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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ELECTRONIC FRONTIER
FOUNDATION,

Plaintiff,

v.

DEPARTMENT OF JUSTICE,

Defendant.

Case No. [15-cv-03186-MEJ](#)

**ORDER RE: CROSS MOTIONS FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 19, 23

INTRODUCTION

Plaintiff Electronic Frontier Foundation (“EFF”) filed this lawsuit under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel the release of records from the Drug Enforcement Administration (“DEA”), a component of Defendant United States Department of Justice (“DOJ”) (collectively “the Government”). Compl. ¶ 1, Dkt. No. 1. Pending before the Court are the parties’ cross motions for summary judgment. Gov’t Mot., Dkt. No. 19; EFF Mot., Dkt. No. 23. Having considered the parties’ positions, the relevant legal authority, and the record in this case, the Court **GRANTS IN PART** and **DENIES IN PART** the Government’s Motion and **GRANTS IN PART** and **DENIES IN PART** EFF’s Motion as set forth below.

BACKGROUND

On February 5, 2014, EFF submitted a FOIA request to the DEA for records pertaining to the “Hemisphere” program. Compl. ¶ 1; Declaration of Katherine L. Myrick (“Myrick Decl.”), Ex. A (“FOIA Request”), Dkt. No. 21. EFF alleges Hemisphere is a partnership between telecommunications provider AT&T and law enforcement officials, including the DEA, that allows law enforcement to access detailed phone records and conduct complicated analysis and data mining of those records. *Id.* (both). The *New York Times* first reported on Hemisphere’s existence on September 1, 2013. EFF Mot. at 1 (citing Scott Shane & Colin Moynihan, *Drug*

1 *Agents Use Vast Phone Trove, Eclipsing N.S.A.'s*, N.Y. Times (Sept. 1, 2013,
 2 <http://www.nytimes.com/2013/09/02/us/drug-agents-use-vast-phone-trove-eclipsing-nsas.html>)).
 3 The program involves the placement of AT&T employees within law enforcement facilities to
 4 assist law enforcement access trillions of Americans' electronic call detail records (CDRs) dating
 5 back to 1987. *Id.* at 2. CDRs contain a phone user's dialing, routing, and location information.
 6 *Id.*; *see also* Declaration of Jennifer Lynch ("Lynch Decl."), Ex. 1 (Hemisphere Summary), Dkt.
 7 No. 23-1.

8 EFF's FOIA request specifically sought the following about Hemisphere:

- 9 1. Any and all DEA or DOJ memoranda, policies, procedures, forms,
 10 training and practice manuals concerning the "Hemisphere"
 program;
- 11 2. The case name, docket number, and court of all criminal
 12 prosecutions, current or past, in which officers and agents used the
 "Hemisphere" program to obtain records or data;
- 13 3. Any communications or discussions with AT&T or any other
 14 telecommunications providers concerning technical or legal
 15 difficulties the DEA or DOJ has encountered in obtaining records
 and data through "Hemisphere;"
- 16 4. Any communications or discussions between DEA or DOJ and other
 17 law enforcement agencies, including, but not limited to
 18 Immigrations and Customs Enforcement ("ICE"), the Federal
 Bureau of Investigation ("FBI"), state and local law enforcement
 agencies, and fusion centers related to coordinating or managing the
 "Hemisphere" program or any data obtained through "Hemisphere;"
- 19 5. Any DEA or DOJ contracts or compensation agreements with
 20 AT&T or any other telecommunications provider concerning the
 "Hemisphere" program;
- 21 6. Any DEA or DOJ contracts or compensation agreements with fusion
 22 centers or local law enforcement agencies to manage or coordinate
 the "Hemisphere" program and any data obtained through
 23 "Hemisphere"; and
- 24 7. Any briefings, discussion, or other exchanges between DEA or DOJ
 25 officials and members of the Senate or House of Representatives
 concerning the existence and operation of "Hemisphere."

26 FOIA Request at 2.¹

27 _____
 28 ¹ EFF requested expedited processing under 5 U.S.C. § 522(a)(6)(E)(v)(II) and 28 C.F.R. §§
 16.5(d)(1)(ii) and (iv), citing a "compelling need," an "urgency to inform the public about an

1 Between March 2014 and June 2014, the parties exchanged communications during which
2 EFF reformulated and narrowed its request in response to the DEA’s requirements. *See* Myrick
3 Decl., Ex. D (DEA letter to EFF). Among other things, EFF limited the search to (1) the DEA
4 Headquarters in Springfield, Virginia, and the Los Angeles, San Diego, and San Francisco field
5 divisions; (2) records between 2008 and the present; (3) with regard to Item 2, criminal records
6 contained within the DEA’s Investigative Reporting and Filing System; and (4) with regard to
7 Item 6, communications, discussions, contracts or compensation agreements between the DEA
8 offices identified above and six specific fusions centers. Myrick Decl., Ex. E (EFF’s
9 Reformulated FOIA Request). In responses dated May 13, 2014 (*id.* ¶ 14, Ex. F (DEA’s first
10 response)), and April 7, 2015 the DEA informed EFF it would release 176 pages and withhold 132
11 pages based on FOIA Exemptions 5, 6, 7(A), 7(C), 7(D), 7(E), and (7)(F). *Id.* ¶ 15, Ex. M (DEA’s
12 Apr. 7 response). EFF filed an administrative appeal with the DOJ’s Office of Information Policy
13 (“OIP”) on April 28, 2015. Second Myrick Decl., Ex. A, Dkt. No. 26. OIP affirmed the DEA’s
14 withholding on July 10, 2015. *Id.*, Ex. B.

15 On July 9, 2015, EFF filed the present lawsuit. *See* Compl. The DEA subsequently
16 prepared a draft *Vaughn* Index as part of its meet and confer with EFF. Myrick Decl. ¶ 16. On
17 December 24, 2015, the DEA released to EFF portions of 13 pages it previously withheld in full.
18 *Id.* ¶ 17. Following the meet and confer process, the parties no longer dispute employee
19 identifying information withheld under Exemptions 6, 7(C), and 7(F). EFF Mot. at 1 n.1; *see also*
20 Scharf Decl., Ex. B (EFF’s e-mail response to the Government identifying the disputed
21 documents), Dkt. No. 20; Gov’t Mot. at 12.

22 The Government then filed its Motion for Summary Judgment, asserting the DEA
23 conducted an adequate search and properly withheld responsive documents protected by the FOIA

24
25 actual or alleged federal government activity,” and “widespread and exceptional media interest in
26 which there exist possible questions about the government’s integrity which affect public
27 confidence.” FOIA Request at 2-5. EFF also requested that it not be charged search or review
28 fees as a representative of the news media pursuant to FOIA and 28 C.F.R. § 16.11(b)(6), and
stated that it was entitled to a waiver of duplication fees because disclosure of the requested
information is in the public interest under 5 U.S.C. § 552(a)(4)(a)(iii) and 28 C.F.R. §
16.11(k)(1)(i), (ii). *Id.* at 5-7. The DEA denied EFF’s request for expedited processing, but
granted its request for a fee waiver or reduction of fees. Myrick Decl. ¶¶ 9-11.

1 Exemptions. Gov't Mot. at 2; *see also* Myrick Decl., Ex. O (“*Vaughn Index*”). EFF filed a cross-
2 Motion for Summary Judgment, disagreeing with DEA’s claimed exemptions and seeking
3 information from seven documents withheld under Exemption 5, plus 27 documents withheld or
4 redacted under Exemption 7. EFF Mot. at 6, 12; Gov’t Reply at 11, Dkt. No. 25.

5 Since the parties filed their Motions, the Court ordered two rounds of supplemental
6 briefing, and the parties have timely responded. The Government also filed a Statement of Recent
7 Decision (Dkt. No. 39), attaching an Opinion by Judge Emmet G. Sullivan in *Electronic Privacy*
8 *Information Center v. United States Drug Enforcement Agency* (“*EPIC*”), 2016 WL 3557007
9 (D.D.C. June 24, 2016). *EPIC* considers some of the same documents and exemptions at issue in
10 this action. However, as of the date of this Order, the briefing in that case is still ongoing, and
11 Judge Sullivan appears to be conducting further review of the evidence in that matter. For clarity,
12 this Court ordered the Government to indicate which documents were at issue in both cases and
13 which Exemptions it asserted in *EPIC* for each of those documents. Order, Dkt. No. 40. Based on
14 the Government’s response, it appears that in some instances the Government applied different
15 Exemptions to the same documents in this case and the *EPIC* case. *See* Third Myrick Decl., Ex. B
16 (chart), Dkt. No. 43. EFF argues these inconsistencies demonstrate the need to “independently
17 check” the Government’s withholding decisions. EFF Fifth Suppl. Resp. at 3, Dkt. No. 45.

18 **LEGAL STANDARD**

19 FOIA’s “core purpose” is to inform citizens about “what their government is up to.”
20 *Yonemoto v. Dep’t of Veterans Affairs*, 686 F.3d 681, 687 (9th Cir. 2012), *overruled on other*
21 *grounds by Animal Legal Defense Fund v. U.S. Food & Drug Admin.* (“*Animal Legal*”), 836 F.3d
22 987 (9th Cir. 2010) (internal quotation marks omitted). This purpose is accomplished by
23 “permit[ting] access to official information long shielded unnecessarily from public view and
24 attempt[ing] to create a judicially enforceable public right to secure such information from
25 possibly unwilling official hands.” *EPA v. Mink*, 410 U.S. 73, 80 (1973), *superseded on other*
26 *grounds by statute as recognized in Islamic Shura Council of S. Cal. v. F.B.I.*, 635 F.3d 1160,
27 1166 (9th Cir. 2011). Such access “ensure[s] an informed citizenry, vital to the functioning of a
28 democratic society, needed to check against corruption and to hold the governors accountable to

1 the governed.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (internal quotation
 2 marks omitted). Congress enacted FOIA to “clos[e] the loopholes which allow agencies to deny
 3 legitimate information to the public.” *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 150
 4 (1989) (internal quotation marks and edits omitted).

5 At the same time, FOIA contemplates that some information can legitimately be kept from
 6 the public through the invocation of nine “Exemptions” to disclosure. *See* 5 U.S.C. § 552(b)(1)-
 7 (9). An agency may withhold only information to which the asserted Exemption applies and must
 8 provide all “reasonably segregable” portions of that record to the requester. 5 U.S.C. § 552(b).
 9 “These limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the
 10 dominant objective of the Act.” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*
 11 (*“Klamath”*), 532 U.S. 1, 7-8 (2001) (internal quotation marks omitted). “Consistently with this
 12 purpose, as well as the plain language of the Act, the strong presumption in favor of disclosure
 13 places the burden on the agency to justify the withholding of any requested documents.” *U.S.*
 14 *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991); *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987)
 15 (agency seeking to withhold information has burden of proving the information falls under the
 16 claimed Exemption).

