**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

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| COUNCIL ON AMERICAN-ISLAMIC RELATIONS, CALIFORNIA; and EDGAR HOPIDA,<br><br>Plaintiffs,<br><br>vs.<br><br>FEDERAL BUREAU OF INVESTIGATION; and DEPARTMENT OF JUSTICE,<br><br>Defendants. | CASE NO. 09-CV-823 - IEG (CAB)<br><br>ORDER:<br><br>(1) GRANTING IN PART SUMMARY JUDGMENT;<br><br>(2) RESERVING JUDGMENT IN PART; and<br><br>(3) ORDERING LIMITED IN CAMERA REVIEW.<br><br>[Doc. No. 22] |

This is an action filed under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, challenging Defendants' decision to redact and withhold certain documents in response to Plaintiffs' FOIA request. Currently before the Court is Defendants' Motion for Summary Judgment. [Doc. No. 22]. Having considered the parties' arguments, and for the reasons set forth below, the Court **GRANTS IN PART** the motion for summary judgment, **RESERVES JUDGMENT IN PART**, and **ORDERS** limited *in camera* review of the documents.

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## BACKGROUND

### I. Factual background

The Council on American-Islamic Relations ("CAIR"), its San Diego-based Public Relations Director Edgar Hopida ("Hopida"), and the Islamic Center of San Diego (collectively, "Requestors") sent joint FOIA requests to the FBI and Justice Department (collectively, "Defendants") on July 14, 2008. [Doc. No. 25-2 at 2-15]. The requests were triggered by a *San Diego Union-Tribune* article that described a security breach at Camp Pendleton, in which staff had stolen classified information and passed it along to local law enforcement agencies and defense contractors. (Countryman Decl., Ex. 1.) According to the article, that information included "more than 100 FBI and Defense Department files," which revealed that the Islamic Center and other mosques were "monitored by a federal surveillance program targeting Muslim groups." (Id.)

The FOIA requests in this case sought information from the FBI, National Joint Terrorism Task Force ("NJTTF"), and any other Joint Terrorism Task Force ("JTTF") regarding the surveillance program, as well as details on whether the Islamic Center, CAIR, and Mr. Hopida had been monitored as part of this or any other program, and, if so, how, when, and why the monitoring was carried out, and by whom. [Doc. No. 25-2 at 4-5]. The requests also sought information regarding how any documents related to the surveillance were stored, disseminated, or destroyed. [Id.] The following are examples of Plaintiffs' requests:

> 2. Any records authorizing, ordering, instructing, or agreeing to collect information about, monitor, conduct surveillance of, observe, question, interrogate, investigate, and/or infiltrate any of the Requestors;
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> 3. Any records relating or referring to how, why or when any of the Requestors was selected for collection of information, monitoring, surveillance, observation, questioning, interrogation, investigation, and/or infiltration;
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> . . . .
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> 6. Any records relating or referring to the specific role of the National Joint Terrorism Task Force or any local Joint Terrorism Task Force in any collection of information about, monitoring, surveillance, observation, questioning, interrogation, investigation and/or infiltration of any of the Requestors;
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> 7. Any records relating or referring to the specific role of any federal, state, or local government agency participating in any collection of information about, monitoring, surveillance, observation, questioning, interrogation, investigation, and/or infiltration of any of the Requestors;

> 8. Any records relating or referring to how records about any of the Requestors have been, will be, or might be maintained or used, shared, or disseminated;
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> . . . .
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> 16. Any policies or procedures in place to protect the privacy of records that refer or relate to the employees, members, and/or board of directors of any of the Requestors.

[Id.] In their FOIA request, the Requestors also sought expedited processing of their request, pursuant to 5 U.S.C. § 552(a)(6)(E)(v)(II) and 28 C.F.R. § 16.5(d)(1)(ii), and a waiver of processing fees associated with their request, pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. §§ 16.11(c)(1)(i) and 16.11(d)(1). [Id.]

