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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

**ISLAMIC SHURA COUNCIL OF
SOUTHERN CALIFORNIA ET AL.**

Plaintiffs,

vs.

**FEDERAL BUREAU OF
INVESTIGATION ET AL.**

Defendants.

Case No.: SACV 07-1088-CJC(ANx)

**ORDER GRANTING PLAINTIFFS'
MOTION FOR SANCTIONS**

I. INTRODUCTION AND BACKGROUND

Currently before the Court is Plaintiffs’ motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure against Defendants the Federal Bureau of Investigation (the “FBI”) and the United States Department of Justice (“DOJ”) (collectively, the “Government”), arising out of the Government’s May 2009 *in camera* submissions revealing that it provided false and misleading information to the Court in pleadings,

1 declarations, and briefs regarding the documents responsive to Plaintiffs' request for
2 information under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The
3 Government represented to the Court that only a limited number of documents responsive
4 to Plaintiffs' FOIA request existed when, in reality, a significant number of responsive
5 documents existed. The Government claims that its intention was not to mislead the
6 Court but that it was following a well-established policy of the Attorney General to deny
7 the existence of responsive documents if, in the sole opinion of the Government, the
8 disclosure of the information in the responsive documents would compromise national
9 security. The Government's deception of the Court was inexcusable. The Court cannot
10 perform its important oversight role mandated by FOIA unless the Government provides
11 it with complete and accurate information. It is the Court, not the Government, who
12 determines what the law requires. The Court must impose monetary sanctions to deter
13 the Government from deceiving the Court again.

14
15 **A. Procedural Background**

16
17 Plaintiffs consist of six Muslim American community organizations and five
18 community leaders — Islamic Shura Council of Southern California, Council on
19 American Islamic Relations of Southern California ("CAIR"), Islamic Center of San
20 Gabriel Valley, Islamic Center of Hawthorne, West Coast Islamic Center, Human
21 Assistance and Development International, Inc., Dr. Muzammil Siddiqi, Shakeel Syed,
22 Hussam Ayloush, Mohammed Abdul Aleem, and Rafe Husain (collectively, "Plaintiffs").
23 On May 15, 2006, Plaintiffs jointly submitted a request under FOIA and the Privacy Act,
24 5 U.S.C. § 552a, to the FBI's headquarters and its Los Angeles Field Office for
25 information that included all records created since January 2001 concerning the agency's
26 surveillance, monitoring, and other investigations of Plaintiffs. On April 27, 2007, the
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28

1 FBI notified nine of the Plaintiffs (collectively, “Nine Plaintiffs”)¹ that no responsive
2 documents were found. On June 7, 2007, Plaintiffs filed a joint administrative appeal to
3 the Department of Justice, Office of Information and Privacy (“OIP”), questioning the
4 Government’s “no records” response. That same month, the FBI released three pages of
5 documents to Mr. Ayloush and a one-page document to CAIR. These four pages of
6 documents were redacted pursuant to the FOIA exemptions under Subsections (b)(2),
7 (b)(6), and (b)(7)(C).

8
9 On September 18, 2007, Plaintiffs initiated the present action against the
10 Government for declaratory and injunctive relief, asserting that the FBI’s search of
11 responsive records to their FOIA request was inadequate and untimely, in violation of
12 FOIA. (Dkt. No. 1.) After Plaintiffs filed suit, the FBI conducted additional searches for
13 the Nine Plaintiffs, but not for Mr. Ayloush or CAIR. From September 5 to September
14 27, 2007, OIP affirmed the FBI’s “no records” response to the Nine Plaintiffs. (Decl. of
15 David M. Hardy, Mar. 21, 2008 (“First Hardy Decl.”) ¶ 16.) Nevertheless, on March 14,
16 2008, the FBI released an additional 120 pages of responsive documents to seven of the
17 Nine Plaintiffs — a large amount of which was either redacted or withheld as “outside
18 the scope” of Plaintiffs’ FOIA request while some of the information was redacted
19 pursuant to specific exemptions under FOIA. (*Id.* ¶ 19 & Exh. N; Pls.’ Mem. in Supp.
20 Sum. J., at 5 & Exh. C-1.)

21
22 On March 21, 2008, the Government moved for summary judgment against
23 Plaintiffs, asserting that its search for documents in response to Plaintiffs’ FOIA request
24 was adequate and that it properly withheld documents under the FOIA exemptions.
25 (Dkt. No. 13.) On November 26, 2008, Plaintiffs filed a cross motion for summary
26 judgment and opposition to the Government’s motion for summary judgment,

27
28 ¹ These nine Plaintiffs included Islamic Shura Council of Southern California, Islamic Center of San Gabriel Valley, Islamic Center of Hawthorne, West Coast Islamic Center, Human Assistance and Development International, Inc., Dr. Siddiqi, Mr. Syed, Mr. Aleem, and Mr. Husain.

