No. 18-15416

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS JOSEPH RAIMONDO, AKA JUSTIN RAIMONDO AND ERIC ANTHONY GARRIS,

Plaintiff-Appellants,

v.

FEDERAL BUREAU OF INVESTIGATION

Defendant-Appellee,

APPELLANT'S OPENING BRIEF

On Appeal from the United States District Court
for the Northern District of California
No. 3:13-CV-02295-JSC
The Honorable Jacqueline Scott Corley

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INTRODUCTION

This appeal concerns the Federal Bureau of Investigation's collection and retention of records describing the First Amendment activities of journalists Eric Garris and Justin Raimondo. In 2011, Garris and Raimondo learned that they had been the subject of a 2004 FBI "threat assessment." The threat assessment described the journalists' internet news website, Antiwar.com, as well as a wide range of their writings, statements, and media appearances, many of which were critical of U.S. foreign policy and intelligence agencies. It concluded by recommending that the San Francisco field office of the FBI open a preliminary investigation to determine if Garris or Raimondo were engaged in activities "which constitute a threat to National Security on behalf of a foreign power."

The FBI's San Francisco field office rejected the recommendation, stating that the information on Antiwar.com was public source information without a direct nexus to terrorism and did not pose a threat to FBI investigations. Instead, "San Francisco opine[d] that Eric Garris and Justin Raimondo [were] exercising their constitutional right to free speech."

The Privacy Act of 1974 prohibits federal agencies from maintaining records describing individuals' First Amendment activities except under certain circumstances. 5 U.S.C. § 552a(e)(7) (1974) (hereinafter "Section (e)(7)"). The law enforcement exception invoked by the FBI in this case allows maintenance of

records describing First Amendment activities only if "pertinent to and within the scope of an authorized law enforcement activity." *Id.* Thus, the central questions underlying the journalists' Section (e)(7) claims are whether the law enforcement activities pursuant to which the FBI maintained descriptions of the journalists' First Amendment activities were "authorized" and whether they were pertinent to and within the scope of those law enforcement activities.

For the Privacy Act's protections to be meaningful, these questions must relate to the law enforcement activity that actually took place, rather than an agency's *post hoc* explanation of the challenged record. But throughout this litigation, the district court allowed the FBI's litigation position to provide the necessary "authorized law enforcement activity." This approach informed the district court's orders denying the journalists access to necessary discovery and overruling evidentiary objections to agency declarations. The district court abused its discretion by misapplying the law with respect to discovery and evidence, resulting in an incomplete record of disputed facts inappropriate for resolution on summary judgment.

The district court also failed to enforce the requirements of the Privacy Act. The district court failed to recognize limits on the FBI's authority to monitor and record First Amendment protected activities and even disclaimed authority to consider whether maintenance of descriptions of the journalists' writings and

statements were properly within the scope of the FBI's stated law enforcement activity. The district court repeatedly expressed a disagreement with the basic premise of the Privacy Act, asserting that if the FBI could *view* the articles on Antiwar.com, it could not be precluded from creating a record of them. But limiting the collection and maintenance of records describing individuals' First Amendment activities is exactly what the Privacy Act does. The decisions of the district court render these protections a nullity, and must be reversed.

JURISDICTIONAL STATEMENT

Appellants challenge the FBI's maintenance of records describing their First Amendment activities in violation of the federal Privacy Act, 5 U.S.C. § 552a(e)(7). The district court had subject matter jurisdiction over this claim under 5 U.S.C. § 552a(g) and 28 U.S.C. § 1331. The district court granted summary judgment for the FBI on Appellants' Privacy Act claims on May 10, 2016 and January 12, 2018 and entered judgment for the FBI on those claims on January 12, 2018. ER40, ER1. The journalists filed a timely notice of appeal within 60 days of the judgment, on March 13, 2018. ER206; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

Appellants Garris and Raimondo are journalists who write, publish, and edit articles on U.S. foreign policy and international affairs. They serve as the managing editor and editorial director of the website Antiwar.com. In April 2004, the U.S. Federal Bureau of Investigation ("FBI") created a 10-page memorandum detailing Appellants' political views, ideological positions, and funding sources, and recording and attaching a selection of their articles and statements. In response to litigation, the FBI asserted that the record was a "threat assessment," conducted following the discovery of a publicly-available list of suspects posted on Antiwar.com.

1. Did the district court apply erroneous legal standards when it credited the FBI's *post hoc* "authorized law enforcement activity" rationale to deny the journalists' reasonable discovery and accept agency declarations submitted without personal knowledge and based on inadmissible hearsay?
2. Were there authorized law enforcement activities that justified the April 30 and Halliburton Memos' descriptions of the journalists' First Amendment Activities?
3. If so, with respect to the April 30 Memo, was the FBI's recording of the journalists' writings, statements, and political views on a wide range of topics "pertinent to and within the scope of" that authorized law enforcement activity?

4. Does the Privacy Act allow the maintenance of records describing First Amendment activities once they are no longer pertinent to or within the scope of an ongoing authorized law enforcement activity?

STATEMENT OF THE CASE

I. Origins of the Privacy Act and Limits on FBI Investigative Authority

In the 1950s, the FBI engaged in covert programs to collect intelligence about "'racial matters,' 'hate organizations,' and 'revolutionary-type subversives,'" through counterintelligence programs referred to as "COINTELPRO."[1] In the 1960s, these investigations extended to the anti-war and civil rights movements. *Id.* In 1975, the Senate Select Committee to Study Governmental Operation with Respect to Intelligence Activities, known as the "Church Committee," and the House Select Committee on Intelligence, known as the "Pike Committee" conducted parallel hearings to investigate the FBI's practices. *Id.* These efforts revealed that that the FBI had developed over 500,000 domestic intelligence files on Americans and domestic groups. *Id.* "The targets of the intelligence activities included organizations and individuals espousing revolutionary, racist, or

[1] Office of the Inspector General, *The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines (Redacted)* Ch. 2 (2005) (hereinafter "OIG Ch. 2"), https://oig.justice.gov/special/0509/chapter2.htm.

otherwise 'extremist' ideological viewpoints," but also included investigations of the civil rights, anti-war, and women's movements. *Id.*

A. Privacy Act of 1974

Inspired by the Watergate scandal, revelations about the FBI's surveillance of civil rights and other political activists, and Internal Revenue Service surveillance of thousands of groups and individuals between 1969 and 1973, Congress passed the Privacy Act of 1974. 120 Cong. Rec. 36900 (statement of Sen. Nelson) (Nov. 21, 1974). Government surveillance of news reporters were among the abuses that spurred this effort. *Id.* at 36901*; see also* H.R. Rep. No. 93-1416, at 8 (Oct. 2, 1974).

The Privacy Act established the right for individuals to access agency records held about them, as well as safeguards regarding the methods by which information is gathered and content that may be maintained. *See* 5 U.S.C. §§ 552a(d); 552a(e). Among its substantive components, the Privacy Act prohibits the collection of information that is not "relevant and necessary to accomplish a purpose of the agency." § 552a(e)(1). Congress imposed an "even more rigorous" standard for collection, use, and maintenance of records describing individuals' exercise of First Amendment rights. Office of Management and Budget Privacy Act Guidelines, 40 Fed. Reg. 28,965 (July 9, 1975). Section 552a(e)(7) of the Privacy Act provides:

> (e) Each agency that maintains a system of records shall—
>
> . . . .
>
> (7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity

The Privacy Act provides civil remedies for violations of the statute. *See* 5 U.S.C. § 552a(g).

B. Attorney General Guidelines

In response to the findings of the Church and Pike Committees—and as an alternative to statutory limitations on FBI authority—Attorney General Edward Levi issued the first Attorney General Guidelines in 1976, which proceeded "from the proposition that Government monitoring of individuals or groups because they hold unpopular or controversial political views is intolerable in our society." OIG Ch. 2 (citing testimony of Edward H. Levi, Attorney General, Department of Justice) (1976). The 1976 Guidelines specified that investigations should be limited to exposing criminal conduct and established the factual predicates required for different levels of investigatory intrusion. For example, they allowed a "full domestic security investigation" only on the basis of "specific and articulable facts giving reason to believe that an individual or group is or may be engaged in activities which involve the use of force or violence." OIG Ch. 2.

Since 1976, many Attorneys General have revised the guidelines, altering the level of suspicion or articulable facts required to open FBI investigations. *Id*. In May 2002, Attorney General John Ashcroft issued new guidelines to allow FBI agents to search and monitor internet activity without evidence of criminal activity or suspicious behavior.[2] Effective October 31, 2003, Attorney General Ashcroft issued the *NSI Guidelines*, which introduced a new investigative activity called "threat assessments"—the lowest level of investigation, and one that could be initiated without any articulable suspicion of criminal activity.[3]

Critically, both the *NSI Guidelines* and the *General Crimes Guidelines* specifically exclude from the FBI's permitted law enforcement activities "investigating or maintaining information on United States persons solely for the purpose of monitoring activities protected by the First Amendment" or exercising

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[2] *See* John Ashcroft, *Remarks of Attorney General John Ashcroft*, Dept. of Justice (May 30, 2002), https://www.justice.gov/archive/ag/speeches/2002/53002agpreparedremarks.htm; John Ashcroft, *The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations*, at 8 (2002) (hereinafter *General Crimes Guidelines*), https://epic.org/privacy/fbi/FBI-2002-Guidelines.pdf (FBI may make a "preliminary inquiry" based on information or an allegation that is not supported by "'reasonable indication' of criminal activities").

[3] OIG Ch. 5 (2002), https://oig.justice.gov/special/0509/chapter5.htm#300. According to the NSI Guidelines, the purpose and scope of threat assessments was "comparable to the authorization under Part VI" of the *General Crimes Guidelines*. John Ashcroft, *The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection*, at 3 (2003) (hereinafter *NSI Guidelines*), ER540-77.

other constitutional or legal rights. *NSI Guidelines*, ER546-47; *see also General Crimes Guidelines* at 7. The *NSI Guidelines* also affirm a distinction between investigative *actions* and records of those actions, noting that Privacy Act limitations on maintaining records "do not apply to activities that do not involve the maintaining of records." *NSI Guidelines*, ER547. In the practice manuals the FBI has created to implement these and subsequent Attorney General Guidelines, the agency has specified that "standards for initiating or approving an assessment" "will ensure that there is a rational relationship between that authorized purpose and the protected speech such that a reasonable person with knowledge or the circumstances could understand why the information is being collected."[4]

II. FBI's Interest in Antiwar.com and Impact on Plaintiffs

A. FBI Threat Assessment of Garris, Raimondo, and Antiwar.com

Antiwar.com is an anti-interventionist, pro-peace website whose editorial mission is to publish news, information, and analysis on the issues of war and peace, diplomacy, foreign policy, and national security, as an alternative to mainstream media sources. ER244. Antiwar.com is nonpartisan, non-sectarian, and

[4] FBI, *Domestic Investigations and Operations Guide*, at 26 (Dec. 16, 2008) (hereinafter "DIOG"), https://www.aclu.org/sites/default/files/field_document/ACLURM004947.pdf; *see also* DIOG, § 4.2.1 (Oct. 16, 2013), ER229-30.

unique in its dedication to publishing analysis and perspectives from across the political spectrum. *Id.*

In April 2004, the Newark, New Jersey office of the FBI produced an "electronic communication" memorializing a threat assessment it conducted on Antiwar.com and two of its principal employees, Eric Garris and Justin Raimondo. ER263-72. The FBI claims it undertook this threat assessment following discovery of a document posted on Antiwar.com that appeared to be a list of FBI suspects—a list that the FBI knew had been posted elsewhere as well. ER521, ER264, ER270, ER275.