The FBI responded by three letters, dated July 18, 2008 (request for documents regarding Plaintiff Mr. Hopida), July 18, 2008 (request for documents regarding the Islamic Center), and August 8, 2008 (request for documents regarding Plaintiff CAIR). By letters dated August 7, 2009, the FBI also denied the requests for expedited processing and fee waiver.[1] Finally, with respect to each of the Requestors, the FBI took the following actions:

- By letter to Plaintiffs' attorney, dated August 8, 2008, the FBI advised Plaintiff CAIR that it had located approximately 805 pages that were potentially responsive to the request for information about CAIR. Then, by letter dated January 15, 2010, the FBI released to the Plaintiffs 181 pages of responsive records pertaining to Plaintiff CAIR, Plaintiff Hopida, and the Islamic Center. However, upon further review, the FBI discovered it has miscounted the number of pages released, had omitted three responsive pages, and had failed to provide Plaintiffs with deleted page information sheets ("DPIS"). Thus, by letter dated January 22, 2010, the FBI corrected the discovered error by re-releasing to Plaintiffs the same set of documents released with the January 15, 2010 letter, correcting the page count to be 183 pages, and including both the previously omitted responsive pages and the DPIS.
- The FBI initially informed Plaintiff Hopida that it did not find any responsive documents relating to him. However, after Hopida filed a successful administrative appeal contesting the scope of the search, the agencies agreed to conduct a "further search." Then, on May 21, 2009,

[1] These letters were originally mailed to a wrong address on July 10, 2009.

the FBI sent Plaintiff Hopida the documents it identified as responsive to his request. These documents were located by a search of "'reference' or other files, including but not limited to electronic surveillance files or indices (e.g. ELSUR)." (See Hardy Decl., Ex. O.) No documents responsive to Plaintiff Hopida's request were withheld. By letter dated November 9, 2009, the FBI released to Plaintiffs an additional 29 pages of responsive records pertaining to Plaintiff Hopida and the Islamic Center.

- By letters dated October 17, 2008, January 15, 2009, April 15, 2009, and July 14, 2009, the FBI advised Plaintiffs that the request for records pertaining to the Islamic Center was being reviewed by an analyst who would confirm that all located records were responsive to Plaintiffs' request and apply the appropriate exemptions allowed under the FOIA. The FBI also advised Plaintiffs that if the request involved national security information, the records must undergo a systematic declassification review prior to application of the FOIA exemptions. Then, by letter dated August 17, 2009, the FBI released to Plaintiffs 128 pages pertaining to the Islamic Center.

Overall, the FBI processed a total of **491** pages of records responsive to the July 14, 2008 FOIA request. (Hardy Decl., ¶ 4.) Out of those, the FBI released **26** pages in full, **312** pages in part, and it withheld in full **153** ages.

## II. Procedural background

Plaintiffs CAIR and Hopida commenced the present action on April 20, 2009, alleging violations of FOIA and Justice Department Regulations. [Doc. No. 1]. Defendants answered on May 20, 2009. As previously noted, the majority of the documents were not released until January 15, 2010, which is 9 months after the suit was filed and 18 months after the requests were made.

Currently before the Court is Defendants' motion for summary judgment, filed on May 10, 2010. [Doc. No. 22]. The motion is supported by a detailed declaration from David M. Hardy, the Section Chief of the Record / Information Dissemination Section ("RIDS"), Records Management Division ("RMD"), formerly at the FBI Headquarters ("FBIHQ") in Washington, D.C. (See Doc. Nos. 29, 30 [hereinafter, "Hardy Decl."].) According to Mr. Hardy, the declaration is meant to "provide the Court and plaintiffs with an explanation of the FBI's record keeping system and the procedures used

to search for records responsive to plaintiffs' requests to FBIHQ and the [San Diego Field Office ("SDFO")]." (Hardy Decl., ¶ 4.) The declaration also provides "justifications for the withholding of information from these records" pursuant to FOIA and Privacy Act exemptions. (Id.) There are also 37 exhibits attached to the declaration.

Plaintiffs filed their opposition on June 1, 2010, together with 14 exhibits. [Doc. No. 32]. Defendants replied on June 11, 2010, supported by a second declaration of Mr. Hardy. [Doc. No. 36]. The Court heard oral argument on June 21, 2010.

