staff  
9 Office of the Program Manager for the Information  
10 Sharing Environment, Office of Director of  
11 National Intelligence  
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11 *Attorneys for Federal Defendants*

12 **UNITED STATES DISTRICT COURT**  
 13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

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

16 Plaintiffs,

17 v.

18 DEPARTMENT OF JUSTICE, *et al.*,

19 Defendants.  
20  
21

No. 3:14-cv-03120 (RS)

**EXHIBIT A TO AMENDED  
 CERTIFICATION OF THE  
 ADMINISTRATIVE RECORD**

DOCUMENT 43



# ISE PRIVACY AND CIVIL LIBERTIES ADVOCACY GROUP ROUNDTABLE

MAY 20, 2010  
ARLINGTON, VA

**1911 North Fort Myer Drive  
Arlington, Virginia 22209  
Key Bridge Room**

**Phone Number: 866-733-8802  
Participant Pass Code: 234-1841**

## **Agenda**

**8:30 A.M. – 12:30 P.M.**

- ❖ Nationwide Suspicious Activity Reporting Initiative (NSI)
  - Current Program Status
  - NSI Privacy Analysis and Recommendations Report
  - Highlights of Front Line Officer SAR Training Video
  - Criminal Intelligence Coordinating Council (CICC) Privacy Committee Training Materials
- ❖ Building Communities of Trust Initiative
- ❖ Fusion Centers
  - Current Program Status/Fusion Center Privacy and Civil Liberties Framework
  - Privacy Policy Review
    - 2010 Homeland Security Grant Guidance
    - Revision of Global Justice *Fusion Center Privacy Policy Development Template*
  - Privacy and Civil Rights and Civil Liberties training to designated fusion center officials at 2010 regional fusion center conferences
- ❖ Introduction to the National Information Exchange Model (NIEM) Process

DOCUMENT 44



Sign in

May 20th Roundtable Attendees by Category and Method of Attendance

Attending in Person					Total: 36
Check In	Title	First Name	Last Name	Group	Agency
<b>Advocates</b>					
✓	Mr.	Michael	German	Advocate	American Civil Liberties Union (ACLU)
✓	Mr.	Peter	Bibring	Advocate	American Civil Liberties Union (ACLU) of S. California
✓	Ms.	Farhana	Khera	Advocate	Muslim Advocates
✓	Ms.	Lillie	Coney	Advocate	Electronic Privacy Information Center (EPIC)
✓	Mr.	Mohamed	Elibiary	Advocate	Freedom and Justice Foundation
✓	Mr.	Harley	Geiger	Advocate	Center for Democracy and Technology (CDT)
	Mr.	Gregory	Nojeim	Advocate	Center for Democracy and Technology (CDT)
	Mr.	Abed	Ayoub, Esq.	Advocate	American-Arab Anti-Discrimination Committee
✓	Mr.	Naeem	Baig	Advocate	Islamic Shura Council of Southern California
✓	Mr.	Haris	Tarin	Advocate	Muslim Public Affairs Council
✓	Mr.	Alejandro	Beutel	Advocate	Muslim Public Affairs Council
	Ms.	Jumana	Musa	Advocate	Rights Working Group
✓	Ms.	Sahar	Aziz	Advocate	Bill of Rights Defense Committee
<b>State and Local</b>					
✓	Mr.	Vernon	Keenan	Local/State	Georgia Bureau of Investigation & CICC Privacy Cmte
✓	Ms.	Rosemary	DeMenno	Local/State	International Assoc of Chiefs of Police (IACP)
<b>Federal Employees</b>					
✓			01	Federal	Office of the Program Manager, ISE - <b>Presenter</b>
✓	Mr.	Clark	Smith	Federal	Office of the Program Manager, ISE - <b>Presenter</b>
✓	Mr.	Thomas	O'Reilly	Federal	U.S. Department of Justice/BJA - <b>Presenter</b>
	<del>Ms.</del>	<del>Nancy</del>	<del>Libin</del>	Federal	U.S. Department of Justice - <b>Presenter</b>
	Mr	James P	McCreary	Federal	U.S. Department of Justice/BJA
✓			01	Federal	U.S. Department of Justice/FBI
✓	Ms.	Mary Ellen	Callahan	Federal	Department of Homeland Security/Privacy - <b>Presenter</b>
	Ms.	Lynn	Parker	Federal	Department of Homeland Security/Privacy
✓	Mr.	David	Gersten	Federal	Department of Homeland Security/CRCL - <b>Presenter</b>
✓	Ms.	Donna	Roy	Federal	Department of Homeland Security/CIO - <b>Presenter</b>
✓	Ms.	Christina	Bapst	Federal	Department of Homeland Security/CIO
✓	Mr.	Thomas	Crane	Federal	Department of Homeland Security/FEMA
✓			01	Federal	Office of the Director of National Intelligence/CRCL
✓			01	Federal	Office of the Director of National Intelligence/CRCL
✓	Ms.	Amy	Schapiro	Federal	U.S. Department of Justice/COPS
<b>Staff</b>					
✓	Ms.	Katherine	Black	Staff	Office of the Program Manager, ISE
✓			01	Staff	Office of the Program Manager, ISE
✓	Ms.	Jaynee E.	Farrell	Staff	Office of the Program Manager, ISE
✓	Mr.	Bob	Cummings	Staff	Institute for Intergovernmental Research
✓	Mr.	John	Wilson	Staff	Institute for Intergovernmental Research
✓	Ms.	Donna	Lindquist	Staff	Institute for Intergovernmental Research

