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10 **IN THE UNITED STATES DISTRICT COURT**  
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
12 **SAN FRANCISCO DIVISION**

13 ELECTRONIC FRONTIER FOUNDATION,  
14  
Plaintiff,  
15  
vs.  
16 DEPARTMENT OF JUSTICE,  
17  
Defendant.

Case No. 10-CV-4892-RS

**DEFENDANT'S NOTICE OF  
RENEWED MOTION AND RENEWED  
MOTION FOR SUMMARY  
JUDGMENT**

**Judge: Hon. Richard Seeborg**  
**Date: April 25, 2013**  
**Place: Courtroom 3, 17<sup>th</sup> Floor**

1 TO PLAINTIFF AND ITS COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on April 25, 2013, or as soon thereafter as counsel may be  
3 heard by the Court, Defendant will, and hereby does, move the Court to grant Defendant's  
4 Renewed Motion for Summary Judgment. In this case under the Freedom of Information Act  
5 ("FOIA"), 5 U.S.C. § 552, Defendant Department of Justice, and its components Criminal  
6 Division, Drug Enforcement Administration and Federal Bureau of Investigation, have adequately  
7 searched for and produced records in response to Plaintiff's FOIA requests that were not otherwise  
8 protected from disclosure under the FOIA. Accordingly, Defendant moves for summary judgment  
9 pursuant to Rule 56 of the Federal Rules of Civil Procedure. Attached in support of this motion are  
10 a Memorandum of Points and Authorities, the Fifth Declaration of David M. Hardy of the Federal  
11 Bureau of Investigation, the Fourth Declaration of Katherine L. Myrick of the Drug Enforcement  
12 Administration, and the Second Declaration of John E. Cunningham III of the Criminal Division,  
13 as well as supporting exhibits, FBI's revised Vaughn indexes, and a Proposed Order. In addition,  
14 this Motion is supported by the declarations and exhibits submitted in support of its previous  
15 Opposition (ECF No. 19) to Plaintiff's Partial Motion for Summary Judgment, Defendant's initial  
16 Motion for Summary Judgment (ECF No. 39), and Reply in support of that Motion (ECF No. 51).  
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**IN THE UNITED STATES DISTRICT COURT  
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SAN FRANCISCO DIVISION**

ELECTRONIC FRONTIER FOUNDATION,  
  
Plaintiff,  
  
vs.  
  
DEPARTMENT OF JUSTICE,  
  
Defendant.

Case No. 10-CV-4892-RS

**DEFENDANT'S MEMORANDUM IN  
SUPPORT OF ITS RENEWED  
MOTION FOR  
SUMMARY JUDGMENT**

**Judge: Hon. Richard Seeborg  
Date: April 25, 2013  
Place: Courtroom 3, 17<sup>th</sup> Floor**

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## INTRODUCTION

1  
2 Plaintiff Electronic Frontier Foundation (“EFF”) has sued the Department of Justice’s  
3 Criminal Division (“CRM”), Drug Enforcement Administration (“DEA”), and the Federal Bureau  
4 of Investigation (“FBI”) under the Freedom of Information Act, 5 U.S.C. § 552, seeking the release  
5 of agency records relating to two separate FOIA requests. The first request was directed solely to  
6 the FBI and sought the production of records regarding the agency’s “Going Dark” program. The  
7 second request was submitted to all three components and sought, *inter alia*, records concerning  
8 problems experienced by the components conducting electronic surveillance of communication  
9 systems such as Blackberry, Facebook, and peer-to-peer messaging services like Skype.  
10

11 On March 1, 2012, Defendant moved for summary judgment, contending that the  
12 components had conducted an adequate search of agency records and had produced all reasonably  
13 segregable, non-exempt records that were responsive to Plaintiff’s FOIA requests. ECF No. 39. In  
14 response, on March 29, 2012, Plaintiff filed a cross-motion for summary judgment. ECF No. 43.  
15

16 On October 30, 2012, the Court denied, without prejudice, the parties’ cross-motions for  
17 summary judgment for two reasons. First, the Court determined that the Vaughn indexes submitted  
18 by the FBI did not “provide an adequate foundation for review of the soundness of the exemption  
19 claims.” 10/30/12 Order (ECF No. 60) at 6. As a result, the Court ordered FBI to provide Plaintiff  
20 with revised Vaughn indexes that grouped exempt information into “function- and topic-based  
21 categories.” 11/27/12 Order (ECF No. 62) at 1. Second, the Court directed the components to  
22 conduct a further review of certain information the components had determined was not responsive  
23 to, or was “outside the scope” of, Plaintiff’s FOIA requests. 10/30/12 Order at 4-5. Specifically,  
24 the Court ordered the components to “conduct a review of pages that were previously withheld in  
25 full or part from otherwise responsive documents based on the components’ prior determination  
26  
27



1 that the information in question was outside the scope of Plaintiff's FOIA requests." *Id.* at 2.

2 As the attached declarations of the components demonstrate, Defendant has now complied  
3 with both aspects of the Court's order, which has further narrowed the issues in dispute between  
4 the parties. *See* Fifth Declaration of David M. Hardy of the Federal Bureau of Investigation ("Fifth  
5 Hardy Decl.") (attached as Exhibit 1); Fourth Declaration of Katherine L. Myrick of the Drug  
6 Enforcement Administration ("Fourth Myrick Decl.") (attached as Exhibit 2); Second Declaration  
7 of John E. Cunningham III of the Criminal Division ("Second Cunningham Decl.") (attached as  
8 Exhibit 3).

9  
10 As FBI explains, it has now provided Plaintiff with revised Vaughn indexes that group  
11 exempt information into function- and topic-based categories. *See* Fifth Hardy Decl. ¶ 7. In  
12 addition, among other changes, the revised indexes also provide additional detail to support certain  
13 of FBI's withholdings.<sup>1</sup> *See generally* revised Cardozo Vaughn Index and revised Lynch Vaughn  
14 Index (attached as Exhibit A to Fifth Hardy Decl., which is attached hereto as Exhibit 1).

15  
16 Pursuant to the Court's orders, the components also conducted a further review of pages  
17 that were withheld in full or part from otherwise responsive documents based on the components'  
18 previous determination that the withheld information was not responsive to Plaintiff's FOIA  
19 requests. *See* Fifth Hardy Decl. ¶ 7; Fourth Myrick Decl. ¶¶ 5-6; Second Cunningham Decl. ¶ 4.  
20 As discussed in the attached declarations, the components confirmed that the information in  
21 question was outside the scope of Plaintiffs' FOIA requests. *Id.* As a result, CRM and FBI did not  
22 release any additional materials. Fifth Hardy Decl. ¶ 7 (explaining that FBI found that the  
23 information in question was both not responsive and, in any event, was exempt; therefore no  
24 additional materials were released); Second Cunningham Decl. ¶ 4 (CRM's review "confirmed that  
25

26  
27 <sup>1</sup> The Fifth Hardy Declaration provides additional detail about the changes made to FBI's  
revised indexes. *See* Fifth Hardy Decl. ¶¶ 5-6.