The April 30, 2004 electronic communication ("April 30 Memo") is a ten-page memorandum that describes Antiwar.com, the results of several law enforcement database searches, and references to Garris, Raimondo, and Antiwar.com found within the FBI's records.[5] The April 30 Memo had eleven enclosures, including five news articles and three Internet postings written by Raimondo on a variety of topics. The April 30 Memo indicates that its authors conducted a search for news articles about Garris, Raimondo, and Antiwar.com, and describes the views attributed to Garris and Raimondo by these articles. ER267-70. The April 30 Memo noted, for example:

[5] The FBI produced several versions of the April 30 Memo, with varying degrees of redaction. For completeness, Appellants generally refer to the least redacted version at ER263-71.

> The Boston Globe, dated 10/13/2002, stated that in August 2001, Raimondo published an article in Pravada in which he dismissed the idea that "America is a civilized country," and, referring to World War II, maintained that "the wrong side won the war in the Pacific." As for Israel, Raimondo continued to proclaim the myth that "Israel had foreknowledge of 9/11."
>
> U.S. Newswire, dated 11/02/2002, posted "It's Definitely Not Your Father's Anti-War Movement: Antiwar.com Provides News and Commentary From All Parts Of The Political Spectrum." This article focuses on the editorial comments of Eric Garris.

Additional descriptions attribute to Raimondo the views that "war in the Persian Gulf is not inevitable," and "FBI information in many ways is worse than McCarthy's hunt for communists." The April 30 Memo also references an article entitled "Intrepid Antiwarriors of the Libertarian Right," as describing "the opinions of Justin Raimondo and Eric Garris." The document notes several occasions in which persons of interest to the FBI accessed Antiwar.com and describes a flyer that was handed out at a "peaceful protest" that listed Antiwar.com as a news source on U.S. detention of "suspected Israeli spies." ER266.

> The April 30 Memo concludes with analyst comments:
>
> The rights of individuals to post information and to express personal views on the Internet should be honored and protected; however, some material that is circulated on the Internet can compromise current active FBI investigations. The discovery of two detailed Excel spreadsheets posted on www.antiwar.com may not be significant by itself since distribution of the information on such lists are wide spread. Many agencies outside of law enforcement have been utilizing this information to screen their employees. Still, it is unclear whether www.antiwar.com may only be posting research material compiled

> from multiple sources or if there is material posted that is singular in nature and not suitable for public release. There are several unanswered questions regarding www.antiwar.com. It describes itself as a non-profit group that survives on generous contributions from its readers. Who are these contributors and what are the funds utilized for? Due to the lack of background information available on Justin Raimondo, it is possible that this name is only a pseudonym used on www.antiwar.com. If this is so, then what is his true name? Two facts have been established by this assessment. Many individuals worldwide do view this website including individuals who are currently under investigation and Eric Garris has shown intent to disrupt FBI operations by hacking the FBI website.

ER270-71. Notably the April 30 Memo contained no facts suggesting that Appellants' posting of the Excel spreadsheets—the suspect lists—posed any threat to national security or raised suspicion of past or potential criminal activity. The only allegation raising possible criminal conduct by the journalists was Garris's alleged intent to hack the FBI, but FBI disclosures in this case revealed that this charge arose from a rather obvious mistake made by a different FBI agent. *See* ER496-97.

This review of the journalists' First Amendment activity resulted in a recommendation:

> It is recommended that a [preliminary investigation] be opened to determine if Eric Anthony Garris and/or Justin Raimondo are engaging in, or have engaged in, activities which constitute a threat to National Security on behalf of a foreign power.

ER271.

Shortly thereafter, the FBI's San Francisco Field Office rejected the recommendation to open a preliminary investigation, stating:

> After reviewing the website, it appears the information contained therein is public source information and not a clear threat to National Security. Furthermore, there does not appear to be any direct nexus to terrorism nor the threat of compromising current FBI investigations. San Francisco opines that Eric Garris and Justin Raimondo are exercising their constitutional right to free speech.

ER415-17.

B. Disclosure and Impact of FBI Threat Assessment

Garris and Raimondo learned of the April 30 Memo in August 2011 after a partially redacted version was released on the website Scribd.com. ER356-57. Shocked that they had been targeted for an investigation based on their writing and political analysis, Garris and Raimondo published cartoons and statements decrying the FBI's surveillance practices. ER378-79, ER409. At the same time, public awareness of the April 30 Memo—as well as the journalists' own awareness that the FBI had created the document—caused them significant injury. In addition to taking an emotional toll, the April 30 Memo had a chilling effect on the journalists' exercise of their First Amendment rights. ER337-38, ER400 (emotional impact on Raimondo).

Release of the April 30 Memo led to a loss of reputation for the journalists and Antiwar.com, lessening their influence as political thought leaders. ER361, ER393-92. They experienced a decrease in their ability to secure writers,

information from confidential sources, and news leaks. ER361, ER394. Learning of the April 30 Memo, and later the Halliburton Memo, also had a chilling effect on their own editorial choices. ER393, ER441-42, ER244-45.

Perhaps most impactful, the April 30 Memo led to a withdrawal of financial support from several major donors, who expressed concern that their support for Antiwar.com would cause them to be surveilled by the federal government. ER346-47; ER374. This withdrawal of financial support in turn resulted in the termination of four full-time employees, five paid columnists, and two part-time assistants. ER361. The decrease in financial support to Antiwar.com also led to a costly loss of employment benefits to Garris and Raimondo as employees. ER317-320.

Finally, through Freedom of Information Act ("FOIA") disclosures in this case, Garris and Raimondo received 21 partially redacted FBI records referencing Garris, Raimondo, and/or Antiwar.com that were created after April 30, 2004, some of which reference the April 30 threat assessment. ER362-63; ER274-74. These disclosures suggest that the April 30 Memo has led to increased FBI interest and monitoring of the journalists and their website.

III. Proceedings Below

A. Exhaustion of Administrative Claims and Filing of Complaint and First Amended Complaint

Garris and Raimondo submitted FOIA and Privacy Act requests to the FBI for disclosure of documents related to themselves and Antiwar.com. ER456-60. After the FBI failed to produce any documents in response to the requests, Plaintiffs filed a complaint to enforce their rights to disclosure of documents under FOIA and the Privacy Act on May 21, 2013. *Id*. On the same day Garris and Raimondo filed their FOIA complaint, they submitted requests to the FBI pursuant to 5 U.S.C. §§ 552a(e)(7) and (d)(2) of the Privacy Act, seeking expungement of all records maintained by the FBI that describe their exercise of First Amendment rights. ER473-78.

The FBI made its first interim release on October 1, 2013. This production revealed, *inter alia*,

- A September 1972 memo describing Garris's participation in an anti-Vietnam war protest, ER514-15;
- A January 7, 2002 FBI memo concluding that Eric Garris had threatened to hack the FBI website, and the underlying documentation for that conclusion (which was an email Eric Garris received from someone threatening to hack Antiwar.com and forwarded to FBI in order to report the threat), ER496-97; and
- The San Francisco FBI memo declining the April 30 Memo's recommendation to open a preliminary investigation. ER415-17.

Garris requested the FBI expunge the January 2002 FBI memo that mistakenly concluded he had threatened to hack the FBI's website. ER480-85. The FBI granted Garris's request only in part. The FBI generated a document entitled "Notification of Corrective Action," which states "Garris in no way threatened to hack the FBI's website on September 12, 2001; instead he reported a threat made to his website, www.antiwar.com." ER499-506.

The FBI denied the journalists' administrative requests for expungement of records describing their First Amendment activities and Garris and Raimondo exhausted their administrative appeals. ER508-12. The journalists amended their disclosure lawsuit to include substantive claims under (e)(1) and (e)(7) of the Privacy Act. ER197, Dkt.28.

B. Discovery Practice and Protective Order Precluding Depositions of the Authors of the April 30 Memo

Garris and Raimondo sought discovery to illuminate the FBI's law enforcement justification for maintaining the April 30 Memo. In its initial response to Plaintiffs' interrogatory on this subject, the FBI simply referred to the text of the April 30 Memo, stating only: "Unclassified/non-privileged responsive information is contained in the redacted version of the "APRIL 30 MEMO" provided by FBI in its response to plaintiffs' Freedom of Information Act ("FOIA") requests." ER719. After repeated efforts to elicit more information through meeting and conferring,

Garris and Raimondo filed a motion to compel a further response. Only then did the FBI elaborate further, amending its interrogatory response to say:

> Unclassified/non-privileged responsive information is contained in the redacted versions of the "APRIL 30 MEMO" provided by FBI in its response to plaintiffs' Freedom of Information Act ("FOIA") requests. The threat assessment conducted by the FBI on Justin Raimondo, Eric Garris, and the www.antiwar.com site is captured in the document dated April 30, 2004. The assessment was initiated after discovery of one or more lists that contained information about individuals of investigative interest to the FBI on the www.antiwar.com site. The assessment provided background information about the www.antiwar.com site as well as Raimondo and Garris, as that information related to other investigations, both pending and closed. Because an investigation was not opened on either the www.antiwar.com site, Raimondo or Garris, the April 30 document was created in an administrative control file in the central records system, as investigatory material not related to one, specific investigative file, and available to inform pending, new, or reopened investigations. This document is maintained in this administrative control file and also maintained within other investigative files to inform related pending, new, or reopened investigations.

ER699. At oral argument, the district court acknowledged that the face of the April 30 Memo did not clearly reveal the law enforcement activity the FBI considered it to be "pertinent to and within the scope of," but did not order the FBI to produce a more detailed interrogatory response. ER23.

Seeking further evidence concerning the relationship between Antiwar.com's posting of open source government documents and the variety of First Amendment activities described in the April 30 Memo, Garris and Raimondo

issued deposition subpoenas for the two former FBI agents who had written the April 30 Memo. ER650-60. The FBI moved for a protective order, arguing that the depositions would be duplicative of existing evidence and could touch on matters protected by a law enforcement privilege. ER661-78, 578-97. Although the FBI neither claimed nor provided evidence that the depositions would be a hardship or burden to the authors of the April 30 Memo, the district court granted the FBI's motion for a protective order based on the district court's own speculation about the likelihood of such a burden. ER145-49.