17 The usual question raised in FOIA litigation is, as here, whether the information withheld
 18 by the government properly falls within the scope of the asserted exemptions. “Most FOIA cases
 19 are resolved by the district court on summary judgment, with the district court entering judgment
 20 as a matter of law.” *Animal Legal*, 836 F.3d at 989 (citation omitted). Trial courts review
 21 summary judgment motions in FOIA actions under a *de novo* standard, in line with Federal Rule
 22 of Civil Procedure 56(c).² *Id.*; 5 U.S.C. § 552(a)(4)(B) (a reviewing court “shall determine the

23
 24 ² Additionally, not all FOIA cases may be resolved on summary judgment. “[S]ome FOIA cases
 25 require resolution of disputed facts.” *Animal Legal*, 836 F.3d at 989 (citing *GC Micro Corp. v.*
 26 *Def. Logistics Agency*, 33 F.3d 1109, 1110 (9th Cir. 1994) (requiring a factual determination of
 substantial competitive harm)). If a factual determination needs to be made, summary judgment is
 not appropriate. *Id.* at 990. The Ninth Circuit also held that

27 [c]onsistent with our usual procedure, if there are genuine issues of
 28 material fact in a FOIA case, the district court should proceed to a
 bench trial or adversary hearing. Resolution of factual disputes
 should be through the usual crucible of bench trial or hearing, with

1 matter de novo, and may examine the contents of such agency records in camera to determine
2 whether such records or any part thereof shall be withheld under any of the exemptions . . . , and
3 the burden is on the agency to sustain its action.”).

4 The *de novo* standard requires courts to determine whether there are any genuine issues of
5 material fact. *Animal Legal*, 836 F.3d at 989. To carry their burden on summary judgment,
6 “agencies are typically required to submit an index and ‘detailed public affidavits’ that, together,
7 ‘identify[] the documents withheld, the FOIA exemptions claimed, and a particularized
8 explanation of why each document falls within the claimed exemption.’” *Yonemoto*, 686 F.3d at
9 688 (edits in original) (quoting *Lion Raisins v. Dep’t of Agric.*, 354 F.3d 1072, 1082 (9th Cir.
10 2004)). “These submissions—commonly referred to as a *Vaughn* index—must be from ‘affiants
11 [who] are knowledgeable about the information sought” and “detailed enough to allow [a] court to
12 make an independent assessment of the government’s claim [of exemption].” *Id.* (edits in
13 *Yonemoto*) (quoting *Lion Raisins*, 354 F.3d at 1079; 5 U.S.C. § 552(a)(4)(B)). While the *Vaughn*
14 index need not “disclose facts that would undermine the very purpose of its withholding, . . . it
15 should reveal as much detail as possible as to the nature of the document, without actually
16 disclosing information that deserves protection.” *Id.* (internal quotation marks omitted). Courts
17 “accord substantial weight to an agency’s declarations regarding the application of a FOIA
18 exemption.” *Shannahan v. IRS*, 672 F.3d 1142, 1148 (9th Cir. 2012) (citing *Hunt v. CIA*, 981 F.2d
19 1116, 1119-20 (9th Cir. 1992)).

20 However, while “the [agency’s] reasons are entitled to deference, the [agency’s]
21 declarations must still describe the justifications for nondisclosure with reasonably specific detail,
22 demonstrate that the information withheld logically falls within the claimed exemptions, and show

23
24
25 evidence subject to scrutiny and witnesses subject to cross-
26 examination. The district court must issue findings of fact and
27 conclusions of law. Fed. R. Civ. P. 52(a)(1). Our review remains
28 the same as in all civil cases: we review the findings of fact for clear
error and the conclusions of law de novo. See *OneBeacon Ins. Co.*
v. Haas Indus., Inc., 634 F.3d 1092, 1096 (9th Cir. 2011).

Id.

1 that the justifications are not controverted by contrary evidence in the record or by evidence of
 2 [the agency’s] bad faith. The [agency] must do more than show simply that it has acted in good
 3 faith.” *Berman v. CIA*, 501 F.3d 1136, 1140 (9th Cir. 2007) (internal quotation marks and
 4 citations omitted); *see also Kamman v. IRS*, 56 F.3d 46, 48 (9th Cir. 1995) (“[T]he government
 5 ‘may not rely upon conclusory and generalized allegations of exemptions.’” (quoting *Church of*
 6 *Scientology v. Dep’t of the Army* (“*Church of Scientology P*”), 611 F.2d 738, 742 (9th Cir. 1980))).
 7 Indeed, *de novo* review has been “deemed essential to prevent courts reviewing agency action
 8 from issuing a meaningless judicial imprimatur on agency discretion.” *Animal Legal*, 836 F.3d at
 9 990 (quoting *Halpern v. FBI*, 181 F.3d 279, 287 (2d Cir. 1999)). Moreover, “[a] basic policy of
 10 FOIA is to ensure that Congress and not administrative agencies determines what information is
 11 confidential.” *Lessner v. U.S. Dep’t of Commerce*, 827 F.2d 1333, 1335 (9th Cir. 1987). As such,
 12 courts do not defer to a federal agency’s determination that the requested information falls under a
 13 particular FOIA exemption. *Carlson v. U.S. Postal Serv.*, 504 F.3d 1123, 1127 (9th Cir. 2007).

14 DISCUSSION

15 As an initial matter, EFF has not challenged the adequacy of the DEA’s search. *See* Gov’t
 16 Mot. at 3 (noting EFF never challenged the reasonableness of the search during the meet and
 17 confer process); Declaration of James A. Scharf (“Scharf Decl.”), Ex. B (EFF’s e-mail response to
 18 the DEA, only challenging FOIA Exemptions), Dkt. No. 20. The Court is satisfied the DEA’s
 19 search was sufficient.³ Accordingly, the only issue remaining is whether the Government properly
 20 withheld documents under Exemptions 5, 7(A), 7(D), and 7(E). The Court discusses each asserted
 21 Exemption below.

22 A. Exemption 5

23 Exemption 5 permits withholding of “inter-agency or intra-agency memorandums or letters
 24

25 ³ In responding to EFF’s reformulated FOIA request, the DEA searched six offices likely to have
 26 responsive records within the DEA Headquarters, as well as the Los Angeles, San Diego, and San
 27 Francisco divisions. Myrick Decl. ¶¶ 19-31. It also searched the Narcotics and Dangerous Drugs
 28 Information System, and the index to the Investigative Reporting and Filing System. *Id.* ¶ 32. It
 returned responsive documents to the FOIA Unit, except those documents that it withheld under
 specific FOIA exemptions. *Id.* ¶¶ 19-34; *see Vaughn Index*.

1 which would not be available by law to a party other than an agency in litigation with the agency.”
 2 5 U.S.C. § 552(b)(5). The exemption extends only to documents that are “normally privileged in
 3 the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (footnote
 4 omitted). This includes documents covered by the attorney-client privilege (“ACP”), the attorney
 5 work-product rule (“WP”), and the deliberative process privilege (“DPP”). *Maricopa Audubon*
 6 *Soc. v. U.S. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997). In keeping with FOIA’s goal of
 7 disclosure, Exemption 5 is narrowly construed. *Klamath*, 532 U.S. at 8.

8 EFF’s chart summarizes the documents withheld under Exemption 5:

9	Index #	Page #	Document Description ^[4]	ACP	WP	DPP
10	1	1-12	E-mails with attachments among federal staff including a Deputy Assistant Attorney General addressing Hemisphere legal issues	x	x	x
11						
12	4	16-27	Draft memorandum by the DEA’s Office of Chief Counsel about Hemisphere legal issues.	x	x	x
13						
14	6	31-34	Record about how to use Hemisphere capabilities			x
15	7	35-36	Record about how to use Hemisphere			x
16	25	110	E-mails in May 2007 about legal issues about Hemisphere and subpoenas		x	
17						
18	27	253-54	E-mails within the DEA including attorneys in November 2007 about Hemisphere Subpoenas	x	x	
19						
20	32	267-68	E-mails in June 2008 about a draft Hemisphere policy			x

21 EFF Mot. at 7; *but see* Myrick Decl. ¶¶ 42-43 (initially indicating Documents 28 and 33 are
 22 disputed, not Documents 27 and 32); *compare* Joint Resp. re: Order for Clarification ¶ 2, Dkt. No.
 23 32 (indicating Document 27 (pages 253-54) is in dispute) & *see* Gov’t Reply (indicating
 24 Documents 28 and 33 are disputed); *see also Vaughn* Index at 86 (Document 28 does not include
 25 Exemption 5 assertions) and 104 (Document 33 does not include Exemption 5 assertions).⁵

26 _____
 27 ⁴ These descriptions correspond with the Government’s descriptions in its draft *Vaughn* Index.

28 ⁵ This sort of inattention and incorrect citations has caused the Court to waste considerable time
 and resources checking and rechecking the documents at issue in this action.

1 EFF first argues the DEA has not established that Documents 4, 6, 7, 25, and 32 are “inter-
2 agency” or “intra-agency” communications that qualify for protection under Exemption 5’s “inter-
3 agency or intra-agency memorandums or letters” protections. EFF Mot. at 7-8; *see* 5 U.S.C. §
4 552(b)(5). EFF does not challenge Documents 1 and 27 on this ground, where the Government
5 alleged the authors and recipients of the communications are attorneys and employees within the
6 federal Government or the DEA. EFF Mot. at 8; *see* Myrick Decl. ¶¶ 37, 42; *Vaughn* Index at 1,
7 No. 1 (alleging the communication was “among federal government employees”); *id.* at 83, No. 27
8 (alleging the communication was “internal-DEA”). But EFF contends the DEA’s silence as to
9 Documents 4, 6, 7, 25, and 32 “speaks volumes”—particularly in contrast with the affirmative
10 inter- and intra-agency allegations in support of Documents 1 and 27. EFF Mot. at 8. EFF asserts
11 the DEA has “withheld five records under Exemption 5 without alleging, let alone proving, they
12 were not shared outside the executive branch[,]” and Exemption 5 does not extend to
13 communications outside the federal government. *Id.* at 7 (citing *Ctr. for Int’l Env’tl. Law v. Trade*
14 *Representative*, 237 F. Supp. 2d 17, 25 (D.D.C. 2002)). In support of its challenge, EFF cites
15 various news articles and previously disclosed documents indicating that Hemisphere involves
16 many parties outside the federal government, including state and local police and private
17 corporations, and that communications related to Hemisphere have been shared outside the federal
18 government. *Id.* at 8 (citations omitted). In response, the Government argues these documents fit
19 under the “consultant corollary,” which holds that documents prepared for a government agency
20 by an outside consultant qualify as an “intra-agency” communication where the consultant has no
21 other interest other than the agency. Gov’t Reply at 4 (citing *Klamath*, 532 U.S. at 2).

