

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILEY GILL, et al.,
Plaintiffs,
v.
DEPARTMENT OF JUSTICE, et al.,
Defendants.

Case No. 14-cv-03120-RS (KAW)

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
COMPLETE ADMINISTRATIVE
RECORD**

Dkt. No. 73

In this Administrative Procedure Act case, Plaintiffs have filed a motion to complete or, in the alternative, to supplement, the administrative record. The Court held a hearing on the motion on December 3, 2015. Having considered the papers filed by the parties, the relevant legal authority, and the arguments advanced by counsel, the Court GRANTS the motion IN PART and DENIES the motion IN PART for the reasons set forth below.

I. BACKGROUND¹

A. The National Suspicious Activity Reporting Initiative

The federal government created the National Suspicious Activity Reporting Initiative ("NSI") to facilitate the sharing of information potentially related to terrorism through the use of Suspicious Activity Reports ("SARs"). (1st Supp. Compl. ("FSC") ¶ 22, Dkt. No. 70.) The 78 fusion centers located throughout the country serve as the focal points for the initiative—gathering, storing, analyzing, and disseminating SARs through databases that receive financial support from the Office of Justice Programs ("OJP"), a component of the Department of Justice ("DOJ"). (*Id.* ¶¶ 12, 23-25.) The centers are federally funded and are generally, though not

¹ This background is drawn from the allegations in the operative complaint.

1 always, owned and operated by state or local government entities. (*Id.*)

2 The DOJ, through its FBI component, "has set forth the following standard for suspicious
3 activity reporting: 'observed behavior that *may be indicative* of intelligence gathering or pre-
4 operational planning related to terrorism, criminal or other illicit intention.'" (*Id.* ¶ 54 (emphasis in
5 original).) This DOJ SAR Standard is described in the FBI's 2008 eGuardian Privacy Impact
6 Assessment ("2008 eGuardian PIA"). (*Id.* ¶ 54, Ex. E.) It encourages reporting even in the
7 absence of reasonable suspicion of criminal activity. (*Id.* ¶ 55.) Under the DOJ SAR Standard,
8 which was allegedly not issued in accordance with the public notice and comment procedures of
9 the Administrative Procedure Act ("APA"), "people acting suspiciously" constitutes a reportable
10 activity. (*Id.* ¶¶ 57, 70, Ex. F.)

11 The Program Manager of the Information Sharing Environment ("PM-ISE") is charged
12 with issuing uniform standards for sharing terrorism and homeland security information across
13 federal, state, and local governments. (*Id.* ¶ 16.) It has also issued a standard governing SAR
14 reporting, entitled "Information Sharing Environment (ISE) – Functional Standard (FS) –
15 Suspicious Activity Reporting (SAR)" ("Functional Standard"). (*Id.*) The PM-ISE issued Version
16 1.0 of the Functional Standard in January 2008, Version 1.5 in May 2009, and Version 1.5.5 in
17 February 2015. (*Id.*, Exs. D & K; AR at 75-77.) Functional Standard 1.5 and Functional Standard
18 1.5.5 do not condition the collection, maintenance, or dissemination of suspicious activity on
19 reasonable suspicion. (FSC ¶ 42.) Rather, the standards incorporate a "reasonably indicative"
20 standard for reporting suspicious activity, which as the PM-ISE has purportedly acknowledged, is
21 less demanding than the reasonable suspicion standard.² (*Id.* ¶¶ 44, 45.) According to Plaintiffs,
22 the PM-ISE did not adhere to the notice and comment procedure set forth in the APA prior to
23 issuing the Functional Standard. (*Id.* ¶ 42, 52.)

24 Functional Standard 1.5.5 went into effect immediately upon its publication on February
25 23, 2015 and is currently in effect. (*Id.* ¶ 52.) It defines suspicious activity as "[o]bserved

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² According to Plaintiffs, both the DOJ and the PM-ISE standards therefore conflict with 28 C.F.R. Part 23, which prohibits the collection, maintenance, and dissemination of criminal intelligence information absent reasonable suspicion of criminal activity. FSC ¶ 4.