1 the information was outside the scope of plaintiff's FOIA request. Accordingly, no additional  
2 information was released to the plaintiff."'). As for DEA, although it confirmed that all the  
3 information at issue was not responsive to Plaintiff's FOIA request, pursuant to its administrative  
4 discretion, DEA made a discretionary release of 14 pages of material that were previously withheld  
5 because they were outside the scope of Plaintiff's request. Fourth Myrick Decl. ¶¶ 6-7.

7 In response to the production of FBI's revised Vaughn indexes, Plaintiff's counsel has  
8 informed counsel for the Government that EFF no longer intends to challenge the adequacy of  
9 FBI's indexes. See January 22, 2013 email from Jennifer Lynch (counsel for EFF) to Nicholas  
10 Cartier (counsel for Defendant) (attached as Exhibit A to the Declaration of Nicholas Cartier,  
11 which is attached hereto as Exhibit 4). EFF has reserved the right to challenge the Government's  
12 scoping decisions. *Id.*

14 In addition to the resolution of the previous dispute concerning the adequacy of FBI's  
15 Vaughn indexes, this case has substantially narrowed in other respects since the Government filed  
16 its initial motion for summary judgment. Since that time, EFF has withdrawn its challenge to the  
17 adequacy of the components' searches and their use of Exemptions 1, 2, 6, 7(C) and 7(F), as well  
18 as DEA's use of Exemption 3, FBI's assertion of the attorney-client privilege, and CRM's and  
19 DEA's withholdings under Exemption 7(D). See Plaintiff's Cross-Motion for Summary Judgment  
20 (ECF No. 43) at 6 n.12; Plaintiff's Reply (ECF No. 57) at 2 n.4.

22 Given the narrowing of the issues before the Court, including EFF's decision not to  
23 challenge the adequacy of the components' searches, this renewed motion addresses only the  
24 exemptions that remain in dispute: namely, the components' use of Exemptions 4, 5, 7(A) and 7(E)

1 and FBI's use of Exemptions 3 and 7(D) to withhold materials either in full or part.<sup>2</sup> In support of  
2 the motion, the Government relies upon the attached declarations and FBI's revised Vaughn  
3 indexes. *See* Fifth Hardy Decl. (attached as Exhibit 1); Fourth Myrick Decl. (attached as Exhibit  
4 2); Second Cunningham Decl. (attached as Exhibit 3); FBI's revised Cardozo Vaughn Index and  
5 revised Lynch Vaughn Index (attached as Exhibit A to Fifth Hardy Decl.).  
6

7 In addition, the Government relies upon the following declarations submitted in support of  
8 its previous Opposition to Plaintiff's Partial Motion for Summary Judgment seeking expedited  
9 processing and the declarations and Vaughn indexes submitted in support of Defendant's first  
10 Motion for Summary Judgment: First Hardy Decl. (ECF No. 19-1); First Ellis Decl. (ECF No. 19-  
11 2); First Myrick Decl. (ECF No. 19-3); Second Ellis Decl. (ECF No. 39-1); CRM's Vaughn Index  
12 (ECF No. 39-2); Second Myrick Decl. (ECF No. 40); DEA's Vaughn Index (Exhibit J to Second  
13 Myrick Decl.); Second Hardy Decl. (ECF No. 41); Third Hardy Decl. (Exhibit K to Second Myrick  
14 Decl.); Fourth Hardy Decl. (ECF No. 52); Third Myrick Decl. (ECF No. 53); First Cunningham  
15 Decl. (ECF No. 54).  
16

17 As set forth below, the components conducted an adequate search of agency records and  
18 produced all reasonably segregable, non-exempt records that were responsive to Plaintiff's FOIA  
19 requests. Given the nature of Plaintiff's requests seeking documents identifying problems and  
20 obstacles faced by the components in conducting lawful electronic surveillance, which included  
21 sensitive internal deliberations addressing these problems, many of the responsive records are,  
22 unsurprisingly, exempt from release under the FOIA. As discussed below, the components have  
23 properly invoked Exemptions 4, 5, 7(A) and 7(E), and FBI has properly invoked Exemptions 3 and  
24

---

25  
26 <sup>2</sup> The components originally moved for summary judgment with respect to Exemptions 1,  
27 2, 3, 4, 5, 6, 7(A), 7(C), 7(D), and 7(E).

1 7(D) to withhold materials either in full or part. Accordingly, this Court should grant summary  
 2 judgment to the Government with respect to the materials found to be exempt by the components.<sup>3</sup>

### 3 BACKGROUND

#### 4 **I. PLAINTIFF'S MAY 21, 2009 AND SEPTEMBER 28, 2010 FOIA REQUESTS.**

5 There are two separate FOIA requests that are at issue in this case. The first was submitted  
 6 to FBI on May 21, 2009 concerning the Bureau's Going Dark Program. *See* Exhibit A to First  
 7 Hardy Decl. (ECF No. 19-1). Specifically, Plaintiff requested documents from 2007 to the present  
 8 concerning: (1) "[A]ll records that describe the Going Dark Program"; (2) "[A]ll Privacy Impact  
 9 Assessments prepared for the Going Dark Program"; and (3) "[A]ll System of Records Notices  
 10 ('SORNs') that discuss or describe the Going Dark Program." *Id.* at 2-3.

11 Plaintiff's second request, dated September 28, 2010, was directed to CRM, DEA and FBI  
 12 and sought "all agency records created on or after January 1, 2006 (including, but not limited to,  
 13 electronic records) discussing, concerning, or reflecting":  
 14

- 15 1. any problems, obstacles or limitations that hamper the DOJ's current ability to  
 16 conduct surveillance on communications systems or networks including, but not  
 17 limited to, encrypted services like Blackberry (RIM), social networking sites  
 18 like Facebook, peer-to-peer messaging services like Skype, etc.;
- 19 2. any communications or discussions with the operators of communications systems  
 20 or networks (including, but not limited to, those providing encrypted  
 21 communications, social networking, and peer-to-peer messaging services), or with  
 equipment manufacturers and vendors, concerning technical difficulties the DOJ has  
 encountered in conducting authorized electronic surveillance;

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22 <sup>3</sup> The Government's motion does not address certain materials that the components referred  
 23 to other government entities for processing. It is the understanding of Government counsel that  
 24 EFF is still evaluating whether to challenge the adequacy of the processing decisions made by  
 25 other government entities. *See* January 22, 2013 email from Jennifer Lynch (counsel for EFF) to  
 26 Nicholas Cartier (counsel for Defendant) (attached as Exhibit A to the Declaration of Nicholas  
 27 Cartier, which is attached hereto as Exhibit 4). Once EFF's evaluation is complete, the  
 Government will confer with EFF to determine whether any disputes exist regarding the materials  
 that were referred to other government components. If necessary, the Government will move for  
 summary judgment with respect to any materials that are in dispute.