22 Under 5 U.S.C. §§ 551(1) and 552(f), “‘agency’ means each authority of the Government
23 of the United States” and “includes any executive department, military department, Government
24 corporation, Government controlled corporation, or other establishment in the executive branch of
25 the Government (including the Executive Office of the President), or any independent regulatory
26 agency.” Documents prepared for a Government agency by an outside consultant may qualify as
27 intra-agency communication where “the consultant does not represent an interest of its own, or the
28 interest of any other client,” while advising the agency. *Klamath*, 532 U.S. at 11. These

1 documents “play[] essentially the same part in an agency’s process of deliberation as documents
 2 prepared by agency personnel[.]” *Id.* Whether a document is an inter- or intra-agency
 3 communication is a fact-specific inquiry. *Elect. Frontier Found. v. Office of the Dir. of Nat’l*
 4 *Intelligence* (“*EFF I*”), 639 F.3d 876, 890 (9th Cir. 2010).

5 Having reviewed the Government’s supporting evidence, the Court finds it has raised a
 6 genuine question of fact as to whether Document 4 qualifies as an “inter-agency” communication.
 7 The Government indicates Document 4 is “a draft memorandum prepared by an attorney in the
 8 DEA Office of Chief Counsel” and “contains a draft of confidential legal advice to DEA.” Myrick
 9 Decl. ¶ 38. Thus, Document 4 appears to be a communication shared by employees within the
 10 federal government, specifically the DEA.

11 Documents 6, 7, 25, and 32 are less clear. The Government’s supporting declaration and
 12 *Vaughn* Index describe them as follows:

- 13 • “Document 6 . . . is undated and concerns Hemisphere, Hemisphere’s capabilities,
 14 and how to use Hemisphere.” Myrick Decl. ¶ 39. The “author [is] not indicated.”
 15 *Id.*; *Vaughn* Index at 19, No. 6.
- 16 • “Document 7 . . . is undated and concerns how to use Hemisphere.” Myrick Decl. ¶
 17 40. “No author [is] indicated.” *Id.*; *Vaughn* Index at 24, No. 7.
- 18 • “Document 25 . . . is an e-mail dated May 2007, concerning legal issues related to
 19 the use of Hemisphere and subpoenas” and “was initiated by a DEA attorney.”
 20 Myrick Decl. ¶ 41. No recipient is identified. *See id.*; *see also Vaughn* Index at 75,
 21 No. 25.
- 22 • Document 32 “consists of e-mails dated June 2008, entitled ‘DRAFT Operation
 23 Hemisphere Policy.’” Myrick Decl. ¶ 43.⁶ No author or recipient is identified. *See*
 24 *id.*

25 The Government tacitly acknowledges these documents may have been shared outside the
 26 federal government but argues the consultant corollary still applies. Gov’t Reply at 4. But the

27 _____
 28 ⁶ As noted earlier, the Myrick Declaration identifies this Document as Document 33, not 32. *See*
 Myrick Decl. ¶ 43.

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1 Government has not provided any evidence in support of its consultant corollary theory. There is
 2 no indication of who these alleged consultants were or how they are related to the materials
 3 communicated. Indeed, except for Document 25, the Court cannot even determine who wrote or
 4 received these documents. The Government’s *Vaughn* Index and its supporting declarations fail to
 5 provide information sufficient for the Court to assess the Government’s consultant corollary
 6 theory or to fully assess whether these documents might otherwise constitute “inter-agency” or
 7 “intra-agency” communications. Without more, the Court cannot find that Documents 6, 7, 25,
 8 and 32 are “inter-agency” or “intra-agency” communications subject to protect under Exemption
 9 5. *See Elec. Frontier Found. v. U.S. Dep’t of Justice*, 826 F. Supp. 2d 157, 172 (D.D.C. 2011)
 10 (*Vaughn* submissions did not provide a sufficient basis for evaluating whether agency improperly
 11 withheld documents under Exemption 5 because the plaintiff had provided evidence casting doubt
 12 as to whether the Government shared with non-Executive Branch entities the responsive
 13 documents it withheld from the plaintiff); *cf. EFF I*, 639 F.3d at 891 (“Nearly all of the
 14 characterizations in the government-offered declarations comport with the descriptions in the
 15 *Vaughn* indices of inter-branch or intra-branch communications.”). Accordingly, the Court only
 16 addresses whether Exemption 5 applies to Documents 1, 4, and 27, which the Government has
 17 adequately supported as intra- or inter-agency documents; Documents 6, 7, 25, and 32 shall be
 18 released.

19 1. Attorney-Client Privilege

20 The parties dispute whether the DEA has provided sufficient information to prove
 21 Documents 1, 4, and 27 are protected under the attorney-client privilege. *EFF Mot.* at 10-11;
 22 *Gov’t Reply* at 5-6. To invoke the privilege, the party seeking protection must establish the
 23 following elements:

- (1) when legal advice of any kind is sought (2) from a professional legal adviser in his or her capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are, at the client’s instance, permanently protected (7) from disclosure by the client or by the legal adviser (8) unless the protection be waived.

28 *United States v. Martin*, 278 F.3d 988, 999-1000 (9th Cir. 2002), *as amended on denial of reh’g*

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1 (Mar. 13, 2002) (citations omitted). “A communication from the attorney to the client that does
2 not contain legal advice may be protected if it ‘directly or indirectly reveals communications of a
3 confidential nature by the client to the attorney.’” *United States v. Christensen*, 801 F.3d 970,
4 1007 (9th Cir. 2015) (internal quotation marks and edits omitted); *see id.* (“[A] communication
5 from the attorney to a third party acting as his agent for the purpose of advising and defending his
6 clients also may be protected if it reveals confidential client communications.” (internal quotation
7 marks omitted)). “[A]n agency can be a ‘client’ and agency lawyers can function as ‘attorneys’
8 within the relationship contemplated by the privilege.” *Coastal States Gas Corp. v. Dep’t of*
9 *Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980).

10 The Government represents that information in Document 1 was confidentially
11 communicated between “federal government attorneys, including a Deputy Assistant Attorney
12 General at DOJ, to and among federal government employees[,]” Document 4 is a draft
13 memorandum communicated by an attorney in the DEA Office of Chief Counsel, and Document
14 27 was confidentially communicated via “internal-DEA e-mails” from “DEA attorneys to DEA.”
15 Myrick Decl. ¶¶ 37-38, 42. But the Government fails to show that these documents contain legal
16 advice or could reveal communications of a confidential nature. The Government’s declaration is
17 too conclusory. *See Wiener v. FBI*, 943 F.2d 972, 978-79 (9th Cir. 1991) *cert. denied*, 505 U.S.
18 1212 (1992) (holding that unless the agency discloses as much information as possible without
19 thwarting the claimed Exemption’s purpose, the adversarial process is unnecessarily
20 compromised, and affidavits consisting of “boilerplate” descriptions that fail “to tailor the
21 explanation to the specific document withheld” are insufficient)); *Coastal States*, 617 F.2d at 861
22 (“We repeat, once again, that conclusory assertions of privilege will not suffice to carry the
23 Government’s burden of proof in defending FOIA cases.”). Specifically, the *Vaughn* Index
24 vaguely describes the e-mails in Document 1 as “addressing legal issues relating to Hemisphere”
25 which “deliver[] confidential legal advice (albeit preliminary advice) regarding features of the
26 Hemisphere program and does not itself establish final policy.” *Vaughn* Index at 1-2, No. 1. The
27 Government’s supporting declaration adds little to the *Vaughn* Index, merely regurgitating the
28 same description included in the *Vaughn* Index. *See* Myrick Decl. ¶ 37. Ultimately, the

1 Government's declaration is too vague: it does not indicate even generally what sorts of legal
2 issues are presented in these e-mails, nor does not explain what "features" of the Hemisphere
3 program are at issue. That the communications were between an attorney and agency employees
4 does not establish the documents are protected under the attorney client privilege; without more
5 about what "features" or "legal issues" are discussed or why they might be confidential in nature,
6 the Government has not raised enough facts to show that Document 1 may be protected by the
7 privilege.

8 As to Document 27, the *Vaughn* Index merely describes it as an e-mail "concerning
9 Hemisphere and subpoenas," without explaining the context in which subpoenas are discussed.
10 *Vaughn* Index at 84, No. 27. For instance, the Government fails to explain whether it is referring
11 to particular subpoenas or whether the communications are simply administrative procedures or
12 instructions related to subpoenas in general. Though the Government states that Document 27
13 contains e-mails "concerning Hemisphere and subpoenas to and/or from DEA attorneys," it
14 merely asserts that the e-mails are privileged "because of the confidential legal advice from DEA
15 attorneys to DEA contained therein." Myrick Decl. ¶ 42. The Government is essentially asking
16 the Court to presume that because it uses the word "subpoenas" and states that attorneys wrote or
17 received e-mails, these documents therefore reveal attorney-client communications of a
18 confidential nature. Merely reiterating the elements of the privilege, however, does not satisfy the
19 Government's burden of establishing the privilege applies to this document. *See Ctr. for*
20 *Biological Diversity v. Office of Mgmt. & Budget*, 625 F. Supp. 2d 885, 892 (N.D. Cal. 2009)
21 (holding that defendants could not invoke the privilege by merely restating the scope of the
22 privilege and stating that the documents fell within that scope).