1 behavior reasonably indicative of pre-operational planning associated with terrorism or other
2 criminal activity." (*Id.*, Ex. K.)

3 The PM-ISE and the DOJ train state, local, and tribal law enforcement agencies as well as
4 private entities on the collection of information that may be related to terrorism based on the
5 standard each agency has adopted and the submission of information, in the form of a SAR, either
6 to a fusion center or to the FBI. (*Id.* ¶ 24, 59.)

7 If a SAR meets Defendants' standards, it is uploaded to one or more national databases.
8 (*Id.* ¶ 26.) One such repository is the eGuardian system, which the FBI oversees and maintains.
9 (*Id.*) Law enforcement personnel and analysts across the country can access eGuardian, and SARs
10 are maintained on the system for 30 years, even if the FBI determines that a SAR report has no
11 connection to terrorism. (*Id.*) Individuals who are the subjects of a SAR are automatically
12 subjected to various degrees of law enforcement scrutiny. (*Id.* ¶ 27.)

13 **B. This lawsuit**

14 On July 10, 2014, Wiley Gill, James Prigoff, Khaled Ibrahim, Tariq Razak, and Aaron
15 Conklin ("Plaintiffs") commenced this action against the DOJ, U.S. Attorney General Loretta
16 Lynch, the PM-ISE, and the agency's head, Kshemendra Paul. (FSC ¶¶ 5-17.)

17 Wiley Gill ("Gill") is a U.S. citizen living in Chico, California. (*Id.* ¶ 80.) He converted to
18 Islam in 2009, after learning about the religion in a course he took while enrolled at Chico State,
19 where he now works as a custodian. (*Id.*) Gill is the subject of a SAR that identifies him as a
20 "Suspicious Male Subject in Possession of Flight Simulator Game." (*Id.* ¶ 81.)

21 James Prigoff ("Prigoff") is a U.S. citizen and an internationally renowned photographer of
22 public art. (*Id.* ¶ 101.) While attempting to photograph a famous piece of public art on a natural
23 gas storage tank near Boston, he was harassed by private guards who prevented him from
24 photographing the tank even though he was not, as the guards claimed, on private property. (*Id.* ¶
25 103.) Although Prigoff did not provide the guards with any identifying information, the FBI
26 tracked him cross-country, visited his home in Sacramento, and questioned a neighbor about him.
27 (*Id.* ¶¶ 110, 111.) Prigoff believes that the Boston security guards submitted a SAR or SAR
28 precursor report. (*Id.* ¶ 11.)

1 Khaled Ibrahim ("Ibrahim"), a U.S. citizen of Egyptian descent, is the subject of a SAR
2 based his attempt to purchase "a large amount of computers." (*Id.* ¶ 118, 121.) At the time of the
3 purported suspicious activity, he worked as a purchasing agent for Nordix Computer Corporation,
4 and he was attempting to purchase computers in bulk for the company. (*Id.* ¶ 119.)

5 Tariq Razak ("Razak") is a U.S. Citizen of Pakistani descent who works in the bio-tech
6 industry. (*Id.* ¶ 126.) He is the subject of a SAR pertaining to a "Male of Middle Eastern decent
7 [*sic*] observed surveying entry/exit points" at the Santa Ana Train Depot. (*Id.* ¶ 127.) Santa Ana
8 Police Officer J. Gallardo filed the SAR. (*Id.* ¶ 130.) According to Razak, he had an appointment
9 with the county employment resource center, which is located in the station building, and he had
10 not been to the station before, so he spent some time locating the office before meeting his mother
11 by the restrooms and leaving. (*Id.* ¶ 131.)