**May 20th Roundtable Attendees by Category and Method of Attendance**

Participating Via Phone					Total : 7
Check In	Title	First Name	Last Name	Group	Agency
<b>Advocates</b>					
	Mr.	Shakeel	Syed	Advocate	Islamic Shura Council of Southern California
<b>State and Local</b>					
	Mr.	Tom	Monahan	Local/State	NFCA/Las Vegas Fusion Center
	Lieutenant	Ron	Leavell	Local/State	Seattle Police Department
	Mr.	Russ	Porter	SME	Former Deputy Director, Iowa Dept of Public Safety & Director, Iowa Fusion Center
<b>Federal Employees</b>					
	01		01	Federal	Department of Homeland Security/FEMA
	Ms.	Ayn	Crawley	Federal	Department of Homeland Security/CRCL
<b>Staff</b>					
	Ms.	Jennifer	Skinner	Staff	Institute for Intergovernmental Research

<b>Total Attendees</b>	<b>43</b>
Attending	36
Call-in	7

*Attendees*

**May 20th Roundtable Attendees by Category and Method of Attendance**

Attending in Person					Total: 36
Check In	Title	First Name	Last Name	Group	Agency
<b>Advocates</b>					
✓	Mr.	Michael	German	Advocate	American Civil Liberties Union (ACLU)
✓	Mr.	Peter	Bibring	Advocate	American Civil Liberties Union (ACLU) of S. California
✓	Ms.	Farhana	Khera	Advocate	Muslim Advocates
✓	Ms.	Lillie	Coney	Advocate	Electronic Privacy Information Center (EPIC)
✓	Mr.	Mohamed	Elibiary	Advocate	Freedom and Justice Foundation
✓	Mr.	Harley	Geiger	Advocate	Center for Democracy and Technology (CDT)
✓	Mr.	Gregory	Nojeim	Advocate	Center for Democracy and Technology (CDT)
✓	Mr.	Abed	Ayoub, Esq.	Advocate	American-Arab Anti-Discrimination Committee
✓	Mr.	Nacem	Baig	Advocate	Islamic Shura Council of Southern California
✓	Mr.	Haris	Tarin	Advocate	Muslim Public Affairs Council
✓	Mr.	Alejandro	Beutel	Advocate	Muslim Public Affairs Council
✓	Ms.	Jumana	Musa	Advocate	Rights Working Group
✓	Ms.	Sahar	Aziz	Advocate	Bill of Rights Defense Committee
<b>State and Local</b>					
✓	Mr.	Vernon	Keenan	Local/State	Georgia Bureau of Investigation & CICC Privacy Cmte
✓	Ms.	Rosemary	DeMenno	Local/State	International Assoc of Chiefs of Police (IACP)
<b>Federal Employees</b>					
✓			01	Federal	Office of the Program Manager, ISE - <b>Presenter</b>
✓	Mr.	Clark	Smith	Federal	Office of the Program Manager, ISE - <b>Presenter</b>
✓	Mr.	Thomas	O'Reilly	Federal	U.S. Department of Justice/BJA - <b>Presenter</b>
X	Ms.	Nancy	Libin	Federal	U.S. Department of Justice - <b>Presenter</b>
✓	Mr	James P	McCreary	Federal	U.S. Department of Justice/BJA
			01	Federal	U.S. Department of Justice/FBI
✓	Ms.	Mary Ellen	Callahan	Federal	Department of Homeland Security/Privacy - <b>Presenter</b>
	Ms.	Lynn	Parker	Federal	Department of Homeland Security/Privacy
✓	Mr.	David	Gersten	Federal	Department of Homeland Security/CRCL - <b>Presenter</b>
✓	Ms.	Donna	Roy	Federal	Department of Homeland Security/CIO - <b>Presenter</b>
✓	Ms.	Christina	Bapst	Federal	Department of Homeland Security/CIO
✓	Mr.	Thomas	Crane	Federal	Department of Homeland Security/FEMA
✓			01	Federal	Office of the Director of National Intelligence/CRCL
✓			01	Federal	Office of the Director of National Intelligence/CRCL
✓	Ms.	Amy	Schapiro	Federal	U.S. Department of Justice/COPS
<b>Staff</b>					
✓	Ms.	Katherine	Black	Staff	Office of the Program Manager, ISE
✓			01	Staff	Office of the Program Manager, ISE
✓	Ms.	Jaynee E.	Farrell	Staff	Office of the Program Manager, ISE
✓	Mr.	Bob	Cummings	Staff	Institute for Intergovernmental Research
✓	Mr.	John	Wilson	Staff	Institute for Intergovernmental Research
✓	Ms.	Donna	Lindquist	Staff	Institute for Intergovernmental Research

May 20th Roundtable Attendees by Category and Method of Attendance

Participating Via Phone					Total : 7
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<b>Advocates</b>					
	Mr.	Shakeel	Syed	Advocate	Islamic Shura Council of Southern California
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	Mr.	Tom	Monahan	Local/State	NFCA/Las Vegas Fusion Center
	Lieutenant	Ron	Leavell	Local/State	Seattle Police Department
	Mr.	Russ	Porter	SME	Former Deputy Director, Iowa Dept of Public Safety & Director, Iowa Fusion Center
<b>Federal Employees</b>					
	01	01	01	Federal	Department of Homeland Security/FEMA
	Ms.	Ayn	Crawley	Federal	Department of Homeland Security/CRCL
<b>Staff</b>					
	Ms.	Jennifer	Skinner	Staff	Institute for Intergovernmental Research

