No. 25-2383

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HONOLULU CIVIL BEAT, INC.,

Plaintiff-Appellant,

vs.

FEDERAL BUREAU OF INVESTIGATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Hawaii
No. 1:23-cv-00216-SASP-WRP

PLAINTIFF-APPELLANT'S REPLY BRIEF

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The crux of this appeal turns on how this Court construes the scope of the Freedom of Information Act (FOIA) Exemption 7A concerning disclosure of records that "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). Defendant-Appellee Federal Bureau of Investigation (FBI) and the District Court adopted an interpretation that simply defers to the FBI's assessment of interference whenever enforcement proceedings exist. FOIA requires more when the requested records do not concern the FBI's pending investigation.

The circumstances here present a novel scenario for this Court. Prior Exemption 7A cases addressed requests for public access to records *about the active investigation*.[1] Here, in contrast, the request by Plaintiff-Appellant

[1] *Shannahan v. IRS*, 672 F.3d 1142, 1151 (9th Cir. 2012) ("FOIA is not designed 'as a substitute for civil discovery.'"); *Lion Raisins, Inc. v. U.S. Dep't of Agric.*, 354 F.3d 1072, 1075 (9th Cir. 2004), *overruled on other grounds by Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 989-90 (9th Cir. 2016) ("Lion, a large independent handler of California raisins, is the subject of a criminal investigation"); *Lewis v. IRS*, 823 F.2d 375, 380 (9th Cir. 1987) ("It would aid Lewis in discovering the exact nature of the documents supporting the government's case against him earlier than he otherwise would or should."); *Lion Raisins, Inc. v. U.S. Dep't of Agric.*, 231 Fed. Appx. 565, 567 (9th Cir. 2007) (mem.) ("the Reports, if disclosed to Lion, would improperly give Lion a premature view of the government's theory of the case and evidence, an understanding -- which it presently lacks -- of the investigation's narrow focus and specific scope, and an opportunity to devise methods to circumvent the prospective prosecution."); *Lion Raisins, Inc. v. U.S. Dep't of Agric.*, 231 Fed. Appx. 563,

Honolulu Civil Beat, Inc. (Civil Beat) only seeks records for investigations that culminated in the public—and undisputedly closed—criminal prosecutions of former Hawai`i State Senator Jamie Kalani English (English) and former Hawai`i State Representative Ty J.K. Cullen (Cullen) on corruption charges.

The FBI instead relies on a separate active investigation to identify other corrupt public officials. That investigation is only tenuously connected to Civil Beat's request because it is based on English's and/or Cullen's *post-arrest* cooperation. But Civil Beat has consistently disclaimed any portion of its request that may cover the post-arrest investigation based on English's or Cullen's cooperation. *E.g.*, 2-ER-32 ("this request was focused on the investigation into Mr. Cullen and Mr. English, not the things that are related to their cooperation."); SER-68 n.5; SER-188-89 & n.5;

565 & n.2 (9th Cir. 2007) (mem.) ("their disclosure would provide Lion with additional information about the ongoing proceedings, and interfere therewith."). The District Court and parties also erroneously cited the Eighth Circuit's *Barney v. IRS*, 618 F.2d 1268 (8th Cir. 1980), as a decision of this Court. 1-ER-14-15; Dkt. 7.1 at 37; Dkt. 14.1 at 36. As summarized by the *Lewis* Court, *Barney* concerned a request for information focused on records about the active investigation.

SER-200-01, 205; SER-206-07; DC Dkt. 23 at PageID.98 n.1.[2] The FBI, however, refused to acknowledge the narrower request unless Civil Beat stipulated to a years-long delay in the proceedings below. SER-206.

Under these circumstances, FOIA cannot be construed to allow the FBI to casually recite typical concerns about interference with ongoing investigations. Such concerns are not objectively reasonable. More is required from the FBI when, as here, the government's theory of the case and evidence concerning English's and Cullen's pre-arrest conduct has been publicly disclosed. There is insufficient evidence in the record to establish interference from disclosing the FBI's investigation records concerning English's and Cullen's criminal conduct when that same information has been summarized and quoted verbatim in criminal complaints and plea agreements.

This Court should: (1) reverse the April 1 Judgment to the extent that it permits the FBI to categorically withhold the entirety of over 38,000 pages concerning these two closed enforcement proceedings on the basis of Exemption 7A; and (2) vacate the District Court's decision regarding other

[2] Pinpoint "Dkt." citations refer to the corresponding PDF page as designated in the Court's header.

exemptions because the record is insufficient to establish whether the FBI properly limited the scope of the exemptions. On remand, the FBI can supplement the record, redact documents, and begin the process of providing public accountability concerning the investigations that led to English's and Cullen's convictions for receiving bribes for legislative services.