12 Aaron Conklin ("Conklin") is a graphic design student and amateur photographer with an
13 interest in industrial architecture, including refineries. (*Id.* ¶ 137.) He has been prevented from
14 photographing oil refineries on two occasions. (*Id.* ¶¶ 139, 143.) One of those incidents involved
15 the Shell Refinery in Martinez, California. (*Id.* ¶ 144.) When Conklin attempted to photograph it,
16 he was detained and searched by Contra Costa Sheriff's deputies, who told him he had to be placed
17 on a "NSA watch list." (*Id.*)

18 Plaintiffs assert four claims for relief. (*Id.* ¶¶ 159-168.) Their first cause of action,
19 asserted against the DOJ and the U.S. Attorney General, is for violation of the APA based on
20 agency action that is arbitrary and capricious and not in accordance with law. (*Id.* ¶¶ 153-158.)
21 Plaintiffs bring the same claim against the PM-ISE and Kshemendra Paul in their second cause of
22 action. (*Id.* ¶¶ 159-162.) Plaintiffs' third cause of action, asserted against the DOJ and the U.S.
23 Attorney General, is for violation of the APA based on the issuance of a legislative rule without
24 notice and comment. (*Id.* ¶¶ 165-166.) Plaintiffs assert the same claim in their fourth cause of
25 action against the PS-ISE and Kshemendra Paul. (*Id.* ¶¶ 167-168.)

26 Plaintiffs pray for a variety of declaratory and injunctive relief, including a declaratory
27 judgment that both the PM-ISE's Functional Standard and the DOJ's SAR Standard are invalid, a
28 permanent injunction requiring the rescission of those standards and the ceasing of any training on

1 those standards, a declaratory judgment that 28 C.F.R. Part 23 sets forth the standard for SAR
 2 reporting, and a permanent injunction requiring Defendants to employ that standard for SAR
 3 reporting. (*Id.* ¶¶ 1-4.)

4 **C. The instant motion**

5 After Defendants filed a certified administrative record ("AR") containing "information
 6 considered in the development of the definition of suspicious activity, including the behavior
 7 criteria related to that definition, used in the functional standard to provide guidance to
 8 participants regarding the sharing of ISE suspicious activity reports through the [NSI],"³ Plaintiffs
 9 filed a motion to complete or, in the alternative, to supplement, the administrative record on
 10 October 1, 2015.⁴ (Notice of Filing AR, Dkt. No. 52, Certification of AR ¶ 3, Dkt. No. 52-1; Pls.
 11 Mot., Dkt. No. 73.)

12 Plaintiffs assert that Defendants certified an AR that is plainly inadequate. (*Id.* at 11.)
 13 First, they contend that Defendants compiled the AR based on the wrong legal standard, choosing
 14 to include some, but not all, of the information considered in the development of only a portion of
 15 the Functional Standard, namely, the PM-ISE's definition of "suspicious activity." (*Id.*) Second,
 16 Plaintiffs assert that Defendants plainly excluded documents that, as reflected in the AR itself, the
 17 agency must have actually considered. (*Id.* at 12.) These documents include (1) ISE
 18 Implementation Plan (November 2006), (2) ISE Enterprise Architecture Framework (August
 19 2007), (3) ISE Enterprise Architecture Framework Version 2.0 (September 2008), (4) ISE
 20 Suspicious Activity Reporting Evaluation Environment Segment Architecture (December 2008),
 21 (5) ISE Privacy Guidelines, (6) Privacy and Civil Liberties Implementation Guide for the
 22 Information Sharing Environment, Version 1.0, (7) National Information Exchange Model,
 23 Concept of Operations, Version 0.5 (January 9, 2007), (8) National Strategy for Information
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25 ³ Purportedly privileged documents pertaining to the subject were not included in the
 26 administrative record. Certification of AR ¶ 2.

27 ⁴ Because, as discussed below, the Court orders Defendants to complete the administrative record
 28 according to the correct legal standard, the Court need not address Plaintiffs' alternative request for
 supplementation.