Total Attendees 43  
 Attending 36  
 Call-in 7

Phone

Tim Skinner - DHS CRCL  
 Dick Ward  
 Jen Skinner  
 Lilly Conroy - EPIC  
 Ron Leavell - Wash State  
 Tom Monahan  
 Ross Ashley - NFCA  
 01  
 01  
 Russ Porter

1 BENJAMIN C. MIZER  
 Principal Deputy Attorney General  
 2 ANTHONY J. COPPOLINO  
 Deputy Branch Director  
 3 PAUL G. FREEBORNE  
 Virginia Bar No. 33024  
 4 Senior Trial Counsel  
 5 KIERAN G. GOSTIN  
 Trial Attorney  
 6  
 Civil Division, Federal Programs Branch  
 7 U.S. Department of Justice  
 P.O. Box 883  
 8 Washington, D.C. 20044  
 Telephone: (202) 353-0543  
 9 Facsimile: (202) 616-8460  
 10 E-mail: paul.freeborne@usdoj.gov

11 *Attorneys for Federal Defendants*

12 **UNITED STATES DISTRICT COURT**  
 13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

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

16 Plaintiffs,

17 v.

18 DEPARTMENT OF JUSTICE, *et al.*,

19 Defendants.  
20  
21

No. 3:14-cv-03120 (RS)

**EXHIBIT B TO AMENDED  
 CERTIFICATION OF THE  
 ADMINISTRATIVE RECORD**

**RECORD INDEX**

	<b><u>DOCUMENT INFORMATION</u></b>	<b><u>BATES NUMBER</u></b>	<b><u>REDACTION<sup>1</sup></u></b>
1	White House Memorandum on Guidelines and Requirements in Support of the Information Sharing Environment (December 16, 2005) (wh121605-memo.pdf)	1-5	None
2	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 (November 24, 2006) (Guideline 2 - common sharing framework.pdf)	6-27	None
3	The Information Sharing Environment Suspicious Activity Reporting (SAR) Working Group’s Business Process Analysis (February 13, 2007) (SAR_BusinessAnalysis_final20070215.doc)	28-36	None
4	Common Terrorism Information Sharing Standards (CTISS) Program Manual, Version 1.0 (October 2007) (CTISS Program Manual 20071031.pdf)	37-66	None
5	Information Sharing Environment Administrative Memoranda (ISE-AM) Common Terrorism Information Sharing Standards (CTISS) Program (October 31, 2007) (ise-asm300-ctiss-issuance.pdf)	67-70	None
6	PM-ISE Memorandum, Release of the Information Sharing Environment (ISE) Functional Standard for Suspicious Activity Reporting (SAR) Version 1.0 (ISE-FS-200) (January 25, 2008) (Transmittal_Memorandum_ISE-FS-200.pdf)	71-74	None
7	Information Sharing Environment (ISE) Functional Standard (FS) Suspicious Activity Reporting (SAR) Version 1.0 ISE-FS-200 (January 25, 2008) (Functional Standard_Issuance_Version_1.0_Final_Signed).pdf)	75-106	None

<sup>1</sup> The nature of each of the redactions is explained in Defendants’ Notice of Filing of Administrative Record, Dkt. No. 52.

1	8	ISE-SAR Governance Panel June Meeting Agenda (June 17, 2008) (ISE-SAR SC Agenda (06-17-2008).doc)	107	01
2	9	ISE-SAR Steering Committee email, with attachment ISE-SAR Steering Group - Contact List.doc (June 26, 2008) (FW ISE-SAR Steering Committee.msg)	108-110	01, 02 & 03
3	10	ISE-SAR Governance Panel July Meeting Agenda (July 17, 2008) (ISE-SAR SC Agenda (07-17-2008).doc)	111	01
4	11	ISE- SAR Steering Committee September email (August 26, 2008) (FW Next Meeting - Monday September 8.msg), with attachment containing the agenda for the September 2008 meeting (ISE-SAR SC Agenda_2008-09-08.doc)	112-113	01 & 02
5	12	Agenda for a September 2008 Dialogue on Privacy and Civil Liberties outreach meeting agenda hosted by the PM-ISE (August 27, 2008) (PCL Dialogue Agenda 090308.pdf)	114-115	01
6	13	September 2008 PM-ISE hosted Dialogue on Privacy and Civil Liberties outreach meeting attendee list (August 27, 2008) (AttendeeList Sept2008.doc)	116-119	01, 02 & 03
7	14	September 2008 PM-ISE hosted Dialogue on Privacy and Civil Liberties outreach meeting description of meeting purpose and ground rules (August 28, 2008) (Purpose of 9-3_SAR.pdf)	120	None
8	15	Information Sharing Environment – Suspicious Activity Reporting Functional Standard And Evaluation Environment Initial Privacy and Civil Liberties Analysis September 2008—Version 1 (September 2008) (ISE-SAR FS and EE Initial Privacy and Civil Liberties Analysis_090508.pdf)	121-152	None
9	16	Agenda for the ISE-SAR Steering Committee on October 7, 2008 (ISE-SAR SC Agenda_2008-10-07.doc)	153	01
10	17	Email from Michael German (ACLU) providing	154-157	01 & 03