23 Next, the Government indicates Document 4 is a draft memorandum communicated by an
24 attorney in the DEA Office of Chief Counsel to the DEA, and contains legal advice by "analyzing
25 legal issues regarding the procedures used to obtain information through Hemisphere, intended to
26 assist senior DEA management, and containing comments added by the same attorney regarding
27 the same topics." Myrick Decl. ¶ 38, *Vaughn* Index at 10-11, No. 4. But the Government does not
28 articulate why this information is confidential or contains legal advice. While it asserts that this

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1 document contains “confidential legal advice,” again, this merely states the element without
 2 explaining the basis of that confidentiality. *Id.* The Government has not sufficiently demonstrated
 3 the confidential nature of Document 4. *See In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984)
 4 (“[T]he claimant must demonstrate with reasonable certainty . . . that the lawyer’s communication
 5 rested in significant and inseparable part on the client’s confidential disclosure.” (internal citation
 6 omitted)); *Elec. Frontier Found. v. CIA (“EFF IP”)*, 2013 WL 5443048, at *16 (N.D. Cal. Sept.
 7 30, 2013) (“[T]he agency must show that it supplied information to its lawyers with the
 8 expectation of secrecy and the information was not known by or disclosed to any third party.”);
 9 *see also Am. Civil Liberties Union of N. Cal. v. Dep’t of Justice*, 2015 WL 4241005, at *4 (N.D.
 10 Cal. July 13, 2015) (“While the Government states that this email contains the ‘Criminal
 11 Division’s legal advice on how law enforcement may use its own equipment to obtain location
 12 information for a particular wireless device,’ . . . it is not clear how this document qualifies as
 13 legal advice Without more, the Court cannot find this document is protected under the
 14 attorney-client privilege of Exemption 5.” (brackets and internal citation omitted)). Accordingly,
 15 the Court cannot find Document 4 is protected under the attorney-client privilege.

16 Finally, while the Government argues its generalized descriptions are sufficiently specific
 17 to show the documents contain “confidential legal advice,” it relies only on cases that demonstrate
 18 how its support in this case is lacking. *See Gov’t Reply* at 5 (citing *Performance Coal Co. v. U.S.*
 19 *Dep’t of Labor*, 847 F. Supp. 2d 6, 15 (D.D.C. 2012) (upholding privilege where lawyer gave her
 20 opinion based on confidential communications regarding specific allegations against the agency
 21 and also involving settlement recommendations); *Judicial Watch, Inc. v. U.S. Dep’t of the*
 22 *Treasury*, 802 F. Supp. 2d 185, 200, 204 (D.D.C. 2011) (upholding privilege where memoranda
 23 contained lawyer’s legal analyses of proposed compensation structures and statutory
 24 requirements); *Ctr. For Medicare Advocacy, Inc. v. U.S. Dep’t of Health & Human Servs.*, 577 F.
 25 Supp. 2d 221, 238 (D.D.C. 2008) (upholding privilege where the defendant “identified the source
 26 and recipient of the communications, which is critical to the Court’s assessment of whether the
 27 communications are between an attorney and a client” and where communications were made for
 28 the purpose of seeking legal advice or rendering legal advice about the transfer of an agency

1 appeals process, as well as draft regulations, draft hearings manuals, draft memoranda of
 2 understanding, drafting talking points, and draft reports to Congress); *Odland v. Fed. Energy*
 3 *Regulatory Comm'n*, 34 F. Supp. 3d 3, 19 (D.D.C. 2014) (upholding privilege where the
 4 Government disclosed the source and recipient of the communications and stated that the
 5 communications contained legal advice regarding underlying legal proceedings); *Touarsi v. U.S.*
 6 *Dep't of Justice*, 78 F. Supp. 3d 332, 345 (D.D.C. 2015) (upholding privilege where declaration
 7 “makes clear” the confidential attorney-client communications involved a specific investigation
 8 and potential prosecution); *Judicial Watch, Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 20 F. Supp.
 9 3d 247, 258 (D.D.C. 2014) (upholding privilege involving, among other things, an e-mail chain
 10 with a lawyer weighing approaches to take in possible forthcoming litigation)). The Government
 11 argues the agency’s task should not be “herculean” in providing supporting evidence for its
 12 claimed Exemptions. Gov’t Reply at 5 (quotation marks omitted). But while the Government
 13 need not expose the very information contained in the withheld documents, here it does not
 14 provide the sufficient information for this Court to assess its assertion of privilege. The Court is
 15 not asking the Government to make a herculean effort, merely something beyond regurgitation of
 16 the elements. Without more, the Court cannot find Documents 1, 4, and 27 protected by the
 17 attorney-client privilege.

18 2. Attorney Work-Product

19 The parties also dispute whether Documents 1, 4, and 27 are protected as attorney work-
 20 product. EFF Mot. at 10; Gov’t Reply at 6-8. Under the attorney work-product doctrine,
 21 documents are protected from discovery if they are “prepared in anticipation of litigation or for
 22 trial” and prepared “by or for another party or its representative.” Fed. R. Civ. P. 26(b)(3)(A); *In*
 23 *re Grand Jury Subpoena Mark Torf/Torf Envtl. Mgmt.*, 357 F.3d 900, 907 (9th Cir. 2004).

24 EFF argues the Government needs to “identify the litigation for which the documents were
 25 created” while the Government argues the privilege includes documents prepared in anticipation
 26 of foreseeable litigation, even if no specific claim is contemplated. EFF Mot. at 10 (quoting
 27 *Church of Scientology Int'l v. U.S. Dep't of Justice*, 30 F.3d 224, 237 (1st Cir. 1994); Gov’t Reply
 28 at 6 (quoting *Am. Civil Liberties Union of N. Cal. v. Dep't of Justice*, 70 F. Supp. 3d 1018, 1030

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1 (N.D. Cal. 2014)); citing *Feshbach v. Sec. & Exch. Comm’n*, 5 F. Supp. 2d 774, 782 (N.D. Cal.
 2 1997)). As the Court has noted in prior orders, “the primary concern in determining whether a
 3 document is protected as work product . . . [is] whether it was created in anticipation of litigation
 4 in the way the work-product doctrine demands, i.e., by risking revealing mental impressions,
 5 conclusions, opinions, or legal theories of an agency attorney, relevant to any specific, ongoing, or
 6 prospective case or cases.” *Am. Civil Liberties Union of N. Cal.*, 2015 WL 4241005, at *2 (citing
 7 *Judicial Watch, Inc. v. U.S. Dep’t of Homeland Sec.*, 926 F. Supp. 2d 121, 143 (D.D.C. 2013)
 8 (“While the memorandum may be, in a literal sense, ‘in anticipation of litigation’—it simply does
 9 not anticipate litigation in the way the work-product doctrine demands, as there is no indication
 10 that the document includes the mental impressions, conclusions, opinions, or legal theories of ...
 11 any [] agency attorney, relevant to any specific, ongoing or prospective case or cases.”)). Here, it
 12 is not clear whether Documents 1, 4, and 27 were prepared in anticipation of *any* litigation—
 13 foreseeable or not.

14 Superficially, the Government appears to indicate these documents relate to anticipated
 15 litigation. For instance, it states Document 1 was “prepared by DOJ attorneys in anticipation of
 16 litigation relating to features of the Hemisphere program and the use of Hemisphere in law
 17 enforcement.” Myrick Decl. ¶ 37. Similarly, the Government states Documents 4 and 27 were
 18 “prepared by a DEA attorney in anticipation of litigation relating to the use of Hemisphere in law
 19 enforcement.” *Id.* ¶ 38. But the Government makes no further reference to any current or
 20 foreseeable litigation in either its supporting declarations or *Vaughn* Index or provide other
 21 context that would allow the Court make a de novo review of the Government’s work product
 22 assertions. Again, the Government cannot satisfy its burden of proof by relying on a mere
 23 recitation of the elements. *Cf. Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127
 24 (D.C. Cir. 1987) (upholding privilege where the withheld document “advise[d] the agency of the
 25 types of legal challenges likely to be mounted against a proposed program, potential defenses
 26 available to the agency, and the likely outcome”); *Church of Scientology Int’l v. IRS*, 845 F. Supp.
 27 714, 724 (C.D. Cal. 1993) (upholding privilege where the Government’s declaration and *Vaughn*
 28 Index specifically indicated the documents were “generated in preparation for litigation between

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1 Plaintiff and the IRS in four specified matters”). Nor does the Government meet its burden merely
 2 by referring to law enforcement efforts. *See Senate of Puerto Rico on Behalf of Judiciary Comm.*
 3 *v. U.S. Dep’t of Justice*, 823 F.2d 574, 586 (D.C. Cir. 1987) (“[I]nternal memoranda concerning
 4 the status of a criminal investigation, prepared by DOJ attorneys in the course of their law
 5 enforcement duties, are surely the kind of documents commonly sheltered by the work product
 6 doctrine” but calling the government’s affidavit a “bare” assertion where it merely stated that the
 7 documents “were prepared by Civil Rights Division attorneys in anticipation of litigation” and
 8 provided no other information). As such, the Court cannot find Documents 1, 4, and 27
 9 necessarily protected as work-product.

10 The Court acknowledges the *EPIC* court reached a different conclusion as to Document 1.
 11 It appears that the *EPIC* plaintiff essentially waived argument on this issue by failing to contest
 12 the application of the work-product doctrine to the email message in its first summary judgment
 13 brief. *EPIC*, 2016 WL 3557007, at *8. Although the *EPIC* court considered essentially the same
 14 supporting declarations as offered here, it found adequate grounds to find the document
 15 constituted work product. *Id.* at *9 (finding “no reason to doubt the veracity of Ms. Myrick’s
 16 declaration” and noting “the nature of the Hemisphere program, which clearly implicates
 17 controversial law-enforcement techniques and privacy rights as evidenced by this lawsuit, satisfies
 18 the Court that it is objectively reasonable for the government agencies involved to hold a
 19 subjective belief that litigation was and is a real possibility.”). Having carefully weighed the
 20 analysis in *EPIC* and the Government’s showing here, the Court ultimately cannot find the
 21 Government adequately supports the application of this privilege. The Government merely recites
 22 the elements necessary to establish the privilege, but it does not explain *why* they are met, such as
 23 explaining why these particular documents relate to some anticipated litigation. *See Senate of*
 24 *Puerto Rico*, 823 F.2d at 586-87 (“While it may be true that the prospect of future litigation
 25 touches virtually any object of a DOJ attorney’s attention, if the agency were allowed to withhold
 26 any document prepared by any person in the Government with a law degree simply because
 27 litigation might someday occur, the policies of the FOIA would be largely defeated.” (internal
 28 quotation marks omitted)). Accordingly, given the disparity between this Court’s and the *EPIC*

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1 court’s findings, the Court orders the Government to produce Document 1 for *in camera* review.