I. GENERIC ALLEGATIONS OF HARM ARE INSUFFICIENT FOR CATEGORICAL WITHHOLDING UNDER EXEMPTION 7A WHEN CONTRADICTED BY OTHER EVIDENCE.

The facts relevant to Exemption 7A are undisputed. The requested FBI files were compiled for law enforcement purposes. The FBI closed its investigations into English's and Cullen's pre-arrest criminal conduct. English and Cullen were publicly prosecuted for their pre-arrest conduct, convicted, sentenced, and now released from incarceration. A separate FBI investigation into other targets remains active based at least in part on English's and/or Cullen's post-arrest cooperation.

The dispute concerns whether disclosure of information about English's and Cullen's pre-arrest conduct could reasonably interfere with the investigation into other targets. Because the FBI sought categorical withholding of its internal files, it must justify the expansive scope of that

denial of public access based on all the facts in the record. Those facts include the already public disclosure of detailed information concerning the focus, scope, strategy, and evidence of the pre-arrest investigations as part of English's and Cullen's prosecutions.

When a requester asks for records focused on a currently active investigation, categorical withholding may be appropriate based on a reasonable inference that disclosure may lead, for example, to evidence tampering in that investigation. *E.g.*, *Lewis*, 823 F.2d at 378-80 & n.5; *accord* 2-ER-35-36. But this Court has been clear that judicial review concerning Exemption 7A is not blind acceptance of alleged interference simply because some investigation exists. *Lion Raisins*, 354 F.3d at 1084-85. For example, in *Lion Raisins*, this Court required disclosure—despite agency concerns about interference with a law enforcement proceeding—because Lion Raisins already had the information to be disclosed. *Id.* at 1085 ("USDA cannot argue that revealing the information would allow Lion premature access to the evidence upon which it intends to rely at trial."). The Court reaffirmed that analysis in later proceedings that affirmed denial of access, explaining that "Lion's failure to show that it already knows the

scope of the government's investigation counts strongly against disclosure." *Lion Raisins*, 231 Fed. Appx. at 567 n.3.

Here, the public already knows the scope of the government's investigation into English's and Cullen's criminal conduct. Public access to extensive information about their pre-arrest conduct directly contradicts the FBI declared assessment of interference as a basis to categorically withhold every piece of paper in the FBI's internal files. Disclosure of similar information in the FBI's files cannot possibly harm any other investigation. *E.g.*, 2-ER-24-26 ("if you look at all of these files, somewhere in there there has to be a basic factual report as to the controlled bribes that occurred that are described in the criminal informations.").

In its declarations, the FBI never distinguished between purported interference from disclosure of information about English's and Cullen's pre-arrest criminal conduct and disclosure of information about their post-arrest cooperation. *See* 3-ER-306-07 ¶¶ 36-38; 3-ER-383-85 ¶¶ 10-14; *see also* 2-ER-33 (Civil Beat conceding the 7A concerns related to English's and Cullen's post-arrest cooperation and again disclaiming any such request for cooperation-related files). Instead, the FBI obscured the distinction by refusing to provide additional information (*e.g.*, dates).

2-ER-33; *Rein v. U.S. Patent & Trademark Off.*, 553 F.3d 353, 366 n.21 (4th Cir. 2009) ("in many situations the date of the document may be a critical factor" for a *Vaughn* index). As Civil Beat has emphasized throughout this proceeding, much is publicly known about the focus and scope of the pre-arrest investigations and the FBI's evidence against English and Cullen through the public prosecutions. *E.g.*, DC Dkt. 73 at PageID.593 ("the scope and nature of the investigations into Cullen and English are well known; the FBI cannot rely on generic assertions of harm."). That existing public knowledge precludes *categorical* withholding based on Exemption 7A.[3]

Although this case presents novel facts for this Court, the D.C. Circuit addressed a comparable situation when a requester sought access to the FBI's closed investigation of former U.S. Representative Tom DeLay, which was part of a larger active investigation into lobbyist Jack Abramoff's

[3] Because the District Court affirmed categorical withholding under Exemption 7A, the FBI never offered justifications for redacting or denying access to specific information in documents, and the District Court never reviewed such concerns. In the abstract, Civil Beat has not contested that the FBI may have legitimate concerns that justify limited withholding of specific information based on Exemption 7A. *E.g.*, 2-ER-35-36. This appeal, however, only concerns the sufficiency of the FBI's claim for categorical withholding of all its internal files.

conduct. *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 746 F.3d 1082 (D.C. Cir. 2014) [*CREW I*]. Although the FBI conceded that it closed its investigation of DeLay's conduct, it argued that other "related" investigations were ongoing.[4] *Id.* at 1097. The D.C. Circuit acknowledged that disclosing the focus of an investigation and evidence may be sufficient in a typical Exemption 7A case when "requested records relate to a specific individual or entity that is the subject of the ongoing investigation, making the likelihood of interference readily apparent." *Id.* at 1098-99. But when the request primarily concerns a closed investigation, the D.C. Circuit held that it could not readily infer harm from disclosure to justify categorically withholding everything. *Id.* at 1099.