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3. any communications or discussions concerning technical difficulties the DOJ has encountered in obtaining assistance from non-U.S.-based operators of communications systems or networks, or with equipment manufacturers and vendors in the conduct of authorized electronic surveillance;
  4. any communications or discussions with the operators of communications systems or networks, or with equipment manufacturers and vendors, concerning development and needs related to electronic communications surveillance-enabling technology;
  5. any communications or discussions with foreign government representatives or trade groups about trade restrictions or import or export controls related to electronic communications surveillance-enabling technology;
  6. any briefings, discussions, or other exchanges between DOJ officials and members of the Senate or House of Representatives concerning implementing a requirement for electronic communications surveillance-enabling technology, including, but not limited to, proposed amendments to the Communications Assistance for Law Enforcement Act (CALEA).

*See, e.g.*, Ex. 1 to First Ellis Decl. at 2 (ECF No. 19-2). Plaintiff sought expedited processing of this request, which was granted by FBI but denied by CRM and DEA. *See generally* Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment (ECF No. 19).

On October 28, 2010, Plaintiff brought suit against CRM, DEA and FBI, alleging that the components had wrongfully withheld agency records and sought expedited processing of the materials. Comp. (ECF No. 1). On January 6, 2011, Plaintiff moved for partial summary judgment (ECF No. 16) seeking the expedited processing of these records. Defendant opposed the motion (ECF No. 19), and a hearing was held on February 17, 2011 (ECF No. 21). Following the hearing, the Court adopted the parties' proposed processing schedule and, as a result, denied Plaintiff's motion without prejudice. (ECF No. 27).

As noted above, on March 1, 2012, Defendant moved for summary judgment, and on March 29, 2012, Plaintiff filed a cross-motion for summary judgment. A hearing was held on May 31, 2012, and on October 30, 2012, the Court denied the parties' cross-motions without prejudice.

1  
2 **II. STATUTORY OVERVIEW OF FOIA AND STANDARD OF REVIEW.**

3 The FOIA represents a balance struck by Congress “between the right of the public to  
4 know and the need of the Government to keep information in confidence.” *John Doe Agency v.*  
5 *John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. 1497, 89th Cong., 2d Sess., 6  
6 (1966)). While the FOIA generally requires agencies to search for and release documents  
7 responsive to a properly submitted request, the statute also recognizes “that public disclosure is not  
8 always in the public interest.” *Baldrige v. Shapiro*, 455 U.S. 345, 352 (1982). Accordingly, the  
9 Act provides nine statutory exemptions to its general disclosure obligation. *See* 5 U.S.C. §§  
10 552(a)(3), (b)(1)-(9). Although the nine exemptions should be “narrowly construed,” *FBI v.*  
11 *Abramson*, 456 U.S. 615, 630 (1982), the Supreme Court has made clear that courts must give  
12 them “meaningful reach and application.” *John Doe Agency*, 493 U.S. at 152.  
13  
14

15 Summary judgment is appropriate where there is no genuine issue as to any material fact  
16 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). “As a  
17 general rule, all FOIA determinations should be resolved on summary judgment.” *Lawyers’*  
18 *Comm. for Civil Rights of San Francisco Bay Area v. U.S. Dep’t. of the Treasury*, 534 F. Supp. 2d  
19 1126, 1131 (N.D. Cal. 2008). A court reviews an agency’s response to a FOIA request *de novo*. 5  
20 U.S.C. § 552(a)(4)(B).  
21

22 **ARGUMENT**

23 **I. THE DOJ COMPONENTS’ WITHHOLDINGS ARE APPROPRIATE.**

24 Under the FOIA, a document may be withheld or redacted “only if it falls within one of  
25 nine statutory exemptions to the [FOIA] disclosure requirement.” *Kamman v. IRS*, 56 F.3d 46, 48  
26 (9th Cir. 1995). Ordinarily, government agencies submit affidavits or declarations, commonly  
27

1 referred to as “Vaughn indexes,” that identify the materials withheld and that contain a  
2 particularized explanation of the reasons for the withholdings. *See Lion Raisins v. U.S. Dep’t. of*  
3 *Agric.*, 354 F.3d 1072, 1082 (9th Cir. 2004) (citing *Vaughn v. Rosen*, 484 F.2d 820, 823-25 (D.C.  
4 Cir.1973)). The declaration must offer “‘reasonably detailed descriptions of the documents and []  
5 facts sufficient to establish an exemption.’” *Kamman*, 56 F.3d at 48 (internal quotation marks  
6 omitted).

8 In this case, the components have provided declarations and Vaughn indexes detailing the  
9 records withheld, the FOIA exemptions claimed, and the reasons for the withholdings. *See*  
10 Criminal Division’s Vaughn index (ECF No. 39-2); DEA’s Vaughn Index (Ex. J to Second Myrick  
11 Decl.) (ECF No. 40); FBI’s revised Cardozo and Vaughn indexes (Exhibit A to Fifth Hardy Decl.,  
12 attached hereto as Exhibit 1). Because the number of responsive records ultimately identified by  
13 CRM was far smaller than the number of responsive records located by the other components,  
14 CRM’s declaration and Vaughn index are organized by individual documents. Given the  
15 voluminous nature of the responsive materials identified by DEA and FBI, these components have  
16 grouped similar documents into like categories for ease of analysis. DEA’s and FBI’s declarations  
17 and Vaughn indexes describe the pages that make up each category in detail and demonstrate that  
18 the exemptions at issue have been properly applied to the materials.  
19

20  
21 **A. FBI Properly Withheld Records Pursuant to Exemption 3.**

22 FBI withheld materials pursuant to Exemption 3, which applies to records that are  
23 “specifically exempted from disclosure by statute” provided the statute “requires that the matters  
24 be withheld from the public in such a manner as to leave no discretion on the issue,” or  
25 alternatively, if the statute “establishes particular criteria for withholding or refers to particular  
26 types of matters to be withheld.” 5 U.S.C. § 552(b)(3). In promulgating the FOIA, Congress  
27

1 included Exemption 3 to recognize the existence of collateral statutes that limit the disclosure of  
2 information held by the government, and to incorporate such statutes within FOIA's exemptions.  
3 *See Baldrige*, 455 U.S. at 352-53; *Essential Info., Inc. v. U.S. Info. Agency*, 134 F.3d 1165, 1166  
4 (D.C. Cir. 1998).

5  
6 As FBI's declarations and revised Lynch index make clear, it properly withheld material  
7 under Exemption 3 in accordance with the "two-part inquiry [that] determines whether Exemption  
8 3 applies to a given case." *Minier v. CIA*, 88 F.3d 796, 801 (9th Cir. 1996). Under this two-step  
9 process: "First, a court must determine whether there is a statute within the scope of Exemption 3.  
10 Then, it must determine whether the requested information falls within the scope of the statute."