**LEGAL STANDARD**

Summary judgment is proper where the pleadings and materials demonstrate "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c)(2); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A material issue of fact is a question a trier of fact must answer to determine the rights of the parties under the applicable substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

The moving party bears "the initial responsibility of informing the district court of the basis for its motion." Celotex, 477 U.S. at 323. To satisfy this burden, the movant must demonstrate that no genuine issue of material fact exists for trial. Id. at 322. To withstand a motion for summary judgment, the non-movant must then show that there are genuine factual issues which can only be resolved by the trier of fact. Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 738 (9th Cir. 2000). The non-moving party may not rely on the pleadings alone, but must present specific facts creating a genuine issue of material fact through affidavits, depositions, or answers to interrogatories. FED. R. CIV. P. 56(e); Celotex, 477 U.S. at 324.

The court must review the record as a whole and draw all reasonable inferences in favor of the non-moving party. Hernandez v. Spacelabs Med. Inc., 343 F.3d 1107, 1112 (9th Cir. 2003). To avoid summary judgment, the non-moving party need not produce evidence in a form that would necessarily be admissible at trial. Celotex, 477 U.S. at 324. However, unsupported conjecture or conclusory statements are insufficient to defeat summary judgment. See Hernandez, 343 F.3d at 1112; Surrell v. Cal. Water Serv. Co., 518 F.3d 1097, 1103 (9th Cir. 2008).

In an action brought under FOIA, the withholding agency bears the burden of proving it may withhold documents under one of the exemptions. 5 U.S.C. § 552(a)(4)(B); U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991). It may meet this burden by submitting affidavits showing that the information falls within the claimed exemption. Minier v. CIA, 88 F.3d 796, 800 (9th Cir.1996). "In evaluating a claim for exemption, a district court must accord 'substantial weight' to [agency] affidavits, provided the justifications for nondisclosure 'are not controverted by contrary evidence in the record or by evidence of [agency] bad faith.'" Id. (citation omitted).

**DISCUSSION**

FOIA "was enacted to facilitate public access to Government documents." Ray, 502 U.S. at 173. The statute provides public access to official information "'shielded unnecessarily'" from public view and establishes a "'judicially enforceable public right to secure such information from possibly unwilling official hands.'" Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976) (citation omitted). Doing so, it was hoped, would "'ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.'" John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) (citations omitted).

At the same time, FOIA contemplates that some information may legitimately be kept from the public. The statute contains nine enumerated exemptions allowing the government to withhold documents or portions of documents. See 5 U.S.C. § 552(b)(1)-(9). However, FOIA's "strong presumption in favor of disclosure," Ray, 502 U.S. at 173, means that "its exemptions are to be interpreted narrowly." Assembly of Cal. v. U.S. Dep't of Commerce, 968 F.2d 916, 920 (9th Cir.1992). Moreover, even if the documents may be withheld, the agency must disclose any "reasonably segregable" portions. 5 U.S.C. § 552(b).

In the present case, in seeking to justify the withholding of some documents or portions of documents responsive to the July 14, 2008 request, the agencies have invoked several FOIA exemptions. Before turning to those exemptions, however, the Court will address the issue of whether the agencies' search for responsive documents in this case was adequate.

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**I. Adequacy of the search**

A. Legal standard

For the search to be adequate, the agency must "'demonstrate that it has conducted a search reasonably calculated to uncover all relevant documents.'" Lahr v. Nat'l Transp. Safety Bd., 569 F.3d 964, 986 (2009) (quoting Zemansky v. EPA, 767 F.2d 569, 571 (9th Cir. 1985)). This showing may be made by "'reasonably detailed, nonconclusory affidavits submitted in good faith.'" Zemansky, 767 F.2d at 571 (citation omitted). The ultimate issue to be resolved, however, "'is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*.'" Id. (citation omitted). As with any other summary judgment motion, the Court must construe "the facts in the light most favorable to the requestor." Citizens Comm'n on Human Rights v. FDA, 45 F.3d 1325, 1328 (9th Cir. 1995) (citation omitted).

