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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff,

v.

DEPARTMENT OF JUSTICE,

Defendant.

Case No.: 3:10-cv-04892-RS

NOTICE OF RENEWED CROSS MOTION AND RENEWED CROSS MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES

AND

OPPOSITION TO DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT

Date: April 25, 2013
Time: 1:30 p.m.
Place: Ctrm. 3, 17th Floor
Judge: Hon. Richard Seeborg

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

NOTICE OF RENEWED MOTION

TO DEFENDANT AND ITS COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on April 25, 2013 at 1:30 P.M., or as soon thereafter as the matter may be heard in Courtroom 3 on the 17th Floor at 450 Golden Gate Avenue in San Francisco, California, plaintiff Electronic Frontier Foundation (EFF) will, and hereby does, cross move for summary judgment.

Pursuant to Federal Rule of Civil Procedure 56, EFF seeks a court order requiring the Department of Justice (DOJ) and its components the Criminal Division (CRIM), Federal Bureau of Investigation (FBI) and Drug Enforcement Agency (DEA) to release records under the Freedom of Information Act (FOIA). EFF respectfully asks that this Court issue an order requiring the government to release all records improperly withheld from the public. This Cross Motion is based on this notice of Cross Motion, the memorandum of points and authorities in support of this Cross Motion, the Second Declaration of Jennifer Lynch and attached exhibits filed in support of EFF's original Cross Motion, and all papers and records on file with the Clerk or which may be submitted prior to or at the time of the hearing, and any further evidence which may be offered.

DATED: February 28, 2013

Respectfully submitted,

/s/ Jennifer Lynch

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeks the disclosure of records held by Defendant Department of Justice (DOJ) and its components, Criminal Division (CRIM), Federal Bureau of Investigation (FBI) and Drug Enforcement Agency (DEA) concerning the agency's efforts to push for changes to federal surveillance law to ensure that all services that enable communications be technically capable of complying with a wiretap order. Defendant renewed its Motion for Summary Judgment, asking the Court to sustain its decision to withhold a substantial portion of the requested material in part or whole. Because the agency has failed to meet its burden—both procedurally and substantively—the Court should deny the government's Renewed Motion for Summary Judgment and grant EFF's Renewed Cross Motion. EFF respectfully requests entry of an order compelling Defendant immediately to disclose all improperly withheld records.

II. STATEMENT OF FACTS

A. The Communications Assistance for Law Enforcement Act (CALEA) and DOJ's Efforts to Expand the Law

In 1994, Congress passed the Communications Assistance for Law Enforcement Act (CALEA), 47 U.S.C. §§1001, *et seq.*, to aid law enforcement in its efforts to conduct surveillance of digital telephone networks. CALEA forced telecommunications companies to re-design their equipment, facilities, and services to make such surveillance easier and requires a telecommunications carrier that receives a court order or other lawful authorization to be able to provide law enforcement with call identifying information and communications from a targeted person. 47 U.S.C. § 1002. Although CALEA was expanded in 2005 to apply to broadband and certain Voice over IP (VoIP) providers,[1] it expressly excludes the regulation of "information services" providers and does not require any carrier to decrypt encrypted communications. 47 U.S.C. § 1001(8)(C)(i), 47 U.S.C. §§ 1002(b)(2)-(3).

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[1] *See* FCC, FCC 05-153, First Report and Order and Further Notice of Proposed Rulemaking (2005).

1 Over the last several years, the DOJ, FBI and several other agencies have been pushing
2 Congress and the Federal Communications Commission (FCC) to expand CALEA to apply to all
3 services that enable communications, including peer-to-peer messaging, social networking sites,
4 and others. As reported in a series of articles published in the *New York Times*[2] between September
5 and November 2010 and picked up immediately by other media,[3] officials from FBI, DOJ, the
6 National Security Agency, and other agencies met with White House officials to develop
7 legislation to expand CALEA.[4] According to the *Times*, this legislation would

8 require all services that enable communications—including encrypted e-mail
9 transmitters like BlackBerry, social networking Web sites like Facebook and software that allows direct "peer to peer" messaging like Skype—to be technically
10 capable of complying if served with a wiretap order. The mandate would include being able to intercept and unscramble encrypted messages.[5]

11 The FBI continues to push for changes to CALEA.[6]

12 Security researchers, privacy scholars and activists have been increasingly concerned that
13 the expansion the agencies were proposing would, in effect, mandate technological "back doors"
14 for the Internet.[7] "These "back doors" would result in new, easily-exploited security flaws and
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16 [2] Charlie Savage, "U.S. Tries to Make it Easier to Wiretap the Internet," *N.Y. Times*, Sept. 27,
17 2010, at A1, *available at* www.nytimes.com/2010/09/27/us/27wiretap.html; Charlie Savage, "Officials Push to Bolster Law on Wiretapping," *N.Y. Times*, Oct. 18, 2010, at A1, *available at*
18 www.nytimes.com/2010/10/19/us/19wiretap.html; Charlie Savage, "F.B.I. Seeks Wider Wiretap Law for Web," *N.Y. Times*, Nov. 16, 2010 at B5, *available at*
19 www.nytimes.com/2010/11/17/technology/17wiretap.html.

20 [3] *See, e.g.,* Ellen Nakashima, "Administration Seeks Ways to Monitor Internet Communications," *Wash. Post* (Sept. 27, 2010) http://www.washingtonpost.com/wp-
21 dyn/content/article/2010/09/27/AR2010092703244.html; "Proposal Could Expand Government's Web Wiretapping Efforts," *PBS News Hour* (Sept. 27, 2010)
22 http://www.pbs.org/newshour/bb/government_programs/july-dec10/wiretap_09-27.html.

23 [4] *See* Savage, *U.S. Tries to Make it Easier to Wiretap the Internet*, *supra* note 2; Savage, *Officials Push to Bolster Law on Wiretapping*, *supra* note 2.

24 [5] Savage, *U.S. Tries to Make it Easier to Wiretap the Internet*, *supra* note 2.

25 [6] *See* Declan McCullagh, "FBI renews broad Internet surveillance push," *CNet* (Sept. 22, 2012), http://news.cnet.com/8301-13578_3-57518265-38/fbi-renews-broad-internet-surveillance-push/;
26 Leslie Harris, "Top Five Internet Issues to Watch in 2013," *ABC News* (Feb. 14, 2013), http://abcnews.go.com/Technology/internet-freedom-biggest-threats-2013-center-democracy-
27 technolgy/story?id=18493996.

28 [7] *See* Steven M. Bellovin, *et al*. "Going Bright: Wiretapping without Weakening Communications Infrastructure," *IEEE Security & Privacy* (Jan./Feb. 2013), *available at*

1 would make all communications more vulnerable to attack.[8] They would also make
2 communications more vulnerable to surveillance by repressive governments around the world.
3 These fears are not merely hypothetical. For 10 months in 2004 and 2005, back doors built into
4 Vodafone's systems in Greece allowed someone to bug more than 100 high-ranking government
5 officials and dignitaries, including the Prime Minister and the Mayor of Athens.[9] And between
6 1996-2006, six thousand people were the targets of unauthorized wiretaps in Italy.[10]

7 **B. EFF's FOIA Requests For Records Related to the FBI's "Going Dark"**
8 **Program and Defendant's Proposals to Expand CALEA**

9 Although CRIM, FBI and DEA have argued they need a new and expanded version of
10 CALEA to prevent the "Going Dark" problem—the agencies' stated inability to conduct
11 surveillance on new communications technologies—they have provided few examples and no
12 statistical information to the public on criminal or national security investigations thwarted by the
13 inability to wiretap.[11] EFF filed its FOIA requests to obtain this and related information. This
14 lawsuit is based on two separate but related FOIA requests. The earlier request, submitted on
15

16 http://www.computer.org/portal/web/computingnow/security/content?g=53319&type=article&
17 urlTitle=going-bright%3A-wiretapping-without-weakening-communications-infrastructure.

[8] *See, e.g.*, Steven Bellovin (computer security expert), "The Worm and the Wiretap," *SMBlog*
18 (Oct. 16, 2010) https://www.cs.columbia.edu/~smb/blog//2010-10/2010-10-16.html; Susan Landau
(cybersecurity researcher and former Distinguished Engineer at Sun Microsystems), "Moving
19 Rapidly Backwards on Security," *Huffington Post* (Oct. 13, 2010)
20 http://www.huffingtonpost.com/susan-landau/moving-rapidly-backwards-_b_760667.html.

[9] *See* John Markoff, "Engineers as Counterspies: How the Greek Cellphone System Was Bugged,"
21 *NY Times Bits Blog* (July 10, 2007) http://bits.blogs.nytimes.com/2007/07/10/engineers-as-
counterspys-how-the-greek-cellphone-system-was-bugged/.

22 [10] *See Going Dark: Lawful Electronic Surveillance in the Face of New Technologies: Hearing*
23 *Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the*
Judiciary, 112th Cong. 27 (2011) (statement of Susan Landau at 27) , *available at*
24 http://judiciary.house.gov/hearings/printers/112th/112-59_64581.PDF (also discussing FBI wiretap
system called "Carnivore" that was vulnerable to insider attacks).

