

1 STUART F. DELERY
Principal Deputy Assistant Attorney General
2 MELINDA HAAG
United States Attorney
3 ELIZABETH J. SHAPIRO
Deputy Branch Director, Federal Programs Branch
4 Civil Division
NICHOLAS CARTIER, CA Bar #235858
5 Trial Attorney, Federal Programs Branch
Civil Division
6 20 Massachusetts Ave NW, 7224
PO Box 883 (US Mail)
7 Washington, DC 20530
Tel: 202-616-8351
8 Fax: 202-616-8470
email: nicholas.cartier@usdoj.gov
9 Attorneys for Defendants

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.
18
19
20
21
22
23
24
25
26
27
28

Case No. 10-CV-4892-RS

**DEFENDANT'S OPPOSITION TO
PLAINTIFF'S RENEWED CROSS
MOTION FOR SUMMARY
JUDGMENT AND REPLY IN
SUPPORT OF DEFENDANT'S
RENEWED MOTION FOR
SUMMARY JUDGMENT**

Judge: Hon. Richard Seeborg

Date: April 25, 2013

Place: Courtroom 3, 17th Floor

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

 I. Defendant Did Not Withhold Responsive, Non-Exempt Information. 2

 A. Defendant Complied With This Court’s Order To Conduct A Secondary Review of Certain Material Previously Deemed To Be Unresponsive. 2

 B. Defendant's Interpretation of Plaintiff’s FOIA Requests Were Reasonable..... 3

 C. DEA Did Not Withhold Responsive, Non-Exempt Materials..... 6

 D. CRM Did Not Withhold Responsive, Non-Exempt Materials. 7

 E. FBI Did Not Withhold Responsive, Non-Exempt Materials..... 8

 II. Defendant Has Provided All Reasonably Segregable, Non-Exempt Information. 9

 III. Defendant Has Properly Withheld Information Pursuant to Exemption 4. 10

 IV. Defendant Has Properly Withheld Information Under Exemption 5..... 15

 A. Defendant Did Not Invoke The Deliberative Process Privilege To Withhold Segregable Non-Exempt Factual Material. 15

 B. Defendant Did Not Invoke The Deliberative Process Privilege To Withhold Final Agency Positions..... 17

 C. EFF Is Wrong That DEA And FBI Improperly Applied The Deliberative Process Privilege To Withhold Information Shared With Personnel Outside The Agency. 19

 D. FBI Did Not Improperly Invoke The Deliberative Process Privilege To Withhold Draft Documents. 22

E.	The Criminal Division Properly Applied The Attorney Work Product Doctrine.	23
V.	Defendant Has Properly Withheld Sensitive Law Enforcement Information Pursuant to Exemption 7.....	24
A.	Defendant Has Properly Withheld Information Under Exemption 7(A).	24
B.	FBI Properly Withheld Information Under Exemption 7(D).	26
C.	Defendant Properly Withheld Information Pursuant to Exemption 7(E).	27
	CONCLUSION	30

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

STUART F. DELERY
Principal Deputy Assistant Attorney General
MELINDA HAAG
United States Attorney
ELIZABETH J. SHAPIRO
Deputy Branch Director, Federal Programs Branch
Civil Division
NICHOLAS CARTIER, CA Bar #235858
Trial Attorney, Federal Programs Branch
Civil Division
20 Massachusetts Ave NW, 7224
PO Box 883 (US Mail)
Washington, DC 20530
Tel: 202-616-8351
Fax: 202-616-8470
email: nicholas.cartier@usdoj.gov
Attorneys for Defendants

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

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff,

vs.

DEPARTMENT OF JUSTICE,

Defendant.