1 Sharing and Safeguarding (December 2012), (9) Nationwide Suspicious Activity Reporting
 2 Concept of Operations (December 2008), (10) NSI SAR Data Repository CONOPS (January
 3 2014), (11) documents related to the Evaluation Environment, (12) findings and recommendations
 4 of SAR Support and Implementation Project (June and October 2008) versions, (13) comments
 5 and input in formulating and updating the Functional Standard, (14) input and recommendations
 6 from the ISE SAR Working Group, (15) input and recommendations by an NCTC-led interagency
 7 group, including documents pertaining to its definition of "suspicious activity," (16) input and
 8 recommendations from the CTISS Committee, (17) input and recommendations from the ISE-
 9 SAR Governance Panel and ISE-SAR Steering Committee, and (18) input and recommendations
 10 from working groups formed to implement Guideline 2 of the December 2005 White House
 11 memorandum, (19) the October 2007 National Strategy for Information Sharing,⁵ (20) Guideline 1
 12 of the White House December 2005 memorandum and documents related thereto.⁶

13 Alternatively, Plaintiffs argue that two documents should be supplemented because the
 14 unanimous recommendations of major law enforcement agencies regarding the applicability of 28
 15 C.F.R. Part 23 to the SAR process were ignored. (*Id.* at 23-25.) Plaintiffs also argue that
 16 Defendants have wrongfully withheld a number of documents on the basis of privilege and have
 17 done so without providing a privilege log. (*Id.* at 14.)

18 Defendants filed their opposition to the motion on October 22, 2015.⁷ (Defs.' Opp'n, Dkt.

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 20 ⁵ Defendants apparently do not object to Plaintiffs citing this document in their upcoming
 21 summary judgment briefing but have declined to include it in the administrative record. Pls.' Mot.
 at 22 n.4.

22 ⁶ In addition to these 20 documents/categories of documents, Plaintiffs also request that the Court
 23 order Defendants to complete the record with "(a) all internal and external documents regarding
 24 the decision-making process for the Functional Standard, including drafts, memoranda, reports,
 25 internal reviews and critiques, inter-agency reviews, and e-mail exchanges or other
 26 correspondence between and among the agencies and/or others involved in the process; (b) all
 27 documents addressing whether 28 C.F.R. Part 23 applies to SARs and the NSI; and; and [*sic*] (c)
 28 all documents exploring whether the agency should have pursued formal notice and comment
 proceedings." *See* Pls.' Mot. at 13. At the hearing, the parties agreed to meet and confer regarding
 specific documents or categories of documents. In light of this, the Court will deny Plaintiff's
 request for such materials as premature.

⁷ Contemporaneous with the filing of their opposition, Defendants also filed an Amended
 Certification of the Administrative Record, produced two letters that were identified in Plaintiffs'
 motion and inadvertently omitted from the AR, provided a revised index of the AR that includes

1 No. 79.) They contend that Plaintiffs have failed to meet their burden of showing that the certified
 2 record is incomplete, that the record is appropriately tailored to the challenge Plaintiffs assert here,
 3 that granting the instant motion would be tantamount to allowing discovery, and that deliberative
 4 material was properly excluded from the record without a privilege log. (*Id.* at 8-9.) They further
 5 argue that there are no grounds for considering the extra-record evidence Plaintiffs seek to make
 6 part of the AR. (*Id.* at 16.) Plaintiffs filed their reply on November 5, 2015. (Pls.' Reply, Dkt.
 7 No. 82.)