25 [11] *See, e.g.,* Robert S. Mueller, Director, Fed. Bureau of Investigation, *Speech to Preparedness*
26 *Group Conference,* Washington, D.C. (Oct. 6, 2010) *available at*:
http://www.fbi.gov/news/speeches/countering-the-terrorism-threat (noting FBI's difficulties
27 intercepting communications in a drug cartel case and a child exploitation case but also noting the
FBI was not prevented from obtaining the information it sought in either case by using other
28 investigative techniques).

May 21, 2009, seeks documents about the FBI's "Going Dark Program." The second request, filed on September 28, 2010, seeks materials related to the proposed expansion of CALEA, including evidence of any limitations of current surveillance technologies and records of communications between DOJ agencies and technology companies, trade organizations and Congress about potential legislation.[12]

After over a year of negotiations and multiple rounds of productions, the components completed processing and produced records in response to EFF's requests, withholding a significant amount of material in whole or part as stated in their declarations.[13] The parties cross moved for summary judgment in the spring of 2012, and the Court heard the cross motions on May 10, 2012. On October 30, 2012, the Court issued its Order on the cross motions, denying both without prejudice. The Court ordered the FBI to produce a revised *Vaughn* Index and each of the components to "conduct a further review of the materials previously withheld as non-responsive." (Order at 4.) The Court noted that "[i]n conducting such review, the presumption should be that information located on the same page, or in close proximity to undisputedly responsive material is likely to qualify as information that in "any sense sheds light on, amplifies, or enlarges upon" the plainly responsive material, and that it should therefore be produced, absent an applicable exemption." (*Id.* at 4-5.)

On December 14, 2012, FBI and DEA responded to this Court's order. The FBI sent Plaintiff revised versions of its *Vaughn* Indices, grouping documents into function- and topic-based categories.[14] The Bureau also provided new copies of 30 pages that originally contained sections withheld as outside the scope of Plaintiff's FOIA request. The FBI determined this material was, in fact, responsive but now withholds the same material under FOIA exemptions (b)(5) and (b)(7)(E). It is unclear from the FBI's *Vaughn* Index whether the Bureau re-processed other pages originally

[12] Defendant quotes EFF's FOIA requests in its Renewed Motion at pp. 5-6.

[13] These include: Second Decl. of Kristin Ellis, CRIM (Second Ellis Decl.); Decl. & Second Decl. of John E. Cunningham, CRIM (First Cunningham Decl., Second Cunningham Decl.), Second, Third & Fourth Decl. of Katherine Myrick, DEA (Second Myrick Decl., Third Myrick Decl., etc.); Second, Third, Fourth & Fifth Decl. of David M. Hardy, FBI, (Second Hardy Decl., Third Hardy Decl., etc.).

[14] EFF does not challenge the sufficiency of FBI's revised *Vaughn* Index.

withheld in full as outside the scope as the FBI's revised *Vaughn* does not appear to address these records. For example, while the FBI re-released material on several pages within Category 1A, it continues to withhold as outside the scope approximately 42 whole pages within this category alone. (*See e.g.*, Dkt. No. 63-1, 25-26 (*FBI Revised Vaughn* 2-3).)

Similarly, DEA re-processed records in response to this Court's order and provided Plaintiff with 14 new pages. (Fourth Myrick Decl. ¶ 7.) However, the agency continues to deny that it has withheld responsive material, (*id.*, Ex. A at 1) and continues to withhold approximately 20 pages in full as outside the scope of Plaintiff's request.

Finally, on December 17, 2012, CRIM responded to the Court's order in a letter addressed to Plaintiff. As noted in Mr. Cunningham's Declaration, CRIM did not release any additional information to Plaintiff. (Second Cunningham Decl. ¶ 4.) As discussed further below, CRIM continues to withhold an unknown quantity of records as not responsive to Plaintiff's FOIA request.

III. ARGUMENT

A. The Freedom of Information Act and the Standard of Review

The FOIA is intended to safeguard the American public's right to know "what their Government is up to." *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (quotations omitted). The central purpose of the statute is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214, 242 (1978). FOIA requests must be construed liberally, and "disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The Supreme Court has stated that "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within [FOIA's] statutory purpose." *Reporters Comm*, 489 U.S. at 773.

The FOIA requires an agency to disclose records at the request of the public unless the records fall within one of nine narrow exemptions. *See* 5 U.S.C. § 552(b). The exemptions "have been consistently given a narrow compass," and agency records that "do not fall within one of the exemptions are improperly withheld[.]" *DOJ v. Tax Analysts*, 492 U.S. 136, 151 (1989) (internal

1 quotation marks omitted); *see also NLRB*, 437 U.S. at 221; *Nat'l Wildlife Fed'n v. U.S. Forest*
2 *Service*, 861 F.2d 1114, 1116 (9th Cir. 1988).
3 FOIA disputes involving the propriety of agency withholdings are commonly resolved on
4 summary judgment. *See, e.g.*, *Nat'l Wildlife Fed'n*, 861 F.2d at 1115. Summary judgment is proper
5 when the moving party shows that "there is no genuine dispute as to any material fact and the
6 movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Feshbach v. SEC*, 5 F.
7 Supp. 2d 774, 779 (N.D. Cal. 1997) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). A
8 moving party who bears the burden of proof on an issue at trial "must affirmatively demonstrate
9 that no reasonable trier of fact could find other than for the moving party." *Feshbach*, 5 F. Supp. 2d
10 at 779. "In contrast, a moving party who will not have the burden of proof on an issue at trial can
11 prevail merely by pointing out that there is an absence of evidence to support the nonmoving
12 party's case." *Id.*
13 A court reviews the government's withholding of agency records *de novo*, and the
14 government bears the burden of proving that a particular document falls within one of the nine
15 narrow exemptions. 5 U.S.C. § 552(a)(4)(B); *Reporters Comm.*, 489 U.S. at 755. An agency must
16 prove that "each document that falls within the class requested either has been produced, is
17 unidentifiable, or is wholly exempt from the Act's inspection requirements." *Goland v. CIA*, 607
18 F.2d 339, 352 (D.C. Cir. 1978) (internal citation and quotation omitted). When claiming an
19 exemption, the agency must provide a "'relatively detailed justification' for assertion of an
20 exemption and must demonstrate to a reviewing court that records are clearly exempt." *Birch v.*
21 *USPS*, 803 F.2d 1206, 1209 (D.C. Cir. 1986) (citing *Mead Data Cent., Inc. v. Dep't of the Air*
22 *Force*, 566 F.2d 242, 251 (D.C. Cir. 1977). An agency may submit affidavits to satisfy its burden,
23 but "the government may not rely upon conclusory and generalized allegations of exemptions."
24 *Kamman v. IRS*, 56 F.3d 46, 48 (9th Cir. 1995) (quoting *Church of Scientology v. Dep't of Army*,
25 611 F.2d 738, 742 (9th Cir. 1979) (internal quotation marks omitted). All doubts as to whether a
26 FOIA exemption applies are resolved in favor of disclosure. *Bloomberg, L.P. v. Bd. of Governors*
27 *of the Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010).
28

B. EFF is Entitled to Summary Judgment Because the Government Has Improperly Withheld Agency Records

As described in detail below, Defendant has failed to satisfy its burden of proving that it has released all non-exempt material in response to EFF's FOIA requests. As a result, the Court should deny the government's Renewed Motion for Summary Judgment and grant EFF's Renewed Cross Motion, requiring the components to release all material they have improperly withheld under the FOIA.[15]

1. Defendant Continues to Improperly Withhold Records as "Outside the Scope" and "Not Responsive"

In reviewing records previously withheld as "outside the scope" and "not responsive," the government appears to have ignored the Court's direction that "the presumption should be that information located *on the same page*, or *in close proximity to* undisputedly responsive material is likely to qualify as information that in 'any sense sheds light on, amplifies, or enlarges upon' the plainly responsive material, and that it should therefore be produced, absent an applicable exemption." (Order at 4-5 (citing *Dunaway v. Webster*, 519 F. Supp. 1059, 1083 (N.D. Cal. 1981) (emphasis added)). Instead, the government performed only the bare minimum review of previously withheld material and has released only a handful of records, almost all of which are still redacted. Defendant continues to maintain that pages within "undisputedly responsive" slide presentations, memoranda and other records are nevertheless still "outside the scope" of Plaintiff's FOIA request, thus improperly narrowing the scope of EFF's FOIA request to withhold records that are clearly responsive, in violation of the FOIA.

In the Court's October 30, 2012 Order on the parties' Cross Motions, the Court recognized that "[u]nder FOIA, agencies are required "to construe a FOIA request liberally." (Order at 4 (citing *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995)). This means agencies are "obliged to release any information, subject to the specified exemptions, which relates to the subject of the request or which *in any sense sheds light on, amplifies, or enlarges upon* that

[15] As Defendant notes, EFF has withdrawn its challenge to the adequacy of the components' searches and their withholdings under Exemptions 1, 2, 6, 7(C), and 7(F). EFF also withdraws its challenges to the adequacy of FBI's revised *Vaughn* Index and to the Bureau's Exemption 3 claims.

material which is found in the same documents." *Dunaway*, 519 F. Supp. at 1083 (emphasis added).