11 *Id.*

12  
13 As Mr. Hardy explains, Exemption 3 was applied to documents containing information that  
14 if disclosed "would reveal information pertaining to the authorization of interception of wire, oral,  
15 or electronic communications." Second Hardy Decl. ¶¶ 37, 142, 191, 229. Such information must  
16 be withheld under Title III. In addition, as required by 18 U.S.C. § 3123(d), FBI has asserted  
17 Exemption 3, at times in conjunction with Exemption 1, to withhold information that "would reveal  
18 the existence or use of a pen register or trap and trace device," or that would "reveal the existence  
19 of an investigation involving a pen register or trap and trace devices." Second Hardy Decl. ¶¶ 143,  
20 157, 177, 227; *see also Manna v. U.S. Dep't of Justice*, 815 F. Supp. 798, 812 (D.N.J. 1993) (pen  
21 register materials protected pursuant to 18 U.S.C. § 3123(d) and Exemption 3).

22  
23 As shown above, and for the additional reasons set forth in FBI's declarations and attached  
24 Vaughn indexes, FBI properly withheld materials pursuant to Exemption 3 under the two-part  
25 *Minier* analysis.



1           **B.     DEA and FBI Properly Withheld Documents Pursuant to Exemption 4.**

2           FOIA authorizes withholding “trade secrets and commercial or financial information  
3 obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4) (“Exemption 4”). To  
4 withhold information under Exemption 4, the government agency must demonstrate that the  
5 materials in question contain “(1) commercial and financial information, (2) obtained from a  
6 person or by the government, (3) that is privileged or confidential.” *GC Micro Corp. v. Def.*  
7 *Logistics Agency*, 33 F.3d 1109, 1112 (9th Cir.1994). Commercial or financial matters are  
8 “confidential” for purposes of this exemption if disclosure of the information is likely to have  
9 either of the following effects: it will (1) “impair the Government’s ability to obtain necessary  
10 information in the future; or (2) [ ] cause substantial harm to the competitive position of the person  
11 from whom the information was obtained.” *Id*; see also *Critical Mass Energy Project v. Nuclear*  
12 *Regulatory Comm'n*, 975 F.2d 871, 879 (D.C.Cir.1992) (en banc) (“financial or commercial  
13 information provided to the Government on a voluntary basis is ‘confidential’ for the purpose of  
14 Exemption 4 if it is of a kind that would customarily not be released to the public by the person  
15 from whom it was obtained.”).

16  
17  
18           **I.     DEA Properly Invoked Exemption 4.**

19           DEA withheld seventeen pages pursuant to Exemption 4. DEA’s Vaughn Index (Exhibit J  
20 to Second Myrick Decl.); see also Third Myrick Decl. ¶8, fn. 1. These pages included  
21 communications between DEA and companies regarding specific problems experienced by DEA  
22 during intercept operations. Second Myrick Decl. ¶ 21b(2). As made clear by Ms. Myrick of  
23 DEA, these companies voluntarily provided information to DEA regarding their “internal  
24 operations” and “technical and product capabilities” that is not customarily released to the public.  
25 *Id*. Each company also articulated “the competitive harm that would result from the release of such  
26

1 internal, commercial information shared with DEA and made clear that release would adversely  
2 impact DEA's ability to obtain any such information in the future."<sup>4</sup> *Id.*; *see also* Third Myrick  
3 Decl. ¶¶ 8-9 (stating that companies explained that release of the information "would adversely  
4 impact DEA's ability to obtain any such information in the future"). These representations satisfy  
5 the requirements for treating material as "confidential" within the meaning of Exemption 4. *See*  
6 *GC Micro Corp.*, 33 F.3d at 1112 (information is "confidential" and properly withheld under  
7 Exemption 4 if it would "impair the Government's ability to obtain necessary information in the  
8 future"; or would "cause substantial harm to the competitive position of the person from whom the  
9 information was obtained."); *see also Critical Mass*, 975 F.2d at 879 (voluntarily provided  
10 information is "confidential" under Exemption 4 if it would not customarily be released to the  
11 public by the person from whom it was obtained).  
12  
13

14 Pursuant to Exemption 4, DEA also withheld summaries of meetings that took place in  
15 2008 and 2009 between DEA and specific carriers, service providers, and industry consultants. *Id.*  
16 ¶ 21c(2). The withheld pages include "detailed, technical information" from two companies  
17 concerning their "communication system capabilities" and contain information about the  
18 companies' "levels of investment in certain technologies, and corporate operational and budget  
19 constraints associated with implementing certain capabilities." *Id.* One company articulated the  
20 competitive harm that would result if the information was released and stated that doing so would  
21 prevent the company from voluntarily providing information to law enforcement in the future. *Id.*  
22 One company also expressed concern that the information it shared with DEA could be used by  
23 terrorists or criminal elements to the detriment of the company and DEA's operations. *Id.*  
24

25 As DEA's declarations explain, the disclosure of the proprietary information provided by  
26

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27 <sup>4</sup> Four of these pages are also exempt under Exemption 7D as they contain information  
28 supplied to DEA under an express, confidentiality agreement. *See infra.*

1 these companies, all of which operate in the communications market, would damage their  
2 competitive positions. Third Myrick Decl. ¶ 10. One company stated that, given the highly  
3 competitive nature of the communications market, which is characterized by a small number of  
4 competitors, the disclosure of the proprietary information provided to DEA “could readily enable a  
5 competitor to differentiate its product, services, technology, or market position, and seek a higher  
6 percentage of the relevant market.” *Id.* ¶ 10.

8 As the Second and Third Myrick Declarations and DEA’s Vaughn index demonstrate, the  
9 information withheld by DEA pursuant to Exemption 4 was confidential commercial information  
10 voluntarily provided by various companies. The release of this information would cause  
11 competitive harm to the companies and impair DEA’s ability to receive such information in the  
12 future. As a result, the information was properly withheld under Exemption 4. *GC Micro Corp.*,  
13 33 F.3d at 1112; *Critical Mass*, 975 F.2d at 879.