1 challenging the propriety of the FBI’s “outside of scope” redactions to the documents
2 produced in response to their FOIA request. (Dkt. No. 38.) Plaintiffs did not challenge
3 the propriety of the redactions under the FOIA exemptions, but requested disclosure of
4 the information withheld as “outside the scope” or, alternatively, an *in camera* review by
5 the Court of the unredacted documents. Plaintiffs also requested that the Court order
6 further searches for responsive documents on behalf of Mr. Ayloush and CAIR. The
7 Government filed its opposition and reply papers on January 23, 2009. (Dkt. No. 41.)
8

9 In its opposition, the Government represented to the Court that it “provided
10 plaintiffs with all responsive portions [of documents] containing references to any of the
11 plaintiffs,” and that the redacted portions of the documents did not “relate or refer to any
12 of the plaintiffs.” (Defs.’ Opp. to Sum. J., at 3, 7.) The Government maintained that
13 because the documents “relate to investigations of others,” the material redacted as
14 “outside the scope” was “not responsive” to Plaintiffs’ FOIA request. (*Id.* at 3.) With
15 respect to Mr. Ayloush and CAIR, the Government represented to the Court that it had
16 performed adequate searches on their behalf. The Government submitted a declaration
17 from David M. Hardy, Section Chief of the Record/Information Dissemination Section,
18 Records Management Division at the FBI, stating under oath that the Government had
19 identified one document for both Mr. Ayloush and CAIR in its search of the Central
20 Records System, four pages of which were released. (First Hardy Decl. ¶¶ 40–41, 44.)
21 The Government further argued that Mr. Ayloush and CAIR could not challenge the
22 adequacy of the Government’s search because they failed to exhaust their administrative
23 remedies. (Defs.’ Opp. to Mot. Sum. J., at 13; *see also* Amended Order, at 6.)
24

25 The Court heard oral arguments on the parties’ summary judgment motions on
26 April 20, 2009. In light of the FBI’s lack of evidence to support its redactions, the Court
27 ordered an *in camera* review of the documents produced to determine the propriety of the
28 FBI’s “outside the scope” redactions. (Ct. Order, Dkt. No. 49, Apr. 20, 2009.) The Court

1 further concluded that the searches for responsive documents on behalf of Mr. Ayloush
2 and CAIR were insufficient and ordered the FBI to conduct additional searches on their
3 behalf. (*Id.*)

4 5 **B. The Government’s Misrepresentations to the Court**

6
7 Pursuant to the Court’s Order, on May 4, 2009, the Government filed an *ex parte*
8 submission, consisting of a second declaration by David M. Hardy and copies of the
9 pages the FBI redacted or withheld as “outside of the scope” of Plaintiffs’ FOIA request.
10 (Dkt. No. 50.) The Government’s *in camera* submission revealed a very disturbing issue:
11 the Government had provided blatantly false and misleading information to the Court.
12 The Government represented in pleadings, declarations, and briefs — most notably, in its
13 summary judgment papers — that it found only a limited number of responsive
14 documents to Plaintiffs’ FOIA request. However, Mr. Hardy’s second declaration stated,
15 for the first time, that the Government withheld “responsive information” from the
16 Plaintiffs. (Decl. of David M. Hardy, May 1, 2009 (“Second Hardy Decl.”) ¶¶ 1, 15.)
17 Contrary to its previous representations, the Government revealed that it located a
18 significant number of responsive documents, which the Government asserted it withheld
19 to avoid compromising national security.

20
21 In light of this revelation, the Court held two *in camera* hearings on May 14, 2009
22 and June 23, 2009, and the Government submitted supplemental briefing. (Dkt. Nos. 53,
23 55, 56, 60.) The Court subsequently issued a sealed order regarding Plaintiffs’ request
24 under FOIA and the Government’s misinformation to the Court. (Ct. Order, Dkt. No. 58,
25 June 23, 2009 [“Sealed Order”].) The Court stated that the Government cannot, under
26 any circumstances, affirmatively mislead the Court, as doing so contradicts bedrock
27 principles of the separation of powers as well as numerous statutes, rules, and cases
28 reflecting the understanding that the judiciary cannot carry out its essential function if

1 lawyers, parties, or witnesses obscure the facts. (*Id.*) The Court also pointed out that
2 federal courts are well-equipped to handle sensitive and classified information, and that
3 filing an *in camera* declaration, along with its public filings, would have rendered the
4 Government's misrepresentation to the Court wholly unnecessary without endangering
5 disclosure of security-sensitive information. (*Id.*) Although the Court did not condone
6 the Government's misinformation to the Court, the Court nevertheless determined that
7 the additional responsive documents that the Government professed to have located were
8 properly withheld from Plaintiffs. (*Id.*) The Court stated that the Sealed Order would be
9 unsealed and made public on July 7, 2009, unless the Court of Appeals for the Ninth
10 Circuit directed otherwise. (*Id.*)