Defendant has not followed this rule. FBI continues to withhold in full as outside the scope more than 100 full pages of records. These pages fall within documents whose titles make it clear they are otherwise responsive to Plaintiff's request. For example, FBI withheld seven pages of a 13-page 2010 presentation titled "Preservation of Lawful Intercepts: Challenges and Potential Solutions," (*see* Dkt. 41-5 at 53-55 (EFF/Lynch 72-77)[16]) and six pages from a 14-page presentation titled "Going Dark Initiative: Closing the National Security ELSUR Gap." (Dkt. 41-6 at 143.) FBI also withheld two briefing pages as outside the scope from an "Intelligence Note" whose subject is "Going Dark; Evolution in Mobile Technology & Potential Collection Issues." (*See* Dkt 41-5 at 111-113, (EFF/Lynch 142-145)) and withheld two pages from a 16-page "'Going Dark' talking points presentation" titled "The Going Dark Problem: Congressional Briefing, House and Senate Intelligence Committee Staff." (Dkt. 41-7 at 188.)[17] The titles and subjects of these documents make clear the material is responsive to EFF's FOIA request for information on "any problems, obstacles or limitations that hamper the FBI's current ability to conduct surveillance on communications systems. . . ."

The DEA and Criminal Division also continue to withhold material as "not responsive" or "outside the scope." For example, DEA originally withheld as not responsive 29 pages of material

[16] FBI has filed its entire production with the Court as Exhibits M and N to the Second Hardy Declaration. Exhibit M includes documents responsive to Plaintiff's first FOIA request and is split into three parts. Dkt. 41-2 (Part 1) covers Bates pages EFF/Cardozo 1-402; Dkt. 41-3 (Part 2) covers Bates pages EFF/Cardozo 403-677; and Dkt. 41-4 (Part 3) covers Bates pages EFF/Cardozo 678-1088. Exhibit N includes documents responsive to Plaintiff's second FOIA request and is also split into three parts. Dkt 41-5 (Part 1) covers Bates pages EFF/Lynch 1-285; Dkt 41-6 (Part 2) covers Bates pages EFF/Lynch 286-1011; and Dkt 41-7 (Part 3) covers Bates pages EFF/Lynch 1012-1572.

When discussing pages withheld in full as "outside the scope," Plaintiff will refer to the slip sheets discussing those withholdings and will use their Docket and page number. Otherwise, Plaintiff will refer to pages by Bates number where possible.

[17] FBI withheld whole pages in full as outside the scope of Plaintiff's FOIA request as noted in Dkt. No. 41-5 at 61 (10 pp.), 63 (6 pp.), 75 (5 pp.), 104 (9 pp.), and 130 (2 pp.). FBI also withheld pages in full as noted in Dkt. 41-6 at 58 (1 p.), 68 (1 p.), 81 (1 p.), 91 (2 pp.), 182 (1 p.) and withheld pages in full as noted in Dkt 41-7 at 101 (1p.), 140 (28 pp.), 172 (6 pp.), 174 (15 pp.), 180 (12 pp.), 182 (2 pp.), and 194 (2 pp.).

1 from a category of briefing presentations and slides (*see* DEA *Vaughn* Index, Dkt. No. 40-1 at 50,
2 nn. 3, 4). While DEA released 9 pages within this category of records on December 14, 2012, the
3 agency continues to withhold 20 pages in full as outside the scope. It is impossible to tell from the
4 DEA's *Vaughn* Index which pages the agency withheld in full based on specific FOIA exemption
5 claims and which it withheld in full as not responsive. The pages withheld in full (whether as not
6 responsive or under certain exemption claims) are from several presentations titled "Diminishing
7 Electronic Surveillance Capabilities in the Communications Age," that are otherwise responsive to
8 Plaintiff's FOIA request. (*See, e.g.*, Second Declaration of Jennifer Lynch in Support of Plaintiff's
9 Cross Motion for Summary Judgment and Opposition to Defendant's Motion for Summary
10 Judgment (Second Lynch Decl.) ¶ 5, Ex. 1, attaching DEA Bates pp. 5C-1-12 (DEA withheld pp.
11 2, 8-11), 5C-13 (DEA withheld pp. 14-25, 27), 5C-37-54 (DEA withheld pp. 38, 42, 44, 46-48 and
12 53 from a presentation titled "Law Enforcement's Need to Preserve Lawful Intercept
13 Capabilities"), 5C-131-155 (DEA withheld pp. 132, 135-36, and 148-54).)

14 The Criminal Division, unlike FBI and DEA, failed to release any new records, even
15 though material withheld as not responsive appears on pages containing responsive material.
16 (Second Cunningham Decl. ¶ 4.) For example, in a document CRIM describes as "released to
17 plaintiff in full," (CRIM *Vaughn* Index, Dkt. 39-2 at 4, n. 2), the agency withheld as "not
18 responsive" two paragraphs of handwritten notes from a March 18, 2010 meeting with "Main
19 Justice" on "Going Dark." (*See* Second Lynch Decl. ¶ 6, Ex. 2 (attaching Bates p. CRM-000011).)
20 CRIM also withheld as "not responsive" several paragraphs and one full page from a five-page
21 email chain entitled "24/7 Trace of Threat Email" that describes "e-mail anonymizing services."
22 (Dkt. 39-2 at 8 (CRIM *Vaughn* entry for Bates pp. CRM-000055-59); *see also* Second Lynch Decl.
23 ¶ 6, Ex. 2 (attaching Bates pp. CRM-000055-59).)

24 CRIM may also be withholding other information as not responsive. For several documents
25 the agency appears to be claiming an exemption for only a portion of the document, even though it
26 withheld the entire document in full. For example, CRIM's *Vaughn* entry for pages CRM-000013-
27 14 notes that CRIM withheld under Exemptions 5 and 7(E) "approximately 12 lines of text from
28 two pages" that discussed a proposal "to address particular limitations on the Government's ability

to conduct lawfully intercept certain communications [*sic*]." However, it is not clear whether the two pages only contain 12 lines of text or whether they contain more text but the agency only chose to claim exemptions for those 12 lines, finding (without noting specifically) the other text not responsive. (*See* CRIM *Vaughn* Index, Dkt. 39-2 at 4.)[18] Even though EFF raised these issues in its original Cross Motion, (Cross Mot. at 8-9,) the agency has failed to respond to them directly or to release these records.

The material withheld by Defendant as outside the scope or not responsive does not meet the test laid out in *Dunaway v. Webster* and cited in this Court's Order. (Order at 4.) In *Dunaway*, the court determined that the FBI withheld responsive material and ordered release where there was "any possibility that the material might bear some relationship to the subject of the request, or if the information was necessary to understand the context in which the reference to the subject of the request arises in the document." *Id.* at 1083-84. The court held "[t]he agency may withhold material found in documents which are in any way responsive to the request *only if that material is clearly and without any doubt unrelated to the subject of the request*." *Id.* at 1083 (emphasis added).

Here, the titles, descriptions and subject matter of the material Defendant withheld show that these records, at the very least "shed[] light on, amplif[y], or enlarge[] upon that material which is found in the same documents." *Dunaway*, 519 F. Supp. at 1083. Defendant has now had several months to conduct a review of this material to determine if it should be withheld under one or more exemptions. Defendant chose not to do so.

In a recent case out of the Central District of California, the court severely chastised the FBI for similar "outside the scope" claims. *See Islamic Shura Council of S. Cal. v. FBI*, 779 F. Supp. 2d 1114 (C.D. Cal. 2011). In *Islamic Shura Council*, the FBI represented to the court and to the plaintiffs in pleadings, declarations, and briefs that "a significant amount of information" it had located was outside the scope of the plaintiffs' FOIA request. *Id.* at 1117. Yet the court found after

[18] *See also* CRIM *Vaughn* entry for CRIM-000030 (withholding "1/2 page of information" from a 1-page draft document withheld in full); CRM-000032-33, 36, 37-38, 39, 40, 41, 42-43 (same or similar). *Compare* Dkt. 39-2 at 8, n.3 (noting specifically that the first page of an email chain "does not contain any information about the 'going dark' issue.")

in camera review of the records that "[t]he Government's representations were then, and remain today, blatantly false." *Id.* On appeal, the Ninth Circuit agreed that the government had misled the district court and held the government "cannot . . . represent to the district court that it has produced all responsive documents when in fact it has not." *Islamic Shura Council of S. Cal. v. FBI*, 635 F.3d 1160, 1166 (9th Cir. Cal. 2011). Ultimately, the court granted Rule 11 sanctions against the FBI for submitting false information. *Islamic Shura Council of S. Cal. v. FBI*, 2011 U.S. Dist. LEXIS 134123 (C.D. Cal., Nov. 17, 2011).

Plaintiff respectfully asks this Court to follow *Dunaway* and order this material released. If it turns out Defendant improperly claimed this material as outside the scope or not responsive, Plaintiff reserves the right to seek sanctions pursuant to the court's decision in *Islamic Shura Council*. *Id.*

2. Defendant Has Improperly Withheld Records Under Exemption 4

Both DEA and FBI have improperly withheld information under Exemption 4. Defendant's exemption claims fail because the government has not shown that disclosure of the information would be likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Defendant's justifications include little more than conclusory restatements of speculative expected harm. Further, Defendant's evidence is not based on personal knowledge and includes inadmissible hearsay. Therefore Defendant cannot satisfy its burden at summary judgment.