1		suspicious activity examples (January 16, 2009), with attachment Suspicious Activity Examples.docx (SAR meeting.msg)		
2				
3	18	Email from Michael German regarding possible amendments to the ISE-SAR Functional Standard ver. 1.0 (January 23, 2009) (Comments on Functional Standard.msg)	158-160	01 & 03
4				
5				
6	19	Tips and Leads Issue Paper email, with attachment Tips and Leads Issue Paper 10 07.pdf (February 10, 2009) (Tips and Leads Issue Paper.msg)	161-174	01 & 03
7				
8	20	Feedback Session with Privacy and Civil Liberties Advocates: Suspicious Activity Reporting (SAR) Line-Officer Training and the ISE-SAR Functional Standard --Agenda (February 13, 2009) (Agenda February 18, 2009 - SAR Feedback Session.doc)	175	01
9				
10				
11	21	Feedback Session with Privacy and Civil Liberties Advocates: Suspicious Activity Reporting (SAR) Line-Officer Training and the ISE-SAR Functional Standard --Attendee List (February 18, 2009) (Attendee List v3 Feb2009 roundtable.xls)	176-177	01 & 03
12				
13				
14				
15	22	ISE- SAR Steering Committee March meeting email, with attachment ISE-SAR SC Agenda_2009-03-05_v2.doc (February 25, 2009) (FW ISE-SAR Steering Committee Meeting March 5 2009.msg)	178-179	01 & 02
16				
17				
18	23	Email from Mohamed Elibiary regarding feedback (February 26, 2009) (Re follow-up and some heart-felt feedback.msg)	180-182	01 & 03
19				
20	24	Suggestions from Michael German for revision to functional standard email (March 30, 2009) (Re Thanks.msg)	183-184	01, 03 & 04
21				
22	25	ISE- SAR Steering Committee April meeting email, with attachment ISE-SAR SC_Agenda_2009-04-07.doc (April 1, 2009) (FW ISE-SAR Steering Committee Meeting April 7 2009.msg)	185-186	01 & 02
23				
24				
25	26	Memorandum for Release of the Information Sharing Environment (ISE) Functional Standard for	187-188	None



1	Suspicious Activity Reporting, Version 1.5 (May 21, 2009) (ISE-SAR_Functional_Standard_V1.5_Cover Letter.pdf)		
2			
3	27 Fact Sheet: Update to Suspicious Activity Reporting Functional Standard Provides Greater Privacy and Civil Liberties Protections (May 21, 2009) (ISE-SAR_Functional_Standard_V1_5_Fact_Sheet.pdf)	189-191	None
4			
5			
6	28 Information Sharing Environment (ISE) Functional Standard (FS) Suspicious Activity Reporting (SAR) version 1.5 (May 21, 2009) (ISE-FS-200_ISE-SAR_Functional_Standard_V1.5_Issued.pdf)	192-227	None
7			
8			
9	29 Proposed redlines and feedback provided by Michael German (ACLU) to the PM-ISE on the draft NSI Privacy, Civil Rights, and Civil Liberties Analysis and Recommendations report issued by PM-ISE (May 17, 2010) (NSI_PCRCL_Analysis_05132010_(ver_188)_ACLU R.doc)	228-264	None
10			
11			
12			
13	30 NSI Privacy, Civil Rights, and Civil Liberties Analysis and Recommendations report issued by PM-ISE on privacy compliance outcomes of the ISE SAR Evaluation Environment and providing recommendations for additional privacy protections during nationwide expansion of the NSI (July 2010) (NSI_PCRCL_Analysis_July2010_final.pdf)	265-301	None
14			
15			
16			
17			
18	31 Email regarding meeting between Mike German and the Program Manager on July 18, 2012 ( July 9, 2012) (MGerman Scheduling meeting with Kshemendra Paul July2012.msg) and meeting invitation (MGerman PM meeting 7182012.pdf)	302-305	01 & 03
19			
20			
21	32 Email regarding meeting between Lillie Coney (EPIC) and the Program Manager on July 31, 2012 (Meeting between Kshemendra Paul PM-ISE and Lillie Coney (EPIC).msg) and meeting invitation (LConey PM meeting 7312012.pdf)	306-307	01 & 03
22			
23			
24			
25	33 Email regarding meeting between Sharon Bradford Franklin (The Constitution Project) and Program	308-313	01 & 03
26			