2 3. Deliberative Process Privilege

3 The Government also asserts Documents 1, 4, and 32 are protected by the deliberative
4 process privilege. *See* Gov’t Mot. at 9-11. The purpose of the privilege is “to allow agencies
5 freely to explore possibilities, engage in internal debates, or play devil’s advocate without fear of
6 public scrutiny.” *Assembly of State of Cal. v. U.S. Dep’t of Commerce*, 968 F.2d 916, 920 (9th
7 Cir. 1992), *as amended on denial of reh’g* (Sept. 17, 1992). Documents must be both
8 predecisional and deliberative to be protected under this privilege. *Id.* A document is
9 “predecisional” if it was “prepared in order to assist an agency decisionmaker in arriving at his
10 decision.” *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975).
11 Predecisional documents may include “recommendations, draft documents, proposals,
12 suggestions, and other subjective documents which reflect the personal opinions of the writer
13 rather than the policy of the agency.” *Assembly of State of Cal.*, 968 F.2d at 920 (quoting *Coastal*
14 *States*, 617 F.2d at 866). A predecisional document is deliberative if “the disclosure of the
15 materials would expose an agency’s decisionmaking process in such a way as to discourage candid
16 discussion within the agency and thereby undermine the agency’s ability to perform its functions.”
17 *Id.* (quoting *Dudman Commc’ns Corp. v. Dep’t of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir.
18 1987)). Although facts are not protected by the deliberative process privilege, factual material
19 may be “so interwoven with the deliberative material that it is not severable.” *United States v.*
20 *Fernandez*, 231 F.3d 1240, 1247 (9th Cir. 2000).

21 The Court ultimately finds the Government has not shown Documents 1, 4, and 32 are
22 protected under the deliberative process privilege. Assuming the documents are predecisional, the
23 Government has failed to show how the disclosure of these documents would discourage candid
24 discussion within the DEA and undermine its ability to function. *See Kowack v. U.S. Forest Serv.*,
25 766 F.3d 1130, 1135 (9th Cir. 2014) (rejecting assertion of deliberative process where the
26 Government did not “adequately show how the disclosure of any portion of the redacted
27 documents would expose the agency’s decision-making process itself to public scrutiny.” (quoting
28 *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1118 (9th Cir. 1988); edits and internal

1 quotation marks omitted)). For Documents 1 and 4, the Government offers no information other
2 than the general assertion the documents were “intended to facilitate or assist” development of the
3 DEA’s final policy decisions regarding Hemispheres’ “features” or “use” and its use in law
4 enforcement. Myrick Decl. ¶¶ 37-38. Document 32’s *Vaughn* Index description appears to
5 appreciate the “deliberative” element, describing the purpose for this exemption, but it ultimately
6 does not explain how the draft policy actually risks undermining that purpose. *See Vaughn* Index
7 at 100, No. 32. In other words, the Government does not explain how the disclosure of these
8 documents would affect its deliberative process by preventing or discouraging DEA employees or
9 affiliates from giving their honest opinions, recommendations, or suggestions on how to develop
10 policy decisions. *Cf. Maricopa*, 108 F.3d at 1094-95 (finding documents deliberative as they
11 consisted of “recommendations” and “suggestions” from an agency official to an independent
12 consultant regarding charges against him, and adding that the official sought the consultant
13 specifically for his “frankness” and “independence” in hopes of receiving an objective opinion).
14 Moreover, factual information that does not reveal the deliberative process is not subject to
15 protection. *See Kowack*, 766 F.3d at 1135. As such, the Government has not shown these
16 documents are covered by the deliberative process privilege.

17 Again, the Court has arrived at a different conclusion than the *EPIC* court as to Document
18 4. *See EPIC*, 2016 WL 3557007, at *7. As to this document, the *EPIC* court was seemingly
19 satisfied that because “the memorandum includes comments by the attorney who prepared the
20 document” it “reflect[s] the deliberative posture of the memorandum.” *Id.* But this analysis does
21 not assess whether the Government adequately supports that disclosure of this document could
22 discourage candid discussion within the DEA and undermine its ability to perform its functions.
23 This Court must do so under Ninth Circuit law as discussed above. The Court nonetheless will
24 review Document 4 *in camera* given the disparity between these holdings.

25 4. Summary of Exemption 5 Withholdings

26 The Government has not provided support for its decision to withhold Documents 1, 4, 6,
27 7, 25, 27, and 32 under Exemption 5. However, the Government also withheld these documents
28 under Exemption 7, which the Court discusses next.

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B. Exemption 7

Exemption 7 permits the Government to withhold “records or information compiled for law enforcement purposes” under certain enumerated requirements. 5 U.S.C. § 552(b)(7). “The term ‘law enforcement purpose’ has been construed to require an examination of the agency itself to determine whether the agency may exercise a law enforcement function.” *Church of Scientology I*, 611 F.2d at 748. If an agency has a clear law enforcement mandate, it “need only establish a ‘rational nexus’ between enforcement of a federal law and the document for which an exemption is claimed.” *Id.*

It is undisputed that the documents at issue in this case were “compiled for law enforcement purposes” (EFF Mot. at 14); the dispute is whether the documents withheld by the Government satisfy the requirements of Exemptions 7(A), 7(C), and 7(D). EFF’s chart summarizes the Exemptions asserted for each withheld document:

#	Page #	Document Description ⁷	A	D	E
1	1-12	Emails with attachments among federal staff including a Deputy Assistant Attorney General addressing Hemisphere legal issues	x	x	x
2	13-14	Emails within DEA from August 2008 through September 2012 about Hemisphere, subpoenas, and use of Hemisphere	x	x	x
4	16-27	Draft memorandum by the DEA’s Office of Chief Counsel about Hemisphere legal issues	x	x	x
5	28-30	Slides about Hemisphere users, providers, and subpoenas	x	x	x
6	31-34	Record about how to use Hemisphere capabilities	x	x	x
7	35-36	Record about how to use Hemisphere	x	x	x
8	37-39	Document used in connection with Hemisphere	x	x	x
9	40-41	Hemisphere request form	x		x
10	42-46	Emails with attachments within DEA in October 2008 about Hemisphere use and subpoena	x	x	x
11	47-48	Hemisphere request form	x		x

⁷ These descriptions correspond with the Government’s descriptions in its draft *Vaughn* Index. See generally *Vaughn* Index.

1	12	49-50	Slides about Hemisphere subpoenas	x	x	x
2	14	53-55	A form court order for California Superior Court	x	x	x
3	16	59-72	Emails with attached agenda and charts within DEA in May 2012		x	x
4			about a Hemisphere meeting in June 2012			
5	17	73-77	Emails of May 2012 with attachments about Hemisphere requests	x	x	x
6	18	78-79	Email in September 2013 about Hemisphere articles and scrutiny		x	x
7	19	80-95	Email of December 2013 from L.A. HIDTA with attached data slides	x	x	x
8	22	100-05	Emails and attachments in October 2010 and September 2012 titled			
9			“request form and contract”	x	x	x
10	23	106	DEA subpoena form	x	x	x
11	25	110	Email in May 2007 about legal issues about Hemisphere and subpoenas		x	x
12	26	111-252	Hemisphere tutorial	x	x	x
13	27	[2]53-	Emails within DEA including attorneys in November 2007 about			
14		54 ⁸	Hemisphere Subpoenas	x	x	x
15	28	255-59	Email with attachments within DEA in January 2008 about			
16			Hemisphere subpoena protocols	x	x	x
17	29	260-64	Unsolicited Hemisphere proposal in August 2007	x	x	x
18	30	265	Email within DEA in November 2007 about Hemisphere changes		x	x
19	31	266	Email within DEA in January 2008 about Hemisphere subpoenas		x	x
20	32	267-68	Emails in June 2008 about a draft Hemisphere		x	x
21	34	278-82	Hemisphere Summary	x	x	x

EFF Mot. at 12; *see also id.* at 5 (noting EFF “advised defendant it would no longer challenge defendant’s withholding of any parts of . . . [Documents] 3, 13, 15, 20, 21, 24, 33, and 35 in the final *Vaughn* Index”); Myrick Decl. ¶¶ 49, 59 (noting (1) “DEA applied FOIA Exemption 7(A) to

⁸ EFF’s chart referred to Document 27 as identifying page numbers “353-54” but this appears to be a typographical error as the *Vaughn* Index refers to Document 27 as identifying page numbers “253-254.” *Vaughn* Index at 83, No. 27.

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1 the following documents: 1-2, 4-14, 17, 19, 22-24, 26-29, and 33-35”; (2) “DEA applied FOIA
2 Exemption 7(D) to the following documents: 1-2, 4-8, 10, 12, 14, 16-19, and 21-25”; and (3)
3 “DEA applied FOIA Exemption 7(E) to the following documents: 1-14, 16-20, and 21-35.”). The
4 Government does not dispute the accuracy of this chart, though it notes that it did not withhold all
5 of these documents in full. Gov’t Reply at 11.

6 1. Exemption 7(A)

7 Exemption 7(A) protects records compiled for a law enforcement purpose to the extent that
8 disclosure “could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. §
9 552(b)(7)(A). The agency bears the burden establishing “that it is a law enforcement agency, that
10 the withheld documents were investigatory records compiled for law enforcement purposes, and
11 that disclosure of those documents would interfere with pending enforcement proceedings.”
12 *Lewis*, 823 F.2d at 379 (citations omitted).

13 At issue is whether the Government has established the disclosure of the documents above
14 would interfere with pending enforcement proceedings.⁹ EFF Mot. at 13-14; EFF Reply at 6-7;
15 Gov’t Reply at 11-12. EFF agrees Hemisphere is a law enforcement tool used by multiple law
16 enforcement agencies to support existing investigations, but it argues this fact “does not tend to
17 show, as required by Exemption 7(A), that disclosure ‘could reasonably be expected to interfere
18 with enforcement proceedings.’” EFF Mot. at 14 (quoting Gov’t Mot. at 13).

19 The Government asserts it withheld these documents based on the advice of DEA
20 personnel familiar with the use of Hemisphere in law enforcement, current enforcement efforts,
21 and existing law enforcement strategies. Myrick Decl. ¶ 48. Rather than providing specific detail
22 about any specific pending or prospective law enforcement proceedings, the Government
23 generally argues “[t]he release of information about the scope of Hemisphere could reasonably be
24 expected to assist targets who could then use this information to evade law enforcement.” Gov’t
25

26 ⁹ The *EPIC* court did not consider whether any of these documents were protected under
27 Exemption 7(A). In supplemental briefing, EFF argues that “the federal government’s decision
28 not to assert Exemption 7(A) over 107 pages in the *EPIC* case shows that Exemption 7(A) does
not apply to those same 107 pages in this case.” EFF Sixth Suppl. Resp., Dkt. No. 47 (citing EFF
Fifth Suppl. Resp.).

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1 Mot. at 14-15. In its Reply, it broadly asserts that “[r]evealing the particular scope, parameters,
2 uses, and functionality of a law enforcement technique would render that law enforcement
3 technique worthless which, in turn, could reasonably be expected to interfere with all of the
4 enforcement proceedings currently using Hemisphere.” Gov’t Reply at 12.