C. Cross Motions for Summary Judgment

The parties filed cross motions for summary judgment on the journalists' disclosure claims and claims for amendment or expungement of records under the Privacy Act. Specifically, Plaintiffs sought expungement of the April 30 Memo and attached articles comprising or describing Plaintiffs' First Amendment Activities and the 1972 memo regarding Garris's participation in a mock war tribunal to call attention to abuses during the Vietnam War. ER200, Dkt.82.[6]

The FBI argued that the records at issue fell within the authorized law enforcement activity exception to the Privacy Act's general prohibition against

[6] Plaintiffs also sought expungement or amendment of the January 2002 memo that mistakenly concluded Garris had threatened to hack to FBI website under 5 U.S.C. § 552a(d)(2), but Plaintiffs do not appeal the district court's ruling as to that document or the 1972 Vietnam War era document.

maintaining records of First Amendment activities. As to the April 30 Memo, FBI relied on the declaration of Andrew Campi, an FBI agent who had no personal knowledge of the drafting of the April 30 Memo and whose statements were based on his review of information provided to him. ER518-23.

According to Campi, the *NSI Guidelines* authorized the threat assessment. *Id*. Campi asserted that review of a possible "watch list" on Antiwar.com led to the further discovery of a second spreadsheet whose markings—"FBI SUSPECT LIST" and "Law Enforcement Sensitive,"—suggested the information it contained was not for public dissemination "and as such should not have been on the www.antiwar.com website." ER521. As to the other First Amendment activities described in the April 30 Memo, Campi asserted, "To provide context for the information assembled in the April 30, 2004 EC, a selection of publicly available articles regarding plaintiffs and www.antiwar.com located from online resources and services was attached to the record." ER522.

Plaintiffs filed evidentiary objections to the portions of the Campi declaration that were not based on personal knowledge and provided information that was not discernible from the face of the April 30 Memo, but the district court overruled those objections. ER43-44.

The district court agreed with the FBI that the *NSI Guidelines* permitted a threat assessment "to investigate matters related to national security," based on the

two spreadsheets discovered on Antiwar.com. ER60. It further held that the April 30 Memo's description of First Amendment activity unrelated to the spreadsheets was permissible to provide "'a complete picture' of Plaintiffs and thus potentially how and why the spreadsheets were on Antiwar.com." ER61 (quoting *MacPherson v. I.R.S.*, 803 F.2d 479, 484 (9th Cir. 1986)). The district court also disclaimed any authority to evaluate whether the FBI's description of First Amendment activities unrelated to the watch lists was within the proper *scope* of the April 30 Memo. *Id*. Finally, the district court held that the FBI could continue to maintain the April 30 Memo after the expiration of the law enforcement activity that produced it. ER63-65.

D. Motion for Reconsideration and Further Motions for Summary Judgment

In response to the district court's ruling on the journalists' FOIA claims, the FBI released additional and less redacted documents. Because some of the newly disclosed material provided additional context for the April 30 Memo and raised additional Privacy Act concerns, Garris and Raimondo moved for reconsideration of the district court's order granting summary judgment to the FBI on their Section (e)(7) claim. ER203, Dkt.102.

Plaintiffs highlighted two documents as providing important context for the April 30 Memo. *First*, an FBI memorandum dated April 22, 2008 ("April 2008 Memo") references the FBI Suspect List that triggered the threat assessment

memorialized in the April 30 Memo and indicates that "the FBI has been aware of this FBI Suspect List being posted on the internet since November 2003," *five months before* the April 30 Memo was drafted. ER274-75 at 5, 26-27. *Second,* a three-page memorandum dated August 18, 2004 ("August 2004 Memo") documented the Pittsburgh, Pennsylvania FBI office's efforts "to determine the origin of a list posted on www.antiwar.com.," which was known as the "Finnish list." The Pittsburgh FBI's August 2004 Memo was far more limited in scope than the Newark FBI's April 30 Memo, and focused entirely on the posting of the Finnish list. Its description of the journalists' First Amendment activities was limited to their writings *as they related to that list.* ER280-98.

Plaintiffs argued that these memos demonstrated the April 30 Memo used the posting of an FBI suspect list as pretext for the FBI's illegal recording of the journalists' First Amendment activities. ER203-04, Dkts.102, 109. Not only did the April 2008 Memo reveal that the FBI knew about the public, widespread posting of this document for months prior to the April 30 Memo, the narrow scope of the August 2004 Memo presented a strong counterpoint to the district court's earlier acceptance of the April 30 Memo's wide-ranging discussion of First Amendment activities.

The district court denied Plaintiffs' motion for reconsideration of the court's ruling on the April 30 memo, asserting "Section (e)(7) does not authorize the Court

to substitute its judgment for that of the FBI regarding the manner or scope of the investigation." ER36.

Plaintiffs also moved for reconsideration with respect to two documents that revealed FBI descriptions of Antiwar.com content. One was an FBI memo dated April 5, 2006, that describes protest activity planned for a Halliburton shareholders' meeting and names Antiwar.com as one of several websites publishing information about the meeting. ER304-05 (hereinafter "Halliburton Memo").

The district court ordered further briefing on this aspect of Plaintiffs' motion for reconsideration and the parties filed cross motions for summary judgment regarding the Halliburton Memo. ER37-38, 1-12. The district court—over Plaintiffs' evidentiary objections—credited an agency declaration to find that the purpose of the memo was public safety related and its description of First Amendment activities "authorized." ER5-10. The district court granted the FBI's motion for summary judgment as to the Halliburton Memo. ER203.

E. Dismissal of Disclosure Claims and Entry of Judgment

The parties reached agreement on Plaintiffs' disclosure claims, including a settlement of attorneys' fees, and Plaintiffs voluntarily dismissed those claims. ER203, Dkt.100. The district court entered judgment on January 12, 2018 and Plaintiffs filed a notice of appeal on March 13, 2018.

SUMMARY OF ARGUMENT

The district court failed to apply the case-by-case, searching inquiry required to evaluate the journalists' claims under Section (e)(7) of the Privacy Act. *See MacPherson v. I.R.S.*, 803 F.2d 479, 484 (9th Cir. 1986). Applying undue deference to the FBI's litigation position, the district court made a series of errors that require reversal and remand.

First, because the April 30 Memo does not itself identify why its wide-ranging description of the journalists' First Amendment activities were "pertinent to and within the scope of" an authorized law enforcement activity, competent evidence was needed to resolve the claims on summary judgment. But the district court applied improper legal standards and abused its discretion with respect to both discovery and evidentiary rulings. It denied Garris and Raimondo the opportunity to take the depositions of the only persons with personal knowledge of the facts underlying their claims. Then, having precluded the journalists from obtaining evidence, the district court improperly relied on agency declarations unsupported by personal knowledge to make determinative factual findings for the FBI.

Second, the district court applied several erroneous legal standards to conclude that the April 30 Memo could be maintained pursuant to Section (e)(7)'s law enforcement exception. As a threshold matter, the district court incorrectly

held that the *NSI Guidelines* authorized a threat assessment based solely on the First Amendment protected activity of the journalists' posting of an open source, non-classified, government document. Then, the district court asserted it had no authority to review whether the FBI's descriptions of the journalists' First Amendment activities were within the *scope* of the FBI's purported law enforcement activity as required by the statutory text. Throughout, the district court insisted that if FBI agents are authorized to *review* the journalists' writings and statements, the agents must also be able to create *records* describing those writings, even though it is the *recording* of First Amendment activity that the Privacy Act prohibits.

Third, the district court erred in granting summary judgment to the FBI with respect to the Halliburton Memo because that record targeted First Amendment protected protest activity, and identified news sites sharing information about such protest activity, without any stated public safety or other authorized law enforcement purpose.

Finally, the district court failed to give effect to the words of the Privacy Act by imposing a blanket rule that agency descriptions of First Amendment activities need not be justified by an ongoing law enforcement activity. This is contrary to the plain language of the statute, is in conflict with the concerns that animated the passage of Privacy Act, and is inconsistent with the Ninth Circuit's fact-based

inquiry. Well after the expiration of any law enforcement activity that led to the April 30 and Halliburton Memos, the FBI has nothing but an administrative interest in maintaining the records. On the other side of the scale, Garris and Raimondo have a strong interest in preventing the retention of records describing their views and writings, particularly a record that inaccurately and unfairly maligns them as possible "agents of a foreign power."

ARGUMENT

I. The District Court's Discovery and Evidentiary Rulings Prevented Development of Admissible Evidence

The April 30 Memo indisputably contains descriptions of Appellants' First Amendment activities, and thus raised on its face a potential Privacy Act violation. In order to overcome the FBI's stated defense—that its descriptions of the journalists' views, writings, and statements were "pertinent to and within the scope of an authorized law enforcement activity"—the journalists needed to understand what law enforcement activity the authors of the April 30 Memo were engaged in, the scope of that activity, and the purported authorization for it. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). For the Privacy Act's protections to be real, the FBI may only maintain records describing First Amendment activities if they truly *are* pertinent to and within the scope of an

authorized law enforcement activity. The FBI's *assertion* that they are subject to the exception is not sufficient.

But from the journalists' first attempt to compel discovery relevant to the FBI's law enforcement activities defense, the district court revealed a willingness to accept the government's *post hoc* litigation position as representative of the facts as they existed when the April 30 Memo was written. As the district court previously acknowledged, the April 30 Memo itself did not specify the law enforcement activity pursuant to which descriptions of the journalists' First Amendment activities were included. *See* ER187 ("I mean you read this and it's not clear. There's a lot of things in there"). But once the FBI supplemented its interrogatory response to specify that the threat assessment was "initiated after discovery of one or more lists" on Antiwar.com, the district court refused to compel further responses, declaring:

> That's it. That's the reason. . . . I mean, that's it. So, for purposes of this case, that's what it's going to be. It has to do with the list that was found and all that.

ER168-69.[7]

The district court's unquestioning acceptance of the FBI's litigation position as fact played out in its discovery orders, evidentiary rulings, and in its analysis of

[7] Appellants' discussion of this hearing is for background purposes only, as Appellants do not seek this Court's review of Dkt.53.

the journalists' Privacy Act claims. As explained below, the district court failed to apply applicable legal rules and abused its discretion in granting the FBI's motion for a protective order and accepting of the incompetent declarations of declarants Campi and Bujanda. These errors prevented the development of a competent record for analysis of the journalists' Section (e)(7) claim.