## 15 2. ***FBI Properly Invoked Exemption 4.***

16 FBI withheld 39 pages pursuant to Exemption 4 to protect proprietary contractual  
17 information provided by the RAND Corporation. Second Hardy Decl. ¶ 118; Fourth Hardy Decl.  
18 ¶¶ 10-11; FBI’s revised Cardozo Vaughn Index at 14. Specifically, the FBI applied Exemption 4 to  
19 a draft proposal describing the scope of work the company would perform on behalf of the “FBI  
20 Going Dark Initiative Electronic Surveillance Analyst Project.” Second Hardy Decl. ¶ 118. The  
21 FBI withheld the information pursuant to Exemption 4 based on representations made by the  
22 company that the cost projections and other information provided to FBI were confidential,  
23 proprietary information. Fourth Hardy Decl. ¶ 10 (noting that “draft proposal specifically states  
24 that RAND expects its information to remain confidential under the restrictions provided in the  
25 proposed contract.”). Furthermore, as Mr. Hardy explains, “[d]isclosure of specific details of  
26  
27

1 RAND's project proposal and cost analysis would give competitors an unfair advantage over  
2 RAND in developing requirements, counter proposals and lower cost analyses that would  
3 undermine RAND's ability to compete for contracts." *Id.* Consequently, disclosure of the  
4 information would likely discourage companies from making similar contract proposals in the  
5 future to FBI "out of concern that their proprietary information would become publicly available to  
6 competitors." *Id.* ¶ 11. Because disclosure would likely result in competitive injury to RAND and  
7 prevent FBI from obtaining similar information in the future, the material was properly treated as  
8 confidential and withheld under Exemption 4. *GC Micro Corp.*, 33 F.3d at 1112 (information is  
9 "confidential" and made be withheld under Exemption 4 if it would impair Government's ability to  
10 obtain necessary information in the future or would cause substantial competitive harm to company  
11 providing information); *see also Critical Mass*, 975 F.2d at 879 (voluntarily provided information  
12 is "confidential" under Exemption 4 if it would not customarily be released to the public by the  
13 person from whom it was obtained).

16 **C. The DOJ Components Properly Withheld Documents Pursuant to**  
17 **Exemption 5.**

18 Exemption 5 of the FOIA exempts from mandatory disclosure "inter-agency or intra-  
19 agency memorandums or letters which would not be available by law to a party other than an  
20 agency in litigation with the agency." 5 U.S.C. § 552(b)(5). As a result, Exemption 5 permits  
21 agencies to withhold privileged information, including materials protected by the deliberative  
22 process, attorney client and attorney work product privileges. *See, e.g., NLRB v. Sears, Roebuck &*  
23 *Co.*, 421 U.S. 132, 149 (1975); *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1092  
24 (9th Cir. 1997).

26 The deliberative process privilege applies to "decisionmaking of executive officials  
27 generally," and protects documents containing deliberations that are part of the process by which

1 governmental decisions are formulated. *In re Sealed Case*, 121 F.3d 729, 737, 745 (D.C. Cir.  
2 1997). As the Supreme Court has explained:

3         The deliberative process privilege rests on the obvious realization that officials will not  
4         communicate candidly among themselves if each remark is a potential item of discovery  
5         and front page news, and its object is to enhance the quality of agency decisions by  
6         protecting open and frank discussion among those who make them within the Government.

7         *Dep't of the Interior v. Klamath Water Users Protective. Ass'n*, 532 U.S. 1, 8-9 (2001) (internal  
8         quotation marks and citations omitted). The privilege “rests on the policy of protecting the  
9         decision making processes of government agencies . . . with the ultimate purpose being to prevent  
10         injury to the quality of agency decisions.” *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1113 (D.C.  
11         Cir. 2004) (internal quotation marks, alteration and citation omitted).

12         A document may be withheld on the basis of the deliberative process privilege if it is both  
13         pre-decisional and deliberative. *Nat'l Wildlife Federation v. U.S. Forest Serv.*, 861 F.2d 1114,  
14         1117 (9th Cir. 1988). A document is “predecisional” if it is “generated before the adoption of an  
15         agency policy” and “deliberative” if it “reflects the give-and-take of the consultative process.”  
16         *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The privilege  
17         “thus covers recommendations, draft documents, proposals, suggestions, and other subjective  
18         documents which reflect the personal opinions of the writer rather than the policy of the agency.”  
19         *Id.*

20  
21         The attorney-client privilege exists to “protect a client’s confidences to her attorney so that  
22         the client may have uninhibited confidence in the inviolability of her relationship with her  
23         attorney.” *Nat'l Res. Def. Council v. U.S. Dept. of Def.*, 388 F. Supp. 2d 1086, 1099 (C.D. Cal.  
24         2005) (internal quotation marks omitted). To withhold a document under Exemption 5 pursuant to  
25         the attorney-client privilege, “an agency must demonstrate that the document it seeks to withhold  
26         (1) involves confidential communications between an attorney and his client and (2) relates to a

1 legal matter for which the client has sought professional advice.” *Id.* (internal quotation marks  
2 omitted).

3 The attorney work product doctrine protects materials prepared by an attorney in  
4 anticipation of litigation, including the materials of government attorneys generated in litigation  
5 and pre-litigation counseling. *See* Fed. R. Civ. P. 26(b)(3); *In re Grand Jury Subpoena (Mark*  
6 *Torf/Torf Environmental Management)*, 357 F.3d 900, 907 (9th Cir. 2004).

8 ***1. CRM Properly Invoked Exemption 5.***

9 CRM relied on the attorney work product doctrine to withhold e-mails containing  
10 discussions among Department attorneys in relation to on-going cases that are still under  
11 investigation or that have proceeded to prosecution. Second Ellis Decl. ¶ 42; Cunningham Decl. at  
12 9. CRM concluded that these messages were sent in anticipation and/or in furtherance of litigation,  
13 *id.*, and therefore it properly invoked the attorney work product doctrine as a basis to withhold the  
14 materials.

15  
16 With respect to the remaining materials to which Exemption 5 applies, CRM invoked the  
17 deliberative process privilege. CRM found that the following materials were both pre-decisional  
18 and deliberative:

19 ***Development of Proposed Legislation to Fix the “Going Dark” Problem.*** CRM applied  
20 the deliberative process privilege to draft documents created during deliberations within the  
21 Criminal Division about how to address the “Going Dark” problem, and, in particular, whether the  
22 problem could be fixed through legislation. Second Ellis Decl. ¶ 46.

23  
24 ***Preliminary and Draft Resource Requests to Address the “Going Dark” Problem.*** CRM  
25 relied on the deliberative process privilege to withhold a preliminary request for resources by the  
26 Child Exploitation and Obscenity Section (CEOS) to combat the “Going Dark” problem, as well as

1 subsequent draft requests prepared by CRM-CEOS to request additional resources. *Id.* ¶ 47. All of  
2 these requests for resources are predecisional because they were compiled for submission to  
3 CRM’s Office of Administration (ADMIN), which would then make the final decision about  
4 additional resources. *Id.* These requests are also deliberative. The drafts represent the views of  
5 the employees about what additional resources would be needed by CRM-CEOS to combat the  
6 “Going Dark” problem. *Id.*

8 ***Draft Responses to a Proposed Digital Due Process Initiative.*** CRM relied on the  
9 deliberative process privilege to withhold draft responses prepared by an office in CRM reflecting  
10 its views about how the Division should respond to an initiative proposed by the “Digital Due  
11 Process” organization, which was seeking to limit law enforcement’s access to electronic evidence.  
12 *Id.* ¶ 48.