8 II. LEGAL STANDARD

9 When reviewing agency action under the APA, the court "will reverse the agency action
 10 only if the action is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law."
 11 *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2004) (citing 5 U.S.C. § 706(2); footnote
 12 omitted). "An agency's action is arbitrary and capricious if the agency fails to consider an
 13 important aspect of a problem, if the agency offers an explanation for the decision that is contrary
 14 to the evidence, if the agency's decision is so implausible that it could not be ascribed to a
 15 difference in view or be the product of agency expertise, or if the agency's decision is contrary to
 16 the governing law." *Id.* (citations omitted). "Although [the court's] inquiry must be thorough, the
 17 standard of review is highly deferential; the agency's decision is 'entitled to a presumption of
 18 regularity,' and [the court] may not substitute [its] judgment for that of the agency." *San Luis &*
 19 *Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014).

20 In considering a challenge, "courts reviewing an agency decision are limited to the
 21 administrative record." *Lands Council*, 395 F.3d at 1029. Courts must, however, "review the
 22 whole [administrative] record or those parts . . . cited by a party . . ." 5 U.S.C. § 706. "The
 23 whole administrative record, however, is not necessarily those documents that the agency has
 24 compiled and submitted as the administrative record. The whole administrative record, therefore,
 25 consists of all documents and materials directly or indirectly considered by agency decision-

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 28 the documents, and submitted new copies of other pages of the AR that were either "reduced in
 size from the original" or contained inadvertent redactions. Am. Certification of AR ¶¶ 4, 5 Dkt.
 No. 79-1; Freeborne Decl. ¶ 2, Dkt. No. 79-2.

1 makers and includes evidence contrary to the agency's position." *Thompson v. U.S. Dep't of*
2 *Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (internal citations and quotations omitted).

3 "An agency's designation and certification of the administrative record is treated like other
4 established administrative procedures, and thus entitled to a presumption of administrative
5 regularity." *McCrary v. Gutierrez*, 495 F. Supp. 2d 1038, 1041 (N.D. Cal. 2007) (citations
6 omitted). For this reason, "in the absence of clear evidence to the contrary, courts presume that
7 public officers have properly discharged their official duties." *Id.* (citations omitted).

8 In limited circumstances, however, the record may be supplemented, i.e., "(1) if admission
9 is necessary to determine 'whether the agency has considered all relevant factors and has explained
10 its decision,' (2) if 'the agency has relied on documents not in the record,' (3) 'when supplementing
11 the record is necessary to explain technical terms or complex subject matter,' or (4) 'when
12 plaintiffs make a showing of agency bad faith.'" *Lands Council*, 395 F.3d at 1029 (citation
13 omitted).

14 "These limited exceptions operate to identify and plug holes in the administrative record,"
15 and "are narrowly construed and applied" to ensure "that the exception does not undermine the
16 general rule." *Id.* (citations omitted). "Were the federal courts routinely or liberally to admit new
17 evidence when reviewing agency decisions, it would be obvious that the federal courts would be
18 proceeding, in effect, *de novo* rather than with the proper deference to agency processes, expertise,
19 and decision-making." *Id.*

20 To meet the clear evidence standard, a plaintiff must (1) "identify reasonable, non-
21 speculative grounds for the belief that the documents were considered by the agency and not
22 included in the record," and (2) "identify the materials allegedly omitted from the record with
23 sufficient specificity, as opposed to merely proffering broad categories of documents and data that
24 are 'likely' to exist as a result of other documents that are included in the administrative record[.]"
25 *Winnemem Wintu Tribe v. U.S. Forest Service*, No. 2:09-CV-01072-KJM-KJN, 2014 WL
26 3689699, at * 10 (E.D. Cal. July 24, 2014) (citation omitted). "It is insufficient for a plaintiff to
27 'simply . . . assert [] that the documents are relevant, were before . . . [the agency] at the time it
28 made its decision, and were inadequately considered.'" *Id.* (citation omitted; modifications in

1 original).