> Here, by contrast, the documents requested relate to DeLay, who is no longer under investigation; he was told more than three years ago that he would not be charged. Thus, assuming some individuals do remain under investigation, the relevant question is whether any of the responsive records, which are primarily about DeLay, would disclose anything relevant to the investigation of *those* individuals. Given the "intertwined and interrelated nature of the documents at issue," Hardy Decl. 17, the answer may well be yes. But without more information

[4] The FBI cites *Boyd v. U.S. Department of Justice*, 475 F.3d 381 (D.C. Cir. 2007), for the proposition that any "related" investigation justifies categorical withholding. Dkt. 14.1 at 38. The D.C. Circuit expressly distinguished *Boyd* in *CREW I* because the request for DeLay's file—as true for the requests here—sought records about an individual who was no longer under investigation. 746 F.3d at 1099.

> about the degree of overlap, we cannot say that the circumstances "'characteristically support an inference'" that disclosure would interfere with any pending enforcement proceeding.

Id. The Court of Appeals required more detailed information from the FBI. *Id.* at 1098-99 ("it is not sufficient for the agency to simply assert that disclosure will interfere with enforcement proceedings; 'it must rather demonstrate *how* disclosure' will do so").

Here, the FBI seeks to distinguish *CREW I* by claiming that the D.C. Circuit instead rejected the FBI's claim that there was an ongoing investigation. Dkt. 14.1 at 40. The Court of Appeals did raise an independent question about the existence of an ongoing investigation. But that was not its only holding. 746 F.3d at 1099 (remanding for clarification *both* as to "whether a related investigation is in fact ongoing and, if so, how the disclosure of documents relating to DeLay would interfere with it"). As to its concerns about interference, the D.C. Circuit expressly stated that it assumed the existence of a pending investigation. *Id.* ("assuming some individuals do remain under investigation").

The FBI makes other attempts to bolster the District Court's order regarding Exemption 7A. But each of those efforts reflects a fundamental

disagreement with the plain language of FOIA and its statutory premise that federal executive agencies must be accountable to the public.

For example, the FBI challenges this Court's holding in *Lion Raisins* that FOIA exemptions "must be narrowly construed." Dkt. 14.1 at 35. According to the FBI, the U.S. Supreme Court rejected that principle. *Id.* (citing *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 439 (2019)). *Argus Leader* concerned what records are "confidential" under Exemption 4 ("commercial or financial information obtained from a person and privileged or confidential"). 588 U.S. at 433-34. Before *Argus Leader*, courts had developed an extra-statutory analysis that required agencies show "substantial competitive harm" to prove that records are "confidential". *Id.* at 436. In response to an argument that the "substantial competitive harm" standard accorded with the principle of narrowly construing FOIA exemptions, the Supreme Court held that courts cannot disregard the fair reading of statutory words or add limitations not imposed by Congress. *Id.* at 439. Nothing in Civil Beat's arguments asks this Court to deviate from the plain language or impose unwritten limits on Exemption 7A. Exemption 7A plainly requires that the FBI prove an objectively reasonable

expectation of interference from disclosure—not just the FBI's subjective assessment.

Moreover, the *Argus Leader* Court did not overrule the Supreme Court's numerous express prior holdings regarding general principles for construing FOIA.

> This Court repeatedly has stressed the fundamental principle of public access to Government documents that animates the FOIA. "Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." The Act's "basic purpose reflected 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." There are, to be sure, specific exemptions from disclosure set forth in the Act. "But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Accordingly, these exemptions "must be narrowly construed."* Furthermore, "the burden is on the agency to sustain its action."

John Doe Agency v. John Doe Corp., 493 U.S. 146, 151-52 (1989) (emphasis added) (citations omitted); *accord Milner v. Dep't of the Navy*, 562 U.S. 562, 571 (2011); *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001); *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988); *see also* 5

U.S.C. § 552(d) ("This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section."). And, post-*Argus Leader*, this Court has reaffirmed the principle that FOIA exemptions must be construed narrowly. *Rojas v. FAA*, 989 F.3d 666, 674 (9th Cir. 2021) (en banc); *see also Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 58 F.4th 1255, 1261 (D.C. Cir. 2023); *Am. Oversight v. U.S. Dep't of Justice*, 45 F.4th 579, 587 (2d Cir. 2022).

