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9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA

11 ELECTRONIC FRONTIER FOUNDATION,

Case No. 15-cv-03186-MEJ

12 Plaintiff,

**DEFENDANT’S SUPPLEMENTAL REPLY  
BRIEF RE *HAMDAN V. UNITED STATES  
DEPARTMENT OF JUSTICE***

13 v.

14 DEPARTMENT OF JUSTICE,

15 Defendant.  
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20 Pursuant to the Court’s Order Vacating Hearing and Ordering Supplemental Briefing, Dkt. No.  
21 33, Defendant submits this supplemental reply brief regarding the impact of *Hamdan v. United States*  
22 *Department of Justice*, 797 F.3d 759 (9th Cir. 2015) on FOIA Exemption 7(E) and segregability.

23 In its Supplemental Brief, Dkt. No. 36, Plaintiff asserts that the withheld records are guidelines.  
24 Quoting from a dictionary, and not even a legal dictionary, Plaintiff defines “guideline” as “an  
25 indication or outline of policy.” That overly broad definition, which could encompass nearly all law  
26 enforcement records, is not the definition of “guidelines” within the meaning of FOIA Exemption 7(E).  
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1 In *Allard K. Lowenstein Int'l Human Rights Project v. DHS*, 626 F.3d 678, 682 (2d Cir. 2010), a  
2 case on which the *Hamdan* court relied, the Second Circuit explained that, under Exemption 7(E),  
3 “guidelines” refers to the means by which agencies allocate resources for law enforcement  
4 investigations while “techniques and procedures” refers to the means by which agencies conduct  
5 investigations. See also *Families for Freedom v. U.S. Customs & Border Prot.*, No. 10-2705, 2011 WL  
6 6780896, at \*5 (S.D.N.Y. Dec. 27, 2011) (applying *Allard* definition). Using the *Allard* FOIA  
7 definition, rather than Plaintiff’s dictionary definition, it is clear that most if not all of the withheld  
8 records concern techniques and procedures.

9 In her initial Declaration, Dkt. No. 21, Ms. Myrick explained that DEA applied FOIA Exemption  
10 7(E) to the following categories of information: (a) contact information; (b) parts of a form used to  
11 make Hemisphere requests; sample text for completing request forms, associated subpoenas, and other  
12 documents used in conjunction with Hemisphere requests; and other details of internal procedures and  
13 guidelines for making Hemisphere requests or otherwise using Hemisphere; (c) technical details about  
14 how Hemisphere works and details about the specific capabilities and limitations of Hemisphere; (d)  
15 details how Hemisphere requests are routed and processed and how resources are organized and  
16 deployed, including the specific terminology used to refer to certain Hemisphere resources and  
17 personnel; (e) information naming or otherwise directly identifying specific law enforcement agencies,  
18 other than DEA, that have access to Hemisphere; (f) information naming or otherwise identifying  
19 private-sector companies that are instrumental in the operation of Hemisphere; (g) details about how  
20 Hemisphere results and output are delivered to and presented to law enforcement, including sample  
21 results displays; (h) contact information; (i) details regarding how Hemisphere requests are prioritized  
22 and the implications of that prioritization for the handling of requests; and (j) documents detailing the  
23 means through which Hemisphere secures the cooperation of entities instrumental to Hemisphere’s  
24 operations, and references to those documents. Myrick Decl. paragraph 58.<sup>1</sup>

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28 <sup>1</sup>If requested, Defendant can provide the Court with more detail as to what 7(E) withheld  
material is “techniques and procedures” and what 7(E) withheld material is “guidelines.”

1 Because these records show how Hemisphere works, they concern enforcement techniques and  
2 procedures rather than guidelines. Thus, under *Hamdan*, Defendant need not prove a circumvention risk  
3 if the information is not generally known to the public.

4 Plaintiff has not established that this information is not generally known to the public. If it were  
5 generally known to the public, Plaintiff would not be litigating this case. Unlike the pretext telephone  
6 calls considered in *Rosenfeld*, the specifics and details of Hemisphere are not generally known to the  
7 public. Perhaps this Court (like defense counsel and many DEA employees) had never even heard of  
8 Hemisphere before this case. Moreover, courts have endorsed the withholding of the details of a wide  
9 variety of commonly known procedures where, as here, disclosure could reduce the effectiveness of  
10 such procedures. *McGehee v. DOJ*, 800 F.Supp. 2d 220, 236-37 (D.D.C. 2011). Indeed, the *Hamdan*  
11 court endorsed this notion by citing *Bowen v. FDA*, 925 F.2d 1225, 1229 (9th Cir. 1991) for its holding  
12 that “additional details of law enforcement techniques were exempt from disclosure under 7(E) even  
13 where some information about those techniques had been previously disclosed.”

14 Without any supporting legal authority, Plaintiff asserts that, if a record is both a guideline and a  
15 technique or procedure, Defendant must show a circumvention risk. Plaintiff is assuming that a record  
16 can be both a guideline and a technique or procedure. Given that FOIA distinguishes between  
17 “techniques and procedures” on the one hand and “guidelines” on the other hand, and given the *Allard*  
18 definitions of these terms, this assumption is highly questionable. Moreover, there is “longstanding  
19 precedent” that law enforcement techniques and procedures are afforded categorical protection. *Citizens*  
20 *for Responsibility & Ethics in Wash. V. DOJ*, 870 F.Supp. 2d 70, 85 (D.D.C. 2012). Even if this Court  
21 were to hold that Defendant must show a circumvention risk, Defendant has met that standard, which is  
22 a relatively low bar, by demonstrating logically how the release of the requested information could  
23 reasonably be expected to risk circumvention of the law. *See Blackwell*, 646 F.3d 37, 42 (D.C. Cir.  
24 2011). Thus, Defendant properly applied Exemption 7(E) to Documents 1-14, 16-20, and 21-35.

1 For these additional reasons, Defendant respectfully requests the Court to grant Defendant's  
2 Motion for Summary Judgment and Deny Plaintiff's Cross Motion for Summary Judgment.

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4 Respectfully submitted,

5 Dated: June 15, 2016

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