Exemption 4 permits agencies to withhold the "trade secrets and commercial or financial information" of private parties, obtained by the government, when that information is "privileged or confidential." 5 U.S.C. § 552(b)(4). But withholding information under Exemption 4 is by no means presumed. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 291-93 (1979) (rejecting Chrysler's argument that (b)(4) "impose[s] affirmative duties on an agency to withhold information sought" and noting that "[e]nlarged access to governmental information undoubtedly cuts against the

privacy concerns of nongovernmental entities, and as a matter of policy some balancing and accommodation may well be desirable.”).

Much of the case law concerning the “confidential” requirement of Exemption 4 has been developed in so-called “reverse” FOIA litigation; that is, in litigation where a private party—usually a corporation—has submitted information to the government and sues in federal court to prevent the disclosure of that information in response to a FOIA request. *See, e.g.*, *Frazee v. U.S. Forest Serv.*, 97 F.3d 367 (9th Cir. 1996). The government may also affirmatively invoke Exemption 4 to withhold “confidential” information from a requester. *See, e.g.*, *Watkins v. CBP*, 643 F.3d 1189, 1193 (9th Cir. 2011).

To withhold material under Exemption 4 in the Ninth Circuit, agencies must show the information the agency seeks to protect is “‘(1) commercial and financial information, (2) obtained from a person or by the government, (3) that is privileged or confidential.’” *Id.* at 1194 (citing *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1112 (9th Cir. 1994)). This test, which incorporates the two-part *National Parks* test above, *see GC Micro Corp.,* 33 F.3d at 1112, focuses on the probable response to disclosure by the *company*. *See Nat’l Parks*, 498 F.2d at 769 (describing the two-fold justification for Exemption 4: “(1) encouraging cooperation by those who are not obliged to provide information to the government and (2) protecting the rights of those who must”).

To support any Exemption 4 claims, courts consistently hold that an agency must either submit declarations from the companies whose information it seeks to protect or show that the agency declarant has expertise in the commercial area. *See, e.g.*, *GC Micro Corp*, 33 F.3d at 1113 (government’s Exemption 4 withholdings supported by “declarations by officers of each of the three corporations involved”); *Watkins*, 643 F.3d at 1193, 1196 (declarations submitted from agency officials who had “extensive knowledge of commercial enforcement and intellectual property affecting the nation’s borders” and from “major trade organizations”); *Lion Raisins v. Dep’t of Agric.*, 354 F.3d 1072, 1080 (9th Cir. 2004) (agency declarant provided adequate factual basis where declarant was in “almost daily contact” with companies in the relevant commercial market) (internal quotation marks omitted); *Raher v. Fed. Bureau of Prisons*, 749 F. Supp. 2d.

1148, 1156 (D. Ore. 2010) (letter from corporation opposing disclosure attached as exhibit to declaration).

Here, Defendant has neither submitted declarations from the companies nor demonstrated the declarants' familiarity with the relevant market. While the declarants—Mr. Hardy and Ms. Myrick—are undoubtedly knowledgeable in matters concerning FOIA and their respective agencies, Defendant has not shown that either declarant has personal knowledge of competition in particular markets or knowledge of the market harm posed by disclosure of the responsive records. As such, those sections of Defendant's declarations supporting its Exemption 4 withholdings should be disregarded. *See* Fed. R. Civ. Pro. 56(c)((4) (declarations used to support a motion "must be made on personal knowledge"); *Londrigan v. FBI*, 670 F.2d 1164, 1174-75 (D.C. Cir. 1981) (affidavit not based on personal knowledge should have been disregarded); *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 480 (2d Cir. 1999) (same).

The Third Hardy and Myrick Declarations also include inadmissible hearsay—recounting information that the companies allegedly provided to the declarants. (*See, e.g.* Third Myrick Decl. ¶ 9 ("*[T]he companies articulated* the competitive harm that would result from the release of its proprietary information[.]"), ¶ 10 ("*As one company explained*, because there are a small number of competitors in these markets, the disclosure of proprietary information" would harm the company's competitive position); Fourth Hardy Decl. ¶ 11 ("*RAND states*, 'This material is considered proprietary to RAND. This data shall not be disclosed outside the Government and shall not be duplicated used or disclosed[.]"(emphasis added in each)).[19] Because these statements would not be admissible in evidence, all declarants' statements concerning information conveyed by the companies to the agency or restating the beliefs and opinions of company employees and the sections of Defendant's Renewed Motion relying on these statements, (Def. Renewed Mot. at 10-13), should be disregarded. Fed. R. Civ. Pro. 56(c)(4); Fed. R. Evid. 801, 802; *Feshbach*, 5 F.

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[19] Even assuming this statement were admissible, the existence of a non-disclosure agreement with a company is not determinative for Exemption 4 purposes. *GC Micro Corp.,* 33 F.3d at 1113 ("[W]hether the government has promised to keep the information confidential, is not dispositive under Exemption 4."); *see also Petkas v. Staats,* 501 F.2d 887, 889 (D.C.Cir.1974) ("Nor can a promise of confidentiality in and of itself defeat the right of disclosure.").

1 Supp. 2d at 780 ("Hearsay statements found in affidavits are inadmissible."); *L.A. Times v. Dep't of*
2 *the Army*, 442 F. Supp. 2d 880, 887-88 (C.D. Cal. 2006) (court sustained objection to declaration in
3 FOIA case where declarant's statement concerning "what someone else told him" was "clearly
4 hearsay").

5 Finally, even if the Court were to overlook the evidentiary issues in the declarations, the
6 declarations fail to support Defendant's Exemption 4 claims because they provide only conclusory
7 statements of expected harm and are internally inconsistent. For example, Ms. Myrick states that
8 "disclosure of [the companies'] proprietary information would damage their competitive positions
9 because of the competitiveness of the industry." (Third Myrick Decl. ¶ 9.) Mr. Hardy asserts that
10 disclosure would result in competitors providing "lower cost analyses that would undermine
11 RAND ability to compete for contracts;" but then later asserts, despite this alleged competitive
12 pricing threat, that disclosure of the requested records would simultaneously "lead to higher
13 program and project costs" for the FBI. (Fourth Hardy Decl. ¶ 11.) The conclusory and
14 contradictory nature of Defendant's declarations fails to "show how release of the *particular*
15 *material* would have the adverse consequence that [Exemption 4] seeks to guard against." *Wash.*
16 *Post Co. v. Dep't of Justice*, 863 F.2d 96, 101 (D.C. Cir. 1988) (emphasis added).

17 In the absence of declarations supported by personal knowledge, statements admissible in
18 evidence, and specific, non-conclusory descriptions of the competitive harm posed by disclosure of
19 the responsive records, Defendant has not carried its burden under Exemption 4. Plaintiff raised all
20 these issues in earlier briefing (*see* Cross Mot. at 16-18, Reply at 5-7), and Defendant has now had
21 almost a year to obtain declarations that meet its evidentiary and substantive burdens on summary
22 judgment. Defendant has not done so. As such the information withheld should be released.

23 **3. Defendant Has Improperly Withheld Records Under Exemption 5**

24 FBI, DEA and CRIM have withheld over 2,000 pages of material under Exemption 5,
25 claiming these records are protected by the deliberative process privilege and the work-product
26 doctrine. (*See* Def. Renewed Mot. at 13-19; Second Ellis Decl. ¶ 41; Second Myrick Decl. ¶ 9(b)
27 (noting DEA has claimed Exemption 5 on 461 pp.); Second Hardy Decl. ¶ 45 (noting (b)(5)
28 withholdings on 1,809 pp.) Exemption 5 provides a narrow exception for "inter-agency or intra-

agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency[.]" 5 U.S.C. § 552(b)(5). The Supreme Court has interpreted Exemption 5 to protect records that fall "within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001); *see also Carter v. Dep't of Commerce*, 307 F.3d 1084, 1088 (9th Cir. 2002). For each claim, the government has failed to show the records withheld fit into one of the narrow privileges available under Exemption 5; therefore, Defendant has not met its burden and the records must be disclosed.

(a) Defendant Has Improperly Withheld Records That Are not Inter or Intra-Agency Communications

Exemption 5, by its own terms, applies only to records that are "inter-agency or intra-agency." 5 U.S.C. § 552(b)(5). As the Supreme Court has noted, "[s]tatutory definitions underscore the apparent plainness of the text:" "'agency' means 'each authority of the Government of the United States,' and 'includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . or any independent regulatory agency." *Klamath Water Users Protective Ass'n*, 531 U.S. at 9 (citing 5 U.S.C. §§ 551(1), 552(f)) (internal citations omitted). "In general, this definition establishes that communications between agencies and outside parties are not protected under Exemption 5." *Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Rep.*, 237 F. Supp. 2d 17, 25 (D.D.C. 2002). Thus, when a document is shared outside an agency—even in draft form—the document may not be withheld under Exemption 5.