1	Manager on September 24, 2012 ( SBFranklin meet with Kshemendra Paul September 2012.msg) and meeting invitation (SBFranklin PM 09242012)		
2			
3	34 Email regarding meeting between Greg Nojeim (Center for Democracy and Technology) and the Program Manager on October 22, 2012 (GNojeim confirm meeting Kshemendra Paul Oct2012.msg) and meeting invitation (GNojeim PM meeting 10222012.pdf)	314-319	01 & 03
4			
5			
6			
7	35 Email from PM-ISE Executive Secretariat issuing formal invitation to May 30, 2013 ISE Privacy, Civil Rights, and Civil Liberties Roundtable outreach event (May 15, 2013) (PMISE Invitation to Privacy Civil Rights and Civil Liberties Roundtable-Copy.msg)	320	01, 02 & 03
8			
9			
10	36 May 30, 2013 ISE Privacy, Civil Rights, and Civil Liberties Roundtable outreach event final attendee list (May 16, 2013) (May 30th invitees by category 051613.xlsx)	321-325	01 & 02
11			
12			
13	37 Email from PM-ISE Executive Secretariat providing final meeting agenda and read-ahead materials to confirmed attendees for the May 30, 2013 ISE Privacy, Civil Rights, and Civil Liberties Roundtable outreach event (Read aheads May 30 ISE PCRCL Roundtable.msg), including attachments (Agenda ISE PCRCL Roundtable May 30 2013 final.pdf) and (ISE Privacy Roundtable Background and Resources.pdf)	326-329	01, 02 & 03
14			
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18	38 Letter addressed to Attorney General Eric Holder, and four other senior government officials, including the Program Manager, ISE, Kshemendra Paul, from the ACLU and 27 signatory advocacy groups requesting reform of the ISE and eGuardian standards (September 9, 2013) (SAR Sign On Letter Final.pdf)	330-335	01
19			
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25	39 Email from Program Manager to Vernon Keenan, Chair of the Criminal Intelligence Coordinating Council, and Mike Sena, Chair of the National Fusion	336-405	01, 02 & 03
26			
27			
28			

1	Center Association, sharing proposed changes to the ISE-SAR Functional Standard for version 1.5.5 (November 21, 2014) (KP to SLTTs Proposed final ISE-SAR Functional Standard version 1.5.5.msg), including attachments (FS v1_5_5 Executive Summary PM_ISE_QC_112114 Comprehensive Update.docx; and ISE SAR FS 1 5 5 PM_ISE QC Final DRAFT Clean 112114.doc)		
2			
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6	40 ISE-SAR Functional Standard Version 1.5.5 Executive Summary (February 17, 2015) (FS v1_5_5 Executive Summary PM_ISE 21715 Comprehensive)	406-413	None
7			
8	41 Final and signed version of the ISE-SAR Functional Standard version 1.5.5 issued by the PM-ISE. (February 23, 2015) (SAR_FS_1.5.5_IssuedFeb2015.pdf)	414-473	None
9			
10			
11	42 Screenshot of ISE.gov blog post of the Program Manager announcing the issuance of ISE-SAR Functional Standard version 1.5.5. This blog post serves as the transmittal memorandum for the ISE-SAR Functional Standard v. 1.5.5. (March 2, 2015) (ISE_gov FS v1_5_5 blog 2March2015.jpg)	474	None
12			
13			
14			
15	43 ISE Privacy Agenda Arlington VA May 20	475	None
16	44 Final attendee sign in sheets scanned	476-479	01, 02, 03
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1 BENJAMIN C. MIZER  
Principal Deputy Assistant Attorney General  
2 ANTHONY J. COPPOLINO  
Deputy Branch Director  
3 PAUL G. FREEBORNE  
Virginia Bar No. 33024  
4 Senior Trial Counsel  
5 KIERAN G. GOSTIN  
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7 U.S. Department of Justice  
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8 Washington, D.C. 20044  
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11 *Attorneys for Federal Defendants*

12 **UNITED STATES DISTRICT COURT**  
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

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

17 Plaintiffs,

18 v.

19 DEPARTMENT OF JUSTICE, *et al.*,

20  
21 Defendants.  
22

No. 3:14-cv-03120 (RS)(KAW)

**DECLARATION OF PAUL G.  
FREEBORNE**

1 I, Paul G. Freeborne, declare as follows:

2 1. I am a Senior Trial Counsel in the Federal Programs Branch, Civil Division of the  
3 United States Department of Justice. I represent Defendants in this case. This declaration is  
4 based on my personal knowledge and my familiarity with and review of documents provided to  
5 me in my official capacity as counsel in this litigation.

6 2. In reviewing the administrative record, Dkt. No. 53, undersigned counsel  
7 determined that bates numbered pages 299, 300, 357, 423, and 425 were inadvertently reduced in  
8 size from the original, and redactions were inadvertently made to bates numbered page 120 of  
9 the administrative record. The corrected pages are attached hereto as Exhibit A to this  
10 Declaration.

11  
12 I declare under penalty of perjury that the foregoing is true and correct. Executed in  
13 Washington, D.C. on October 22, 2014.

14  
15 /s/Paul G. Freeborne  
16 Paul G. Freeborne  
17  
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27  
28

1 BENJAMIN C. MIZER  
Principal Deputy Assistant Attorney General  
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20 Defendants.  
21  
22

No. 3:14-cv-03120 (RS)(KAW)

**EXHIBIT A DECLARATION OF PAUL G.  
FREEBORNE**

## Appendix E – Referenced Documents and Resources

This appendix provides a comprehensive listing of the documents referenced in this Analysis.