11 12 **C. Appeal and the Court's Amended Order**

13
14 The Government subsequently filed a notice of appeal and moved for an
15 emergency stay of the Sealed Order pending appeal, which the Ninth Circuit granted on
16 July 6, 2009. (Dkt. Nos. 63, 65.) On March 30, 2011, the Ninth Circuit issued its
17 decision. *See Islamic Shura Council of S. Cal. v. FBI*, 635 F.3d 1160 (9th Cir. 2011).
18 The Ninth Circuit emphatically stated that "FOIA does not permit the government to
19 withhold responsive information from the court." *Id.* at 1165. The Ninth Circuit
20 acknowledged that, as certain categories of documents are exempted and excluded from
21 disclosure under FOIA and there is an imbalance of knowledge between the plaintiffs and
22 the government, FOIA expressly authorizes district courts to examine the documents *in*
23 *camera* to review the propriety of the government's withholdings. *Id.* (citing *Vaughn v.*
24 *Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973)). "When the government does not provide the
25 court with accurate or complete information, the court's function in overseeing FOIA
26 actions and monitoring litigation is compromised. The government may withhold
27 relevant information from plaintiffs 'to protect the secret nature of the information,' *but it*
28 *must disclose to the court all relevant and responsive information* in order for the court to

1 evaluate whether the withholding was appropriate.” *Id.* at 1165–66 (citing *Vaughn*, 484
2 F.2d at 826) (emphasis added). The agency must submit to the district court a detailed
3 affidavit or oral testimony to establish that the documents requested by the plaintiffs
4 clearly fall outside the bounds of materials that may be disclosed under FOIA. *Id.* at
5 1116. “[I]f the government believes that submitting a detailed affidavit would
6 compromise the information it is seeking to protect, then it must seek an *in camera*
7 review. *It cannot, however, represent to the district court that it has produced all*
8 *responsive documents when in fact it has not.*” *Id.* (emphasis added). The Ninth Circuit
9 concluded: “We thus agree with the district court that the FOIA does not permit the
10 government to withhold information from the court. Indeed, engaging in such omissions
11 is antithetical to FOIA’s structure which presumes district court oversight.” *Id.* (citing 5
12 U.S.C. § 552(a)(4)(B)).

13
14 Nevertheless, as this Court concluded that the Government properly withheld
15 documents from *Plaintiffs* under FOIA, the Ninth Circuit held that Plaintiffs and their
16 counsel were not permitted to see the Sealed Order in full, as it contained information
17 that FOIA authorizes to withhold from Plaintiffs and that the Government only revealed
18 *in camera*. *Id.* at 1169. The Ninth Circuit therefore vacated the Sealed Order and
19 remanded to this Court to revise the Sealed Order to eliminate the statements the
20 Government designated as national security and sensitive law enforcement information.
21 *Id.*

22
23 Pursuant to the Ninth Circuit’s decision, on April 27, 2011, this Court issued an
24 amended order largely consistent with the Sealed Order but without references to
25 statements implicating security-sensitive information. (Ct. Order, Dkt. No. 98, Apr. 27,
26 2011, published in *Islamic Shura Council of S. Cal. v. FBI*, 779 F. Supp. 2d 1114 (C.D.
27 Cal. 2011) [“Amended Order”].) The Court emphasized that the Government has no
28 legitimate basis—including the interests of national security—for deceiving the Court,

1 as providing a court with misinformation is inconsonant with the axiomatic principle that
2 “[i]t is emphatically the province and the duty of the judiciary department to say what the
3 law is,” *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803), and in light of the fact
4 that the Government may avail itself of *in camera* review to comport with its duty of
5 honesty to the Court without compromising national security concerns. (*Id.*) Because the
6 Court previously relied on misinformation in issuing its April 20, 2009 Order, the Court
7 vacated the Order in its entirety. (*Id.*) With respect to the parties’ summary judgment
8 motions, the Court advised Plaintiffs that the Government located more documents
9 responsive to their FOIA request, but concluded that they were not entitled to any further
10 information regarding the Government’s previous searches for documents, and that the
11 Government need not conduct any additional searches for responsive documents. (*Id.*)
12

13 **D. Plaintiffs’ Motion for Sanctions**

14

15 Following the Court’s Amended Order, on September 26, 2011, Plaintiffs moved
16 for sanctions against the Government under Rule 11 of the Federal Rules of Civil
17 Procedure for having submitted false information to the Court. (Dkt. No. 123.) Pursuant
18 to the parties’ stipulated briefing scheduling and Court Orders, the Government filed a
19 public redacted opposition on October 24, 2011 and a sealed unredacted version on
20 October 25, 2011. (Dkt. Nos. 126, 130.) Plaintiffs filed their reply on November 4,
21 2011. (Dkt. No. 131.) The Court heard oral arguments from the parties’ counsel on
22 November 14, 2011.
23

24 Plaintiffs contend that the Government’s initial disclosure to the Court regarding
25 the documents responsive to Plaintiffs’ FOIA request lacks factual support, in violation
26 of Subsections (b)(3) and (b)(4) of Rule 11 of the Federal Rules of Civil Procedure.
27 (Pls.’ Mem. in Supp. of Sanct., at 3.) Plaintiffs further contend that the Court should
28 impose sanctions to deter future submission of misinformation to the judiciary by the