5 The Ninth Circuit has consistently held that the Government “need only explain, publicly
6 and in detail, how releasing each of the withheld documents would interfere with the
7 government’s ongoing criminal investigation.” *Lion Raisins*, 354 F.3d at 1084 (citing *Lewis*, 823
8 F.2d at 379). The Government’s “submission must provide as much factual support for [its]
9 position as possible without jeopardizing [its] legitimate law enforcement interest in withholding
10 the documents, and it must be ‘detailed enough for the district court to make a *de novo* assessment
11 of the government’s claim of exemption.’” *Id.* (quoting *Maricopa*, 108 F.3d at 1092).

12 But the *Vaughn* Index¹⁰ and the Government’s declarations fall short of providing
13 “detailed enough” information about these documents to show how their disclosure “could
14 reasonably be expected to interfere with law enforcement proceedings.” *Shannahan*, 672 F.3d at
15 1145 (quoting *Kamman*, 56 F.3d at 48). As EFF notes, the Government’s broad argument that
16 anytime a law enforcement technique is revealed risks interference with law enforcement
17 proceedings seems to implicate Exemption 7(E), concerning the disclosure of “techniques or
18 procedures for law enforcement investigations or prosecutions,” rather than Exemption 7(A)
19 concerning interference in law enforcement proceedings. EFF Reply at 7. While the Court
20 considers Exemption 7(E) below, the Government’s broad assertions about this generalized risk do
21 not indicate a more particularized risk of interference with pending or prospective law
22 enforcement proceedings. None of the Government’s evidence suggests that exposing these
23 documents would interfere with law enforcement proceedings. *Cf. Lewis*, 823 F.2d at 379 & n.5
24 (finding Exemption 7(A) properly applied where it was undisputed the release of the requested
25 documents would reveal, among other things, the limits and scope of the IRS’s case against the
26

27 _____
28 ¹⁰ The *Vaughn* Index repeatedly asserts the conclusory statement under Exemption 7(A) that each
withheld document contained “[m]aterial the disclosure of which could reasonably be expected to
interfere with enforcement proceedings”—without any further support as to *why*.

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1 requesting party, the names of third parties whom the IRS had contacted as well as the names of
2 actual and potential witnesses).

3 Furthermore, the Government acknowledges EFF no longer seeks information related to
4 the names, telephone numbers, and email addresses of individual core mission law enforcement,
5 law enforcement support, and individual personnel involved in the operation of Hemisphere. *See*
6 Scharf Decl. ¶ 4, Ex. B; *see also* EFF Mot. at 1 n.1. As EFF concedes the Government may
7 properly redact this information, the Government has no basis to allege that the exposure of these
8 documents would reveal information about law enforcement agents, etc., which would risk
9 interference with law enforcement proceedings. Without more, the Court cannot find these
10 documents are properly withheld under Exemption 7(A).

11 2. Exemption 7(D)

12 Exemption 7(D) provides that “records or information compiled for law enforcement
13 purposes” may be withheld if they “could reasonably be expected to disclose the identity of a
14 confidential source . . . [who] furnished information on a confidential basis, and, in the case of a
15 record or information compiled by a criminal law enforcement authority in the course of a
16 criminal investigation . . . , information furnished by a confidential source.” 5 U.S.C. §
17 552(b)(7)(D). “Under this exemption, a source is ‘confidential’ if it ‘provided information under
18 an express assurance of confidentiality or in circumstances from which such an assurance could be
19 reasonably inferred.’” *Rosenfeld v. U.S. Dep’t of Justice*, 57 F.3d 803, 814 (9th Cir. 1995)
20 (quoting *U.S. Dep’t of Justice v. Landano*, 508 U.S. 165, 172 (1993)). Indeed, the Ninth Circuit
21 has “observed that such an express promise of confidentiality is ‘virtually unassailable.’” *Id.*
22 (quoting *Wiener*, 943 F.2d at 986). It is also easy to prove: the Government “need only establish
23 the informant was told his name would be held in confidence.” *Id.* “The focus, therefore, is not
24 whether ‘the requested document is of the type that the agency usually treats as confidential, but
25 whether the particular source spoke with an understanding that the communication would remain
26 confidential.’” *Id.* (quoting *Landano*, 508 U.S. at 172) (emphasis in original). To meet its burden,
27 the Government must “make an individualized showing of confidentiality with respect to each
28 source”; confidentiality cannot be presumed. *Landano*, 508 U.S. at 174, 178.

1 The question is whether the sources are actually confidential. The Government argues “the
2 information Defendant withheld under Exemption 7(D) identifies private-sector companies that
3 are instrumental in the operation of Hemisphere and whose role in the operation of Hemisphere
4 entails providing information to the Government.” Gov’t Mot. at 16 (citing Myrick Decl. ¶ 54).
5 Further, “[t]he declaration explains, based on information from DEA personnel familiar with
6 Hemisphere, that the companies provide information to law enforcement with the express
7 *expectation* that both the source and the information will be afforded confidentiality and under
8 circumstances where confidentiality *can be inferred* because providing the information can lead to
9 retaliation against the companies.” *Id.* (citing Myrick Decl. ¶ 54) (emphasis added).

10 EFF argues the Government “has failed to show those companies shared information with
11 the agency under either an express or implied assurance of confidentiality[,]” noting that the
12 Government “only asserts the companies had ‘the express *expectation*’ of confidentiality” without
13 providing a support that the government’s declarant had any “personal knowledge or any other
14 factual basis for [the government’s] assertion about any company’s expectations.” EFF Mot. at 15
15 (emphasis in original). Finally, EFF challenges the implied assurance of confidentiality based on
16 the government’s argument that “providing information can lead to retaliation against the
17 companies.” *Id.* at 16. Specifically, it notes the Supreme Court has held that an “implied
18 understanding of confidentiality” cannot rest solely on the possibility that a private institution
19 “might be subject to possible legal action or loss of business if their cooperation with [law
20 enforcement] became publicly known.” *Id.* (citing *Landano*, 508 U.S. at 176).

21 Whatever “express expectation” of confidentiality these private companies may have, the
22 Government has provided no indication it ever told these companies their names would be held in
23 confidence. *Cf. Davin v. Dep’t of Justice*, 60 F.3d 1043, 1061 (3d Cir. 1995) (“[I]f an agency
24 attempts to withhold information under Exemption 7(D) by *express* assurances of confidentiality,
25 the agency is required to come forward with probative evidence that the source did in fact receive
26 an express grant of confidentiality.” (emphasis in original)).

27 Nor has the Government shown that such an assurance of confidentiality could be
28 reasonably inferred. “An implied assurance of confidentiality may be inferred from evidence

1 showing the circumstances surrounding the imparting of the information, including the nature of
2 the criminal investigation, the informant's relationship to it, whether the source received payment,
3 and whether the source has an 'ongoing relationship' with the law enforcement agency and
4 typically communicates with the agency 'only at locations and under conditions which assure the
5 contact will not be noticed.'" *EFF II*, 2013 WL 5443048, at *21 (quoting *Landano*, 508 U.S. at
6 179). Again, the Government makes no showing of reasonable inference of an assurance of
7 confidentiality. As EFF explains, *Landano* dealt with a similar situation where the government
8 "maintain[ed] that an assurance of confidentiality can be inferred whenever an individual source
9 communicates with the FBI because of the risk of reprisal or other negative attention inherent in
10 criminal investigations." 508 U.S. at 176. But the Supreme Court rejected that argument, noting
11 that it is not reasonable to infer that the information is given with an implied understanding of
12 confidentiality in all cases. *Id.* The Government provides no other basis for the Court can assess
13 regarding an implied assurance of confidentiality.

14 Without more, the Government fails to carry its burden under Exemption 7(D). *See also*
15 *EPIC*, 2016 WL 3557007, at *9-11 (finding same, but giving the Government the opportunity to
16 "either disclose the relevant information withheld under Exemption 7(D), supplement the record
17 with additional affidavits and authority justifying its withholding, or produce documents for the
18 Court's *in camera* review.").

19 3. Exemption 7(E)

20 Exemption 7(E) protects from disclosure law enforcement "records or information
21 compiled for law enforcement purposes, but only to the extent that the production of such law
22 enforcement records or information . . . would disclose techniques and procedures for law
23 enforcement investigations or prosecutions, or would disclose guidelines for law enforcement
24 investigations or prosecutions if such disclosure could reasonably be expected to risk
25 circumvention of the law." 5 U.S.C. § 552(b)(7)(E). To withhold information under this
26 exemption, an agency must demonstrate that the withheld information was "compiled for law
27 enforcement" purposes by establishing a "rational nexus" between "enforcement of a federal law
28 and the document for which" the exemption is claimed. *Rosenfeld*, 57 F.3d at 808.

1 The Ninth Circuit recently revisited Exemption 7(E) in *Hamdan v. United States*
2 *Department of Justice*, 797 F.3d 759 (9th Cir. 2015). In *Hamdan*, the Ninth Circuit adopted the
3 Second Circuit’s reasoning in *Allard K. Lowenstein International Human Rights Project v.*
4 *Department of Homeland Security*, 626 F.3d 678 (2d Cir. 2010). 797 F.3d at 777-78. In so doing,
5 the Ninth Circuit agreed that Exemption 7(E)’s sentence structure indicates that the qualifying
6 phrase in 5 U.S.C. § 552(b)(7)(E)—“if such disclosure could reasonably be expected to risk
7 circumvention of the law”—“modifies only ‘guidelines’ and not ‘techniques and procedures.’” *Id.*
8 at 778 (quoting *Allard*, 626 F.3d at 681). Consequently, an agency need not show that disclosure
9 of its techniques would risk circumvention of the law for Exemption 7(E) to apply; rather the risk
10 of circumvention of the law only applies to agency “guidelines.” *See Hamdan*, 797 F.3d at 777.