DEA and FBI have withheld materials under Exemption 5 that were likely shared outside the executive branch and, thus, have waived their protection under Exemption 5. For example, DEA withheld 26 pages from DEA 6-5-31 under Exemption 5. These records describe "[c]ommunications relating to, and between, DEA and six (6) carrier, service provider, and/or consultant/vendor companies regarding specific technical intercept difficulties encountered during intercept operations." (DEA *Vaughn* at 14.) DEA similarly withheld 8 pages that document "meetings between designated DEA personnel and representative personnel of communication

carries, service providers, or communications industry consultants." (*Id*. (describing DEA 6-32-40).) FBI withheld a 14-page transcript of the FBI Director's testimony before the Senate Intelligence Committee at EFF/Lynch 347-60; an internal congressional contact briefing summary at EFF/Lynch 308, which summarizes a 2006 meeting with a Senate Judiciary staff member where CALEA was discussed; and has withheld approximately 80 pages from a meeting of the Law Enforcement Executive Forum, which appears to include non-agency personnel. (*See* EFF/Lynch 1241-1323.) To the extent these and other records describe meetings and information conveyed to third parties outside the executive branch, Exemption 5 is unavailable to withhold the information.

(b) Defendant Has Improperly Withheld Records Under the Deliberative Process Privilege

Defendant has claimed Exemption 5's deliberative process privilege to withhold hundreds of pages of responsive records in their entirety and many more pages in part. Because many of the components' records are final opinions or contain purely factual information, these records must be released.

The deliberative process privilege protects records that reflect the "opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (internal citations omitted). An agency record may be withheld pursuant to this narrow privilege only if it is "both (1) 'predecisional' or 'antecedent to the adoption of agency policy' and (2) 'deliberative,' meaning 'it must actually be related to the process by which policies are formulated.'" *Nat'l Wildlife Fed'n*, 861 F.2d at 1117 (quoting *Jordan v. DOJ*, 591 F.2d 753, 774 (D.C. Cir. 1978)); *see also Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1093 (9th Cir. 1997).

To support a deliberative process claim, an agency must "establish[] the character of the decision, the deliberative process involved, and the role played by the documents in the course of that process." *United States v. Rozet*, 183 F.R.D. 662, 666 (N.D. Cal. 1998) (citing *Strang v. Collyer*, 710 F. Supp. 9, 11 (D.D.C. 1989), *aff'd*, 899 F.2d 1268 (D.C. Cir. 1990) (internal quotation marks omitted)). An agency must also "*identify a specific decision* to which the document is predecisional." *Maricopa Audubon Soc'y,* 108 F.3d at 1094 (emphasis added). As

detailed below, Defendant has failed to meet its burden to withhold documents under the deliberative process privilege.

(i) *Defendant has Improperly Withheld Records Reflecting Final Agency Positions or Opinions*[20]

For an agency record to be withheld under the deliberative process privilege, the agency must identify "a specific decision to which the document is predecisional." *Maricopa Audubon Soc'y*, 108 F.3d at 1094. Even if a document is predecisional at the time it is prepared, the document can "lose that status if it is adopted, formally or informally, as the agency position on an issue." *NRDC v. DOD* (*NRDC I*), 442 F. Supp. 2d 857, 1098 (C.D. Cal. 2006) (citing *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). Here, because Defendant has failed to identify a specific decision to which many of the records at issue preceded and contributed, the records should be treated as the final agency positions and, thus, may not be withheld under the deliberative process privilege.

For example, DEA's withholding of a two-page "internal DEA bulletin" describing a particular intercept issue and used to "advise and inform agents" likely represents the position of DEA. (DEA *Vaughn* at 15-16 (describing DEA 7-1-7).) FBI withheld a similar three-page document "from an internal 'portal' that presents definitions on topic's such as 'Going Dark,' and the 'Degradation of Domestic Electronic Surveillance Capability.'" (EFF/Lynch 329-331.) These documents, which likely are guidance to agents in the field, are improperly withheld under the deliberative process privilege. *See Tax Analysts v. IRS*, 117 F.3d 607 (D.C. Cir. 1997).

DEA and FBI have withheld other records that likely reflect final agency positions, including "talking points" memos[21]—memos prepared for senior agency officials in preparation for

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[20] EFF has withdrawn its challenges to "draft" documents, or deliberative materials contributing to "draft" documents, withheld under Exemption 5 for which DEA has identified a "final" version. *See* Cross Mot. at 21, n. 28.

[21] For example, the FBI withheld three pages in full from a 16-page "'Going Dark' talking points presentation" dated November 2010, and titled, "The Going Dark Problem: Congressional Briefing, Office of Hon. Lamar Smith (HJC)." (Dkt. 41-7 at 182 (EFF/Lynch 1533-1534, 1546). S*ee, also e.g.,* FBI EFF/Lynch 989-992, 999-1006, 1007-09, 1166-69 (attaching a 2006 talking points memo that likely was adopted by the agency), 1170-75, 1280-1322 (talking points prepared

1 meetings, hearings, or negotiations—and briefing materials.[22] It is highly likely these withheld
2 materials "have been relied upon or adopted as official positions after their preparation." *See Elec.*
3 *Privacy Info. Ctr. v. DOJ*, 511 F. Supp. 2d 56, 71 (D.D.C. 2007); *see also N.Y. Times Co. v. DOD*,
4 499 F. Supp. 2d 501, 514-15 (S.D.N.Y. 2007) (holding "talking points and the formulation of
5 responses to possible questions" prepared "to aid in briefing officials and preparing them to answer
6 questions" not properly withheld under Exemption 5).

7 As Defendant acknowledges, these talking points and briefing materials "are routinely used
8 within [the agency] . . . as preparatory tools for executives, management, and designated agency
9 representatives" to represent the interests of the agency in various fora. (Second Myrick Decl.
10 ¶ 9(c); Second Hardy Decl. ¶ 46) However, because senior officials are responsible for articulating
11 the components' final decisions and policy, these talking points and briefing materials likely reflect
12 the agency's policy or position on various matters, regardless of whether the specific content was
13 actually disclosed. For example, DEA withheld several "Question and Answers (Q and As)"
14 relating to "electronic intercept issues/challenges presented by emerging technologies" that were
15 used to prepare senior agency officials for hearings before Congress. (*See, e.g.,* DEA *Vaughn* Index
16 at 16; Second Myrick Decl. ¶ 23.) And FBI withheld a similar "Q/A" prepared for a hearing before
17 the Senate Judiciary Committee. (FBI EFF/Lynch 1231-32.) Because the Q and As were used to
18 prepare officials for public testimony, the answers likely represent the positions that senior DEA
19 and FBI officials were prepared to articulate during the hearing. That, ultimately, every draft
20 "question" was not answered at the hearing is of no import: instead, it is the fact that senior
21 officials were prepared to rely on these positions that is the relevant inquiry.[23]

22 for Law Enforcement Executive Forum, a group that may or may not include non-agency
23 members); FBI EFF/Cardozo 961-965, 969-970, 973-979; DEA *Vaughn* at 1, 4, 5, 6, 13.

24 [22] *See, e.g.,* DEA *Vaughn* at 11-13, 16, 17; FBI EFF/Lynch at 302-304 (3-page internal briefing prepared March 12, 2007, by the FBI's Directors Research Group), 305-306 (2-page undated internal briefing concerning CALEA limitations).

25 26 27 28 [23] Other examples of "talking points" or "briefing materials" withheld under Exemption 5 include DEA 2D 1-12 ("DEA Administrator Talking Points for Congressional Testimony" regarding electronic intercept issues" for use in testimony before congress"), DEA *Vaughn* at 5; DEA 3A 11-12 ("Title III Intercept Talking Points Paper" prepared for "DOJ Working Group"), DEA *Vaughn* at 6; DEA 3A 15-16 ("Pen Register and Trap and Trace Talking Points Paper" prepared for "DOJ Working Group").

Finally, FBI has withheld as "drafts" multiple versions of the same set of talking points, discussion papers, and presentations,[24] stating in an email to counsel that there are no final versions of these documents. (*See* Second Lynch Decl. ¶ 7, Ex. 3.) An agency's designation of a document as a "draft," alone, does not render it exempt under the deliberative process privilege. While a "draft" version of a document may, in certain circumstances, be legitimately withheld under the deliberative process privilege, "designation of a document as a 'draft' does not automatically trigger proper withholding[.]" *Defenders of Wildlife v. Dep't of Agric.*, 311 F. Supp. 2d 44, 58 (D.D. C. 2004); *see also Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982) ("*Coastal States* forecloses the Agency's argument that any document identified as a 'draft' is *per se* exempt.")). In the absence of a final agency decision or record to which these "drafts" contributed, FBI has improperly withheld these records under the deliberative process privilege.

(ii) *Defendant Has Improperly Withheld Purely Factual Information*

"[M]emoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context" may not be withheld under the deliberative process privilege. *EPA v. Mink*, 410 U.S. 73, 88-89 (1973); *see also Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep't of State*, 818 F. Supp. 1291, 1297 (N.D. Cal. 1992) (same). While the rationale behind the deliberative process privilege encourages candor in deliberative discussions, the requirement that facts must be disclosed is intended to enhance the integrity of agency deliberations. *See Quarles v. Dep't of Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990) (noting that "the prospect of disclosure is less likely to make an advisor omit or fudge raw facts").