B. Defendants' search was adequate

In this case, the Court rejects Plaintiffs' argument that the search was inadequate. As explained in Mr. Hardy's detailed declaration, the FBI conducted two sets of searches to identify documents responsive to the July 14, 2008 request. (See Hardy Decl., ¶¶ 53-60.) First, the FBI conducted a standard search of FBIHQ and SDFO indices to the Central Records System ("CRS"), which consist of administrative, applicant, criminal, personnel, and other files compiled for law enforcement purposes. (Id. ¶ 42.) According to Defendants, because the CRS is the main repository for FBI records, including investigative files, any and all records responsive to the July 14, 2008 requests would be expected to be found there. (Id.)

As the Hardy Declaration explains, the CRS is organized into a numerical sequence of files, broken down according to subject matter. (Id.) The subject matter of a file may correspond to an individual, organization, company, publication, activity, or foreign intelligence matter or program. (Id.) The mechanism that the FBI uses to search the CRS is the Automated Case Support system ("ACS"). (Id. ¶¶ 42-46.) In the present case, the FBI initially searched its indices of "main" files (i.e., files which are mainly about an individual or group) for files concerning the Requestors, (id. ¶¶ 53-

54), by using the names of each of the Requestors as well as variations thereof, (id. ¶ 55).[2]

Moreover, subsequent to Plaintiff Hopida's successful administrative appeal, the FBI conducted a second search of the CRS to locate cross-references (i.e., files which contain only a mere mention or reference to an individual, organization, or other subject matter, contained in a document located in a "main" file on a different subject matter) responsive to Plaintiff Hopida's request, employing the same search terms as the FBI used in searching the CRS for "main" files. (Id. ¶ 56.) The FBI also conducted a search of the Electronic Surveillance Indices ("ELSUR"), which are used to maintain information on a subject whose electronic and/or voice communications have been intercepted as a result of consensual electronic surveillance or a court-ordered (and/or sought) electronic surveillance conducted by the FBI. (Id.)

Finally, upon receipt of the Complaint in the instant litigation, the FBI conducted a second search of the CRS to locate cross-references responsive for all three Requestors. (Id. ¶¶ 57-60.) The FBI also conducted a search of the ELSUR indices for each subject. (Id.)

Upon review, it appears the FBI search in this case was adequate because it was "'reasonably calculated'" to uncover all relevant documents. See Lahr, 569 F.3d at 986 (citation omitted). As Defendants point out, courts have consistently found that FBI searches of its CRS fully meet the standards of adequacy and reasonableness established under the FOIA. See, e.g., Marks v. United States, 578 F.2d 261, 263 (9th Cir. 1978) (finding adequate FBI's search of its CRS, ELSUR, and San Francisco field records, where the request did not ask for a specific database to be searched); Brunetti v. FBI, 357 F. Supp. 2d 97, 103 (D. D.C. 2004) (finding a search of the CRS indices to be adequate, where there was no specific objection from the requester); Masters v. FBI, 926 F. Supp. 193, 196-97 (D. D.C. 1996) (finding a search of the CRS indices to be adequate). Moreover, in this case, the FBI not only conducted a search of the CRS, but it also searched the ELSUR indices, and, as directed by the Requestors, it conducted its searches for responsive records at both FBIHQ and SDFO. Finally,

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[2] A search was conducted using the following terms: "CAIR San Diego," "Council on American Islamic Relations," "CAIR," "Islamic Center of San Diego," and "Hopida, Edgar Del Rosario." (Hardy Decl. ¶¶ 53-55.) According to Mr. Hardy, the search for Plaintiff Hopida's name would also locate any variations of his first and/or last name, such as: "Hopida, Edgar," and "Hopida, E." (Id. ¶ 55.) Moreover, with respect to Plaintiff Hopida, the FBI also used other personal identifying information, such as his date and place of birth and the Social Security number, to facilitate the identification of responsive records. (Id.)

the FBI's search efforts are supported by a "'reasonably detailed, nonconclusory'" declaration of Mr. Hardy, which appears to be "'submitted in good faith.'" See Zemansky, 767 F.2d at 571 (citation omitted). Accordingly, the steps the FBI took to identify responsive records constituted an adequate search meeting the Defendants' obligations under the FOIA.