A. The District Court Abused Its Discretion in Denying the Journalists Reasonable and Necessary Discovery

For challenges under the Privacy Act's substantive provisions—as opposed to its access to records provisions—normal discovery under Rule 26 applies. *See Lane v. Dep't of Interior*, 523 F.3d 1128, 1133-35 (9th Cir. 2008) (explaining limits on discovery regarding access to records claims and noting that substantive Privacy Act claim "initially warranted discovery"); *see also MacPherson v. I.R.S.*, 803 F.2d at 480 (noting cross motions for summary judgment were filed "[a]fter extensive discovery"). Here, the FBI took depositions of both Garris and Raimondo regarding the journalists' claims under Section (e)(7). However, the district court granted the governments' motion for a protective order, preventing the journalists from taking corresponding depositions from the FBI. ER625, ¶4; ER142-43. In doing so, the district court failed to apply the applicable legal standard. Instead it granted the FBI's motion based solely on the district court's speculation that depositions would be unduly burdensome to the retired agents—

the only witnesses with personal knowledge relevant to the journalists' Section (e)(7) claim.

1. Standard of Review

This Court reviews a lower court's decision to grant a protective order for abuse of discretion. *In the Matter of Roman Cath. Archbishop of Portland in Or. v. Various Tort Claimants*, 661 F.3d 417, 423-24 (9th Cir. 2011) (citing *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002)). Abuse of discretion occurs when a district court "fails to identify and apply 'the correct legal rule to the relief requested,'" or if its application of the correct legal standard was "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Id.* at 424-26 (citing *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (internal citations omitted).

2. The District Court Applied an Incorrect Legal Standard

The district court's order granting the FBI's protective order did not explain the basis for its decision. But the court articulated its rationale at the hearing on the motion:

> I do think it's just too extraordinary just to say in every Privacy Act case you get to take the depositions of the agents that are involved. I don't think that's actually consistent with Lane, and certainly not consistent with the D.C. Circuit, which . . . is where most of our guidance comes from.

ER154-55.[8] Contrary to the district court's statement on the record, Appellants never took the position that depositions would be required in *every* Privacy Act case, and neither *Lane* nor persuasive authority from the D.C. Circuit support the conclusion that protective order motions arising in the context of Section (e)(7) claims should be subject to a different standard than "good cause" under Rule 26.

Lane involved an employment dispute at the National Park Service. The plaintiff filed suit to enforce her right to access records under FOIA and the Privacy Act and brought one substantive claim under the Privacy Act, challenging her supervisor's access to and disclosure of Lane's personnel file. *Id.* at 1133-34. This Court explained that "[w]hile ordinarily the discovery process grants each party access to evidence, in FOIA and Privacy Act cases discovery is limited because the underlying case revolves around the propriety of revealing certain documents." *Id.* at 1134 (citing *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991)). Because Lane sought "twenty depositions in four separate cities," and "appeared to be requesting via discovery 'the very information that is the subject of the FOIA complaint,'" the district court properly delayed discovery "with respect to Lane's FOIA claim and right of access Privacy Act claim." *Id.*

[8] Appellants assume the district court was referring to *Lane*, 523 F.3d 1128, although it was not cited in the briefing on the motion.

Critically, the Court acknowledged that Lane's *substantive* Privacy Act claim, unlike her right of access claim, "initially warranted discovery." *Id.* at 1135. Under the circumstances of the case, however, it was not an abuse of discretion to delay discovery until after the government filed its summary judgment motion. *Id.* *Lane* therefore reaffirms the general rule that in an *access to records* case, delay of discovery is appropriate, but also instructed that the usual rule of initial discovery applies to substantive challenge under the Privacy Act. Here, the journalists sought depositions related only to their substantive claim under Section (e)(7) claim, and the district court abused its discretion by applying the standard for discovery on access to records claims.

The D.C. Circuit has also not precluded the use of depositions in Section (e)(7) Privacy Act cases. *Cf.* ER154:23-25. The district court in *Afifi v. Lynch* cited a D.C. Circuit case for the proposition that "[w]here information is needed beyond the agency declarations, the appropriate remedy is the review of an *ex parte* classified submission, not discovery." *Afifi v. Lynch*, 101 F. Supp. 3d 90, 105 n.9 (D.C. 2015) (citing *J. Roderick MacArthur Found. v. FBI*, 102 F.3d 600, 605 (D.C. Cir. 1996)). But *J. Roderick* did not state a general rule. Instead it upheld a denial of discovery because "the documents . . . sought in discovery were largely classified, and the district court's *in camera* review of those documents informed

its decision that discovery was not necessary in order for the court to rule upon the Government's motion for summary judgment." *J. Roderick*, 102 F.3d at 605.

Here, by contrast, most of the content of the April 30 Memo has been made public, and there was no showing that the journalists could not obtain relevant and useful information without intruding upon classified information. *See Ibrahim v. Dep't of Homeland Sec.*, 2013 WL 1703367, *10 (N.D. Cal. 2013). The District Court in this case appears to have adopted the misleading conclusion of the district court for the District of Columbia in *Afifi v. Lynch*—an incorrect legal standard that requires reversal and remand.

3. The District Court's Protective Order Was Not Supported by "Good Cause."

Federal Rule of Civil Procedure 26 provides that "in general, any matter relevant to a claim or defense is discoverable." Fed. R. Civ. P. 26. Although a district court "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," the moving party must show good cause by "demonstrating harm or prejudice that will result from the discovery." Fed. R. Civ. P. 26(c)(1); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004).

In the Ninth Circuit, the party opposing disclosure must show that a "specific prejudice or harm will result" to show good cause for a protective order. *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003); *see*

also Rivera, 364 F.3d at 1063. "If a court finds particularized harm will result from disclosure of information to the public, then it balances the public and private interests to decide whether a protective order is necessary." *Rivera*, 364 F.3d at 1063-64 (quoting *Phillips ex rel. Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002)).

a. The FBI Presented No Evidence of Prejudice or Harm

Here, the FBI presented *no* evidence of a specific prejudice or harm that would result from allowing the depositions to go forward. In fact, the government's submission made clear that the FBI was in contact with the intended deponents regarding availability for the depositions with the expectation of being able to find a date on which they could appear to be deposed. *See* ER643 (email discussing dates for depositions). Instead, the FBI moved for a protective order based on its position that the deposition testimony would be irrelevant to the journalists' claims, duplicative of the litigation position provided through interrogatory responses, and/or covered by a law enforcement privilege.[9] ER666-67, 672-74.

[9] The district court did not address the FBI's assertion of the qualified law enforcement privilege. *See Ibrahim*, 2013 WL 1703367, at *4-5 (Alsup, J.) (describing multi-factor balancing test to evaluate claims of law enforcement privilege).

Instead, the district court granted the protective order based on an entirely imagined hardship to the authors of the April 30 Memo:

> But common sense just tells you—right?—when you retire—these are government employees. When you retire, you retire. You're done with work. I think any time you ask someone, once they're retired, because you did some work for the Government ten years ago, to go spend a day or even half a day, that's a burden. It's uncompensated time. I mean, that's a burden. Maybe they would be willing to do it, I don't know. Well, the Government moved for a protective order.

ER149. The government did not even *claim*—much less present evidence of—harm to support the good cause required to preclude the journalists from taking the depositions. The district court's protective order—based on imagined harm not even asserted by the moving party—was an abuse of discretion.

b. The Balance of Interests Favored Allowing the Depositions to Proceed

While district courts can properly exercise their discretion to protect deponents from undue burden, "a strong showing is required before a party will be denied entirely the right to take a deposition." *Blankenship v. Hearst*, 519 F.2d 418, 429 (9th Cir. 1975) (quoting 4 J. Moore, *Federal Practice* ¶ 26.69 (2d ed. 1974)). The FBI argued that the depositions would be duplicative of the its interrogatory response. But the agency's interrogatory response merely reflected its litigation position, and left many questions unanswered. The journalists' interests in obtaining evidence far outweighed the burden the district court imagined might exist by virtue of the agents' retired status. Had the district court applied the *proper*

analysis under Rule 26, the journalists would not have been denied the right to depose the former agents. *Phillips ex rel. Estates of Byrd*, 307 F.3d at 1211 (if court finds particularized harm will result from disclosure, then it balances public and private interests).

In *Blankenship*, this Court overturned a district court's order protecting George Hearst, the publisher of the defendant Herald-Examiner, from being deposed regarding the alleged price-fixing policies challenged in that case. 519 at 429. The argument for the protective order in *Blankenship* is analogous to what the FBI argued below, "that what [the deponent] had to offer would be repetitious with what plaintiff had learned from other sources." *Id. See also Ibrahim*, 2013 WL 1703367 at *10 (granting motion to compel 30(b)(6) depositions from three federal agencies despite court's view that "depositions will be of less value than the documents themselves"); *Haggarty v. Wells Fargo Bank, N.A.*, 2012 WL 3939320, at *2 (N.D. Cal. Aug. 24, 2012) (denying protective order for high level executive despite other employees being available where proposed deponent had "potentially unique relevant knowledge").

Duplication cannot serve as the sole basis for granting a protective order, particularly where the proposed deponents appear to be the *only* individuals with personal knowledge of the operative facts. *Cf. Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1075 (9th Cir. 2002) (protective order against depositions of former

bank presidents upheld where plaintiff "failed to demonstrate that either of these individuals is remotely competent" to testify on issues to be discovered).

Here, Garris and Raimondo had a significant need to depose the agents who wrote the April 30 Memo in order to "test" the government's litigation position regarding its purported law enforcement activity. *See* ER643 (listing proposed deposition topics). Such discovery was not duplicative—the district court had previously acknowledged that the April 30 Memo does not detail how Garris's and Raimondo's political views, writings, and interviews were "pertinent to" the FBI's concern about the posting of suspect lists. ER187. The FBI's interrogatory response also failed to articulate an "authorized law enforcement activity," as it stated only that the April 30 Memo presents "background information" on Antiwar.com and the journalists. ER699.

But it is equally plausible to read the April 30 Memo's description of the Plaintiffs' political opinions and statements as intended support for the authors' recommendation that a preliminary investigation be opened to "determine if Eric Anthony Garris and/or Justin Raimondo are engaging in, or have engaged in, activities which constitute a threat to National Security on behalf of a foreign power." ER272. A threat assessment based on the content of journalists' First Amendment protected writings is a very different "law enforcement activity" than including the same writings to provide context for a threat assessment on the

posting of a possible "watch list," subject to a different analysis under the Privacy Act. ER264.

Because the FBI could not maintain descriptions of the journalists' First Amendment activities unless pertinent to and within the scope of an authorized law enforcement activity, it was essential that Garris and Raimondo have an opportunity to discover what law enforcement activity the agents that created the record thought they were engaged in, what authorization they believed justified their descriptions of the journalists' political views and statements, and what they believed made those descriptions pertinent to and within the scope of their activity. Indeed, given the ease with which the FBI can later invoke the *NSI Guidelines* to justify its observations of First Amendment activity, precluding discovery to test the FBI's litigation positions would render illusory the protections of the Privacy Act. For these reasons, the balance of interests under Rule 26 required denial of the FBI's requested protective order.[10]

[10] The district court granted the FBI's protective order "without prejudice," allowing the journalists to seek discovery necessary to respond to the FBI's summary judgment motion. ER147-149 (deposition is premature before knowing whether government will rely on declarations from the agents). Plaintiffs did not reapply to the district court to take the agents' depositions after the FBI filed its summary judgment motion because the FBI did not submit declarations from the former agents or any other evidence that would have impacted the district court's rationale for granting the protective order.