1 Government. (*Id.* at 7.) Plaintiffs finally argue that the Court should impose sanctions
2 pursuant to the Court’s inherent powers to sanction litigants. (*Id.* at 8 n.3.) The
3 Government opposes Plaintiffs’ motion for sanctions largely on the grounds that it did
4 not intentionally mislead the Court, but that its misinformation to the Court arose from a
5 “misunderstanding” between the Court and the Government, premised on a “legal
6 disagreement” regarding the term “responsive” under the FOIA, and that the
7 Government’s legal position was neither frivolous nor contrary to legal precedent.
8 (Defs.’ Opp. to Mot. for Sanct., at 2–3, 4.) The Government therefore argues that the
9 proper standard for evaluating Plaintiffs’ motion for sanctions is whether the
10 Government’s representations to the Court lacked any legal basis under Subsections
11 11(b)(2) under Rule 11, not whether it lacked factual support under Subsections (b)(3)
12 and (b)(4). (*Id.* at 4–5.) The Government further argues that it did not seek to hide facts
13 from the Court, but that the disclosure of facts was one of timing, as it disclosed the
14 correct information to the Court in its *in camera* submission. (*Id.* at 3, 7.) Finally, the
15 Government argues that sanctions are inappropriate here, given the Government’s current
16 review of its regulations and consideration of steps to minimize future
17 “misunderstandings” with the judiciary. (*Id.* at 3.)²

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20 ² Additionally, the Government claims that it already corrected the record through its 2009 *in camera*
21 submissions to the Court, after which the Court issued its Amended Order. (*Id.* at 10.) The Government
22 therefore contends that sanctions are inapplicable under the safe harbor provision of Rule 11(c)(2),
23 which states that a motion for sanctions must “not be filed or be presented to the court if the challenged
24 paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after
25 service or within another time the court sets.” FED. R. CIV. P. 11(c)(2). The Court disagrees. The safe
26 harbor provision does not apply here because the Government did not withdraw or amend its erroneous
27 filings within twenty-one days after Plaintiffs served their motion for sanctions. Furthermore, the
28 Government did not correct the record on its own initiative, but filed *in camera* submissions disclosing
the falsity of its previous pleadings with the Court only after and pursuant to the Court’s April 2009
Order. (*See* Ct. Order, Dkt. No. 49, Apr. 20, 2009.) Plaintiffs could not determine the veracity of the
Government’s “out of scope” response to their FOIA request given the fact that they were not privy to
the reason behind the withholding of documents and did not have access to the Government’s *in camera*
submissions or to the Court’s Sealed Order. It was only after the Ninth Circuit issued its decision in
March 2011, and after the Court issued its subsequent Amended Order — four years after Plaintiffs filed
this instant FOIA action — that Plaintiffs had any information for filing the instant motion for sanctions.

1 **II. LEGAL STANDARD**

2
3 **A. Rule 11 Sanctions**

4
5 Rule 11 of the Federal Rules of Civil Procedure permits the Court to impose
6 sanctions on the parties or their attorneys who violate its directive that all papers
7 presented to the court are (1) factually and legally tenable from an objective perspective,
8 (2) not submitted for “any improper purpose,” and (3) presented after “an inquiry
9 reasonable under the circumstances.” FED. R. CIV. P. 11(b); *see also Christian v. Mattel,*
10 *Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002); *Simpson v. Lear Astronics Corp.*, 77 F.3d
11 1170, 1177 (9th Cir. 1996). First, sanctions are proper if “a pleading, written motion, or
12 other paper” presented and certified to the Court — “whether by signing, filing,
13 submitting, or later advocating it” — contains one of the following: (i) factual
14 contentions or denials of factual contentions lacking evidentiary support or (ii) claims,
15 defenses, and other legal contentions unwarranted by “existing law or by a nonfrivolous
16 argument for extending, modifying, or reversing existing law or for establishing new
17 law.” FED. R. CIV. P. 11(b)(2)–(4); *Greenberg v. Sala*, 822 F.2d 882, 885 (9th Cir. 1987)
18 (stating sanctions are proper under Rule 11 “where a litigant makes a ‘frivolous filing,’
19 that is, where he files a pleading or other paper which no competent attorney would
20 believe was well grounded in fact and warranted by law” (internal citation omitted)). A
21 pleader’s lack of candor by submitting misstatements or nondisclosure of material facts to
22 the court is sanctionable under Rule 11. *Pipe Trades Council of N. Cal., U.A. Local 159*
23 *v. Underground Contractors Ass’n of N. Cal.*, 835 F.2d 1275, 1280–81 (9th Cir. 1987);
24 *Mercury Serv. v. Allied Bank*, 117 F.R.D. 147, 159 (C.D. Cal. 1987), *aff’d* 907 F.2d 154
25 (9th Cir. 1990) (imposing Rule 11 sanctions on a party for submitting a declaration with
26 false and misleading information that lacked factual foundation, leading to unnecessary
27 inquiries by plaintiffs and “that demonstrate[d] disrespect for the dignity and authority of
28 the courts”). Second, the court may also award sanctions if a paper is presented for “any

1 improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the
2 cost of litigation.” FED. R. CIV. P. 11(b)(1). Third, sanctions may be imposed under
3 Rule 11 if the pleader fails to make “an inquiry reasonable under the circumstances”
4 before submitting the paper, and such failure results in the filing of a frivolous motion.
5 FED. R. CIV. P. 11(b). Reasonable inquiry means that the pleader must seek “sufficient
6 credible information,” rather than proceeding on mere suspicions, opinions, or
7 conclusions. *Kendrick v. Zanides*, 609 F. Supp. 1162, 1172 (N.D. Cal. 1985).