11 The *Hamdan* court also revisited its prior holding that “Exemption 7(E) only exempts
12 investigative techniques not generally known to the public[,]” *Rosenfeld*, 57 F.3d at 815, *Hamdan*
13 interpreted *Rosenfeld*’s statement as endorsing the withholding of the “specific means” of
14 conducting a technique, “rather than an application” of “a known technique.” *Hamdan*, 797 F.3d
15 at 777 (emphasis in original). *Hamdan* notes that “[i]n *Rosenfeld*, we decided that a pretext phone
16 call was a generally known law enforcement technique”; however “the government argued that the
17 technique at issue involved the specific *application* of a pretext phone call, because it used ‘the
18 identity of a particular individual . . . as the pretext.’” *Id.* (emphasis added) (quoting *Rosenfeld*, 57
19 F.3d at 815). The *Hamdan* court rejected the government’s argument: “accepting it would allow
20 anything to be withheld under Exemption 7(E) because any specific *application* of a known
21 technique would be covered.” *Id.* (citing *Rosenfeld*, 57 F.3d at 815). Consequently, the Ninth
22 Circuit agreed the FBI properly withheld records the FBI asserted would reveal “techniques and
23 procedures related to surveillance and credit searches,” because even though “credit searches and
24 surveillance are publicly known law enforcement techniques . . . the affidavits say that the
25 records reveal techniques that, if known, could enable criminals to educate themselves about law
26 enforcement methods used to locate and apprehend persons[, which] . . . implies a specific means
27 of conducting surveillance and credit searches rather than an application.” *Id.* at 777-78. The
28 Ninth Circuit pointed out that “[b]y contrast, withholding, for example, records under Exemption

1 7(E) by claiming that they reveal the satellite surveillance of a particular place would be an
2 application of a known technique under *Rosenfeld* [.]” *Id.* at 778.

3 Finally, *Hamdan* does not just interpret *Rosenfeld* but also indicates it is supported by
4 *Bowen v. United States Food and Drug Administration*, 925 F.2d 1225, 1229 (9th Cir. 1991). *See*
5 *Hamdan*, 797 F.3d at 778 (citing *Bowen* with the “*Cf.*” parenthetical indicating *Bowen* held “that
6 additional details of law enforcement techniques were exempt from disclosure under 7(E) even
7 where some information about those techniques had been previously disclosed”). In the past,
8 courts adopted *Bowen*’s finding that even if techniques were generally known to the public, if the
9 records withheld revealed “detailed, technical analysis” of the techniques and procedures used,
10 then that information may still be properly withheld under Exemption 7(E). *See, e.g., EFF II*,
11 2013 WL 5443048, at *22; *Am. Civil Liberties Union of N. Cal.*, 2015 WL 4241005, at *7; *Am.*
12 *Civil Liberties Union of N. Cal. v. Fed. Bureau of Investigation*, 2015 WL 678231, at *7 (N.D.
13 Cal. Feb. 17, 2015), *appeal dismissed* (Jan. 5, 2016); *Elec. Frontier Found. v. Dep’t of Homeland*
14 *Sec.* (“*EFF III*”), 2014 WL 1320234, at *5 (N.D. Cal. Mar. 31, 2014); *Am. Civil Liberties Union v.*
15 *Fed. Bureau of Investigation*, 2013 WL 3346845, at *9 (N.D. Cal. July 1, 2013); *Elec. Frontier*
16 *Found. v. Dep’t of Def.*, 2012 WL 4364532, at *4 (N.D. Cal. Sept. 24, 2012).

17 As neither party addressed *Hamdan* in their initial briefing, the Court ordered supplemental
18 briefing on *Hamdan*’s potential impact on Exemption 7(E) or segregability. Dkt. No. 38.
19 Unfortunately, rather than clarifying matters, *Hamdan* has left the parties and the Court in a
20 somewhat uncertain position. On one hand, *Hamdan* has adopted the Second Circuit’s *Allard*
21 analysis that the government must show risk of circumvention of the law only when it withholds
22 guidelines. But *Hamdan* does not clarify when a record should be considered a guideline or adopt
23 *Allard*’s assessment of what constitutes a guideline. On the other hand, *Hamdan* also purports to
24 clarify the issue of whether the government may only withhold information about “techniques not
25 generally known to the public” as stated in *Rosenfeld*. The parties’ briefing on this issue
26 demonstrates confusion over *Hamdan*’s “application” versus “specific means” test, which is also
27 reflected in recent case law. *See Raimondo v. FBI*, 2016 WL 2642038, at *10 (N.D. Cal. May 10,
28 2016). To further complicate matters, *EPIC* involves several of the same records in this action,

1 but the D.C. Circuit does not recognize the distinction between guidelines and techniques when it
2 comes to applying the “risk of circumvention of the law test.” *EPIC*, 2016 WL 3557007, at *11
3 (“[T]he government must ‘demonstrate logically how the release of the requested information
4 might create a risk of circumvention of the law.’” (quoting *Blackwell v. FBI*, 646 F.3d 37, 42
5 (D.C. Cir. 2011))).

6 The foregoing issues lead the Court to several conclusions. First, although it is unclear
7 what documents in this case qualify as guidelines versus techniques and procedures, as the *Vaughn*
8 Index indicates, a document may realistically contain both. In any event, as discussed below, the
9 distinction between these two types of documents does not appear to ultimately adjust the outcome
10 in this case due to the Government’s inadequate supporting evidence. *But see* EFF Third Suppl.
11 Resp. at 3, Dkt. No. 36; EFF Fourth Suppl. Resp. at 4-5, Dkt. No. 38 (persuasively arguing why
12 the Government’s descriptions of the disputed documents suggest they provide “an indication or
13 outline of policy” and therefore constitute “guidelines”). Second, the Court interprets *Hamdan* to
14 adopt a test similar to *Bowen* in the sense that the mere fact that the public might know about a
15 general technique or procedure does not mean that the specific means employed as part of that
16 technique or procedure must be disclosed. That said, the Government may not withhold a
17 document simply because the document describes a specific application of the generally known
18 technique or procedure—the document must reveal something more. *See Hamdan*, 797 F.3d at
19 777-78 (finding withheld records protected because disclosure would “reveal techniques that . . .
20 could enable criminals to educate themselves about law enforcement methods used to locate and
21 apprehend persons . . . impl[y]ing] a specific means of conducting surveillance and credit
22 searches”); *see, e.g., EFF III*, 2014 WL 1320234, at *8 (finding government meets its burden
23 where it shows the “operational information” is not generally known and noting that “while EFF
24 succeeds at showing that some aspects of drone operations are generally known, its piecemeal
25 evidence does not establish that further detailed information about drones is generally known.”).
26 Where there is no conflict of law or fact, the Court will follow the *EPIC* court’s analysis to ensure
27 uniformity where possible.

28 The Court now turns to the specific records withheld in this case. “For purposes of further

1 describing the information withheld,” the Government divides the information withheld under
2 Exemption 7(E) into categories. Gov’t Mot. at 18. The relevant categories at issue in this Order
3 are: (1) “Cities and States,” i.e., the information withheld from ten records regarding the cities and
4 states in which Hemisphere is located or in which agencies have had contact with the Hemisphere
5 program; (2) “Companies,” i.e., the information withheld from 22 records regarding the identity of
6 companies that the Government states are “instrumental” to Hemisphere; (3) “Agencies,” i.e., the
7 information withheld from 12 records contained the identity of law enforcement agencies that
8 “have access” to Hemisphere; and (4) “Requests, processing, responses, and capabilities,” i.e.,
9 details concerning (i) internal procedures and guidelines for making Hemisphere requests, (ii) how
10 Hemisphere requests are routed and processed and how resources are organized and deployed, (iii)
11 how Hemisphere results and output are delivered and presented to law enforcement, and (iv) how
12 Hemisphere technically works and its specific capabilities and limitations. Gov’t Mot. 17-21; EFF
13 Mot. 16-20. The Court addresses each of these categories below.

14 *a. Cities and States*

15 In the first category, the Government has withheld from ten records information regarding
16 the cities or states in which Hemisphere is located or in which agencies have had contact with the
17 Hemisphere program. *See Vaughn* Index at Nos. 4, 6, 9-11, 17-18, 23, 26, 28. This information
18 was not considered in *EPIC*. The DEA indicates it released many pages containing city and state
19 information, but it does not deny that it continues to withhold some of this information. The
20 Government asserts this information “could be used by criminals to disrupt law enforcement
21 operations or obtain unauthorized access to information about such operations.” Gov’t Mot. at 18;
22 Myrick Decl. at 16. But the Government does not explain how criminals could do this by using
23 information about the cities and states where Hemisphere. *See* EFF Reply at 17. EFF also notes
24 that the public already knows that Hemisphere has regional centers in Atlanta, Houston, and Los
25 Angeles, but the Government presents no evidence suggesting criminals have used this publicly
26 available information to disrupt law enforcement operations or obtain unauthorized access to
27 information. *Id.*

28 Without more, the Court has no basis to find that the release of documents containing

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1 information with the cities and states that use Hemisphere would “disclose techniques and
2 procedures for law enforcement investigations or prosecutions, or would disclose guidelines for
3 law enforcement investigations or prosecutions if such disclosure could reasonably be expected to
4 risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). The Government has not shown that
5 information regarding the cities and states where Hemisphere is located was properly withheld and
6 subject to protection under Exemption 7(E). *See EFF II*, 2013 WL 5443048, at *23 (rejecting
7 Exemption 7(E) applies to information identifying the “field office” conducting an investigation,
8 where there was no specific justification for withholding this information).

9 *b. Companies*

10 The Government has withheld from 22 records the identities of companies it contends are
11 “instrumental” to Hemisphere. *See Vaughn* Index at Nos. 1-2, 5-8, 10, 12, 16-18, 22-23, 25-32,
12 34. The *EPIC* court also considered this information. *See EPIC*, 2016 WL 3557007, at *12. As
13 in that case, the Government asserts criminals could use this information to “tailor or adapt their
14 activities to evade apprehension,” or “to attack facilities involved in the Hemisphere program.”
15 *See Myrick* Decl. ¶ 58(h); Gov’t Mot. at 19 (arguing “[c]riminals could use this information to
16 evade detection or disrupt Hemisphere’s operations (citing *Myrick* Decl. ¶ 58)); *EPIC*, 2016 WL
17 3557007, at *12. In response, EFF argues the public has known for two and a half years—that is,
18 since *The New York Times*’ 2013 article on it—that AT&T supports Hemisphere, and the
19 Government has not shown or even argued that criminals have ever attempted to use this
20 information to evade or disrupt Hemisphere. *EFF* Mot. at 17.