The District Court's holding that the FBI may categorically withhold all internal files under Exemption 7A should be reversed. Any more specific proof of interference with enforcement proceedings can be addressed on remand after the FBI redacts the investigation files.

II. COURTS CANNOT DEFER TO THE FBI'S ASSESSMENT OF INTERFERENCE UNDER EXEMPTION 7A.

Accepting facts declared in agency affidavits at face value—in the absence of contradictory direct or circumstantial evidence—is not the same as deferring to the legal conclusions in those declarations. The FBI can provide its subjective assessment that disclosure of information risks interference with an active investigation. But the fact of that assessment does not change a court's duty to independently assess de novo whether

the FBI's assessment is objectively reasonable in light of all relevant facts. The District Court incorrectly deferred to the FBI's assessment, holding that "courts defer to agencies—particularly the FBI—in law enforcement matters." 1-ER-13.

As a basis for "deference," the FBI argues repeatedly—as it did below—that Civil Beat did not submit *specific* facts into evidence that contradicted the FBI's vague declarations of purported interference. *E.g.*, Dkt. 14.1 at 9, 34. Imposing such a burden creates an impossible bar on public access because requesters typically only know the contents of withheld records based on agency declarations. *See* 5 U.S.C. § 552(a)(4)(B) ("the burden is on the agency to sustain its action"); *see also Transgender Law Ctr. v. Immigration & Customs Enf't*, 33 F.4th 1186, 1196 (9th Cir. 2022); *Wiener v. FBI*, 943 F.2d 972, 979 (9th Cir. 1991) ("Unless the agency discloses 'as much information as possible without thwarting the [claimed] exemption's purpose,' the adversarial process is unnecessarily compromised." (citation omitted)).

The FBI here:

- disclosed no redacted records from its internal files;
- failed to describe the contents of the records beyond a broad document category (*e.g.*, "Electronic Communications"—FD-1057) and whether it concerns English, Cullen, or both;
- refused to distinguish between records of English's and Cullen's pre-arrest conduct and their post-arrest cooperation; and
- proffered no details regarding how disclosing internal records regarding already public information from English's and Cullen's prosecutions would interfere with any investigation.

If the FBI's proof is not concrete and specific, Civil Beat can only point out why that proof fails to meet the FBI's burden to at least establish an objectively reasonable inference of interference under all the facts in the record.[5] *See U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 180 (1993) (in

[5] The FBI's citation to *Ecological Rights Foundation* does not support its argument for general deference to agency affidavits regarding the application of FOIA exemptions. Dkt. 14.1 at 34. The record in that case reflects that the EPA released most of the requested documents in full or with redactions with a 650-page *Vaughn* index. *Ecological Rts. Found. v. U.S. Envt'l Protection Agency*, No. 22-15936, 2023 U.S. App. LEXIS 16917, at *1-2 (9th Cir. July 5, 2023). That record stands in stark contrast to the FBI's refusal to provide access to any of 38,000 pages from its internal files.

connection with Exemption 7D, FBI must provide sufficient details regarding a confidential source so that "the requester will have a more realistic opportunity to develop an argument that the circumstances do not support an inference of confidentiality").

Moreover, *Argus Leader* reinforced that courts "cannot properly *expand* [a FOIA exemption] beyond what its terms permit." 588 U.S. at 439. The FBI incorrectly construed Exemption 7A to impose an extra-statutory presumption of interference unless requesters introduce specific facts that disclosure will not interfere with an ongoing investigation. *See, e.g.*, *Landano*, 508 U.S. at 180-81 (rejecting the FBI's statutory construction of Exemption 7D as giving the FBI presumptive authority to withhold "confidential source" records). While such a rule may be easier for the FBI in addressing FOIA cases, it is not the law. *Id.* ("A prophylactic rule protecting the identities of all FBI criminal investigative sources undoubtedly would serve the Government's objectives and would be simple for the Bureau and the courts to administer. But we are not free to engraft that policy choice onto the statute that Congress passed."). The FBI's construction (1) eviscerates Congress's provision for meaningful judicial review and (2) omits from Exemption 7A any requirement that the

FBI's alleged interference be objectively reasonable. *Id.* at 177-78 (FOIA's statutory language "could reasonably be expected to" invokes "a standard of reasonableness . . . based on an objective test").