B. The District Court Abused its Discretion by Relying on Declarations Unsupported by Personal Knowledge

Over the journalists' objections, the district court relied on declarations lacking personal knowledge to find that the FBI's descriptions of the journalists' First Amendment activities were permitted under Section (e)(7)'s law enforcement exception. *See* ER323-36, ER59-62 (citing Campi Declaration's assertions that posting of suspect list raised national security concerns and that descriptions of unrelated First Amendment activities were included for the purpose of "providing context" to posting of suspect lists); ER5-9 (admitting and relying on Bujanda Declaration in support of summary judgment on Halliburton Memo). Evidentiary decisions made in the context of summary judgment motions are reviewed for an abuse of discretion. *Block v. City of Los Angeles*, 253 F.3d 410, 416 (9th Cir. 2001). Failure to identify and apply the correct legal rule constitutes an abuse of discretion. *In the Matter of Roman Catholic Archbishop*, 661 F.3d at 424.

As an initial matter, the district court applied the wrong legal standard to the Declaration of Andrew Campi. The district court cited cases arising in the FOIA context to justify its acceptance of the Campi Declaration unsupported by personal knowledge. ER44 (citing *Our Children's Earth Found. v. Nat'l Marine Fisheries Serv.*, No. 14-1130 SC, 2015 WL 6331268, at 2-3 (N.D. Cal. Oct. 21, 2015)). These cases apply a special rule that allows non-conclusory, contemporaneous affidavits by supervisors to describe the procedures and search methods used by an

agency to respond to FOIA requests. That rule cannot be extended to a declaration made years after the operative facts, by a declarant who had no supervisory or other participation in the facts that occurred. *See* ER7-8 (district court's acknowledgement that rule for FOIA search affidavits does not apply).

Neither the Campi nor the Bujanda Declaration met the evidentiary requirements to support summary judgment for the FBI. Affidavits considered in support of motions for summary judgment must be based on personal knowledge, set forth facts that would be admissible in evidence, and show affirmatively that the affiant is "competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4); *Block v. City of Los Angeles*, 253 F.3d at 419. Although an FBI agent's personal knowledge may be based on a review of records and files, assertions beyond what is shown on the face of the documents. *See e.g., Block*, 253 F.3d at 419 (admission of administrative analyst's declaration based on discussion with department heads was an abuse of discretion); *Londrigan v. FBI*, 670 F.2d 1164, 1174-75 (D.C. Cir. 1981) (competent portions of FBI agent declaration were based on his personal knowledge, including review of records, but agent was not competent to testify about what was in the minds of informants).

Mr. Campi asserted—without personal knowledge—that the April 30 Memo's descriptions of the journalists' writings unrelated to the spreadsheets found on Antiwar.com were included "to provide context" for other information in

the April 30 Memo. ER522, ¶ 10. While this is one possible inference from the document, another natural inference is that the authors of the April 30 Memo described the journalists' extreme political views and their strong critiques of U.S. foreign policy to provide support for their recommendation to open a preliminary investigation into whether the journalists posed a threat to national security. "Summary judgment should not be granted where contradictory inferences may be drawn from undisputed evidentiary facts." *United States v. Perry*, 431 F.2d 1020, 1022 (9th Cir. 1970). Having first denied the journalists an opportunity to test the FBI's *post hoc* rationalization for its wide-ranging description of the journalists' political opinions and writings, the district court further abused its discretion by accepting that same litigation position based on a declaration unsupported by personal knowledge. *See Block*, 253 F.3d at 419 (admission of declaration unsupported by personal knowledge was abuse of discretion).

The district court also abused its discretion by admitting and relying on the Declaration of Raul Bujanda to supply a purported law enforcement justification for an FBI record listing Antiwar.com and other websites as sources for information concerning a Halliburton shareholders meeting. *See* ER8. First, without support from applicable case law, the district court held that Bujanda's current experience at the FBI's Oklahoma City Field Office was sufficient to opine on what might have or would have happened years before he was employed there.

Id. *Cf. Londrigan*, 670 F.2d at 1174 (agent competent to testify about agency procedures "during his own tenure" and "earlier practices *of which he possesses personal knowledge*") (emphasis added); *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990) ("personal knowledge and competence to testify are reasonably inferred from [declarants'] positions *and the nature of their participation in the matters to which they swore*") (emphasis added).

Second, recognizing that several aspects of Bujanda's declaration were based on hearsay, the district court solicited a tentative and unsupported statement from counsel at oral argument that the FBI could offer admissible evidence at trial in order to admit such evidence for purposes of summary judgment. ER9:3-16; ER24-28.[11] But a district court cannot rely on statements by counsel to eliminate the parties' factual dispute. *See British Airways Board v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978) ("legal memoranda and oral argument are not evidence").

The district court accepted the incompetent testimony of both Campi and Bujanda to support the FBI's *post hoc* rationalization for the April 30 Memo and

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[11] THE COURT: Let me ask you this: The agents that he spoke to that told him that there had been past protests prior to 2006, would they be available to testify to those facts at trial?
MS. WANG: I believe so.
THE COURT: Okay, so given that representation then, on summary judgment, you can consider hearsay provided the proponent can show that the – that it would be able to be presented at trial as non-hearsay.
ER27-28. Counsel's statements in court clearly evidenced a reliance on the declaration itself, as opposed to knowledge of any underlying facts. *See* ER25-26.

the Halliburton Memo. The district court's failure to apply the correct legal standard to these evidentiary decisions was an abuse of discretion that requires reversal and remand.

IV. The District Court Erred in Granting Summary Judgment for the FBI

A. Standard of Review

This Court reviews the district court's grant of summary judgment *de novo*. *See e.g., Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 759 (9th Cir. 2017). On review, the Court of Appeals must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law. *See Frudden v. Pilling*, 877 F.3d 821, 828 (9th Cir. 2017); *Olsen v. Idaho State Bd. Of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004). Summary judgment may be appropriate when a mixed question of fact and law involves undisputed underlying facts. *See EEOC v. United Parcel Serv.*, 424 F.3d 1060, 1068 (9th Cir. 2005). However, summary judgment is not proper if material factual issues exist for trial. *See Simo v. Union of Needletrades*, 322 F.3d 602, 610 (9th Cir. 2003).

B. The Ninth Circuit Applies a Fact-Intensive Analysis to Section (e)(7) Challenges

The leading—and only—Ninth Circuit case applying the law enforcement exception to the Privacy Act's prohibition on federal agencies' recording of

individuals' First Amendment activities is *MacPherson,* 803 F.2d 479. In *MacPherson*, the Ninth Circuit considered the inclusion of the plaintiff's speeches maintained in an Internal Revenue Service ("IRS") "Tax Protest Project File." *Id.* at 480. The IRS obtained the speeches through its surveillance of conferences and conventions connected to the "tax protester movement" at which MacPherson spoke. *Id.*[12] MacPherson argued that—although the IRS was authorized to attend the conferences to investigate illegal activity—once the agency realized MacPherson's speeches and tapes did not advocate illegal activity, the IRS could not maintain them consistent with Section (e)(7). 803 F. 2d at 482.

The Court rejected the government's recommendation to adopt the rule used to justify law enforcement exemptions in the FOIA context, holding that "a *narrow* reading of 'law enforcement activities' better serves the goal of privacy and avoids infringing on the overall First Amendment concerns of section (e)(7)." *Id.* at 482 (emphasis in original). Noting that "strong policy concerns on both sides of the issue present close and difficult questions and may balance differently in different cases," the Court declined to adopt a blanket rule and opted to "consider factors for

[12] A "tax protester" is not a person who exercises his First Amendment rights to speak out against taxes. It refers to criminal activity, namely people who employ "'one or more illegal schemes that affect the payment of taxes.'" *England, III v. Comm'r of Internal Revenue*, 798 F.2d 350, 352 (9th Cir. 1986) quoting II Audit, CCH Internal Revenue Manual § 4293.11(1).

and against the maintenance of such records of First Amendment activities on an individual, case-by-case basis." *Id.* at 484.

The Court concluded that even though MacPherson did not engage in or advocate for illegal activity, the Privacy Act's law enforcement activities exception allowed the IRS to maintain records of MacPherson's speeches and statements in order to "give a complete picture of the [tax protester] conference." *Id.* at 485. The Court noted that its analysis could be different if the records had been maintained under MacPherson's own name, rather than as part of a "general 'tax protestor' file." *Id.* at 485, n.9. For this and other reasons explained below, *MacPherson* requires a different result in the instant case.

C. The District Court Fail to Apply the Privacy Act's Protections to the Journalists' Speech as Recorded in the April 30 Memo

The FBI cited to the *NSI Guidelines*' authorization of "threat assessments" as the authorization for the April 30 Memo. ECF 69 at 37-42. The *NSI Guidelines* authorized the FBI to obtain publicly available information, access FBI and other Department of Justice records, and use online services and resources—the activities apparently engaged in by the authors of the April 30 Memo—but only:

> to investigate or collect information *relating to threats to the national security*, including information on individuals, groups, and organizations of possible investigative interest, and information concerning possible targets of international terrorism, espionage, foreign computer intrusion, or other threats to the national security.

ER551 (emphasis added).

As explained above, the Campi declaration was unsupported by personal knowledge. *See* ER507-12. Even if it were admissible, the only assertions in that declaration that arguably implicate national security are conclusory and unspecific: that the "markings 'FBI SUSPECT LIST' and 'Law Enforcement Sensitive' suggested the information . . . was not intended for public dissemination and as such should not have been on the www.antiwar.com website," and that the posting "is concerning for a number of reasons, in that it might have led to the compromise of then ongoing investigations or alternatively lead to the harming or harassment of innocent people." ER521.

The District Court accepted this explanation as a sufficient basis for the First Amendment activities described in and attached to the April 30 Memo: "conducting the threat assessment upon discovery of the two spreadsheets on Antiwar.com was consistent with the FBI's mandate to investigate matters related to national security." ECF 90 at 21. This holding should be reversed for two reasons. First, the Campi Declaration's conclusory assertions do not establish a national security concern sufficient to authorize a threat assessment on the journalists' First Amendment-protected posting of a government document on Antiwar.com. Second, the April 30 Memo's description of First Amendment activity unrelated to the "possible 'watch list'" that the FBI claims triggered the

threat assessment was beyond the scope of any arguably authorized law enforcement activity. ER521.