C. Plaintiffs' objections

Plaintiffs' objections to the adequacy of the search are not persuasive. First, Plaintiffs argue Defendants "should not have limited their search and review to only documents specifically mentioning the Requestors." (Pl. Opp., at 8.) Rather, Plaintiffs contend Defendants should have also searched for documents relating to *why* the investigations were conducted and those documenting the policy decisions, even if those documents did not mention the Requestors at all. (Id. at 8-9.) However, other courts have found that searches limited to the requestors' names are adequate. See, e.g., Davis v. U.S. Dep't of Defense, No. 3:07-cv-492-RJC-DSC, 2010 WL 1837925, at *6 (W.D. N.C. May 6, 2010); Wiesner v. FBI, 668 F. Supp. 2d 157, 163 (D. D.C. 2009); Nielsen v. U.S. Bureau of Land Mgmt., 252 F.R.D. 499, 513-14 (D. Minn. 2008). Moreover, there is no basis to Plaintiffs' argument that Defendants should have used other keywords during their searches. Rather, Defendants can rightfully exercise their discretion to craft lists of search terms "that they believed to be reasonably tailored to uncover documents responsive to the FOIA request." See Physicians for Human Rights v. U.S. Dep't of Defense, 675 F. Supp. 2d 149, 163-64 (D. D.C. 2009).

The Court also rejects Plaintiffs' arguments that the search was inadequate because it was limited to the CRS and ELSUR indices. As the Hardy Declaration explains, the CRS is "the main repository of FBI records," consisting of "administrative, applicant, criminal, personnel, and other files compiled for law enforcement purposes," and is thus the means by which the FBI "maintain[s] information which it has acquired in the course of fulfilling its mandated law enforcement responsibilities." (Hardy Decl. ¶ 42.) Plaintiffs have not introduced any evidence to the contrary. Similarly, although Plaintiffs argue that no search was done for documents from the NJTTF or any other JTTF, the Second Hardy Declaration explains that a search of the CRS would have also located documents from those sources. (See Doc. No. 36-1, ¶ 9 [hereinafter, "Second Hardy Decl."].)

Plaintiffs also argue the agencies should have released, or at least addressed, the FBI records

leaked from Camp Pendleton, which were specifically mentioned in their FOIA request. However, it is well-established that the ultimate issue "'is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*.'" Zemansky, 767 F.2d at 571 (citation omitted). Moreover, whether any such specific documents still exist, and whether they are responsive to the July 14, 2008 request, is pure speculation. As the Eighth Circuit has noted, in rejecting a similar challenge:

> The fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it. Thus, the Department is not required by the Act to account for documents which the requester has in some way identified if it has made a diligent search for those documents in the places in which they might be expected to be found.

Miller v. U.S. Dep't of State, 779 F.2d 1378, 1385 (8th Cir. 1985) (quoted approvingly by the Ninth Circuit in Lahr, 569 F.3d at 987). In the present case, as Mr. Hardy's declaration explains, a search of the CRS and ELSUR would have uncovered all existing responsive documents. Accordingly, Defendants were not required to separately account for the Camp Pendleton documents.

Similarly, Plaintiffs' assertion that a particular surveillance program must exist, and that Defendants would have obtained more responsive documents if they would have "ask[ed] the correct people whether such a program existed," (Pl. Opp., at 9-10), is purely speculative and does not establish that the FBI's search was inadequate. See Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 67 n.13 (D.C. Cir. 1990); Lawyers' Comm. for Civil Right of S.F. Bay Area v. U.S. Dep't of Treasury, 534 F. Supp. 2d 1126, 1131 (N.D. Cal. 2008) (noting that agency's detailed affidavits and declarations are accorded "'a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents'" (citation omitted)); Judicial Watch, Inc. v. U.S. Food & Drug Admin., 514 F. Supp. 2d 84, 88 (D. D.C. 2007) ("'[H]ypothetical assertions are insufficient to raise a material question of fact with respect to the adequacy of the agency's search.'" (quoting Oglesby, 920 F.2d at 67 n.13)). Accordingly, Defendants' search in this case was adequate.

**II. Exemptions raised**

In the present case, the FBI withheld certain information pursuant to FOIA exemptions 1, 2, 3, 4, 6, 7(A), 7(C), 7(D), and 7(E), and Privacy Act exemptions (j)(2) and (k)(2). However, the Court will first address Plaintiffs' request for an *in camera* review.