A fair reading of FOIA reflects an anticipated robust review—not a rubberstamp—for allegations of interference with pending enforcement proceedings. 5 U.S.C. § 552(a)(4)(B) (de novo judicial review and burden on agency to prove exemption), (a)(8)(A) (withholding permitted only if harm "reasonably" foreseeable and redaction required when "possible"), (b) ("reasonably segregable" redactions required), (b)(7)(A) (withholding permitted only if "reasonably" expected to interfere with enforcement proceeding), (d) (agency withholding only allowed "as specifically stated in this section"). Legislative history only further supports a construction that requires such meaningful judicial review. *See, e.g.*, Dkt. 7.1 at 30-32. Exemption 7A does not accord any presumption or deference to the FBI's subjective assessment that disclosure will interfere with its investigations.

As the *Landano* Court acknowledged, categorical denials may be based on *reasonable* inferences, but "Congress did not expressly create a blanket exemption for the FBI." 508 U.S. at 177-78. There, the FBI sought—and the Supreme Court rejected—a presumption of confidentiality from the

mere fact that a source communicated with the FBI during a criminal investigation, citing generic concerns about "risk of reprisal or other negative attention." *Id.* at 176. Here, the FBI presumes interference from the mere fact that it was conducting some "related" investigation, citing generic concerns about, for example, witness or evidence tampering.

In the end, there is no *reasonable* inference of interference here because the FBI's allegations are directly contracted by the totality of the circumstances. The subject matter of the requested records is closed investigations—not any active investigation—so interference cannot be readily inferred. Witness or evidence tampering in those closed investigations is not a concern because English and Cullen already pleaded guilty and served their sentences. The only non-conclusory evidence of a connection between the closed investigations and any active investigation is that English and Cullen cooperated with the FBI *post-arrest*. But the risk of interference from disclosing English's and Cullen's pre-arrest criminal conduct is tenuous at best when the details of those closed investigations are well known based on English's and Cullen's public prosecutions. Targets of any active investigation know that English and Cullen cooperated with the FBI and know the focus, scope, strategy, and evidence

used to convict English and Cullen. The FBI offers only generic and conclusory allegations that disclosing internal files about closed investigations of English's and Cullen's pre-arrest conduct will interfere with an active investigation. That is insufficient, but the District Court nevertheless deferred to the FBI.

The District Court's judgment granting the FBI summary judgment should be vacated for applying the wrong legal standard by simply deferring to the FBI's assessment of whether the FOIA exemptions apply.

III. THE DISTRICT COURT LACKED SUFFICIENT INFORMATION TO INDEPENDENTLY DECIDE THE OTHER EXEMPTIONS.

In support of the District Court's alternative holding that the entirety of the FBI's 38,000 pages may be withheld under a mish-mash of other exemptions, the FBI argues about the scope of various exemptions. Dkt. 14.1 at 41-58. But there is no escape from the real issue. Stating that a document is an electronic communication or some other broad document category regarding English or Cullen does not provide sufficient factual basis for a de novo judicial determination of whether the FBI correctly applied each of those non-categorical, limited-scope exemptions in declaring that the records are exempt.

For example, the FBI declared that virtually every document on its *Vaughn* index was exempt in part under the National Security Act of 1947, 50 U.S.C. § 3024(i)(1). 2-ER-65-98. The only clarification that the FBI offered by declaration is that disclosure purportedly would "reveal intelligence sources and methods." 3-ER-321 ¶ 58. The FBI's Answering Brief offers no further explanation. Dkt. 14.1 at 44 (referencing the FBI's description of what the National Security Act requires—nothing specific to the records at issue—at 3-ER-319-20). The District Court had no basis to conduct a de novo independent review of the FBI's claims based on that conclusory assertion, which simply parrots the relevant standards and declares the records exempt. *See* Dkt. 7.1 at 58-59. And the FBI's other claimed exemptions fare no better—regardless the outcome of any disputes over the exemptions' scope. *See id.* at 46-68.