1. The FBI's Monitoring of First Amendment Activity Was Not "Authorized"

Cognizant of the Privacy Act's prohibition on the general collection of information about individuals' First Amendment activities, the *NSI Guidelines* "do *not* authorize investigating or maintaining information on United States persons solely for the purpose of monitoring activities protected by the First Amendment." *NSI Guidelines*, ER546-47 (emphasis added). In addition, the *NSI Guidelines* recognize the clear distinction between observing and recording First Amendment protected activities for Privacy Act purposes. *NSI Guidelines*, ER548. Thus, while the *NSI Guidelines* certainly authorize FBI agents to access and evaluate online material, FBI agents may not record descriptions of individuals' First Amendment protected activity unless doing so is related to a threat to national security. *NSI Guidelines*, ER551 (describing threat assessments authorized to "collect information relating to threats to the national security").

The journalists' posting of FBI suspect lists was itself First Amendment protected activity. It is well established that the freedom of the press includes the right to publish even secret government documents and illegally obtained information. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1991) (upholding the First Amendment right of newspapers to publish contents of a classified study);

Bartnicki v. Vopper, 532 U.S. 514, 535 (2001) (holding that the application of statute barring publication of illegally intercepted communication violated radio commentator's First Amendment rights).

Not only was there nothing *illegal* about Antiwar.com's posting of the suspect lists, the analysts' comments in the April 30 Memo do not assert any national security concern about Antiwar.com's possession of or posting of the lists.

> [T]he discovery of two detailed Excel spreadsheets posted on www.antiwar.com may not be significant by itself since distribution of such lists are wide spread. Many agencies outside of law enforcement have been utilizing this information to screen their employees.

ER270.[13] Given that the FBI's "mandated mission" is to "investigate violations of federal criminal statutes," the April 30 Memo's connection to an authorized law enforcement purpose is exceedingly tenuous. Hardy Dec., Dkt. 453, p. 12. *Cf. Rosenfeld v. U.S. Dept. of Justice*, 57 F.3d 803, 808 (9th Cir. 1995) (in the FOIA context, agency must establish rational nexus between *enforcement of federal law* and document for which law enforcement exemption is claimed to withhold from disclosure under 5 U.S.C. § 552(e)).

[13] It is striking that, although a suspect list was purportedly the basis for the threat assessment, the April 30 Memo does not document any attempt to confirm the authenticity, source, or other information about the posted lists and concludes, "Still, it is unclear whether www.antiwar.com may only be posting research material compiled from multiple sources or if there is material posted that is singular in nature and not suitable for public release." ER270.

The April 30 Memo's lack of a documented national security concern or allegations of illegal conduct connected to the suspect lists posted on Antiwar.com is a critical fact distinguishing this case from *MacPherson*. MacPherson's speech arose in the context of a broader criminal enterprise—tax protest conferences that support the unlawful avoidance of tax obligations. *Id.* at 484; *England, III*, 798 F.2d at 352. In the context of the IRS's law enforcement investigation, this Court's allowance that the agency could maintain records that included "'incidental' surveillance of innocent people," made sense. *Id.* at 484. Here, by contrast, the FBI specifically targeted Garris and Raimondo alone, based only on their First Amendment activity. *See MacPherson*, 803 F.2d at 485 n.9 (noting possible different outcomes if MacPherson's speeches had been retained in a file about him rather than a tax protest file).

Absent a specific threat to national security raised by Antiwar.com's First Amendment protected activity of posting certain government documents, the *NSI Guidelines* did not authorize the FBI to maintain records describing the journalists' First Amendment protected activities. ER551.

> Merely because [an agency] *may* act within its authority by monitoring the public or private speeches of a person in the course of a legitimate security investigation does not give it the right to maintain records relating to the contents of these speeches where the investigation does not focus on a past or anticipated specific criminal act.

MacPherson, 803 F.2d at 483 (internal quotation marks omitted) (quoting *Jabara v. Kelley*, 476 F. Supp. 561, 581 (E.D. Mich. 1979)). The April 30 Memo was a violation of the Privacy Act when it was written.

2. The April 30 Memo Improperly Included First Amendment Activity Unrelated to Antiwar.com's Posting of "Suspect Lists"

Even if the FBI were authorized to conduct a threat assessment and record its findings regarding Antiwar.com's posting of the suspect lists themselves, the FBI violated the Privacy Act by maintaining a record that describes a great deal of First Amendment activities that were unrelated to the posting of those lists. *See* 5 U.S.C. § 552a(e)(7) (prohibiting maintenance of records describing First Amendment activities "unless pertinent to and *within the scope of* authorized law enforcement activity") (emphasis added). However, the district court specifically declined to scrutinize whether the April 30 Memo's descriptions of unrelated First Amendment activities were within the reasonable scope of a threat assessment focused on the public posting of a "possible watch list," holding:

> If the investigation itself is pertinent to an authorized law enforcement activity, the Privacy Act does not regulate what can be done in the course of that investigation and how that authorized investigation may be documented.

ER62. The district court's interpretation of the Privacy Act conflicts with the statute and is unsupported by this Circuit's precedent. It must be reversed for two reasons. First, it reads the "scope" limitation entirely out of the Privacy Act.

Second, it fails to appreciate the distinction between *observing* and *recording* that is inherent in the Privacy Act and recognized by the *NSI Guidelines*.

a. The District Court Read the "Scope" Limitation Out of Section (e)(7)

The District Court's insistence that it could not scrutinize "what may have been done in the course of [an authorized] investigation," appears to have been drawn from a district court case from the District of Columbia, *Afifi v. Lynch*, 101 F. Supp. 3d 90, 106 (D.C. 2015). In *Afifi*, the plaintiff claimed that the FBI could not maintain records of his First Amendment activities that it obtained by placing a GPS monitor on the plaintiff's car. 101 F. Supp. 3d at 96-97. The district court held—based on *in camera* review of a sealed declaration—that the records obtained were "within the scope of an authorized law enforcement activity." *Id.* at 105 n.9. It then rejected the plaintiff's argument that a later Supreme Court case establishing a warrant requirement to place a GPS monitor on a vehicle precluded maintenance of the records under Section (e)(7). *Id.* at 106 ("[T]he pertinent question is whether the investigation was valid and not whether every act taken in furtherance of the investigation was valid.").

This principle—that records gained through unauthorized actions within an otherwise authorized law enforcement activity do not violate the Privacy Act—was by no means binding on the district court. Even more important, the principle simply does not apply to the question of scope presented by this case. Garris and

Raimondo do not object to the FBI's manner of accessing information, but object to the FBI making a record of any First Amendment activities that are unrelated to the purported basis for the threat assessment, and therefore outside the "scope" of that inquiry.

b. The District Court Failed to Appreciate that the Privacy Act's Protections Apply Exclusively to Records

The district court's second error, disclaiming authority to review "how the information is documented," however, has everything to do with the journalists' Privacy Act claims. ER62. This is because collecting and maintaining records is precisely what the Privacy Act regulates. *See MacPherson*, 803 F.2d at 483 (quoting *Jabara*, 476 F. Supp. at 581).

The April 30 Memo's descriptions of the journalists' political views and statements relating to Israel's connection to the 9/11 terrorist attacks, Antiwar.com's role in the anti-war movement, war in the Persian Gulf, and a perceived lack of secrecy within the FBI, among other matters, are (1) not reasonably related to Antiwar.com's posting of the two suspect lists, (2) not pertinent to any other national security inquiry mentioned in the April 30 Memo or alleged by the FBI's declarant, and (3) are not indicative of any past or anticipated criminal conduct. The district court reasoned that "it made sense" that the FBI would look at the content of the website because:

> the broader investigation here was into how and why the spreadsheets appeared on Antiwar.com. It is difficult to conceive of how the FBI could have responsibly investigated publication of the spreadsheets without having also reviewed the postings on Antiwar.com.

ECF 90 at 22. Garris and Raimondo do not disagree—the agents were free to look at the content on the website. But the Privacy Act forbade the creation of a record that included descriptions of their First Amendment activities outside the scope of any stated national security concern. 5 U.S.C. § 552a(e)(7); *see also NSI Guidelines*, ER547 (stating that the creation of records is governed by Privacy Act protections, but activities that do not involve creation of records are not).

Indeed, the FBI's production in this case revealed a August 2004 Memo, describing the Pittsburgh FBI's threat assessment of Antiwar.com's posting of the Finnish list—a record that described First Amendment activities only as they related to that list. *See* ER280-81. But when Garris and Raimondo provided the District Court with this example of a proper scope limitation in the *written record* of a threat assessment, the District Court again disclaimed authority to scrutinize the scope of the investigation itself—as opposed to the agency record at issue:

> Once the government has established that the documents which it has maintained were "pertinent to and within the scope of an authorized law enforcement activity"—which it has—Section (e)(7) does not authorize the Court to substitute its judgment for that of the FBI regarding the manner *or scope* of the investigation.

ER36. What the District Court properly found was that FBI agents could *look* at information on the website. Whether that information was ultimately pertinent *to*

the underlying question about the posting of suspect lists and therefore could be *described* in an agency record, however, the District Court refused to consider. This was an abdication of the district court's responsibility to enforce the statute. If the Privacy Act's First Amendment protections are to mean anything, there must be judicial scrutiny over whether the agency descriptions of the speech of journalists are within the scope of the law enforcement activity that is proffered to justify them.

The District Court's abiding skepticism regarding the journalists' claim that the FBI could review content on Antiwar.com, but could not necessarily make a record of that content, betrays its misunderstanding of the Privacy Act's purpose and provisions. *See e.g.* ER104 ("are you saying they can do the investigation but they can't write down anything they found?"); ER59:22-60:4. In response to federal agencies opening thousands of dossiers targeting civil rights activists, reporters, and others, Congress made a policy decision to place limits on the *records* federal agencies can maintain. OIG, Ch. 2, *supra* n.1.

The district court refused to consider the core questions posed by Section (e)(7)—whether records describing First Amendment activity were pertinent to and within the scope of an authorized law enforcement activity. For these reasons, the District Court's grant of summary judgment to the FBI must be reversed.

D. The Halliburton Memo Violates Section (e)(7)

The District Court's grant of summary judgment for the FBI regarding the Halliburton Memo must also be reversed. First, the Halliburton Memo clearly describes First Amendment protected activity. It begins with the introductory details:

> Halliburton has planned to hold its annual shareholders' meeting at Duncan, Oklahoma, May 15-17, 2006. This event has been targeted by multiple organized protest groups.

ER252. It describes Halliburton's work, its connection to Vice President Dick Cheney, and the itinerary for the shareholders' meeting, including planned support from the Duncan Police Department. ER253. The Halliburton Memo then states, "The following web sites were provided by [redacted]. According to [redacted] all of these sites have posted information regarding the shareholders' meeting at Duncan." ER 253. Antiwar.com is among the listed websites.

Publicizing information about the annual shareholders' meeting of a prominent military contractor with ties to the Vice President of the United States is clearly First Amendment-protected activity. *Reno v. American Civ. Liberties Union*, 521 U.S. 844, 870 (2009) (full First Amendment protection applies to Internet speech). Both this and any protest activity associated with the shareholders' meeting are within the protections of Section 522(e)(7). *See e.g.*

Brandenburg v. Ohio, 395 U.S. 444 (1960) (striking down conviction arising from Ku Klux Klan rally on First Amendment grounds).