Throughout their opposition to Defendants' motion, Plaintiffs argue that at the very least the Court should conduct an *in camera* review to determine whether the information was properly withheld. The crux of Plaintiffs' argument is that many of the withheld documents might relate to unlawful surveillance programs based on targets' religious views or other protected First Amendment activity, but there is no way to determine that without an *in camera* review. The Court agrees.

As Plaintiffs correctly note, to the extent Defendants' investigations were conducted solely on the basis of religion or other protected First Amendment activity, they would be illegal and not protected by the FOIA exemptions. See Kuzma v. I.R.S., 775 F.2d 66, 69 (2d Cir. 1985) ("[U]nauthorized or illegal investigative tactics may not be shielded from the public by use of FOIA exemptions." (citations omitted)); see also Ramo v. Dep't of Navy, 487 F. Supp. 127, 130 (N.D. Cal. 1979) ("Insofar as the NIS investigation is concerned, the Court acknowledges that if the agency acted outside the scope of its investigatory powers it would be precluded from showing that it acted with a law enforcement purpose." (citation omitted)).[3] The question for the Court is how to balance this need to conduct an inquiry into the substance of the withheld documents with the deference to which the government's decision to withhold, and its affidavits in support thereof, are entitled.

The answer comes in the form of *in camera* review. Congress amended FOIA in 1974 to make it clear that *in camera* review was available for precisely this purpose–to scrutinize the propriety of any agency withholding under FOIA. See Allen v. CIA, 636 F.2d 1287, 1294-97 (D.C. Cir. 1980) ("The legislative history of the 1974 Amendments to the FOIA demonstrates quite clearly that Congress sought to overrule [EPA v. Mink, 410 U.S. 73 (1973),] and facilitate in camera inspection of documents."); Countryman Decl., Ex. 10, at 99-100 (Legislative History to 1974 Amendments). "'While in camera examinations need not be automatic, in many situations it will plainly be necessary and appropriate.'" Goldberg v. U.S. Dep't of State, 818 F.2d 71, 77 (D.C. Cir. 1987) (quoting S. REP. NO. 93-1200, at 9 (1974)); Allen, 636 F.2d at 1296 (quoting H.R. REP. NO. 93-1380, at 8 (1974)).

[3] The FBI's Domestic Investigations and Operations Guide from December 16, 2008, similarly provides that "[n]o investigative activity, including full investigations, may be taken solely on the basis of activities that are protected by the First Amendment or on the race, ethnicity, national origin or religion of the subject." (See Countryman Decl., Ex. 9, at 93.) Likewise, Executive Order 13,292 provides that "[i]n no case shall information be classified in order to: (1) conceal violations of law, . . . (2) prevent embarrassment to a person, organization, or agency; . . . ." E.O. 13,292, § 1.7(a).

The D.C. Circuit in Allen, 636 F.2d 1287, identified several considerations relevant to the determination of whether to conduct an *in camera* inspection. As an initial matter, the trial court "should first offer the agency the opportunity to demonstrate, through detailed affidavits and oral testimony, that the withheld information is clearly exempt and contains no segregable, nonexempt portions." Allen, 636 F.2d at 1298 (citing Mink, 410 U.S. at 73). However, such efforts by the agency will be inadequate in many cases, due to the understandable "inability to reveal the very information sought to be protected." Id. In such cases, an *in camera* inspection permits the courts "to fulfill their statutory obligation to conduct a meaningful de novo review." Id. Similarly, where there is evidence of bad faith on the part of the agency, an *in camera* inspection would be "plainly necessary," unless "it is clear to the court that the withholding by the agency would not even be sustainable after in camera inspection." Id. Next, the D.C. Circuit indicated that an *in camera* inspection will be "most helpful" when there is a "dispute between the parties as to the document's contents." Id. The trial court should also take into account the views of the withholding agency.[4] Id. at 1298-99. Finally, the trial court should consider whether the case at hand presents "a strong public interest in disclosure," because it is in those situations that the need for an *in camera* inspection will be greatest. Id. at 1299.