Only a few of the FBI's misstatements in its Answering Brief warrant further response.[6] First, as it concerns Exemption 7C (privacy), the FBI erroneously seeks to narrow the scope of the "public interest" that is

[6] As to other issues, the FBI's arguments have been addressed in the Opening Brief.

balanced against privacy.[7] Dkt. 14.1 at 49-53. The FBI argues that there is no public interest in records unless the FBI has been legitimately accused of wrongdoing. *Id.* at 53. Its only citation for that proposition is the Supreme Court's interpretation—in a non-FOIA case—of the term "official acts" as used in the federal criminal bribery statute.[8] *Id.* at 50-51 (citing *McDonnell v. United States*, 579 U.S. 550 (2016)). A criminal bribery statute does not define invasion of privacy under FOIA. As outlined in the Opening Brief, the public has an interest in how the FBI conducts its statutory duties—irrespective of whether there is evidence of wrongdoing by the FBI. *E.g.*,

[7] The FBI also implies that there can be no public interest in records if only one news outlet makes a FOIA request. Dkt. 14.1 at 52 n.14. It cites no authority for that limit on public access because—contrary to the FBI's position—FOIA imposes *additional* requirements on agencies when multiple people request the same records. 5 U.S.C. § 552(a)(2)(D)(ii)(II). There is no statutory basis to read FOIA as limiting access simply because only one person (reporter or not) made a request. *E.g.*, *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) ("the rights of the two press respondents in this case are no different from those that might be asserted by any other third party, such as a neighbor or prospective employer.").

[8] The FBI also cites this Court's decision in *Forest Service*, but, as discussed in the Opening Brief, that case only concerned disclosure of names after the agency released extensive redacted records that met the general public interest. *Forest Serv. Emp. for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1027 (9th Cir. 2008); *accord* Dkt. 7.1 at 55-56. In contrast, here, the FBI released nothing from its internal files.

Dkt. 7.1 at 56; *e.g.*, *Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 595 F.3d 949, 960 (9th Cir. 2010) (affirming that public interest established if information "sheds light on an agency's performance of its statutory duties" and ordering disclosure with no evidence of purported agency wrongdoing); *accord John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) ("these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act."). Moreover, the FBI offered no evidence to refute the clear public interest in learning more about English's and Cullen's pre-arrest conduct accepting bribes as elected state legislators.[9] *See* Dkt. 7.1 at 56-58.

Second, as it concerns grand jury records, Civil Beat never cited nor relied on the district court decision on remand in *Labow*. *Compare* Dkt. 7.1

[9] The FBI seeks to supplement the record on appeal by claiming that the legislation that the FBI paid English to "kill" would not have passed the State Legislature—irrespective of the bribe—because the Legislature recessed on March 16, 2020, after the COVID-19 pandemic started. Dkt. 14.1 at 52. Not only is the FBI's supplement procedurally improper, Fed. R. App. P. 10(e), it is factually incorrect. The Hawai`i State Legislature enacted 76 laws during its 2020 session after initially recessing on March 16 for the pandemic. 2020 Haw. Sess. Laws. Moreover, the FBI's factual claim is contradicted by its actions in 2020 when, post-recess, it directed Milton Choy—in April and June—to confirm with English that the legislation English had been paid to kill in March would not become law. 2-ER-101-02 ¶ 16; 2-ER-108 ¶ 16; English Cr. Dkt. 1 at PageID#:42-43.

at 61-63 (citing only the D.C. Circuit case in *Labow*), *with* Dkt. 14.1 at 42 (stating that "Civil Beat misapplied [the *Labow* district court decision]"). Regardless, the FBI misstates the record on remand in *Labow* by claiming that the only evidence submitted in that case was a single sentence that the withheld records were grand jury subpoenas, subpoena returns, and discussions of the subpoenas. Dkt. 14.1 at 42. The FBI then claims that its declaration here stated that the records discussed identities of witnesses, sources of information, steps in the grand jury process, and summaries of grand jury subpoenas and returns. *Id.*; *see* 3-ER-315-17.

As clarified by the *Labow* district court on remand, however, the declarations that the D.C. Circuit *rejected before remand* included recitations similar to those that the FBI now relies on. *Labow v. U.S. Dep't of Justice*, 278 F. Supp. 3d 431, 443 (D.D.C. 2017) ("Included in the earlier case record considered by the Court of Appeals were two FBI declarations, which represented that the documents withheld under Rule 6(e) included the names of recipients of federal grand jury subpoenas, specific identifying information concerning records subject to grand jury subpoenas, and the records provided in response to grand jury subpoenas."). The *Labow* district court highlighted the one sentence that the Answering Brief

emphasizes simply because it was the only new allegation on remand. *Id.* at 444 ("only material additional information"). In the end, the district court reviewed the records in camera to confirm that the FOIA exemption applied. *Id.* The District Court here did not review any of the requested records—in camera or otherwise.