8
9 Whether a pleading is frivolous or improper is determined using an objective
10 “reasonableness” standard, rather than from the perspective of the pleader’s subjective
11 intent. *G.C. & K.B. Investments, Inc. v. Wilson*, 326 F.3d 1096, 1109 (9th Cir. 2003);
12 *Zalidivar v. City of Los Angeles*, 780 F.2d 823, 830 (9th Cir. 1986), *abrogated on other*
13 *grounds by Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 399 (1990). The
14 reasonableness standard is viewed from the perspective of a competent attorney admitted
15 to practice before the district court. *Wilson*, 326 F.3d at 1109. Sanctions are proper “if
16 the paper filed in district court and signed by an attorney or an unrepresented party is
17 frivolous, legally unreasonable, or without factual foundation, even though the paper was
18 not filed in subjective bad faith.” *Zalidivar*, 780 F.2d at 831. The legal basis of a
19 pleader’s contentions must be based on a “good faith argument for his or her view of
20 what the law is, or should be,” and “[a] good faith belief in the merit of a legal argument
21 is an objective condition which a competent attorney attains only after reasonable
22 inquiry.” *Id.* at 831 (internal quotes omitted). The district court determines whether
23 sanctions are warranted by evaluating the reasonableness of the attorney’s belief at the
24 time the paper is filed, presented to the court, or later advocated. *See Operating*
25 *Engineers Pension Trust v. A-C Co.*, 859 F.2d 1336, 1344 (9th Cir. 1988) (“Courts must
26 . . . avoid using the wisdom of hindsight and should test the signer’s conduct by inquiring
27 what was reasonable to believe at the time the pleading . . . was submitted.” (internal
28

1 citation and quotes omitted)); Committee Notes on Amendments to Federal Rules of
2 Civil Procedure, 146 F.R.D. 401, 585 (1993).

3
4 The imposition of sanctions is a matter within the court's discretion. FED. R. CIV.
5 P. 11(c) (providing that if an attorney or party violates Rule 11(b), the court "may"
6 impose appropriate sanctions). "If warranted, the court may award to the prevailing party
7 the reasonable expenses, including attorney's fees, incurred for the motion." FED. R.
8 CIV. P. 11(c)(2). But the sanction imposed under Rule 11 "must be limited to what
9 suffices to deter repetition of the conduct or comparable conduct by others similarly
10 situated." FED. R. CIV. P. 11(c)(4); *see also* Committee Notes on Amendments to
11 Federal Rules of Civil Procedure, 146 F.R.D. at 587 ("The court has significant discretion
12 in determining what sanctions, if any, should be imposed for a violation, subject to the
13 principle that the sanctions should not be more severe than reasonably necessary to deter
14 repetition of the conduct by the offending person or comparable conduct by similarly
15 situated persons.") The Ninth Circuit, however, has recognized that "Rule 11 is an
16 extraordinary remedy, one to be exercised with extreme caution." *Operating Engineers*
17 *Pension Trust*, 859 F.2d at 1345. Nevertheless, attorneys and parties cannot "avoid the
18 sting of Rule 11 sanctions by operating under the guise of a pure heart and empty head."
19 *Zuniga v. United Can Co.*, 812 F.2d 443, 452 (9th Cir. 1987).

20 21 **B. The Court's Inherent Power**

22
23 Pursuant to its inherent powers, the court may further impose sanctions on counsel
24 or parties for conduct that willfully abuses the judicial process. *Chambers v. NASCO,*
25 *Inc.*, 501 U.S. 32, 44–45 (1991); *Fink v. Gomez*, 239 F.3d 989, 991 (9th Cir. 2001). The
26 court's inherent powers "are governed not by rule or statute but by the control necessarily
27 vested in courts to manage their own affairs so as to achieve the orderly and expeditious
28 disposition of cases." *Chambers*, 501 U.S. at 43 (internal citation and quotes omitted).

1 The imposition of sanctions under the court’s inherent power is warranted where a party
2 has “acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” *Id.* at 45–46.
3 (internal citations and quotes omitted).