2 III. DISCUSSION

3 A. Plaintiffs have sufficiently rebutted the presumption of completeness.

4 In this case, the parties agree that the administrative record consists of all documents and
5 materials directly or indirectly considered by the agency in making its decision. (*See* Pls.' Mot. at
6 9; Defs.' Opp'n at 9.) Nonetheless, while Defendants concede that an administrative record
7 consists of all documents and materials directly or indirectly considered by the agency in making
8 its decision, the certification filed on June 16, 2015 does not state that all such documents and
9 materials were included. Rather, the certification reads, in pertinent part:

10 3. The documents included in the accompanying administrative record
11 index, and provided to the Court, reflect to the best of my knowledge, *information*
12 *considered in the development of the definition of suspicious activity*, including the
13 behavior criteria related to that definition, used in the functional standard to provide
14 guidance to participants regarding the sharing of ISE suspicious activity reports
15 through the Nationwide Suspicious Activity Reporting Initiative. The
16 administrative record encompasses documents related to versions 1.0, 1.5, and
17 1.5.5 of the functional standard. Privileged documents pertaining to this subject are
18 not included in the administrative record.

19 (Certification of AR ¶ 3 (emphasis added).)⁸

20 Despite having provided a certification that suggests noncompliance with the standard
21 according to which an administrative record should be compiled, Defendants nonetheless claim
22 that the administrative record they provided is adequate. At the hearing, Defendants argued that
23 despite the language of the certification, which they acknowledge may have been poorly drafted,
24 the administrative record nonetheless contains all necessary documents. In other words,
25 Defendants maintain that even if they were to revisit their compilation of the administrative record
26 to ensure inclusion of all documents and materials directly or indirectly considered by the agency

27 ⁸ The amended certification filed on October 22, 2015 similarly reads:

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

Am. Certification ¶ 6 (emphasis added).

1 in making its decision, the administrative record would remain unchanged.

2 Here, Plaintiffs are entitled to test that representation. Because Defendants certified an
 3 administrative record that, on its face, appears to contain less than all documents and materials
 4 directly or indirectly considered by the agency in making its decision, Plaintiffs have sufficiently
 5 rebutted the presumption of completeness. "The application of an incorrect standard constitutes
 6 'reasonable, non-speculative grounds for the belief that the documents were considered by the
 7 agency and not included in the record.'" *See Winnemem Wintu Tribe*, 2014 WL 3689699, at * 11
 8 (ordering defendants to supplement the administrative record where they had limited its content to
 9 "documents and materials relevant to the specific agency actions that are at issue in th[e]
 10 litigation[,] not all documents directly or indirectly considered by the agency); *Trout Unlimited v.*
 11 *Lohn*, No. C05-1128C, 2006 WL 1207901, at *3 (W.D. Wash. May 4, 2006) (defendants'
 12 concession that a narrow internal directive guided the compilation of the administrative record
 13 sufficed as a prima facie showing of an incomplete record); *People of the State of Cal. ex rel.*
 14 *Lockyer v. U.S. Dep't of Agriculture*, Nos. 05-03508 EDL & C05-04038 EDL, 2006 WL 708914,
 15 at *3 (N.D. Cal. Mar. 16, 2006) (planning specialist's certification that the record only included
 16 materials that agency officials considered, or those on which they relied, did not "provide
 17 sufficient assurance" that alleged omitted documents did not exist).

18 Accordingly, Defendants shall revisit the administrative record to ensure its completeness.
 19 Defendants are advised that merely re-drafting their certification will not constitute compliance
 20 with this order. Rather, Defendants shall ensure that they search for all documents and materials
 21 directly or indirectly considered by the agency in deciding (1) to adopt a standard that is broader
 22 than 28 C.F.R. Part 23 and authorizes the collection, maintenance, and dissemination of
 23 information even in the absence of reasonable suspicion of criminal activity, in conflict with 28
 24 C.F.R. Part 23 and (2) to promulgate such a standard without public notice and comment.⁹ Given

25 _____
 26 ⁹ With respect to Plaintiffs' procedural challenge, Defendants have compiled an administrative
 27 record notwithstanding their position that the Functional Standard does not constitute a legislative
 28 rule subject to notice and comment. *See* Defs.' Opp'n at 3. Given that Defendants have taken this
 approach, they should have no trouble completing the administrative record with any additional
 documents on the issue. This is especially true since, as they claim, the administrative record "is
 complete and ripe for judicial review." *See id.*

1 that Defendants should have already examined the universe of relevant documents, requiring
2 Defendants to conduct another search should not pose too much of a burden. Defendants shall
3 also provide a declaration explaining their search and its results.