The Nationwide Suspicious Activity Reporting Initiative Program Management Office, <http://nsi.ncirc.gov/>

*Baseline Capabilities for State and Major Urban Area Fusion Centers: A Supplement to the Fusion Center Guidelines (September 2008)*

<http://it.ojp.gov/documents/baselinecapabilitiesa.pdf>

*The Guidelines to Ensure that the Information Privacy and Other Legal Rights of Americans are Protected in the Development and Use of the Information Sharing Environment (“ISE Privacy Guidelines”) (December 2006),*

<http://www.ise.gov/docs/privacy/PrivacyGuidelines20061204.pdf>

*Fusion Center Privacy Policy Development – Privacy Civil Rights and Civil Liberties Policy Template (April 2010),*

<http://it.ojp.gov/docdownloader.aspx?ddid=1269>

*The ISE-SAR Functional Standard, Version 1.5 (May 2009), [http://www.ise.gov/docs/ctiss/ISE-FS-200 ISE-SAR Functional Standard V1 5 Issued 2009.pdf](http://www.ise.gov/docs/ctiss/ISE-FS-200%20ISE-SAR%20Functional%20Standard%20V1%205%20Issued%202009.pdf)*

*National Strategy for Information Sharing: Successes and Challenges in Improving Terrorism-Related Information Sharing (October 2007),*

[http://www.ise.gov/docs/nsis/nsis\\_book.pdf](http://www.ise.gov/docs/nsis/nsis_book.pdf)

*The Initial Privacy and Civil Liberties Analysis of the Information Sharing Environment - Suspicious Activity Reporting (ISE-SAR) Functional Standard and Evaluation Environment (September 2008),*

[http://www.ise.gov/docs/sar/ISE SAR Initial Privacy and Civil Liberties Analysis.pdf](http://www.ise.gov/docs/sar/ISE%20SAR%20Initial%20Privacy%20and%20Civil%20Liberties%20Analysis.pdf)

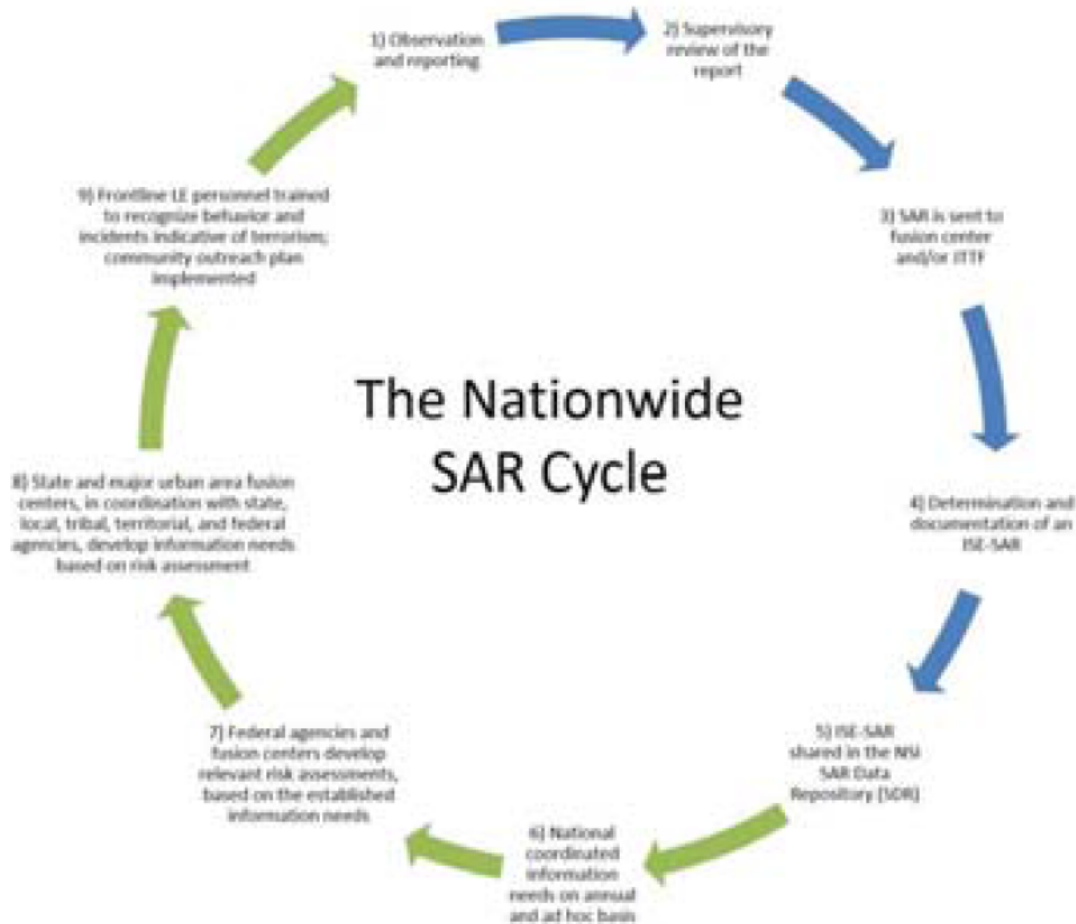
*Findings and Recommendations of the Suspicious Activity Report (SAR) Support and Implementation Project*, (October 2008),

[http://www.it.ojp.gov/documents/SAR\\_Report\\_October\\_2008.pdf](http://www.it.ojp.gov/documents/SAR_Report_October_2008.pdf)

*Final Report: Information Sharing Environment Suspicious Activity Reporting Evaluation Environment* (January 2010), Department of Justice Bureau of Justice Assistance, [http://nsi.ncirc.gov/documents/NSI\\_EE.pdf](http://nsi.ncirc.gov/documents/NSI_EE.pdf)

*The Nationwide Suspicious Activity Reporting Initiative Status Report* (February 2010), Office of the Program Manager for the Information Sharing Environment, [http://www.ise.gov/docs/sar/NSI\\_Status\\_Report\\_FINAL\\_2010-02-03.pdf](http://www.ise.gov/docs/sar/NSI_Status_Report_FINAL_2010-02-03.pdf)