In applying Exemption 5 to over 2,000 pages of records withheld either in their entirety or in part, it is a near-certainty that Defendant has withheld some purely factual material. Some

[24] *See*, *e.g.*, Going Dark presentation/discussion paper titled "Law Enforcement's Need to Preserve Lawful Intercept Capabilities," at, *e.g.*, EFF/Lynch 367-79, 380-92, 393-405, 406-417, 768-84, 785-802; Going Dark Presentation titled "Preservation of Lawful Intercepts: Challenges and Potential Solutions" at, *e.g.*, 419-428, 449-458, 459-468, 469-77, 479-87, 488-99, 558-66, 604-614, 744-54; draft discussion paper titled "Going Dark: Problems and Proposals," at, *e.g.*, 429-448, 431-446, various documents titled "Closing the National Security ELSUR Gap," at *e.g.,* 594-602, 803-811, 812-819.

records, in particular, suggest this. For example, DEA withheld a "Case Example Discussion Paper" that describes "cases and individualized assessments/analysis of the technological impact for each documented intercept difficulty." (DEA *Vaughn* Index at 9 (describing DEA 4 48-52).) Nothing in DEA's description suggests that these case studies are "deliberative" in any way; thus, the factual portions of these case summaries cannot be withheld under Exemption 5. DEA also withheld an "Issue and Proposal Matrix" in full under the deliberative process privilege. (DEA *Vaughn* at 3.) The matrix, which is in "a spreadsheet format," identifies "specific intercept impediments juxtaposed against specific existing statutory and regulatory frameworks." (Myrick Decl. ¶ 11(c).) Again, to the extent that the matrix presents factual descriptions of "specific intercept impediments" and their relation to "existing statutory and regulatory frameworks," those portions of the matrix may not be withheld under the deliberative process privilege.[25]

The purposes underlying the deliberative process privilege are not served by permitting agencies to shield factual information from disclosure to the public. *See Quarles*, 893 F.2d at 392; *see also NRDC I*, 442 F. Supp. 2d at 877 (ordering defendant to disclose factual material withheld under Exemption 5).

[25] CRIM and FBI have also withheld records that likely contain factual material. *See, e.g.*, CRM-000003 (concerning government's ability to intercept particular types of electronic communications on a particular carrier's system); CRM-000013-14 (describing problems the government had conducting wiretaps); CRM-000015-19, CRM-000060-61 (compilation of various investigations); CRM-0000050-52 (e-mails exchanged between a CRM-CCIPS attorney, an AUSA, and an ATF employee, discussing techniques and procedures for addressing an encryption issue encountered on a seized portable USB flash drive); FBI EFF/Lynch 292 (draft presentation titled "ECPA Reform" that lists reforms that members of private industry and privacy community are proposing concerning ECPA); EFF/Lynch 302-304 (3-page internal briefing that reviews FCC orders and discusses possible proposals to amend CALEA); EFF/Lynch 994-998, 1010-11, 1028-29, 1030-32, 1033-36 (discussion papers outlining technical issues and impediments investigators were facing during investigations); FBI EFF/Lynch 1203-05 (discussion paper that summarizes results of a survey of surveillance problems other law enforcement agencies were having); EFF/Cardozo 973-979 (presentation outlining "history of CALEA and its limitations, and new legislative proposed to update CALEA"). Records DEA withheld under Exemption 5 in its Category 5C documents, too, likely contain factual material that has been improperly withheld. (*See* Second Myrick Decl. ¶ 20(a)-(b) (describing records that reflect "challenges to DEA surveillance operations posed by emerging technologies").)

(c) The Criminal Division Has Improperly Withheld Records Under the Work Product Doctrine

CRIM has withheld information from several emails based on the work product doctrine. The doctrine applies to documents with "two characteristics: (1) they must be prepared in anticipation of litigation or for trial, and (2) they must be prepared 'by or for another party or by or for that other party's representative.'" *United States v. Torf (In re Grand Jury Subpoena)*, 357 F.3d 900, 907 (9th Cir. 2003) (quoting *In re Calif. Pub. Utils. Comm'n*, 892 F.2d 778, 780-81 (9th Cir.1989)); *see also* Fed. R. Civ. P. 26(b)(3). In the FOIA context, to promote the statute's objective of disclosure over secrecy, the work product doctrine only applies to records that are created "because" of pending or potential litigation. *See Maine v. Dep't of Interior*, 298 F. 3d 60, 68 (1st Cir. 2002). Documents that are "prepared in the agency's ordinary course of business" and "not sufficiently related to litigation may not be accorded protection." *Public Citizen, Inc. v. Dep't. of State*, 100 F. Supp. 2d 10, 30 (D.D.C. 2000) (citing *Hennessey v. United States Agency for Int'l Dev*., No. 97-1113, 1997 U.S. App. LEXIS 22975, at *17, No. 97-1113 (4th Cir. Sept. 2, 1997)) *rev'd in part on other grounds*, 276 F.3d 634 (D.C. Cir. 2002). "[A]t a minimum, an agency seeking to withhold a document . . . must identify the litigation for which the document was created (either by name or through factual description) and explain why the work-product privilege applies to all portions of the document." *Church of Scientology Int'l v. DOJ*, 30 F.3d 224, 237 (1st Cir. 1994).

Here, CRIM has failed to meet these requirements; it has failed to specifically identify the litigation for which the documents were prepared and has failed to show they were prepared "because" of pending or potential litigation and not merely in the "agency's ordinary course of business." For example, the email at Bates page CRM-000003 appears to discuss in general terms the government's problems related to surveillance of electronic communications, and the *Vaughn* entry notes only that the email discussion was "related to/part of"—not "because" of—a criminal case. (CRIM *Vaughn* Index at 2.) Similarly, the *Vaughn* entry for emails on pages CRM-000042-43 states that they include an outline of resources that a division of CRIM needs to "continue investigating and prosecuting child exploitation crimes." (*Id.* at 6.) Nothing in this entry indicates a

specific litigation for which this outline or the "additional details" discussed were produced. (*Id.*) Instead it merely appears these emails were discussing the general problems the agency was having—across all its child exploitation cases—in conducting surveillance on new technologies. The emails on pages CRM-000050-54 similarly seek general resources related to problems with encryption issues and "inability to intercept certain types of communications" and fail to identify a particular case or litigation for which the records were produced. Because CRIM has failed to show these records are protected by the work product doctrine, they must be released.

4. Defendant Has Improperly Withheld Records Under Exemption 7(A)

Each of the DOJ components has withheld records under 7(A), arguing these records include information that "either summarizes, discusses, or relates to . . . criminal cases which remain in an open or active status[,]" and that the release of this information "could adversely impact on-going and prospective enforcement proceedings." (Def. Renewed Mot. at 22.) The government has failed to show that releasing these records with identifying information such as names and dates redacted would still cause harm. As such they must be released.

To claim Exemption 7(A), an agency must show that the material withheld "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C.§ 552(b)(7)(A), and "relates to a 'concrete prospective law enforcement proceeding.'" *Bevis v. Dep't of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986) (citing *Carson v. DOJ*, 631 F.2d 1008, 1018 (D.C. Cir. 1980)). "[I]t is not sufficient for an agency merely to state that disclosure would reveal the focus of an investigation; it must rather demonstrate *how* disclosure would reveal that focus." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1114 (D.C. Cir. 2007) (citing *Campbell v. Dep't of Health & Human Servs.*, 682 F.2d 256, 265 (D.C. Cir. 1982) and several other cases where courts required "significant" and "specific information about the impact of the disclosures").

Even if an agency's *Vaughn* Index has established "at least a colorable basis for the assertion of Exemption 7(A)" the agency still must show it has released all reasonably segregable portions of the records. *Stolt-Nielsen Transp. Grp LTD. v. United States*, 534 F.3d 728, 733-34 (D.C. Cir. 2008). Conclusory affidavits attesting that an agency employee has "'reviewed each page line-by-line to assure himself that he was withholding from disclosure only information

exempt pursuant to the Act' . . . [are] not sufficient support for a court to conclude that the self-serving conclusion is the correct one." *Id.* at 734 (holding DOJ failed to show that records could not be released with dates and names redacted, if necessary).

Similarly here the government has failed to show why it could not simply redact identifying information from these records. None of the components has provided anything more than blanket assertions as to the potential harm that would occur should these records be released, despite the fact that they have relied on 7(A) to withhold over 300 pages. (*See, e.g.,* Second Ellis Decl. ¶ 65, noting in general terms that "premature release of information . . . *could* adversely impact on-going and prospective enforcement proceedings" (emphasis added); Second Myrick Decl. ¶ 9(e); Second Hardy Decl. ¶ 149; Revised FBI Lynch *Vaughn* Index at 6-8, 10-13, 15-16, 18-25 (merely stating that FBI withheld information from approximately 190 pages under 7)(A) because the material "discussed or related details of FBI criminal investigations that remain in an open or active status" and failing to address segregation).) Without more, the government has failed to meet its obligations under the FOIA, and the records must be released.

5. FBI Improperly Withheld Records Under Exemption 7(D)

FBI has failed to show that information it withheld under Exemption 7(D) was conveyed to it under an implied grant of confidentiality.[26] As such this information must be disclosed.