14 ***Draft Chapter of “Transnational Crime Threats” Document.*** CRM withheld a portion of  
15 a draft chapter from a document entitled “Transnational Crime Threats” pursuant to the  
16 deliberative process privilege. *Id.* ¶ 49. This draft was circulated by the author for comments, and  
17 as such, it reflected the preliminary views of the employee who authored it. *Id.*

18 ***E-mails Related to Preparing Attorney General Briefing Materials.*** CRM withheld  
19 portions of two e-mails in which an Assistant Deputy Chief provided her input about the “Going  
20 Dark” issue for inclusion in briefing materials being prepared for the Attorney General in  
21 connection with a meeting between the United States and the European Union. *Id.* ¶ 50. This  
22 information reflected the over-arching policy debate within the U.S. Government about the “Going  
23 Dark” issue, as well as the Assistant Deputy Chief’s deliberative process of selecting and  
24 suggesting information for briefing to the Attorney General. *Id.*

1           ***Internal Briefing Document.*** CRM withheld an e-mail in which a Deputy Chief briefed  
2 his Chief about a variety of issues, expressing his opinions about a briefing for an ambassador on  
3 the subject of accessing electronic communications on a particular carrier’s system. *Id.* ¶ 51.  
4 CRM concluded that the information was predecisional because it reflected the views and opinions  
5 of a lower-level official about briefing an ambassador, and deliberative because the Deputy Chief  
6 was not the final decision-maker and his views and opinions were merely part of the process by  
7 which the final decision would be made. *Id.*

9           As demonstrated above, and for the additional reasons provided in CRM’s declarations and  
10 *Vaughn* index, all of the documents withheld by CRM pursuant to the deliberative process  
11 privilege were predecisional and deliberative. Furthermore, “[r]eleasing these documents would  
12 expose employees’ candid views and opinions, which do not represent agency policy, to public  
13 scrutiny. Such disclosure would have a chilling effect on those employees’ participation in the  
14 deliberations.” *See, e.g., id.* ¶ 46. For these reasons, CRM properly withheld these materials  
15 pursuant to Exemption 5.  
16

## 17           **2.       DEA Properly Invoked Exemption 5.**

18           DEA applied Exemption 5 to 461 pages of draft documents and emails that either forward  
19 draft material or provide additional comments, recommendations, or suggested edits to the draft  
20 documents to which they pertain. Second Myrick Decl. ¶ 9.b. Many of the draft documents within  
21 the processing categories are replete with edits, strikethroughs, comments and questions. *Id.* *See,*  
22 *e.g., Coastal States*, 617 F.2d at 866 (explaining that the deliberative process privilege “covers  
23 recommendations, draft documents, proposals, suggestions, and other subjective documents which  
24 reflect the personal opinions of the writer rather than the policy of the agency.”). *Id.* As Ms.  
25 Myrick explains, “[d]isclosure [of these materials] would have a profound chilling effect across all  
26  
27



1 DEA decision-making processes as agency personnel would be less inclined to produce and  
2 circulate drafts for consideration and comment.” *Id.*

3 DEA also invoked the deliberative process privilege throughout the processing categories to  
4 records identified as “Talking Points” or “Discussion or Issue Papers.” *Id.* ¶ 9c. Talking points or  
5 discussion papers are routinely used within DEA to prepare agency personnel for interaction with  
6 Congress, other agencies, and private individuals or companies. *Id.* These papers are inherently  
7 predecisional as they are preparatory in nature and do not reflect final agency actions as the  
8 officials or working groups relying on the papers may disregard or modify these advisory papers in  
9 full or in part. *Id.* They are also deliberative and provide the opinions, suggestions,  
10 recommendations, and analysis of subordinate employees or working group participants who draft  
11 them. *Id.*

12  
13  
14 Given the large number of documents over which DEA invoked Exemption 5, Defendant  
15 respectfully refers the Court to the extensive category-by-category discussion in the Second  
16 Declaration of Ms. Myrick and DEA’s *Vaughn* Index, as well as Ms. Myrick’s Third Declaration,  
17 which further demonstrate that DEA properly applied Exemption 5 to these materials. *See* Second  
18 Myrick Decl. (ECF No. 40); DEA’s *Vaughn* Index (Exhibit J to Second Myrick Decl.); Third  
19 Myrick Decl. (ECF No. 53).

### 20 21 **3. FBI Properly Invoked Exemption 5.**

22 Pursuant to Exemption 5, FBI applied the deliberative process privilege to materials  
23 containing “an internal, on-going dialogue among and between FBI and DOJ personnel with regard  
24 to the FBI’s development of the ‘Going Dark Initiative.’” Second Hardy Decl. ¶ 47. “This  
25 dialogue is both (a) ‘predecisional’ — antecedent to the adoption of agency policy, and (b)  
26 ‘deliberative’ — the numerous talking points, discussion papers, presentations, and/or e-mail trails  
27

1 and exchanges reflect a continuous set of deliberations, including the give and take of the  
2 consultative process, with regard to the shaping and evaluation of the FBI's policies and program  
3 development.” *Id.* In addition, the “release of the redacted information is likely to chill full, frank,  
4 and open internal discussions — a chilling effect which is all the more dangerous given the  
5 important national security interest at stake,” which is to prevent “the FBI from ‘Going Dark’ on its  
6 lawful use of intercept capabilities in both counterterrorism and counterintelligence investigations.”  
7 *Id.* ¶ 48.

9 As with DEA, given the large number of documents to which FBI applied Exemption 5,  
10 Defendant respectfully refers the Court to the category-by-category discussion of these materials in  
11 the Second Hardy Declaration and FBI’s revised Cardozo and Lynch Vaughn indexes, as well as  
12 the Fourth and Fifth Hardy Declarations, to further demonstrate that FBI has properly invoked  
13 Exemption 5 in this case. *See* Second Hardy Decl. (ECF No. 41); Fourth Hardy Decl. (ECF No.  
14 52); revised Cardozo Vaughn Index and revised Lynch Vaughn Index (attached as Exhibit A to  
15 Fifth Hardy Decl., which is attached hereto as Exhibit 1).

17 **D. The DOJ Components Properly Withheld Documents Pursuant to**  
18 **Exemption 7.**

19 FOIA protects from mandatory disclosure “records or information compiled for law  
20 enforcement purposes” where it can reasonably be expected to result in one of the enumerated  
21 harms listed in the statute. 5 U.S.C. § 552(b)(7). As a threshold matter, in order to withhold  
22 material under Exemption 7, an agency must show that the materials in question have been  
23 “compiled for law enforcement purposes.” *Id.* Where, as here, the agency has a “clear law  
24 enforcement mandate,” it “need only establish a rational nexus between enforcement of a federal  
25 law and the document for which [a law enforcement] exemption is claimed.” *Rosenfeld v. U.S.*  
26 *Dept. of Justice*, 57 F.3d 803, 808 (9th Cir. 1995) (internal quotation marks omitted).