4 5 **III. DISCUSSION**

6
7 The parties do not dispute that the Government did not act out of some improper
8 purpose or in bad faith when submitting misinformation to the Court. Thus, sanctions
9 under Rule 11(b)(1) and the Court’s inherent powers to impose sanctions do not apply.
10 The parties, however, disagree as to (i) whether the Government’s misinformation should
11 be evaluated for lack of evidentiary support under Rule 11(b)(3) and (4) or for lack of
12 legal support under Rule (b)(2) and (ii) whether sanctions are warranted under the
13 applicable subsection of Rule 11. The Court finds that determining whether the
14 Government’s misinformation to the Court is sanctionable is a mixed question of fact and
15 law. The Government’s submission of information to the Court contradicted the fact that
16 it located more responsive documents to Plaintiffs’ FOIA request than it originally
17 represented to the Court prior to its *in camera* submission, but was also premised on its
18 legal interpretation of the exclusion provisions under FOIA. However, under either a
19 factual or legal analysis, the Court finds that the Government’s presentation of false
20 information to the Court is untenable.

21 22 **A. The Government’s Misrepresentations Were Factually Untenable**

23
24 The Government argues that it was never its intention to mislead the Court
25 regarding what documents were being withheld in response to Plaintiffs’ FOIA request.
26 (Defs.’ Opp. to Mot. Sanct., at 4.) Instead, the Government maintains that the
27 “misunderstanding stems from a disagreement between the Court and the Government
28

1 regarding the interpretation of the term ‘responsive’ under the FOIA.” (*Id.* (citing
2 Amended Order, at 9–10 n.4).) The Government’s argument is not credible.

3
4 As explained in the Amended Order, the Government’s May 2009 *in camera*
5 submission revealed that the Government misled the Court in two material respects.
6 First, the Government’s representations regarding its use of “outside the scope” were
7 inaccurate. The Government initially represented to the Court that the Government
8 provided all information that “include[d] any reference to plaintiffs in any document in
9 any file,” and any information withheld as “outside the scope” of Plaintiffs’ request was
10 “non-responsive.” (Defs.’ Opp. to Mot. Sum. J., at 3, 11.) Mr. Hardy’s second
11 declaration stated that, in truth, documents “that would otherwise be considered to be
12 responsive to plaintiffs’ request” were excluded from production or redacted as “outside
13 the scope.” (Second Hardy Decl. ¶ 5.) Second, the Government’s representations
14 regarding the number of responsive documents were false. The Government previously
15 represented that it had identified only a limited number of documents responsive to
16 Plaintiffs’ FOIA request. (First Hardy Decl. ¶¶ 19, 31–43, 45–46.) Mr. Hardy’s second
17 declaration acknowledged that the Government had identified a large number of
18 additional responsive documents, but that the Government did not disclose the existence
19 of these other documents. (Second Hardy Decl. ¶ 13.)

20
21 The Court does recognize that the Government did not act in bad faith — that is, to
22 harass or oppress the Court. Nor did the Government act out of some venal or misguided
23 purpose. Nevertheless, irrespective of the Government’s motivation, the objective facts
24 cannot be obscured. The Government presented false information to the Court — not
25 negligently or without reasonable inquiry — but with the Government’s full knowledge,
26 over the course of two years in litigating this action, and after diligent factual inquiry.
27 The fact that the Government knowingly and deliberately provided misinformation to the
28 Court cannot be recast simply as a “misunderstanding” or a legal disagreement. Simply

1 put, the Government lied to the Court. To argue otherwise defies the facts of the record,
2 the previous findings of this Court, and the Ninth Circuit’s independent review of the
3 Government’s conduct.

4
5 The Government further argues that it did not seek to hide facts from the Court, but
6 that the disclosure of facts was one of “timing,” as it disclosed the correct information to
7 the Court in its *in camera* submissions. (Defs.’ Opp. to Mot. for Sanct., at 3, 7.) The
8 Government contends that this tactic of delayed disclosure of the truthful facts to the
9 Court is based on its policy and practice under FOIA to disclose information at the
10 earliest time possible in litigation without alerting the requester to national security-
11 sensitive information. (*Id.* at 7.) This argument misses the point.

12
13 Parties cannot choose *when* to tell the Court the truth. They must be truthful with
14 the Court at all stages of the proceedings if judicial review is to have any real meaning.
15 And the Court rejects the Government’s suggestion that it initially had to deceive the
16 Court to protect national security. The Government could have availed itself of routine
17 court procedures without compromising national security, such as by filing an *in camera*
18 declaration concurrently with its public filings. As the Ninth Circuit recognized, “if the
19 government believes that submitting a detailed affidavit would compromise the
20 information it is seeking to protect, then it must seek an *in camera* review.” *Islamic*
21 *Shura Council*, 635 F.3d at 1116. Alternatively, the Government could have employed a
22 Glomar response or submitted sealed briefings concurrently with its public filings. “It
23 cannot, however, represent to the district court that it has produced all responsive
24 documents when in fact it has not.” *Id.* National security is no defense for deceiving the
25 Court at any stage of the proceedings. *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th
26 Cir. 1993) (“[L]awyers representing the government . . . serve truth and justice first.”);
27 *United States vs. Associated Convalescent Enters., Inc.*, 766 F.2d 1342, 1436 (9th Cir.
28 1985) (an attorney is an officer of the court, and as such, has a “duty of good faith and

1 candor in dealing with the judiciary”); CAL. R. PROF’L CONDUCT 5-200(B) (in
2 representing a matter to a tribunal, a member “[s]hall not seek to mislead the judge,
3 judicial officer, or jury by an artifice or false statement of fact or law”); *Williams v.*
4 *Superior Court*, 46 Cal. App. 4th 320, 330 (1996) (“Honesty in dealing with the courts is
5 of paramount importance, and misleading a judge is, regardless of motives, a serious
6 offense.” (internal citations and quotes omitted)).