Exemption 7(D) allows the government to withhold information compiled for law enforcement purposes if (1) it "could reasonably be expected to disclose the identity of a confidential source," or (2) it is information provided by a confidential source and was "compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation." 5 U.S.C. § 552(b)(7)(D). The question under 7(D) "is not whether the requested *document* is of the type that the agency usually treats as confidential, but whether the particular *source* spoke with an understanding that the communication would remain confidential." *DOJ v. Landano*, 508 U.S. 165, 172 (1993); *see also Rosenfeld v. DOJ*, 57 F.3d 803, 814 (9th Cir. 1995) (noting *Landano*'s requirement that a court

[26] EFF does not challenge the records FBI withheld that were provided to it under an express assurance of confidentiality. (*See* Def. Renewed Mot. at 23; Second Hardy Decl. ¶125.)

may "infer that the informant received an implied assurance of confidentiality" *only* if certain factors make "it reasonable to infer that the informant expected such an assurance"). Further, an agency cannot show confidentiality merely by claiming "that all sources providing information in the course of a criminal investigation do so on a confidential basis." *Roth v. DOJ*, 642 F.3d 1161, 1184 (D.C. Cir. 2011) (citing *Landano*, 508 U.S. at 171, 181).

The Supreme Court in *Landano* set out several factors to determine if a source "spoke with an understanding that the communication would remain confidential." 508 U.S. at 172. These include: (1) "the character of the crime at issue;" (2) "the source's relation to the crime;" (3) whether the source received payment; and (4) whether the source has an "ongoing relationship" with the law enforcement agency and typically communicates with the agency "only at locations and under conditions which assure the contact will not be noticed." *Id.* at 179; *see also Roth*, 642 F.3d at 1186.

The FBI has invoked Exemption 7(D) to withhold information from and about certain companies that provided information to the Bureau. (*See* Second Hardy Decl. ¶ 76 (noting 7(D) used to "withhold information provided to the FBI by commercial/private companies").) The Bureau vaguely asserts that disclosing this information "*could* harm the commercial interests of these enterprises by *potentially* deterring the public from employing their services." (Def. Renewed Mot. at 23-24 (citing Hardy Decl. at ¶ 77) (emphasis added).) This is insufficient under the factors laid out in *Landano*. 508 U.S. at 179. It is also insufficient, given the context in which the companies' names might arise in the records in this case. In both *Landano* and *Roth*, the court found factual situations involving violent crimes would lead most people to believe the information they provide to the FBI was provided under some form of confidentiality. *See Landano*, 508 U.S. at 179 (finding implied confidentiality where informant was witness to a gang murder); *Roth*, 642 F.3d at 1186 (finding implied confidentiality, given the "brutal nature of the quadruple homicide [discussed in the case] and the source's relationship with at least some of the victims"). The same cannot be said here. FBI has not argued that sources redacted from these records provided information to the FBI related to a violent crime or that they had a relationship to the possible criminal activity that could place them in harm's way. Here, the FBI is merely attempting to withhold names of

communications service providers and other companies who, as FBI recognizes (Second Hardy Decl. ¶ 78), are required by law to disclose information about their subscribers when presented with a lawful request.[27]

Mr. Hardy asserts, with no factual support or basis for personal knowledge, that the companies "would pay a high price if it were known that they were providing information about their customers." (Second Hardy Decl. ¶ 78.) Defendant's Renewed Motion concludes that these companies "faced a clear economic cost to providing the information" and therefore "there is every reason to believe they provided the information expecting that their identities would remain confidential." (Def. Renewed Mot. at 24.) Yet these unsupported assertions fail to recognize that the law requires these companies to disclose information in certain contexts (*see, e.g.,* 18 U.S.C. §§ 2516-18) and just as clearly prohibits them from disclosing information in other contexts (*see, e.g.,* 18 U.S.C. § 2511). Companies should not "voluntarily" be providing information on their customers to the FBI without appropriate legal process, and the FBI should not be allowed to prevent the public from learning about this through an unsupported claim of economic harm to the companies.

Further, the public already knows that specific companies provide information to law enforcement, and the FBI has provided no evidence to show that customers have switched providers based on this information. For example, Google has been reporting detailed information since 2009 on the government requests the company receives for customer data and how it responds to them.[28] Twitter now does the same.[29] Similarly, information on how and when providers disclose information on their customers to law enforcement is readily available. *See, e.g.*, Jennifer Lynch, "Social Media and Law Enforcement: Who Gets What Data and When?" *EFF*

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[27] Mr. Hardy's assertion that "if the FBI disclosed the identities of confidential sources . . . that revelation would have a chilling effect on the activities and cooperation of other current or potential future FBI confidential sources" (Second Hardy Decl. ¶ 77) can hold no water in this context where CALEA (47 U.S.C. §§ 1001, *et seq*.) and the various surveillance statutes mandate that communications providers and other companies respond when provided with a lawful request. *See*, *e.g.,* 18 U.S.C. §§ 2516, 2518, 2516, 2703, 2709, 3124, 3511; 50 U.S.C. §§ 1802, 1805.

[28] *See* "Government Removal Requests," *Google Transparency Report,* https://www.google.com/transparencyreport/governmentrequests/ (last visited Feb. 25, 2013).

[29] *See Transparency Report*, https://transparency.twitter.com/ (last visited Feb. 25, 2013).

1 (Jan. 20, 2011) (discussing and publishing law enforcement guides produced by social media
2 companies that were disclosed in response to one of EFF's FOIA requests); [30] "Cell Phone
3 Location Tracking Public Records Request," *ACLU* (Sept. 10, 2012) (publishing similar law
4 enforcement guides produced by cell service providers).[31]

5 The FBI has failed to support its claim that communications service providers (or any other
6 similar "sources" in these records) provide information to the FBI under an implied grant of
7 confidentiality. As such, this information must be released.

8 **6. Defendant Improperly Withheld Records Under Exemption 7(E)**[32]

9 As Defendant notes, the components have claimed) Exemption 7(E) on approximately two-
10 thirds of the records in this case, whether released in part or withheld in full. (*See* Def. Renewed
11 Mot. at 25-26.) Exemption 7(E) allows an agency to withhold documents "compiled for law
12 enforcement purposes" that "would disclose techniques and procedures for law enforcement
13 investigations or prosecutions" only if the agency demonstrates a reasonable risk that criminals will
14 use the information to circumvent detection, apprehension or prosecution. 5 U.S.C. § 552(b)(7)(E);
15 *Gordon v. FBI*, 388 F. Supp. 2d 1028, 1035-36 (N.D. Cal. 2005). Ninth Circuit case law holds that
16 Exemption 7(E) "only exempts investigative techniques not generally known to the public."
17 *Rosenfeld*, 57 F.3d at 815. Defendant has failed to show that disclosing records withheld under
18 Exemption 7(E) would lead to circumvention or that the records describe techniques not generally
19 known to the public. As such, these records must be released.

20 Defendant cannot withhold information about techniques or procedures that "would leap to
21 the mind of the most simpleminded investigator." *Rosenfeld*, 57 F.3d at 815 (citing *Nat'l Sec.*
22 *Archive v. FBI,* 759 F. Supp. 872, 885 (D.D.C. 1991)); *Albuquerque Publ'g Co. v. DOJ*, 726 F.
23 Supp. 851, 857 (D.D.C. 1989). In *Albuquerque Publishing*, the court directed agencies to release
24 records "pertaining to techniques that are commonly described or depicted in movies, popular

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[30] https://www.eff.org/deeplinks/2011/01/social-media-and-law-enforcement-who-gets-what.
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[31] http://www.aclu.org/protecting-civil-liberties-digital-age/cell-phone-location-tracking-public-records-request.
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[32] EFF does not challenge DEA's withholding of G-DEP Code numbers withheld under Exemption
28 7(E) (*see* Second Myrick Decl. ¶ 9(h).)

1 novels, stories or magazines, or on television," including "eavesdropping, wiretapping, and
2 surreptitious tape recording and photographing." 726 F. Supp. at 858; *see also Hamilton v. Weise*,
3 No. 95-1161, 1997 U.S. Dist. LEXIS 18900, at *30-32 (M.D. Fla. Oct. 1, 1997) (generally known
4 techniques include those discussed in judicial opinions); *Rosenfeld*, 57 F.3d at 815 (details about a
5 pretextual phone call were not protected because the technique would "leap to the mind of the most
6 simpleminded investigator"). *See also Warshak v. U.S.*, 532 F.3d 521, 524-25 (6th Cir. 2008)
7 (describing law enforcement technique for gaining access to suspects' email); *Dunaway*, 519 F.
8 Supp. at 1082-83 (describing law enforcement technique for gaining access to suspects' physical
9 mail as "commonly known").