Agent Bujanda submitted a declaration stating that he "[had] been informed" that law enforcement had observed public safety concerns at Halliburton shareholders' meetings, as well as protests resulting in arrests." ER249. He stated that the Halliburton Memo reflected the efforts of local law enforcement and the FBI to coordinate "to protect the public safety," and that "[c]oordination . . . routinely involves the inclusion of information received from third parties that could assist law enforcement in their preparedness." *Id.*

According to the FBI's *Domestic Operations and Investigations Guide*, all investigative activity must be conducted for an "authorized purpose," which means a "national security, criminal, or foreign intelligence collection purpose." ER224-225. The authorized purpose "must be well-founded and well-documented" and "the investigative method used to maintain it must be focused in scope, time, and manner to achieve the underlying purpose." *Id*.

The Halliburton Memo contains no references to public safety concerns, anticipated arrests, or possible criminal activity. No reference is made to the need for support from the FBI. Indeed, the most natural inference from the face of the Halliburton Memo is that the FBI created a record related solely to First Amendment protected activity, with little or no basis to anticipate criminal

conduct, much less threats to public safety. Given agency practice requiring that domestic investigations and operations be both "well-founded" and "well-documented," the lack of documentation of any "authorized purpose" on the face of the Halliburton Memo strongly undermines the Agent Bujanda's assertions. Again, the district court's deference the FBI's litigation position reflects its general hesitancy to provide the judicial oversight required to protect the rights guaranteed by the Privacy Act. The district court discounted the intrusion here, despite the chilling effect Eric Garris experienced upon learning that Antiwar.com was listed in the Halliburton memo. ER6, ER244-45. Because protest activity is among the types of First Amendment activity Congress intended to protect from being unnecessarily compiled in government dossiers, summary judgment for the FBI regarding the Halliburton Memo should be reversed.

E. The Privacy Act Prohibits the FBI's Ongoing Maintenance of the April 30 and Halliburton Memos

Even if the FBI possessed an authorized law enforcement activity justifying April 30 and Halliburton Memos at the time they were created, the Privacy Act prohibits the FBI from "maintain[ing]" them in the absence of an ongoing law enforcement purpose. With respect to the April 30 Memo, the asserted law enforcement activity—a threat assessment based on the posting of government documents on Antiwar.com—ended once the threat assessment was completed. Once the San Francisco field office of the FBI declined to continue the

investigation, the threat assessment ceased to have any discernible purpose other than administrative maintenance of government records. The law enforcement activity claimed to justify the Halliburton Memo—awareness of public safety issues related to protests planned in 2006—has also long since expired.

The District Court rejected this argument and adopted an interpretation of the Privacy Act—from the D.C. Circuit—that eliminates any protection against *ongoing* maintenance of records if they were pertinent to and within the scope of an authorized law enforcement activity when they were created. ER63-65 (citing *J. Roderick*, 102 F.3d at 605; *Afifi*, 101 F. Supp. 3d at 107). This is a question of first impression in the Ninth Circuit, and this Court should hold that the Privacy Act does not permit the FBI's ongoing maintenance of the April 30 and Halliburton Memos because they no longer serve any law enforcement purpose.

As always, statutory analysis begins with the language of the Privacy Act itself. Section (e)(7) states that any agency that maintains a system of records shall "maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless . . . pertinent to and within the scope of an authorized law enforcement activity." The statute defines "maintain" to "include[] maintain, collect, use, or disseminate." 5 U.S.C. § 552a(a)(3). In adopting this definition, Congress prohibited maintenance specifically, not simply the original collection of records. *See Bailey v. United States*, 516 U.S. 137, 146 (1995) (assuming that

Congress uses multiple terms "because it intend[s] each term to have a particular, nonsuperfluous meaning"). The plain meaning of the word "maintain" confirms that Congress intended to address agency retention of records over time. *See Maintain*, Merriam-Webster https://www.merriam-webster.com/dictionary/maintain (last updated July 14, 2018) ("[T]o keep in an existing state (as of repair, efficiency, value: preserve from failure or decline).").

Thus, the Privacy Act imposes not only a requirement that the initial "collect[ion]" within a record of First Amendment-protected be justified by an authorized law enforcement activity, but also the ongoing "maint[enance]" of such a record be so justified. § 552a(e)(7). This construction aligns with the Privacy Act's general mandate that records be maintained "with such accuracy, relevance, timeliness, and completeness," as is necessary to ensure fairness to the individuals that are the subject of the records. *See* § 552a(e)(5).

This reading is also responsive to the legislative history of the Privacy Act, which reveals Congressional concern with *both* collection and retention of material about individuals' exercise of First Amendment activities.

> [The Act] is designed . . . for long-overdue evaluation of the needs of the Federal Government to acquire and *retain* personal information on Americans, by requiring stricter review within agencies of criteria for collection *and retention*.

S. Rep. No. 93-1183, at 2 (1974) (emphasis added).

It is also consistent with *MacPherson*'s fact-dependent analysis to eschew the *J. Roderick* blanket rule and leave open the possibility that ongoing maintenance may violate the Privacy Act, even if the record's description of First Amendment activities was originally pertinent to and within the scope of an authorized law enforcement activity. *Macpherson*, 803 F.2d at 484. In *MacPherson*, the question presented was whether the Privacy Act required expungement of individual records describing First Amendment activities that were gathered as part of a broader investigation and held in a general "tax protest movement" file—a law enforcement effort directed at ongoing criminal conduct. *Id.* at 481- 482. This Court did not specifically address the amount of time the record could be maintained *after* resolution of the tax protest investigation, but it did recognize that the outcome may have been different if the record was being maintained under MacPherson's own name. *Id.* at 485 n.9.

By contrast, the April 30 Memo specifically targeted Garris and Raimondo, subjecting their First Amendment activities to scrutiny. The April 30 Memo did not identify any potential criminality or national security concern related to the purported justification for the threat assessment—the posting of certain open source government documents. The April 30 Memo does not even provide useful conclusions about the propriety of the posted suspect lists. Worse, it contains a false accusation that Eric Garris threatened to hack the FBI.

The district court credited the Campi Declaration's general statement that ongoing maintenance of the April 30 Memo is necessary because otherwise

> the next time information regarding www.antiwar.com or the plaintiffs is brought to the attention of one of the FBI's many field offices, that office's investigator would not have the benefit of the analysis conducted in the April 30, 2004 EC . . . .

ER523. However, later FBI access to the April 30 Memo cannot be considered a "benefit," to diligent agents, as it would only provide inaccurate and unfair characterizations of the journalists—alongside descriptions of their First Amendment activities.

In addition, this type of boilerplate language cannot be sufficient to justify maintaining records of First Amendment activities despite the Privacy Act's protections. Instead real and specific law enforcement interests must be provided to justify maintaining records that implicate First Amendment interests. *See Becker v. I.R.S.*, 34 F.3d 298, 409 (1994) (IRS assertion that it may maintain documents for possible future uses untenable); *cf. Bassouni v. FBI*, 436 F.3d 712, 720 (7th Cir.2006) (allowing ongoing maintenance of record because subject's contacts with identified terrorist groups made it likely FBI would continue to receive information about him). As this Court has recognized,

> The purpose of the section (e)(7) First Amendment protection is to prevent collection of protected information not immediately needed, about law-abiding Americans, on the off-chance that Government or the particular agency might possibly have to deal with them in the future.

MacPherson, 803 F.2d at 482 (quoting S. Rep. No. 1183, at 6971 (1974).

The record in this case illustrates both that the April 30 Memo has been referenced by other FBI analysts and the disclosure of the memo caused real harm to the journalists. That harm—loss of support for their news organization and self-censorship—is exactly the type of harm Congress sought to curtail with the Privacy Act. Under these circumstances, it is appropriate to enforce the plain language of the Privacy Act and prohibit the FBI's ongoing maintenance of the April 30 Memo, even if there were an authorized law enforcement activity that justified its creation at the outset.

CONCLUSION

In its summary judgment orders and through its discovery and evidentiary rulings, the district court declined to question—and precluded Plaintiffs from meaningfully questioning—the underlying basis for the FBI's maintenance of records describing Plaintiffs First Amendment activities. But applying the Privacy Act's law enforcement exception to the general bar on maintenance of such records requires judicial oversight over whether the agency's descriptions of individuals' First Amendment activities are *pertinent to and within the scope of* authorized law enforcement activities. The district court refused to apply any oversight to the agency's untested and unsupported positions. Because even the improperly admitted agency declarations fail to establish an ongoing law enforcement interest

that justifies retention of the April 30 Memo and Halliburton Memo, the challenged orders should be vacated with instructions to order the FBI to cease maintaining those records.

Dated: July 27, 2018

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no related cases pending before this Court.

Dated: July 27, 2018

/s/ Julia Harumi Mass
Julia Harumi Mass
Lead Attorney for Appellants, Dennis Joseph Raimondo and Eric Anthony Garris

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,876 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 with Times New Roman 14-point font.

Dated: July 27, 2018

/s/ Julia Harumi Mass
Julia Harumi Mass
Lead Attorney for Appellants, Dennis Joseph Raimondo and Eric Anthony Garris

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: July 27, 2018

/s/ Julia Harumi Mass
Julia Harumi Mass
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ADDENDUM

5 U.S. Code § 552a - Records maintained on individuals

(a) Definitions. For purposes of this section—

(1) the term "agency" means agency as defined in section 552(e) [1] of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;

(8) the term "matching program"—

(A) means any computerized comparison of—

(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of—

(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or

providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or

(II) recouping payments or delinquent debts under such Federal benefit programs, or

(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,

(B) but does not include—

(i) matches performed to produce aggregate statistical data without any personal identifiers;

(ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals;

(iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;

(iv) matches of tax information (I) pursuant to section 6103(d) of the Internal Revenue Code of 1986, (II) for purposes of tax administration as defined in section 6103(b)(4) of such Code, (III) for the purpose of intercepting a tax refund due an individual under authority granted by section 404(e), 464, or 1137 of the Social Security Act; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act;

(v) matches—

(I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject

to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or

(II) conducted by an agency using only records from systems of records maintained by that agency;

if the purpose of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel;

(vi) matches performed for foreign counterintelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel;

(vii) matches performed incident to a levy described in section 6103(k)(8) of the Internal Revenue Code of 1986;

(viii) matches performed pursuant to section 202(x)(3) or 1611(e)(1) of the Social Security Act (42 U.S.C. 402(x)(3), 1382(e)(1));

(ix) matches performed by the Secretary of Health and Human Services or the Inspector General of the Department of Health and Human Services with respect to potential fraud, waste, and abuse, including matches of a system of records with non-Federal records; or

(x) matches performed pursuant to section 3(d)(4) of the Achieving a Better Life Experience Act of 2014; 1

(9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;

(10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;

(11) the term "source agency" means any agency which discloses records contained in a system of records to be used in a matching program, or any State or local government, or agency thereof, which discloses records to be used in a matching program;

(12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent or State on behalf of the

Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and

(13) the term "Federal personnel" means officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits).