Third, as it concerns Exemption 7D (confidential sources), the FBI improperly cites a 1996 unpublished decision that does not provide any insight into the evidence relied on to affirm withholding. Dkt. 14.1 at 55 (citing *Pac. Energy Inst., Inc. v. U.S. IRS*, No. 94-36172, 1996 U.S. App. LEXIS 1015 (9th Cir. Jan. 16, 1996) (mem.)).[10] Although the *Pacific Energy* decision did not recite the underlying evidence, it referenced *Landano* for the standard "from which an assurance of confidentiality could reasonably be inferred." *Pac. Energy Inst.*, 1996 U.S. App. LEXIS 1015, at *3-4. The *Landano* Court explained that various factors about a specific informant—such as the nature of the crime (*e.g.*, gang-related activity) and the informant's relationship to the criminal activity—were necessary to assess

[10] 9th Cir. R. 36-3(c) prohibits citation to unpublished dispositions before January 1, 2007, except for limited circumstances that do not apply here.

the reasonableness of inferring confidentiality. *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 179-80 (1993).

> We think this more particularized approach is consistent with Congress' intent to provide "'workable" rules'" of FOIA disclosure. The Government does not deny that, when a document containing confidential source information is requested, it generally will be possible to establish factors such as the nature of the crime that was investigated and the source's relation to it. Armed with this information, the requester will have a more realistic opportunity to develop an argument that the circumstances do not support an inference of confidentiality. To the extent that the Government's proof may compromise legitimate interests, of course, the Government still can attempt to meet its burden with *in camera* affidavits.

Id. at 180. The FBI here provided no information to the District Court about the specific confidential source(s) here, discussing them in the abstract as an undefined group. *See* 3-ER-338-41. And further contradicting the FBI's citation to *Pacific Energy*, the underlying district court decision clarified that the disputed records were reviewed in camera, which again the District Court here did not do. *Pac. Energy Inst., Inc. v. IRS*, No. C94-313R, 1994 U.S. Dist. LEXIS 17039, at *1-2 (W.D. Wash. Nov. 3, 1994).

In the end, for all the reasons outlined in the Opening Brief and above, there is insufficient basis for holding that all 38,000 pages of the FBI's internal files may be withheld under a mosaic of FOIA exemptions. If the District Court allowing categorical withholding under Exemption 7A

was error—it was—then resolution of the other exemptions is premature. The District Court's alternative holding to withhold *everything* based on the collective effect of other exemptions should be reversed for lack of adequate factual basis. The individual holdings as to these other exemptions—with limited, but unclear scope in light of the FBI's generic assertions and refusal to redact—should be vacated. Legitimate concerns can be addressed on remand with more specific proof after the FBI redacts the investigation files.

IV. THIS COURT HAS NEVER HELD THAT AN AGENCY MAY WITHHOLD THOUSANDS OF PAGES FROM THE PUBLIC SIMPLY BECAUSE THE AGENCY SAYS NOTHING IS SEGREGABLE.

As outlined in the Opening Brief, every time this Court has affirmed a declaration regarding segregability, there has been an independent basis for a court to confirm the agency's declaration. Dkt. 7.1 at 68-70. The FBI relies on this Court affirming its declarations in *Hamdan*. Dkt. 14.1 at 59. But in *Hamdan*, in addition to declaring that nothing further could be disclosed, the FBI released redacted records. *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 780 (9th Cir. 2015) ("This is supported by the partially redacted documents that the FBI produced. These documents demonstrate that the FBI released large portions of previously classified

material, redacting only the bare minimum of information."). In contrast, the FBI released nothing here that would provide an independent basis to verify the proper application and strict adherence to FOIA exemptions.

Moreover, in *Hamdan*, this Court addressed not only the FBI's combination of redacted disclosure plus declarations in that case, but also another agency that—as the FBI did here—withheld all requested records. For the Defense Intelligence Agency, the *Hamdan* court concluded that there was insufficient basis to find good faith regarding the agency's claims on segregability: "Nor does the DIA provide us with any evidence of its good faith. All of the DIA's documents are completely withheld, so the district court did not have the opportunity to observe the DIA's approach to redaction." *Id.* at 781.

As illustrated by the its purported example, the FBI relied on a mix of exemptions that only justify redacting specific information. Dkt. 14.1 at 60-61. But limited-scope redactions do not remove all information. Unless the FBI can justify categorical withholding under Exemption 7A—it cannot—it is bad faith to claim that not a single sentence from more than 38,000 pages can be disclosed from the FBI's internal files of closed investigations into two state legislators who were publicly prosecuted for bribery. In essence,

the FBI does not want to comply with its obligation under FOIA to disclose documents with redactions, *see* Dkt. 14.1 at 61, but redactions (even heavy redactions) do not justify withholding everything. As this Court observed, adherence to the statutory obligation to disclose all non-exempt information avoids a finding of bad faith regarding segregability. *Hamdan*, 797 F.3d at 780 ("For example, the State Department released a document to Plaintiffs in which there was only one sentence that was not redacted. Rather than withhold the entire document, the State Department took the correct view that it was required to release any information that was not classified, even if it was a single sentence."); *accord* 5 U.S.C. § 552(a)(8)(A)(ii)(II), (b). That did not happen here.[11]

The District Court's holding that nothing can be disclosed from the FBI's internal records should be reversed.