10 Defendant has failed to show that disclosing these records would lead to actual
11 circumvention of the law or that the law enforcement techniques it has withheld are not routine and
12 the surveillance problems they are having are not well-known to the public. It is not an unknown
13 fact that the government has had trouble conducting surveillance on certain technologies, or that
14 certain technologies allow people to encrypt their communications or speak anonymously. This has
15 been an important and well-known benefit of certain technologies such as Tor and Off-the-Record
16 (OTR) chat during various recent foreign conflicts and domestic protests and has provided much
17 needed protection for human rights advocates, activists, and journalists around the world. *See*, *e.g.*,
18 Austin Considine "For Activists, Tips on Safe Use of Social Media," *N.Y. Times* (April 1, 2011).[33]
19 In fact, many civil liberties and other organizations, including EFF, have produced guides and tools

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23 [33] Https://www.nytimes.com/2011/04/03/fashion/03noticed.html. *See also* "5 Tools to Fight
Internet Censorship," *IT News Africa*, (March 21, 2012) http://www.itnewsafrica.com/2012/03/5-
24 tools-to-fight-internet-censorship/ (describing anonymization tools such as Tor and "OTR" chat
and noting their importance "in helping journalists get the message out"); Virginia Heffernan,
25 "Granting Anonymity," *N.Y. Times*, (Dec. 17, 2010) https://www.nytimes.com/2010/12/19/
26 magazine/19FOB-Medium-t.html (noting "Peaceniks and human rights groups use Tor, as do
journalists, private citizens and the military"); "Tor (anonymity network)" *Wikipedia*,
27 http://en.wikipedia.org/wiki/Tor_(anonymity_network) (describing how Tor works and noting its
anonymity function has been endorsed by civil liberties groups as a way for whistleblowers and
28 human rights workers to communicate with journalists).

to help people avoid surveillance of their communications. *See*, *e.g.*, EFF, Surveillance Self-Defense Project (detailing specific technical ways to avoid government spying).[34]

It is also well-known that the government has had problems conducting surveillance on specific communications technologies and in getting records from specific providers. *See*, *e.g.*, Declan McCullagh, "Skype: We Can't Comply with Police Wiretap Requests," *CNET* (June 9, 2008).[35] In fact, Immigrations and Customs Enforcement released 12 pages of records on referral from the FBI in this case that detail specific problems it had with several specific providers (whose names were not redacted). (*See* Second Lynch Decl. ¶ 8, Ex. 4.) And many sources offer specific and detailed information on how to either avoid or conduct surveillance on various technologies such as gaming devices, websites and instant messaging. *See, e.g.*, Nate Anderson, "CSI: Xbox—How Cops Perform Xbox Live Stakeouts and Console Searches," *ArsTechnica* (Jan. 10, 2012).[36]

By reviewing the unredacted text within the documents Defendant released and the *Vaughn* submissions, it is clear that at least some, if not all of the techniques and technologies withheld are widely known. For example, several agency records refer to common technologies like email, VoIP (Voice over IP), Peer-to-Peer networks, Skype and Blackberry services, and HTTPS. (*See, e.g.*,

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[34] Https://ssd.eff.org/. *See also* The Guardian Project, https://guardianproject.info/ (an organization that partners with human rights groups and has developed technology to protect various forms of "communications and personal data from unjust intrusion and monitoring"); Martus, https://www.martus.org/ (a secure information management tool used by human rights organizations around the world to encrypt information and shield the identity of victims or witnesses who provide testimony on human rights abuses); whispersystems, http://www.whispersystems.org/ (various tools to protect data on Android phones); "HTTPS Everywhere," EFF, https://www.eff.org/https-everywhere (describing a tool EFF developed that "encrypts your communications with many major websites, making your browsing more secure").

[35] Http://news.cnet.com/8301-13578_3-9963028-38.html. *See also* Savage, *U.S. Tries to Make it Easier to Wiretap the Internet, supra* note 2 (discussing problems intercepting encrypted communications and communications on peer-to-peer networks); Charlie Savage, *Officials Push to Bolster Law on Wiretapping, supra* note 2.

[36] Http://arstechnica.com/tech-policy/news/2012/01/searches-and-xbox-live-stakeouts-how-cops-investigate-consoles.ars. *See also Video Game Device Forensics*, http://consoleforensics.com/ (discussing forensics for several gaming technologies); Declan McCullagh, "How safe is instant messaging? A security and privacy survey," *CNET* (June 9, 2008) http://news.cnet.com/8301-13578_3-9962106-38.html (discussing encryption and ease of surveillance of instant messages on various companies' systems). "Anonymous P2P," *Wikipedia*, https://en.wikipedia.org/wiki/Anonymous_P2P.

Second Lynch Decl. ¶ 5, Ex. 1 (DEA 5C-1-12, 5C-225-227, 229, 235-240, 9-4); *Vaughn* entry for CRM-000001-02; FBI EFF/Lynch 69, 94, 100, 223-224, 228, 276, 1040, 1433-1438 and 1449-1452; EFF/Cardozo 403, 426, 463, 1080.) Other records appear to describe how certain technologies work on a basic level. For example, FBI withheld in full under (b)(7)(E) a two-page talking points "User Guide" that discusses "how to read User, History, and Messaging Information provided by an Internet Service Provider (ISP)." (*See* Dkt. 41-5 at 128 (EFF/Lynch 173-174).) FBI also withheld in full a one-page "talking points summary of what a social networking company is, and what can, or can not be obtained with a NSL/Subpoena." (*Id.* at 129 (EFF/Lvnch 175).[37])

Because the public—including criminals—already knows about the techniques discussed in these records, disclosing this information will not create a circumvention risk. As such it, it must be released.

7. Defendant Has Failed to Segregate and Release All Non-Exempt Information

The FOIA explicitly requires that "[a]ny reasonably segregable potion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt[.]" 5 U.S.C. § 552(b); *see also Church of Scientology*, 611 F.2d at 744 ("[I]t is error for a district court to simply approve the withholding of an entire document without entering a finding on segregability, or the lack thereof."). The duty to segregate extends to material withheld under all of the FOIA's nine exemptions. *Id.*

"In the Ninth Circuit, the district court must review the agency's 'segregability' decisions on a document-by-document basis." *NRDC v. DOD* (*NRDC II*), 388 F. Supp. 2d 1086, 1096 (C.D. Cal. 2005) (citing *Wiener v. FBI*, 943 F.2d 972, 988 (9th Cir. 1991)). To satisfy its burden, the agency must "describe what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document." *Mead Data Cent.*, 566 F.2d at 261; *see also NRDC II*, 388 F. Supp. 2d at 1105 (finding an agency declaration inadequate on segregability

[37] *See also* Dkt. 41-5 at 130 (EFF/Lynch 176-179)(talking points paper titled "Frequently Asked Questions" that was "developed to answer frequently asked questions of FBI investigative personnel concerning obtaining data, interpreting data, and preservation of data provided by an Internet Service Provider (ISP) in response to a FISA order, NSL, or search warrant.")

grounds when it stated merely that "none of the withheld documents contain reasonably segregable information that is not exempt").

Defendant states that it has "provided all 'reasonably segregable' responsive information that is not protected by an exemption." (Def. Renewed Mot. at 27.) Despite this assurance, over 3,000 pages of records at issue in this case have either been withheld in their entirety or have large blocks of redacted text, thus concealing entire sentences, paragraphs, and pages from public disclosure. Given the broad brush with which Defendant has painted exempt material, as discussed within the sections addressing each exemption claim above, it is a near certainty that Defendant has withheld more information than is otherwise justifiable. The examples discussed above only underscore the need for this Court's searching review of the Defendant's compliance with FOIA's obligation to provide "[a]ny reasonably segregable potion" of the records at issue in this case. *See* 5 U.S.C. § 552(b). Thus, despite Defendant's assertions that it has complied with FOIA's segregability requirement, Defendant has not satisfied its burden and is not entitled to summary judgment.

IV. CONCLUSION

For the foregoing reasons, the Defendant's Renewed Motion for Summary Judgment should be denied, and EFF's Renewed Cross Motion for Summary Judgment should be granted.

DATED: February 28, 2013

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ELECTRONIC FRONTIER FOUNDATION, Plaintiff, v. DEPARTMENT OF JUSTICE, Defendant.	Case No. 3:10-cv-04892-RS **[PROPOSED] ORDER DENYING DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S RENEWED CROSS MOTION FOR SUMMARY JUDGMENT** Date: April 25, 2013 Time: 1:30 p.m. Place: Ctrm. 3, 17th Floor Judge: Hon. Richard Seeborg

1 This matter came for hearing before the Court on Defendants' Renewed Motion for
2 Summary Judgment and Plaintiff's Renewed Cross Motion for Summary Judgment. Having given
3 full consideration to all the parties' papers and evidence, the relevant authorities, and the oral
4 presentations of counsel, and good cause appearing, in accordance with Fed. R. Civ. P. 56, it is
5 **HEREBY ORDERED**:
6 1. Defendants' Renewed Motion for Summary Judgment is denied; and it is
7 2. **FURTHER ORDERED** that Plaintiff's Renewed Cross Motion for Summary
8 Judgment is granted; and it is
9 3. **FURTHER ORDERED** that Defendants shall release to Plaintiff all remaining
10 non-exempt portions of the requested agency records within 10 days of the entry of
11 this order; and it is
12 4. **FURTHER ORDERED** that Defendants shall file with the Court and serve upon
13 Plaintiff's counsel within 10 days of the entry of this order an affidavit or
14 declaration attesting to and detailing Defendant's compliance with it.
15
16 **IT IS SO ORDERED.**
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18 DATED: ______________________ ________________________________
HONORABLE RICAHRD SEEBORG
19 DISTRICT COURT JUDGE
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