7

8 **B. The Government’s Misrepresentations Were Legally Untenable**

9

10 The Government further argues that its submission of misinformation was not
11 legally frivolous or contrary to legal precedent. (Defs.’ Opp. to Mot. for Sanct., at 2–3,
12 4.) The Court strongly disagrees. The Government’s deception to the Court is not
13 warranted by any existing law. A reasonable attorney is expected to be familiar with the
14 basic principles of our democratic governance, such as the separation of powers, and the
15 duty of candor to the Court. There is no legal precedent that the Court is aware of — and
16 the Government has furnished none — that permits submission of false information to the
17 Court in any circumstance, including in the context of a FOIA request. Indeed,
18 presenting false information to the Court is antithetical to the very structure of FOIA,
19 which mandates judicial oversight by the district court. *Islamic Shura Council*, 635 F.3d
20 at 1166. As the Ninth Circuit clearly recognized: “FOIA does not permit the government
21 to withhold information from the court.” *Id.* “When the government does not provide
22 the court with accurate or complete information, the court’s function in overseeing FOIA
23 actions and monitoring litigation is compromised. The government may withhold
24 relevant information from plaintiffs to protect ‘the secret nature of the information,’ but it
25 must disclose to the court all relevant and responsive information in order for the court to
26 evaluate whether the withholding was appropriate.” *Id.* at 1165–66 (citing *Vaughn*, 484
27 F.2d at 826).

1 Nevertheless, the Government claims that it was acting pursuant to its FOIA
2 practice and policy under which it notifies the Court of the basis for its withholding of
3 documents from a requester at the earliest practical time so as not to “tip off” the
4 disclosure of national security-sensitive information. (Defs.’ Opp. to Mot. for Sanct., at
5 7.) Previously, as support for its practice and policy, the Government pointed to the
6 Attorney General’s Memorandum on the 1986 Amendments to the Freedom of
7 Information Act (the “Attorney General’s Memorandum”), promulgated by Attorney
8 General Edwin Meese III.³ The Attorney General’s Memorandum provided guidance to
9 agencies with respect to the application of the new “exclusion provisions” under 5 U.S.C.
10 552(c)(1)–(3). It stated that when Subsection (c) applies, “the records in question will be
11 treated, as far as the FOIA requester is concerned, as if they did not exist.” *Id.* at 22; *see*
12 *also id.* at 24, 25. A “requester can properly be advised in such a situation that ‘there
13 exist no records responsive to your FOIA request.’” *Id.* at 27. As the Court explained,
14 however, the Attorney’s General Memorandum does not condone lying to the Court; to
15 the contrary, it prohibits such conduct. (Amended Order, at 16.) An agency may mislead
16 the *requester*, but only the requester. (*Id.*) The Ninth Circuit, too, recognized that “[t]he
17 government may withhold relevant information from plaintiffs to protect the secret nature
18 of the information, but it must disclose to the court all relevant and responsive
19 information in order for the court to evaluate whether the withholding was appropriate.”
20 *Islamic Shura Council*, 635 F.3d at 1165–66 (internal citation and quotes omitted).

21
22 Additionally, the Government argues that sanctions are inappropriate in light of the
23 Department of Justice’s current review of its policies and procedures in which it handles
24 FOIA requests to attempt to avoid future misunderstandings with the judiciary, including
25 procedures governing the invocation of the exclusion provisions. (Defs.’ Opp. to Mot.
26 for Sanct., at 10.) The Government states that the DOJ has issued draft regulations that

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28 ³ See U.S. Dep’t of Justice, *Attorney General’s Memorandum on the 1986 Amendments to the Freedom of Information Act* (hereinafter “Attorney General’s Memorandum”) (1987), available at <http://www.justice.gov/oip/86agmemo.htm>.

1 explain how the DOJ will respond to requesters whose requests implicate exclusions, that
2 it has also proposed additional layers of review before an exclusion has been invoked,
3 and has proposed additional record-keeping and reporting requirements in connection
4 with the invocations of exclusions. (*Id.* at 10–11.) The Government also expressed
5 hopes of working with the judiciary regarding the use of exclusion provisions under
6 FOIA and to discuss approaches that would address the Court’s concerns. (*Id.* at 11.)
7 While the Court finds this encouraging, the Government has only spoken in generalities
8 and has not referenced any specific proposals or provided any suggestions that it will not
9 submit misinformation to the judiciary in the future when litigating FOIA cases. Indeed,
10 the Court is aware of the Department of Justice’s recent proposed amendment to FOIA,
11 which would have made its long-standing policy and practice regarding exclusions under
12 the statute an explicit rule of law. On March 21, 2011, during appeal of the Court’s
13 Sealed Order, the DOJ proposed amendments to FOIA that included Section 16.6(f)(2),
14 which states:

15
16 When a component applies an exclusion to exclude records from the
17 requirements of the FOIA pursuant to 5 U.S.C. 552(c), the component
18 utilizing the exclusion will respond to the request as if the excluded
19 records did not exist. This response should not differ in wording from
20 any other response given by the component.