1           There is no doubt that CRM, DEA and FBI each has a clear law enforcement mandate. *Id.*  
2 (“The releasing agency in this case, the Federal Bureau of Investigation, has a clear law  
3 enforcement mandate.”); *United States v. Harris*, 165 F.3d 1277, 1281 (9th Cir. 1999) (discussing  
4 the Criminal Division’s law enforcement efforts related to firearms violations); *In re Persico*, 522  
5 F.2d 41, 50 (2d Cir. 1975) (recognizing the Criminal Division’s law enforcement purpose as it  
6 relates to prosecuting organized criminal activity); *Manna v. Dep’t of Justice*, 832 F. Supp. 866,  
7 875 (D.N.J. 1993) (noting that “DEA, as the federal agency charged with the primary responsibility  
8 for enforcing federal drug laws, clearly has the requisite criminal law enforcement mandate”).  
9

10           Furthermore, the records at issue here were compiled for law enforcement purposes. In the  
11 case of CRM, the e-mails and documents withheld pursuant to Exemption 7 reflected problems  
12 conducting lawful electronic surveillance and were either collected during criminal investigations,  
13 or were re-compilations of information originally compiled during such investigations. Second  
14 Ellis Decl. ¶¶ 35, 39. *Abramson*, 456 U.S. at 631-32 (law enforcement information retains  
15 Exemption 7 protection even if re-compiled for other purposes.)  
16

17           Similarly, all the records to which DEA applied Exemption 7 were compiled for law  
18 enforcement purposes. These records either “(1) relate to, discuss, or summarize actual DEA  
19 criminal cases, or (2) they relate to or discuss . . . the substantive issue of DEA’s ability or inability  
20 to conduct criminal investigations by electronic intercept.” Second Myrick Decl. ¶ 9.d.  
21

22           Likewise, the records withheld by FBI pursuant to Exemption 7 were also compiled for law  
23 enforcement purposes. Second Hardy Decl. ¶ 51. These materials involve “identifying, analyzing,  
24 and reviewing technical, legal, policy, and resource impediments to the FBI’s electronic intercept  
25 operations, and its development of a five-prong strategic approach to address an identified lawful  
26 intercept capability gap.” *Id.* ¶ 54. FBI concluded that “[t]he intelligence information discussed in  
27

1 these documents, as well as the investigation of potential violations of federal law, fall squarely  
2 within the law enforcement duties of the FBI.” *Id.*

3 With the threshold requirement of Exemption 7 met, Defendant next addresses the specific  
4 uses of Exemption 7 that were applied to the records in this case.

5  
6 **1. The DOJ Components Properly Withheld Materials Under Exemption 7(A).**

7 Exemption 7(A) authorizes the withholding of information “compiled for law enforcement  
8 purposes” where release “could reasonably be expected to interfere with enforcement  
9 proceedings.” 5 U.S.C. § 552(b)(7)(A). For Exemption 7(A) withholdings, the government must  
10 show that the records (1) relate to “a law enforcement proceeding [that] is pending or  
11 prospective[,]” and that (2) “release of the information could reasonably be expected to cause some  
12 articulable harm.” *Manna*, 51 F.3d at 1164. Exemption 7(A) “does not require a presently pending  
13 ‘enforcement proceeding.’ Rather, . . . it is sufficient that the government’s ongoing []  
14 investigation is likely to lead to such proceedings.” *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of*  
15 *Justice*, 331 F.3d 918, 926 (D.C. Cir. 2003). As courts have recognized, “[t]he principal purpose of  
16 Exemption 7(A) is to prevent disclosures which might prematurely reveal the government’s . . .  
17 focus of its investigations, and thereby enable suspects to establish defenses or fraudulent alibis or  
18 to destroy or alter evidence.” *Maydak v. U.S. Dep’t of Justice*, 218 F.3d 760, 762 (D.C. Cir. 2000).

19  
20  
21 **a. CRM Properly Invoked Exemption 7(A).**

22 CRM relied on Exemption 7(A) to withhold information from an internal document  
23 prepared by CRM’s Narcotics and Dangerous Drugs Section providing investigative and  
24 operational examples of how drug cartels were using technology to circumvent law enforcement  
25 efforts to conduct electronic surveillance. *See* Second Ellis Decl. ¶ 61 (discussing CRM-000015 to  
26 CRM-000019); CRM Vaughn Index at 3. According to Ms. Ellis of the Criminal Division, release

1 of this document, which contains “information about surveillance and undercover activities and  
2 about witnesses/cooperators, targets, and other individuals mentioned in relation to those  
3 investigations could adversely impact on-going and prospective enforcement proceedings.” *Id.* ¶  
4 65. For instance, among other things, the release of such information could prejudice the testimony  
5 of witnesses in “the pending investigation and resulting prosecutions.” *Id.* Accordingly, this  
6 information was properly withheld under Exemption 7A.  
7

8 ***b. DEA Properly Invoked Exemption 7(A).***

9 DEA applied Exemption 7A to withhold 112 pages of information that “either summarizes,  
10 discusses, or relates to DEA criminal cases which remain in an open or active status.” Second  
11 Myrick Decl. ¶ 9e; *see also* DEA’s Vaughn Index at 3, 9-10, 12-19. DEA confirmed that these  
12 cases were “under active investigation” or “remained open pending completion of ongoing or  
13 pending prosecutions” by either querying DEA’s case database or by directly contacting DEA field  
14 agents. Second Myrick Decl. ¶ 9e. According to Ms. Myrick, the release of this information  
15 would interfere with enforcement proceedings because it “would reveal the scope, direction, and  
16 nature of the investigations as well as reveal information that could harm prospective and/or  
17 ongoing government prosecutions in these matters.” *Id.* “If the information is released, the  
18 individuals and/or entities, who are of investigative interest in the cases could use the information  
19 to develop alibis or intimidate, harass or harm potential witnesses.” *Id.* Consequently, this  
20 information was properly withheld under Exemption 7A.  
21  
22

23 ***c. FBI Properly Invoked Exemption 7(A).***

24 The FBI applied Exemption 7A “to protect information that either summarize[s],  
25 discuss[es], or relate[s] to FBI criminal cases which remain in an open or active status.” Second  
26 Hardy Decl. ¶ 149; FBI’s revised Lynch Vaughn Index at 6-8, 10-13, 15-16, 18-25. According to  
27

1 the FBI, the release of this information “could harm prospective and/or ongoing government  
2 prosecutions in these matters.” Second Hardy Decl. ¶ 149. Therefore, FBI properly withheld this  
3 information pursuant to Exemption 7A.

4 **2. FBI Properly Withheld Materials Pursuant to Exemption 7(D).**

5 Exemption 7(D) permits the withholding of information in law enforcement records that  
6 “could reasonably be expected to disclose the identity of a confidential source[.]” 5 U.S.C. §  
7 552(b)(7)(D). Exemption 7(D) also protects information “furnished by a confidential source” if it  
8 was “compiled by [a] criminal law enforcement authority in the course of a criminal investigation  
9 or by an agency conducting a lawful national security investigation[.]” *Id.* Exemption 7(D)  
10 applies if the agency establishes that a source has provided information under either an express or  
11 implied promise of confidentiality. *U.S. Dep’t of Justice v. Landano*, 508 U.S. 165, 12 (1993).  
12 When an agency claims a source provided information under an express assurance of  
13 confidentiality, the agency must “come forward with probative evidence that the source did in fact  
14 receive an express grant of confidentiality[.]” *Davin v. U.S. Dep’t of Justice*, 60 F.3d 1043, 1061-  
15 62 (3d Cir. 1995). For assertions of implied promises of confidentiality, the agency must “describe  
16 circumstances that can provide a basis for inferring confidentiality.” *Id.* at 1063.