[11] Contrary to the FBI's insinuation, Civil Beat has never argued that the District Court must review all (or any) records in camera under a segregability analysis. Dkt. 14.1 at 59 ("The district court need not become a 'document clerk, reviewing each and every document an agency withholds'"). As this Court observed in *Hamdan*, the necessary "detail may be provided in a variety of ways." 797 F.3d at 781 n.9.

V. THIS COURT SHOULD REAFFIRM THAT A *VAUGHN* INDEX IS NOT REQUIRED TO ASSERT CATEGORICAL WITHHOLDING.

The FBI insisted on a purported D.C. Circuit procedure in this case that directly conflicts with this Court's holding in *Lewis* and that delayed resolution of the instant case. *See Lewis v. IRS*, 823 F.2d 375 (9th Cir. 1987). Civil Beat did not raise this issue in its Opening Brief because it did not impact the District Court's decision. But in light FBI's non-material, but incorrect statements that Civil Beat delayed this case, *see* Dkt. 14.1 at 12-14, Civil Beat flags the concern for potential procedural guidance from the Court for this case on remand and future FOIA cases.

As the District Court found, the FBI chose from the outset of the case to prepare a *Vaughn* index despite knowing that *Lewis* allowed the FBI to proceed on its Exemption 7A claim without an index. SER-156 n.1; *see also, e.g.*, DC Dkt. 27 at PageID.147. When it became clear that the FBI planned to withhold all requested documents on a categorical basis, Civil Beat immediately suggested that the FBI should move for summary judgment on its claims for categorical withholding.[12] DC Dkt. 23-7 at PageID.119-20

[12] Previously, the FBI had been equivocal about releasing redacted records. *See, e.g.*, SER-202 ("If the FBI wishes to disclose records that are responsive to the proposed request, I certainly think that would narrow the issues in this case and potentially alleviate the need for litigation.").

("We might as well brief the issues for the judge now."). The FBI nevertheless insisted on the index, claiming that the D.C. Circuit's *Maydak* decision required that procedure. *E.g.*, DC Dkt. 20-1 at PageID.81 n.3 ("The *Maydak* principal [sic] requires the government to complete its review of all the documents and set forth its objection to disclosure in one pleading, instead of raising FOIA exemptions [sic] claims one at a time."); DC Dkt. 20-2 at PageID.89 ¶ 9; *see Maydak v. U.S. Dep't of Justice*, 218 F.3d 760 (D.C. Cir. 2000). This Court has never cited *Maydak* nor abrogated *Lewis*.

Rather than expeditiously addressing a dispositive issue—categorical withholding under Exemption 7A—the FBI sought to delay this case for years longer to conduct an unnecessary review of documents.[13] DC Dkt. 20; DC Dkt. 40. A prompt motion for summary judgment on categorical withholding claims serves "the just, speedy, and inexpensive determination" of FOIA cases. Fed. R. Civ. P. 1. As this Court held in *Lewis*, if the court finds categorical withholding justified, there is no reason

[13] The FBI already delayed the case by lying about whether it had started reviewing records for the *Vaughn* index. SER-151-53, 155-56 (order noting the "FBI's demonstrated lack of diligence"); SER-185-88 (outlining the FBI's various representations to counsel and the District Court that it had started the *Vaughn* review *when it had not in fact started*); *accord* 3-ER-396 [Dkt. 35] ("more than a year later, the FBI should have made progress").

for the parties to argue about specific records. 823 F.2d at 380 (in such cases, "a *Vaughn* index is futile"). A targeted summary judgment motion also promotes judicial economy by focusing attention on an issue that would resolve an entire FOIA case, rather than piecemeal applying multiple exemptions on a record-by-record basis.

Agencies should not be permitted to delay FOIA cases by insisting on a document review that this Court has held is unnecessary.

CONCLUSION

Based on the foregoing, Civil Beat respectfully requests that this Court reverse the April 1 Judgment to the extent that it permits the FBI to withhold the entirety of over 38,000 pages concerning these two closed enforcement proceedings against convicted state legislators and otherwise vacate the District Court's decision regarding specific exemptions, so that on remand the process of redaction and public accountability can start.

DATED: Honolulu, Hawai`i, September 26, 2025

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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