21
22 (Dkt. No. OAG 140; AG Order No. 3259-2011; 76 Fed. Reg. 15236, 15239 (Mar. 21,
23 2011).) The proposed legislation was met with a barrage of protests and criticism from
24 various citizens’ groups, prominent politicians, and commentators.⁴ The proposed

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27 ⁴ See, e.g., Letter from the American Civil Liberties Union, Citizens for Responsibility and Ethics in
28 Washington (CREW), OpenTheGovernment.org to Caroline A. Smith (OIP, Dep’t. of Justice) (Oct. 19,
2011), available at <http://www.openthegovernment.org>; Letter from Charles E. Grassley to Attorney
General Eric H. Holder (Dep’t of Justice) (Oct. 28, 2011), available at <http://www.grassley.senate.gov>;
Editorial, *Obama’s Secret*, L.A. TIMES, Oct. 31, 2011, at A12; Jacob Sullum, *Open Government Law
Twisted to Permit Lies*, CHICAGO SUN-TIMES, Nov. 2, 2011, at 35.

1 amendment was criticized in several meaningful respects: (1) that it undercuts FOIA’s
2 goals of promoting the government’s openness and accountability to the public by
3 authorizing agencies to mislead requesters, (2) that it is counterproductive because it
4 thwarts the ability for meaningful judicial review, and (3) it undermines the government’s
5 legitimacy by making deception an explicit rule of law.⁵ Amidst a firestorm of
6 opposition against the proposed amendment, the DOJ recently withdrew Section
7 16.6(f)(2). *See* Letter from Ronald Weich (Assistant Attorney General, Dep’t. of Justice)
8 to Senator Charles E. Grassley (Nov. 3, 2011) (“We believe that Section 16.6(f)(2) of the
9 proposed regulation falls short by . . . measures [in applying exclusions that protect vital
10 law enforcement and national security concerns in the most transparent manner as
11 possible], and we will not include that provision when the Department issues final
12 regulations”). But the DOJ explained that the proposed amendment to FOIA was simply
13 enacting what has been practiced for over twenty years and therefore “shining further
14 light on a practice that . . . operated for years with much less transparency.” *Id.* Thus,
15 while Section 16.6(f)(2) has been withdrawn, the deceptive policy and practice of the
16 DOJ with respect to asserting and applying exclusions under FOIA apparently remains
17 intact.

18
19 Despite its arguments to the contrary, the Government’s deception of the Court
20 was without any factual or legal basis and simply wrong. When the Executive Branch
21 provides a court with misinformation it impermissibly undermines the judiciary’s
22 authority “to say what the law is.” *Marbury*, 5 U.S. (1 Cranch.) at 177; *see also The*
23 *Federalist No. 78* (Alexander Hamilton) (1788) (“[T]here is no liberty, if the power of
24 judging be not separate from the legislative and executive powers.”); *United States v.*
25 *Nixon*, 418 U.S. 683, 709 (1974) (“The very integrity of the judicial system and public
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⁵ *See id.*

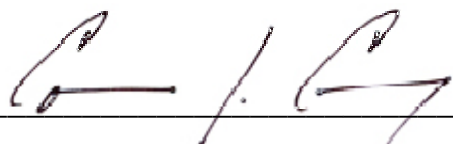
1 confidence in the system depend on full disclosure of all the facts”) What the Court
2 previously stated in its Amended Order bears repeating:

3
4 The Government’s duty of honesty to the Court can never be excused,
5 no matter what the circumstance. The Court is charged with the
6 humbling task of defending the Constitution and ensuring that the
7 Government does not falsely accuse people, needlessly invade their
8 privacy or wrongfully deprive them of their liberty. The Court simply
9 cannot perform this important task if the Government lies to it.
10 Deception perverts justice. Truth always promotes it.

11
12 **IV. CONCLUSION**

13
14 Plaintiffs’ motion for sanctions against the Government is GRANTED. The
15 Government’s submission of false information to the Court is factually and legally
16 untenable under Rule 11 of the Federal Rules of Civil Procedure. The Court therefore
17 imposes monetary sanctions in the amount of reasonable attorneys’ fees to Plaintiffs for
18 bringing the instant motion. Plaintiffs are hereby ordered to submit a detailed affidavit
19 with an accounting of fees for bringing this motion within fourteen (14) days of this
20 Order.

21
22
23 DATED: November 17, 2011

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25 _____
26 CORMAC J. CARNEY
27 UNITED STATES DISTRICT JUDGE
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