17 FBI invoked Exemption 7(D), at times in conjunction with Exemption 1, to withhold  
18 information provided to it by a foreign government regarding on-going investigations under an  
19 express assurance of confidentiality. Second Hardy Decl. ¶ 125. In addition, FBI invoked  
20 Exemption 7(D), again at times in conjunction with Exemption 1, to withhold information provided  
21 by companies to FBI pertaining to the subjects of criminal investigations. *Id.* ¶ 77. According to  
22 Mr. Hardy, to disclose the fact that these companies provided information to the FBI during the  
23 course of an investigation could harm the commercial interests of these enterprises by potentially  
24

1 deterring the public from employing their services. *Id.* Under these circumstances, FBI  
2 determined that an implied assurance of confidentiality had been given to the companies to protect  
3 the information they shared with FBI. *See id.*

4 As Mr. Hardy further explains in his declaration, although the companies were under a legal  
5 obligation to provide the information to the FBI in connection with an ongoing investigation, “an  
6 implied assurance of confidentiality was nevertheless critical to ensure that these companies did  
7 not unnecessarily resist that obligation, thereby increasing FBI’s burden of obtaining important  
8 lawfully-available investigative materials.” Second Hardy Decl. ¶ 78. According to Mr. Hardy,  
9 the companies “would pay a high price if it were known that they were providing information  
10 about their customers to the FBI.” *Id.* Under these circumstances, where the companies faced a  
11 clear economic cost to providing the information, there is every reason to believe they provided the  
12 information expecting that their identities would remain confidential. As a result, FBI’s  
13 withholding of this information pursuant to Exemption 7(D) was proper. *See Davin*, 60 F.3d at  
14 1063 (stating that for assertions of implied promises of confidentiality, the agency must “describe  
15 circumstances that can provide a basis for inferring confidentiality.”); *see also* revised Cardozo  
16 Index at 2-3, 9-10; revised Lynch Index at 2-3, 5-8, 12-13, 15-16, 18-23 (discussing material  
17 withheld pursuant to Exemption 7(D)).

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20  
21 **3. The DOJ Components Properly Withheld Materials Pursuant To  
Exemption 7(E).**

22 Exemption 7(E) protects from disclosure “records or information compiled for law  
23 enforcement purposes” where release of such information “would disclose techniques and  
24 procedures for law enforcement investigations or prosecutions, or would disclose guidelines for  
25 law enforcement investigations or prosecutions if such disclosure could reasonably be expected to  
26 risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E).

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28 DEFENDANT’S MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT





1 Decl. ¶ 9g. “The responsive pages also include guidance on how to conduct investigations of  
2 communication systems or networks to work around intercept difficulties and/or how to employ  
3 countermeasures to intercept evasion practices employed by criminal elements.” *Id.* According to  
4 Ms. Myrick, if this information were released, “[c]riminal elements would gain valuable insight  
5 about the conduct of law enforcement surveillance operations and the exploitation of capability  
6 weaknesses.” *Id.* In addition, DEA explains that the information withheld under Exemption 7(E)  
7 is not widely known. According to DEA, the Exemption 7(E) material “consists of detailed  
8 information regarding the problems, obstacles, or limitations that hamper DEA’s current ability to  
9 conduct surveillance on communications systems or networks, as well as DEA’s countermeasures  
10 to these limitations and obstacles. This information is not publicly known.” Third Myrick Decl.  
11 ¶12. For these reasons, and those set forth in DEA’s declarations and Vaughn index, DEA  
12 properly withheld this information pursuant to Exemption 7(E).  
13  
14

15 ***c. FBI Properly Invoked Exemption 7(E).***

16 FBI applied Exemption 7(E) in full or part to 1,650 pages out of the total 2,662 pages that  
17 were responsive to Plaintiff’s request. Second Hardy Decl. ¶ 83. According to Mr. Hardy of the  
18 FBI, “the release of this detailed information about surveillance techniques and associated  
19 problems or vulnerabilities . . . would enable [criminal elements] to structure their . . .  
20 communications in a manner to evade lawful intercept and/or thwart investigative efforts.” Second  
21 Hardy Decl. ¶ 84. This information is not widely known to the public. FBI explains that, “[w]hile  
22 there have been public reports indicating the government has had trouble conducting electronic  
23 surveillance, it is the FBI’s understanding that the specific and detailed information withheld under  
24 Exemption 7(E) by the FBI in this case is not widely known to the public.” Fourth Hardy Decl.  
25 ¶17. For these reasons, and those set forth in FBI’s declarations and revised Vaughn indexes, FBI  
26  
27

1 properly withheld information pursuant to Exemption 7(E). *See* Second Hardy Declaration and  
2 FBI's revised Cardozo and Lynch Vaughn indexes, as well as the Fourth and Fifth Hardy  
3 Declarations,

4 **II. THE DOJ COMPONENTS HAVE RELEASED ALL REASONABLY**  
5 **SEGREGABLE INFORMATION.**

6 As required by the FOIA, CRM, DEA and FBI have provided all "reasonably segregable"  
7 responsive information that is not protected by an exemption. 5 U.S.C. § 552(b). *See* Second Ellis  
8 Decl. ¶ 30 ("CRM conducted an exacting, line-by-line review of the records located during our  
9 wide-ranging search to identify any non-exempt information that could reasonably be segregated  
10 and released without adversely affecting the Government's legitimate law enforcement interests.");  
11 Second Myrick Decl. ¶ 9j (stating that "[a]ll responsive pages were examined to determine whether  
12 any reasonably segregable information could be released"); Second Hardy Decl. ¶ 22 (stating that  
13 "FBI has taken all reasonable efforts to ensure that no segregable, nonexempt portions were  
14 withheld from plaintiff.")).  
15

16 **CONCLUSION**

17 For the reasons stated above, Defendant respectfully requests that the Court grant its  
18 Renewed Motion for Summary Judgment.  
19

20 Dated: January 31, 2013

Respectfully Submitted,

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24 United States Attorney

25 ELIZABETH J. SHAPIRO  
26 Deputy Director, Federal Programs Branch

27 /s/ Nicholas Cartier  
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**CERTIFICATE OF SERVICE**

I hereby certify that on January 31, 2012, I caused a copy of the foregoing to be served on counsel for Plaintiff via the Court's ECF system.

*/s/ Nicholas Cartier*  
NICHOLAS CARTIER