(b) Conditions of Disclosure. No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the Government Accountability Office;

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

(c) Accounting of Certain Disclosures. Each agency, with respect to each system of records under its control, shall—

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of—

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to Records. Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and

upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

> (A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and
>
> (B) promptly, either—
>
> > (i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or
> >
> > (ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency Requirements. Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include—

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in

substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and

(12) if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.

(f) Agency Rules. In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g) Civil Remedies. (1) Whenever any agency—

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of Legal Guardians. For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i) Criminal Penalties. (1) Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully

discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) General Exemptions. The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific Exemptions. The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency

from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is—

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: Provided, however, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(l) Archival Records. (1) Each agency record which is accepted by the Archivist of the United States for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Archivist of the United States shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m) Government Contractors. (1) When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(2) A consumer reporting agency to which a record is disclosed under section 3711(e) of title 31 shall not be considered a contractor for the purposes of this section.

(n) Mailing Lists. An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) Matching Agreements. (1) No record which is contained in a system of records may be disclosed to a recipient agency or non-Federal agency for use in a computer matching program except pursuant to a written agreement between the source agency and the recipient agency or non-Federal agency specifying—

(A) the purpose and legal authority for conducting the program;

(B) the justification for the program and the anticipated results, including a specific estimate of any savings;

(C) a description of the records that will be matched, including each data element that will be used, the approximate number of records that will be matched, and the projected starting and completion dates of the matching program;

(D) procedures for providing individualized notice at the time of application, and notice periodically thereafter as directed by the Data Integrity Board of such agency (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)), to—

(i) applicants for and recipients of financial assistance or payments under Federal benefit programs, and

(ii) applicants for and holders of positions as Federal personnel,

that any information provided by such applicants, recipients, holders, and individuals may be subject to verification through matching programs;

(E) procedures for verifying information produced in such matching program as required by subsection (p);

(F) procedures for the retention and timely destruction of identifiable records created by a recipient agency or non-Federal agency in such matching program;

(G) procedures for ensuring the administrative, technical, and physical security of the records matched and the results of such programs;

(H) prohibitions on duplication and redisclosure of records provided by the source agency within or outside the recipient agency or the non-Federal agency, except where required by law or essential to the conduct of the matching program;

(I) procedures governing the use by a recipient agency or non-Federal agency of records provided in a matching program by a source agency, including procedures governing return of the records to the source agency or destruction of records used in such program;

(J) information on assessments that have been made on the accuracy of the records that will be used in such matching program; and

(K) that the Comptroller General may have access to all records of a recipient agency or a non-Federal agency that the Comptroller General deems necessary in order to monitor or verify compliance with the agreement.

(2) (A) A copy of each agreement entered into pursuant to paragraph (1) shall—

(i) be transmitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives; and

(ii) be available upon request to the public.

(B) No such agreement shall be effective until 30 days after the date on which such a copy is transmitted pursuant to subparagraph (A)(i).

(C) Such an agreement shall remain in effect only for such period, not to exceed 18 months, as the Data Integrity Board of the agency determines is appropriate in light of the purposes, and length of time necessary for the conduct, of the matching program.

(D) Within 3 months prior to the expiration of such an agreement pursuant to subparagraph (C), the Data Integrity Board of the agency may, without

additional review, renew the matching agreement for a current, ongoing matching program for not more than one additional year if—

(i) such program will be conducted without any change; and

(ii) each party to the agreement certifies to the Board in writing that the program has been conducted in compliance with the agreement.

(p) Verification and Opportunity to Contest Findings. (1) In order to protect any individual whose records are used in a matching program, no recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program to such individual, or take other adverse action against such individual, as a result of information produced by such matching program, until—

(A) (i) the agency has independently verified the information; or

(ii) the Data Integrity Board of the agency, or in the case of a non-Federal agency the Data Integrity Board of the source agency, determines in accordance with guidance issued by the Director of the Office of Management and Budget that—

(I) the information is limited to identification and amount of benefits paid by the source agency under a Federal benefit program; and

(II) there is a high degree of confidence that the information provided to the recipient agency is accurate;

(B) the individual receives a notice from the agency containing a statement of its findings and informing the individual of the opportunity to contest such findings; and

(C) (i) the expiration of any time period established for the program by statute or regulation for the individual to respond to that notice; or

(ii) in the case of a program for which no such period is established, the end of the 30-day period beginning on the date on which notice under subparagraph (B) is mailed or otherwise provided to the individual.

(2) Independent verification referred to in paragraph (1) requires investigation and confirmation of specific information relating to an individual that is used as a

basis for an adverse action against the individual, including where applicable investigation and confirmation of—

(A) the amount of any asset or income involved;

(B) whether such individual actually has or had access to such asset or income for such individual's own use; and

(C) the period or periods when the individual actually had such asset or income.

(3) Notwithstanding paragraph (1), an agency may take any appropriate action otherwise prohibited by such paragraph if the agency determines that the public health or public safety may be adversely affected or significantly threatened during any notice period required by such paragraph.

(q) Sanctions. (1) Notwithstanding any other provision of law, no source agency may disclose any record which is contained in a system of records to a recipient agency or non-Federal agency for a matching program if such source agency has reason to believe that the requirements of subsection (p), or any matching agreement entered into pursuant to subsection (o), or both, are not being met by such recipient agency.

(2) No source agency may renew a matching agreement unless—

(A) the recipient agency or non-Federal agency has certified that it has complied with the provisions of that agreement; and

(B) the source agency has no reason to believe that the certification is inaccurate.

(r) Report on New Systems and Matching Programs. Each agency that proposes to establish or make a significant change in a system of records or a matching program shall provide adequate advance notice of any such proposal (in duplicate) to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget in order to permit an evaluation of the probable or potential effect of such proposal on the privacy or other rights of individuals.

(s) Biennial Report. The President shall biennially submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report—

(1) describing the actions of the Director of the Office of Management and Budget pursuant to section 6 of the Privacy Act of 1974 during the preceding 2 years;

(2) describing the exercise of individual rights of access and amendment under this section during such years;

(3) identifying changes in or additions to systems of records;

(4) containing such other information concerning administration of this section as may be necessary or useful to the Congress in reviewing the effectiveness of this section in carrying out the purposes of the Privacy Act of 1974.

(t) Effect of Other Laws. (1) No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

(u) Data Integrity Boards.

(1) Every agency conducting or participating in a matching program shall establish a Data Integrity Board to oversee and coordinate among the various components of such agency the agency's implementation of this section.

(2) Each Data Integrity Board shall consist of senior officials designated by the head of the agency, and shall include any senior official designated by the head of the agency as responsible for implementation of this section, and the inspector general of the agency, if any. The inspector general shall not serve as chairman of the Data Integrity Board.

(3) Each Data Integrity Board—

(A) shall review, approve, and maintain all written agreements for receipt or disclosure of agency records for matching programs to ensure compliance with subsection (o), and all relevant statutes, regulations, and guidelines;

(B) shall review all matching programs in which the agency has participated during the year, either as a source agency or recipient agency, determine compliance with applicable laws, regulations, guidelines, and agency agreements, and assess the costs and benefits of such programs;

(C) shall review all recurring matching programs in which the agency has participated during the year, either as a source agency or recipient agency, for continued justification for such disclosures;

(D) shall compile an annual report, which shall be submitted to the head of the agency and the Office of Management and Budget and made available to the public on request, describing the matching activities of the agency, including—

(i) matching programs in which the agency has participated as a source agency or recipient agency;

(ii) matching agreements proposed under subsection (o) that were disapproved by the Board;

(iii) any changes in membership or structure of the Board in the preceding year;

(iv) the reasons for any waiver of the requirement in paragraph (4) of this section for completion and submission of a cost-benefit analysis prior to the approval of a matching program;

(v) any violations of matching agreements that have been alleged or identified and any corrective action taken; and

(vi) any other information required by the Director of the Office of Management and Budget to be included in such report;

(E) shall serve as a clearinghouse for receiving and providing information on the accuracy, completeness, and reliability of records used in matching programs;

(F) shall provide interpretation and guidance to agency components and personnel on the requirements of this section for matching programs;

(G) shall review agency recordkeeping and disposal policies and practices for matching programs to assure compliance with this section; and

(H) may review and report on any agency matching activities that are not matching programs.

(4) (A) Except as provided in subparagraphs (B) and (C), a Data Integrity Board shall not approve any written agreement for a matching program unless the

agency has completed and submitted to such Board a cost-benefit analysis of the proposed program and such analysis demonstrates that the program is likely to be cost effective.[2]

(B) The Board may waive the requirements of subparagraph (A) of this paragraph if it determines in writing, in accordance with guidelines prescribed by the Director of the Office of Management and Budget, that a cost-benefit analysis is not required.

(C) A cost-benefit analysis shall not be required under subparagraph (A) prior to the initial approval of a written agreement for a matching program that is specifically required by statute. Any subsequent written agreement for such a program shall not be approved by the Data Integrity Board unless the agency has submitted a cost-benefit analysis of the program as conducted under the preceding approval of such agreement.

(5) (A) If a matching agreement is disapproved by a Data Integrity Board, any party to such agreement may appeal the disapproval to the Director of the Office of Management and Budget. Timely notice of the filing of such an appeal shall be provided by the Director of the Office of Management and Budget to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives.

(B) The Director of the Office of Management and Budget may approve a matching agreement notwithstanding the disapproval of a Data Integrity Board if the Director determines that—

(i) the matching program will be consistent with all applicable legal, regulatory, and policy requirements;

(ii) there is adequate evidence that the matching agreement will be cost-effective; and

(iii) the matching program is in the public interest.

(C) The decision of the Director to approve a matching agreement shall not take effect until 30 days after it is reported to committees described in subparagraph (A).

(D) If the Data Integrity Board and the Director of the Office of Management and Budget disapprove a matching program proposed by the

inspector general of an agency, the inspector general may report the disapproval to the head of the agency and to the Congress.

(6) In the reports required by paragraph (3)(D), agency matching activities that are not matching programs may be reported on an aggregate basis, if and to the extent necessary to protect ongoing law enforcement or counterintelligence investigations.

(v) Office of Management and Budget Responsibilities. The Director of the Office of Management and Budget shall—

(1) develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing the provisions of this section; and

(2) provide continuing assistance to and oversight of the implementation of this section by agencies.

(w) Applicability to Bureau of Consumer Financial Protection. Except as provided in the Consumer Financial Protection Act of 2010, this section shall apply with respect to the Bureau of Consumer Financial Protection.