21 The Court agrees with EFF that the Government has not provided facts showing why it is
22 likely criminals would use the identities of the companies that are instrumental to Hemisphere to
23 evade or attack Hemisphere-related facilities. *See also EPIC*, 2016 WL 3557007, at *13
24 (discussing various public reports about Hemisphere identifying various companies, and
25 ultimately concluding that “[t]he DEA [] failed to logically demonstrate how release of the private
26 corporation’s names would assist drug traffickers seeking to evade law enforcement.”). The *EPIC*
27 court thoroughly analyzed the Government’s shortcomings in asserting Exemption 7(E) over the
28 same or similar records containing this information. *Id.* at *12-13. Although that court did not

1 acknowledge the distinction between guidelines and techniques and procedures, its analysis
2 nonetheless correctly indicates that, regardless of nature of the documents, the Government has
3 neither shown risk of circumvention of the law nor risk of exposure of a specific means of the
4 Government's use of Hemisphere by exposing the identities of the companies related to
5 Hemisphere. *See Hamdan*, 797 F.3d at 777-78; *see also EPIC*, 2016 WL 3557007, at *13
6 (“Publicly available information about such telecommunication companies’ facility locations is as
7 available now as it would be were the DEA to disclose the identities of the companies assisting
8 with Hemisphere.”). Without more, the Government has not demonstrated this information was
9 properly withheld.

10 c. *Agencies*

11 The Government has withheld from 12 records information about the identities of the law
12 enforcement agencies that use Hemisphere. *See Vaughn* Index at Nos. 1, 4, 6, 16, 18-19, 22-23,
13 26, 28, 31, 34. As the Government argued in *EPIC*, it believes that “[b]ecause every law
14 enforcement agency has its own respective focus and sphere of authority, knowing which
15 particular law enforcement agencies have access to Hemisphere would help criminals tailor their
16 activities to avoid apprehension” because “those criminals and criminal organizations would be
17 better informed about the capabilities of their pursuers.” *EPIC*, 2016 WL 3557007, at *14; *see*
18 *also* Gov’t Mot. at 21.

19 The *EPIC* court considered and ultimately rejected these same arguments. It found the
20 Government’s arguments “conclusory” and distinguished the cases the Government relies on for
21 the proposition that agency identities could be withheld under Exemption 7(E). *See EPIC*, 2016
22 WL 3557007, at *14-15 (citations omitted). The Government’s arguments and support in this
23 matter are no more extensive than the Government provides in *EPIC*, and this Court agrees with
24 the *EPIC* court’s conclusion. There is no indication that the release of the identities of the
25 agencies that use Hemisphere risks circumvention of the law or exposes techniques or procedures
26 not already known to the public. *See Hamdan*, 797 F.3d at 778 (“[W]ithholding, for example,
27 records under Exemption 7(E) by claiming that they reveal the satellite surveillance of a particular
28 place would be an *application* of a known technique under *Rosen[feld]*[.]” (emphasis in original)).

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1 In contrast to *Hamdan*, the Government does not provide support for the notion that further detail
2 about which agencies use Hemisphere “would compromise the very techniques the government is
3 trying to keep secret.” *Id.* Accordingly, as in *EPIC*, the Government has not demonstrated this
4 information was properly withheld.

5 d. “Requests, processing, responses, and capabilities”

6 The final category of information withheld pursuant to Exemption 7(E) relates to details
7 concerning (i) internal procedures and guidelines for making Hemisphere requests (*Vaughn* Index
8 at Nos. 1-2, 4-12, 14, 17, 19, 22-23, 25-32, 34), (ii) how Hemisphere requests are routed and
9 processed and how resources are organized and deployed (*id.* at Nos. 1-2, 4-7, 10, 16, 19, 22, 26,
10 28-29, 31-32), (iii) how Hemisphere results and output are delivered and presented to law
11 enforcement (*id.* at Nos. 4, 22, 26, 29, 34), and (iv) technical details about how Hemisphere works
12 and its specific capabilities and limitations (*id.* at Nos. 1, 4-8, 10, 16, 22, 26-29, 34). *See* EFF
13 Mot. at 19 (outlining same).

14 Regardless of whether the documents are guidelines or techniques and procedures, the
15 Court finds the Government has not demonstrated that it properly withheld these documents.
16 Specifically, the Government’s *Vaughn* Index and supporting declarations do not clearly elucidate
17 the nature of the withheld documents or show how they could reveal information that either risks
18 circumvention of the law or exposure to something more than a generally known technique or
19 procedure.

20 EFF persuasively cites numerous articles and other resources describing the publicly
21 known facts about Hemisphere, including Hemisphere’s “use[of a] complicated phone call pattern
22 analysis to map social networks, identify multiple phone numbers used by a single person, and
23 determine a caller’s location”; AT&T’s relationship with Hemisphere; the roles of various
24 government units including the DEA, the Office of National Drug Control Policy, and the High
25 Intensity Drug Trafficking Area program; the kinds of phone records logged into the Hemisphere
26 database; the use of administrative subpoenas to obtain Hemisphere information without a
27 warrant; and the use of this program to find criminals who discard cellphones frequently to thwart
28 government tracking. *See* EFF Mot. at 1-4 and related footnotes. As the *EPIC* court notes, “[t]he

1 cooperation of major telecommunication companies with Hemisphere has been widely reported by
2 various news outlets,” and “according to one of the media reports cited in EPIC’s Complaint, the
3 AT&T database ‘includes every phone call which passes through the carrier’s infrastructure, not
4 just those made by AT&T customers.’” *EPIC*, 2016 WL 3557007, at *12-13 (quoting *U.S. Drug*
5 *Agency Partners with AT&T for Access to ‘Vast Database’ of Call Records*, The Guardian, Sept.
6 2, 2013; also citing Shane & Moynihan, *supra* pp.1-2.). The New York Times article includes a
7 link to a slide show presentation about the Hemisphere project with specific descriptions of
8 instances where Hemisphere had identified specific individuals’ phone numbers and suspects’
9 location. *See Synopsis of the Hemisphere Project*, N.Y. Times (Sept. 1, 2013,
10 http://www.nytimes.com/interactive/2013/09/02/us/hemisphere-project.html?_r=0)).

11 While EFF demonstrates the public knows and has access to a significant body of
12 information about Hemisphere and how it works, that does not necessarily indicate that all of the
13 information the Government withheld is generally known or that the documents sought here could
14 not reveal more specific information beyond what is generally known. Unfortunately, the
15 Government provides little more than conclusory statements that the information contained in
16 these documents

17 would help criminals understand when and how law enforcement
18 authorities are able to use Hemisphere against them and thereby help
19 criminals tailor or adapt their activities to avoid apprehension.
20 Similarly, knowledge of internal guidelines and restrictions for the
use of Hemisphere would help criminals tailor or adapts their
activities to evade apprehension.

21 *See, e.g., Vaughn Index* at 27, No. 8. Several of the documents appear provide general
22 information about what Hemisphere is and how to use Hemisphere, including providing forms and
23 model language. *See, e.g., id.* at 54, No.19 (“including the specific terminology used to refer to
24 certain Hemisphere resources and personnel”); *id.* at 78, No. 26 (a Hemisphere introduction and
25 request tutorial). But the *Vaughn Index* is not clear about how revealing these documents risks
26 circumvention of the law or exposing something more than a generally known technique or
27 procedure. The Government’s supporting declaration is also of little assistance. It notes, for
28 instance, that some of the documents provide “[d]etails about how Hemisphere results and output

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1 are delivered to and presented to law enforcement, including sample results displays” (Myrick
2 Decl. ¶ 58(g)), but it does not explain how this risks circumvention of the law or provides
3 information about Hemisphere’s capabilities (i.e., a government technique or procedure) that is not
4 already generally known.

5 While it is tempting to make assumptions as to why the Government believes such
6 information is protected, the Government ultimately has not provided the Court with enough
7 support to be able to determine on a *de novo* basis whether the Government properly withheld
8 these documents. For the most part, the Government has not provided the sort of individualized,
9 tailored descriptions to allow the Court to find that some of these documents should or should not
10 be protected under Exemption 7(E). *See Wiener*, 943 F.2d at 978-79. Accordingly, the
11 Government has not provided evidence demonstrating this information was properly withheld.

12 **C. Next Steps**

13 EFF urges the Court to conduct an *in camera* review of the withheld materials if it has any
14 doubts about releasing the documents. The Court finds this request appropriate given the findings
15 above, as well as the Court’s concerns over the Government’s choices to withhold and segregate
16 certain information in this case. Among other things, EFF provides Exhibits 9 and 10 to the
17 Lynch Declaration. Both Exhibits contain the same slide show presentation by the Los Angeles
18 Hemisphere Regional Center. *See Lynch Decl.*, Exs. 9-10. But the Government provided Exhibit
19 9 with several redactions, whereas the Los Angeles Clearinghouse (which operates the Los
20 Angeles Hemisphere Regional Center) provided EFF with Exhibit 10, the same report with far
21 fewer redactions. For instance, in the first slide, the Government disclosed only the title
22 (“Hemisphere monthly requests”), while the Los Angeles Hemisphere Regional Center also
23 disclosed the number of requests. *Compare Lynch Decl.*, Ex. 9 *with id.*, Ex. 10; *see also* EFF
24 Mot. at 19-20 (discussing same). It is not clear under what Exemption the Government withheld
25 this information or why. While the Government asserts it used “surgical precision . . . in its word-
26 by-word review and analysis, release-redaction decisions, and segregability analysis” (Gov’t First
27 Suppl. Resp. at 5-6, Dkt. No. 34), ultimately the vagueness and conclusory nature of the
28 Government’s supporting evidence as well as the discrepancy between Exhibits 9 and 10

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undermines its assertion.

In *Hamdan*, the Ninth Circuit held that a “district court is not required to conduct an independent *in camera* review of each withholding unless an agency declaration lacks sufficient details or bears some indicia of bad faith by the agency.” 797 F.3d at 779. Under the circumstances present here, the Court finds it appropriate to review the documents the Government withheld under Exemption 7(E). See, e.g., *Andrus v. U.S. Dep’t of Energy*, 2016 WL 4186917, at *10 (D. Idaho Aug. 8, 2016) (as the government’s “*Vaughn* index and affidavits are conclusory and insufficiently detailed, the Court must conduct an *in camera* review of these documents in order to sufficiently determine whether the [Exemption] has been properly invoked, or whether further disclosure is ultimately appropriate.”). Additionally, as the Court has come to a different conclusion than the *EPIC* court on Documents 1 and 4 (withheld under Exemption 5), the Court will review these documents as for the Exemption 5 withholding in addition to their Exemption 7(E) withholding.

CONCLUSION

For the reasons stated above, the Court **DENIES IN PART** and **GRANTS IN PART** the Government’s Motion for Summary Judgment, and **GRANTS IN PART** and **DENIES IN PART** EFF’s Motion for Summary Judgment. The Government shall lodge copies of the documents withheld under Exemption 7(E) for *in camera* review by **January 23, 2017**. No electronic copy should be filed on the public docket; rather, the Government shall file a notice of lodging of these materials.

IT IS SO ORDERED.

Dated: December 22, 2016

MARIA-ELENA JAMES
United States Magistrate Judge