*Figure 1 – ISE-SAR Flowchart*

The technical framework of the SAR vetting and approval process that may produce an ISE-SAR is discussed in the *Nationwide Suspicious Activity Reporting (SAR) Initiative SAR Data Repository (SDR) Concept of Operations (NSI SDR CONOPS)*<sup>11</sup> The NSI SDR CONOPS explains the technical solution and associated user and training requirements supporting the NSI and details the enhanced platform that offers new efficiencies and deploys distributed capabilities to the NSI user community. The NSI SDR CONOPS provides an overview of the rules, regulations, policies, and training associated with accessing, submitting, and searching SAR data residing in the NSI SDR and the various tools that enable those submissions and searches

## D. ISE-SAR Top-Level Business Process

### 1. Planning

The activities in the planning phase of the NSI cycle, while integral to the overall NSI, are not discussed further in this Functional Standard. See the NSI CONOPS for more details.

<sup>11</sup> The NSI SDR CONOPS, (2014), available from [https://leo.cjis.gov/leoContent/docs/gen/lesig/e\\_guard/fbi\\_reports/2014/201401\\_nsi\\_sar\\_data\\_repository\\_conops.pdf](https://leo.cjis.gov/leoContent/docs/gen/lesig/e_guard/fbi_reports/2014/201401_nsi_sar_data_repository_conops.pdf).

A determination that a SAR constitutes an ISE-SAR is made as part of a two-part vetting process by a trained analyst or investigator who takes into account the reported circumstances of the SAR, including both the training and experience of the law enforcement or homeland security personnel reporting the behavior, to confirm that the reasonably indicative determination has been met. The analyst or investigator then compares the SAR with information from available databases and resources, reviews the behavior against the Part B (ISE-SAR Criteria Guidance) pre-operational terrorism behaviors, and then makes a judgment as to whether, given the context, facts, and circumstances available, there is a potential nexus to terrorism (i.e., to be reasonably indicative of pre-operational planning associated with terrorism). Part B provides a more thorough explanation of ISE-SAR pre-operational behavior criteria and highlights the importance of the trained analyst or investigator taking into account the context, facts, and circumstances in reviewing suspicious behaviors to identify those SARs with a potential nexus to terrorism (i.e., to be reasonably indicative of pre-operational planning associated with terrorism). The following are select examples of the 16 terrorism pre-operational behavioral categories, set forth in Part B, that may be reasonably indicative of terrorism:

Expressed or implied threat

Theft/loss/diversion

Breach/attempted intrusion

Cyberattacks

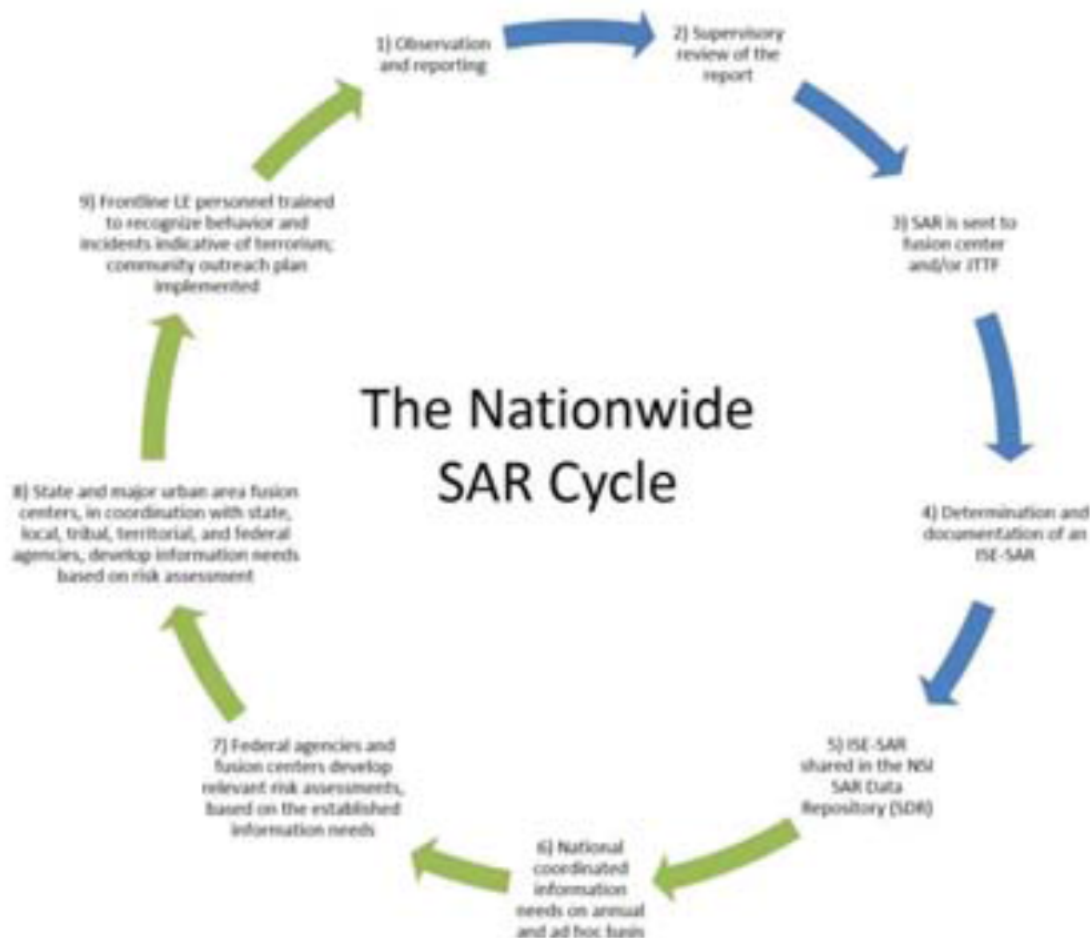
Testing or probing of security<sup>8</sup>