4 **B. Defendants must provide a privilege log.**

5 Plaintiffs argue that Defendants improperly withheld a number of documents on the basis
6 of the deliberative process privilege and did so without providing a privilege log. (Pls.' Mot. at
7 13.) Defendants contend that deliberative material need not be included in the AR or identified in
8 a privilege log because absent an allegation of bad faith or improper behavior, the subjective
9 motivation for an agency's decision is immaterial. (Defs.' Opp'n at 14-16.)

10 "Even under the correct standard, some agency documents, such as purely internal
11 deliberative materials, may be protected from inclusion in the administrative record, but
12 Defendants must make a specific showing establishing the application of a privilege for each
13 document that it contends that it may withhold based on privilege." *Lockyer*, 2006 WL 708914, at
14 *4. In keeping with this rule, courts in this district have required parties withholding documents
15 on the basis of the deliberative process privilege to, at a minimum, substantiate those claims in a
16 privilege log. *See, e.g., Ctr. of Biological Diversity v. U.S. Bureau of Land Management*, No. C-
17 06-4884-SI, 2007 WL 3049869, at * 6 (N.D. Cal. Oct. 18, 2007) (finding in camera review of
18 purportedly privileged documents appropriate despite declaration formally asserting the
19 deliberative process privilege and explaining the bases for those assertions); *Lockyer*, 2006 WL
20 708914, at *4 (granting the plaintiffs' motion to compel and ordering the defendants to provide a
21 privilege log if withholding any documents on the basis of privilege).

22 Here, Defendants have withheld documents from the AR on the basis of the deliberative
23 process privilege. They have not provided a privilege log describing the documents, the basis for
24 their withholding, or the grounds that justify asserting the deliberative process privilege. While
25 Defendants argue that no such privilege log is necessary because deliberative material is, in any
26 event, not part of the AR, they have not pointed to binding Ninth Circuit authority that stands for
27 the proposition that in an APA action, an agency may withhold documents on the basis of
28 privilege without providing so much as a privilege log. Absent any such authority, the Court will

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1 follow the same approach adopted by other judges in this district. Therefore, if, while in the
2 process of completing the AR, Defendants wish to withhold certain documents on the basis of the
3 deliberative process privilege, they shall provide a privilege log that describes the document,
4 identifies the basis for its withholding, and substantiates any claimed deliberative process
5 privilege.

6 **IV. CONCLUSION**

7 For the reasons set forth above, Plaintiffs' motion to complete the administrative record is
8 GRANTED IN PART AND DENIED IN PART. Defendants are to revisit their compilation of
9 the AR to ensure that it includes all documents and materials considered by the agency in deciding
10 (1) to adopt a standard that is broader than 28 C.F.R. Part 23 and authorizes the collection,
11 maintenance, and dissemination of information even in the absence of reasonable suspicion of
12 criminal activity, in conflict with 28 C.F.R. Part 23 and (2) to promulgate such a standard without
13 public notice and comment. If Defendants withhold any documents that should be included in the
14 AR on the basis of the deliberative process privilege, they shall provide a privilege log as set forth
15 above. Plaintiffs' request for specific documents and categories of documents is DENIED as
16 premature, and the parties are to meet and confer to resolve disputes as to particular documents.

17 **IT IS SO ORDERED.**

18 Dated: 12/18/15



KANDIS A. WESTMORE
United States Magistrate Judge