In the instant case, there are strong grounds for an *in camera* inspection. First, it is unlikely the FBI will be able to provide any more specific description of the withheld information because "such justifications would reveal the very information sought to be protected." See id. at 1298. Second, there is clearly a dispute in this case as to the contents of the withheld documents. Plaintiffs strenuously argue Defendants have an incentive to withhold information that might lead to embarrassment or reveal potentially illegal activity. According to Plaintiffs, the Camp Pendleton leak that prompted their FOIA request made it clear that the Islamic Center and other mosques were "monitored by a federal surveillance program targeting Muslim groups."[5] (Countryman Decl., Ex. 1.)

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[4] However, in light of the court's duty to conduct a *de novo* review of the agency's decision to withhold, 5 U.S.C. § 552(a)(4)(B), it is doubtful that this factor alone could defeat the need for an *in camera* inspection.

[5] Plaintiffs also support their allegations with recent media reports of the FBI's surveillance of Islamic individuals and groups, (see Countryman Decl., Exs. 1, 4, 5, 6), as well as unredacted portions of the released documents in this case, (see, e.g., Doc. No. 26-1, at 44 ("According to ACS, [redacted] attended Ar Ribat Mosque while residing in San Diego, California. . . . . ACS also revealed

As previously noted, if such investigations were conducted solely on the basis of religion or other protected First Amendment activity, they would be illegal and not protected by the FOIA exemptions. See, e.g., Kuzma, 775 F.2d at 69. As the Allen court noted, where the parties dispute the contents of the withheld documents, an *in camera* inspection will be "most helpful." 636 F.2d at 1298. Finally, although the process is likely to be burdensome for the Court and although the FBI objects to it, the issues at hand involve important civil liberties that support "a strong public interest in disclosure." See id. at 1299.

Indeed, another district court recently conducted an *in camera* review in one of the cases that Defendants themselves rely upon. See ACLU v. FBI, 429 F. Supp. 2d 179, 186, 188 (D. D.C. 2006). In that case, just as in this one, the FBI supported the non-disclosure of documents related to its surveillance of certain domestic political and religious organizations with a declaration from Mr. Hardy "explain[ing] in detail which category from § 1.4 of E.O. 12958 applies to each document and why." Id. However, "given the importance of the issues raised" in the case, the court proceeded to "undertake an *in camera* review of a representative sample of the disputed documents" to "ensure the propriety of the FBI's withholdings and redactions." Id. at 186.

Defendants make very little effort to distinguish Allen or ACLU v. FBI. Their sole response to Plaintiffs' assertion that the Court should conduct an *in camera* review is that such remedy is generally reserved for "exceptional cases, as it circumvents the adversarial process and overburdens judicial resources." (Def. Reply, at 10 (internal citations omitted).) However, the cases cited by Defendants do not require a different conclusion. For example, in Lane v. Dep't of Interior, 523 F.3d 1128, 1136 (9th Cir. 2008), the Ninth Circuit summarized its case law as follows:

> If, however, the court finds that the government affidavits are "too generalized," it may examine the disputed documents in camera to make a "first-hand determination of their exempt status." [Lewis v. IRS, 823 F.2d 375, 378 (9th Cir. 1987)] (quoting Church of Scientology [of Cal. v. Dep't of Army], 611 F.2d [738,] 742 [(9th Cir. 1979)]). In camera inspection is "not a substitute for the government's burden of proof, and should not be resorted to lightly," due to the ex parte nature of the process and the potential burden placed on the court. Church of Scientology [of Cal.], 611 F.2d at 743; Pollard [v. FBI], 705 F.2d [1151,] 1153-54 [(9th Cir. 1983)]. However, it may be appropriate if the "preferred alternative to in camera

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that [redacted] attended an anti war protest on [redacted]."); Doc. No. 26-2, at 14 ("[Redacted] attends Friday prayers at the Islamic Center of San Diego, [redacted] associates with members of the Council on American Islamic Relations, . . . .")).

> review-government testimony and detailed affidavits-has first failed to provide a sufficient basis for a decision." Id. at 1154.