It is important to stress that this *behavior-focused approach* to identifying suspicious activity requires that factors such as race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity must not be considered as factors creating suspicion (but attributes may be documented in specific suspect descriptions for identification purposes). The same constitutional standards that apply when conducting ordinary criminal investigations also apply to Federal and SLTT law enforcement and homeland security officers collecting information about suspicious activity. The ISE-SAR Functional Standard does not alter law enforcement officers' constitutional obligations when interacting with the public. This means, for example, that constitutional protections and agency policies and procedures that apply to a law

<sup>7</sup> In assessing whether behavior constitutes "suspicious activity," law enforcement and homeland security personnel should consider all of the circumstances in which the behavior was observed, including knowledge such personnel may have had of any emerging threats or tradecraft, such as those based on specific or general threat bulletins, trip wire reports, or other information or intelligence.

<sup>8</sup> For a full list and explanation of the behavioral categories, behavioral criteria, and descriptive examples, see Part B.

<sup>9</sup> Consideration and documentation of race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity shall be consistent with applicable guidance, including, for federal law enforcement officers, [\*Guidance for Federal Law Enforcement Agencies regarding the Use of Race Ethnicity Gender National Origin Religion Sexual Orientation or Gender Identity\*](#) (December 2014).



**Figure 1 – ISE-SAR Flowchart**

The technical framework of the SAR vetting and approval process that may produce an ISE-SAR is discussed in the *Nationwide Suspicious Activity Reporting (SAR) Initiative SAR Data Repository (SDR) concept of Operations (NSI SDR CONOPS)*<sup>12</sup> The NSI SDR CONOPS explains the technical solution and associated user and training requirements supporting the NSI and details the enhanced platform that offers new efficiencies and deploys distributed capabilities to the NSI user community. The NSI SDR CONOPS provides an overview of the rules, regulations, policies, and training associated with accessing, submitting, and searching SAR data residing in the NSI SDR and the various tools that enable those submissions and searches.

## D. ISE-SAR Top-Level Business Process

### 1. Planning

The activities in the planning phase of the NSI cycle, while integral to the overall NSI, are not discussed further in this Functional Standard. See the NSI CONOPS for more details.

<sup>12</sup> The NSI SDR CONOPS, (2014), available from [https://leo.cjis.gov/leoContent/docs/gen/lesig/e\\_guard/fbi\\_reports/2014/201401\\_nsi\\_sar\\_data\\_repository\\_conops.pdf](https://leo.cjis.gov/leoContent/docs/gen/lesig/e_guard/fbi_reports/2014/201401_nsi_sar_data_repository_conops.pdf).



# DIALOGUE ON PRIVACY AND CIVIL LIBERTIES

SEPTEMBER 3, 2008  
WASHINGTON, DC

## Purpose

Federal, state, and local officials across the nation are working to establish a mechanism for gathering, documenting, analyzing, and sharing terrorism-related suspicious activities reports, also known as SARs. As processes and protocols are established and evaluated, these officials are mindful that they must be carried out in a manner that fully protects the legal rights of all United States persons, including information privacy, civil rights, and civil liberties guaranteed by the Constitution and laws of the United States. Federal, state, and local officials involved in these efforts have struggled with how best to engage with privacy and civil liberties advocates.

This roundtable session will serve as a first step toward establishing more open and direct interaction between privacy and civil liberties advocacy groups and government entities involved in SAR efforts. The objective of the session is an open dialogue to inform participants about the SAR effort and to surface significant concerns, resulting in the identification of issues and potential solutions that can be used to inform a larger meeting planned for this fall. The day is also designed to help set the stage for future discussions nationally, regionally, and locally between privacy advocates and federal, state, and local officials.

## Scope of Topic

The topic to be discussed at this meeting is limited to exploring the privacy and civil liberties implications of implementing the SAR initiative. It is understood that there are broader privacy and civil liberties issues associated with overall efforts to improve the sharing of terrorism-related information, and many of these broader issues will be raised during the larger fall meeting.

## Agenda

The roundtable will begin with an overview of the efforts occurring across the nation to support the gathering, documenting, analyzing, and sharing of terrorism-related SARs, as well as current efforts to incorporate privacy and civil liberties protections within those efforts. Efforts by the Los Angeles Police Department will be used as a case study to facilitate discussion of broader issues related to SARs. Privacy advocates will have an opportunity to discuss the privacy and civil liberties perspectives on the SAR process and voice their recommendations in addressing privacy and civil liberties issues, policies, and safeguards that should be implemented. The day will conclude with a discussion of expanding the dialogue nationally.

## Ground Rules

There will be presentations and an opportunity for open dialogue among all participants to allow for many perspectives. Notes will be taken throughout the day, and a summary of the notes will be provided to all participants and made available to the public. The meeting is on the record and for attribution. If a participant prefers a statement to be off the record, it will be treated as such and he or she should state that to meeting participants before making the comment.