These cases do not stand for a categorical rejection of an *in camera* review process. There can be no doubt that whether to hold an *in camera* inspection is left to the "broad discretion" of the trial court. Spirko v. U.S. Postal Serv., 147 F.3d 992, 996 (D.C. Cir. 1998); accord Church of Scientology of Cal., 611 F.2d at 742-43 ("One of the major purposes of the 1974 amendments to the Freedom of Information Act, was to clarify the discretion of the trial court to conduct an In camera inspection of classified government documents." (internal citation omitted)). Rather, at most, the cases cited by Defendants provide that such review is not appropriate until the agency had an opportunity to provide additional testimony and detailed affidavits. See, e.g., Lewis, 823 F.2d at 378 ("Moreover, since the exemptions to FOIA are intended 'to relieve the district courts of potentially onerous in camera inspections of documents,' district courts need not and should not make in camera inspections where the government has sustained its burden of proof on the claimed exemption by public testimony or affidavits." (internal citations omitted)); Pollard, 705 F.2d at 1153-54 ("Although courts have commented on the inherent problems, the practice of *in camera*, *ex parte* review remains appropriate in certain FOIA cases, provided the preferred alternative to in camera review–government testimony and detailed affidavits–has first failed to provide a sufficient basis for a decision.").

In the present case, it is unlikely that more detailed affidavits from the government will provide further help in determining whether the withheld documents concern unlawful surveillance investigations. Rather, in light of the parties' dispute over the contents of the documents, it appears the "most helpful" approach would be to conduct an *in camera* review of those documents. See Allen, 636 F.2d at 1298; see also Lykins v. U.S. Dep't of Justice, 725 F.2d 1455, 1463 (D.C. Cir. 1984) ("[I]n cases in which a look at the withheld material itself would be useful, we have fully approved in camera examination of the withheld material by the trial court." (citations omitted)).

The fact that the Court can undertake an *in camera* review, however, does not mean that it has to look at all of the redacted and withheld documents. Rather, the Court can choose to undertake an *in camera* review of only "a representative sample" of the disputed documents, which would address Plaintiffs' concerns as well as minimize the burden on the Court. See ACLU v. FBI, 429 F. Supp. 2d at 186; see also Stephenson v. I.R.S., 629 F.2d 1140, 1145-46 (5th Cir. 1980) ("[R]andom or

representative sampling in camera with the record sealed for review, oral testimony or combinations thereof would more fully provide an accurate basis for decision."); Ash Grove Cement Co. v. F.T.C., 511 F.2d 815, 817 (D.C. Cir. 1975). In the end, the decision on whether to conduct an *in camera* review hinges on whether the Court "is concerned that [it] is not prepared to make a responsible de novo determination in the absence of In camera inspection." See Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir.1978) (per curiam). Indeed, "[t]he government would presumably prefer In camera inspection to a ruling that the case stands in doubt or equipoise and hence must be resolved by a ruling that the government has not sustained its burden." Id.

Accordingly, because many of the exemptions asserted by Defendants necessarily depend on the content of the underlying documents, it appears this case is a perfect example where the Court should exercise its discretion to conduct an *in camera* review of the documents, especially in light of the parties' dispute over their contents and the important civil liberties at stake.

**CONCLUSION**

For the foregoing reasons, the Court **GRANTS IN PART** the summary judgment and **RESERVES JUDGMENT IN PART**. Specifically, because the Court finds that the agencies' search for the responsive documents was adequate, the summary judgment motion is **GRANTED** in that respect. On the other hand, because many of the exemptions asserted by Defendants depend on the content of the underlying documents and in light of the important civil liberties at stake, the Court **RESERVES JUDGMENT** in that respect and **ORDERS** limited *in camera* review.

The Court shall review **153 pages** that the FBI withheld in full as well as a representative sample of **100 pages** of the other 312 redacted pages. The Government is **ORDERED** to submit to the Court proposed procedures that the Court shall utilize in conducting the *in camera* review. If necessary, such procedures may be submitted under seal. Once the Court has received and reviewed the proposed procedures, Plaintiffs' counsel shall be responsible for identifying **100 pages** of the 312 redacted pages for Court's *in camera* review.

**IT IS SO ORDERED.**

**DATED: June 29, 2010**

**IRMA E. GONZALEZ, Chief Judge**
**United States District Court**