Case No. 10-CV-4892-RS

**DEFENDANT’S OPPOSITION TO
PLAINTIFF’S RENEWED CROSS
MOTION FOR SUMMARY
JUDGMENT AND REPLY IN
SUPPORT OF DEFENDANT’S
RENEWED MOTION FOR
SUMMARY JUDGMENT**

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

INTRODUCTION

1
2 In its opening brief in support of its renewed motion for summary judgment, Defendant
3 demonstrated that the Criminal Division (“CRM”), Drug Enforcement Administration (“DEA”),
4 and the Federal Bureau of Investigation (“FBI”) have produced all reasonably segregable,
5 nonexempt records that were responsive to Plaintiff’s FOIA requests. *See* Def.’s Renewed Motion
6 for Summary Judgment (“Def’s Renewed MSJ”) (ECF No. 63). In response, Plaintiff’s combined
7 Cross-Motion and Opposition largely repeats the arguments made by EFF in the first round of
8 summary judgment briefing and offers no persuasive reasons for why this Court should not award
9 summary judgment to the Government. *See* Pl.’s Renewed Cross-Motion for Summary Judgment
10 and Opposition to Defendant’s Renewed Motion for Summary Judgment (“Pl.’s Renewed MSJ”)
11 (ECF No. 64).
12

13
14 The Government’s reply addresses the issues that remain in dispute between the parties.¹
15 First, whether the components properly determined that certain documents were not responsive to
16 Plaintiff’s FOIA requests; second, whether the components have met their responsibilities to
17 provide all non-exempt information that can be reasonably segregated from exempt information;
18 and third, whether the components properly invoked Exemptions 4, 5 and 7(A) and (E), and
19 whether FBI properly invoked 7(D).² As shown below, Defendant is now entitled to summary
20

21 ¹ EFF has now withdrawn its challenge to the adequacy of FBI’s *Vaughn* index, the
22 reasonableness of the components’ searches and their use of Exemptions 1, 2, 3, 6, 7(C) or 7(F), as
23 well as CRM’s and DEA’s use of Exemption 7(D), and the FBI’s assertion of the attorney-client
privilege. *See* Def’s Renewed MSJ at 3; Pl.’s Renewed MSJ at 7 n.15.

24 ² In support of this reply, Defendant relies upon the declarations submitted with its
25 Renewed Motion for Summary Judgment. *See* Fifth Declaration of David M. Hardy of the Federal
26 Bureau of Investigation (“Fifth Hardy Decl.”) (ECF 63-1); Fourth Declaration of Katherine L.
27 Myrick of the Drug Enforcement Administration (“Fourth Myrick Decl.”) (ECF 63-2); Second
Declaration of John E. Cunningham III of the Criminal Division (“Second Cunningham Decl.”)
(ECF 63-3). In addition, the Government relies upon the following declarations submitted in

1 judgment with respect to the materials found to be exempt by the components.³

2 **ARGUMENT**

3 **I. Defendant Did Not Withhold Responsive, Non-Exempt Information.**

4 EFF argues that the components have improperly withheld information concerning
5 “problems, obstacles and limitations” that have hampered the components’ ability to conduct
6 electronic surveillance as “outside the scope” of its requests. *See, e.g.*, EFF’s Renewed MSJ at 9.
7 That is not correct. Moreover, EFF has ignored the components’ explanations for why it treated
8 particular information to be outside the scope of its requests.

9
10 **A. Defendant Complied With This Court’s Order To Conduct A Secondary**
11 **Review of Certain Material Previously Deemed To Be Unresponsive.**

12 EFF argues that the components did not adequately comply with this Court’s order to
13 conduct a secondary review of certain materials that were previously determined by the
14 components to be unresponsive to Plaintiff’s FOIA requests. Pl.’s Renewed MSJ at 7.
15 Specifically, the Court directed the components to “conduct a review of pages that were previously
16 withheld in full or part from otherwise responsive documents based on the components’ prior
17 determination that the information in question was outside the scope of Plaintiff’s FOIA requests.”
18 11/27/12 Order (ECF No. 62) at 2. The declarations submitted in support of Defendant’s renewed

19
20 support of its previous Opposition to Plaintiff’s Partial Motion for Summary Judgment seeking
21 expedited processing and the declarations and Vaughn indexes submitted in support of Defendant’s
22 first Motion for Summary Judgment. *See* First Hardy Decl. (ECF No. 19-1); First Ellis Decl. (ECF
23 No. 19-2); First Myrick Decl. (ECF No. 19-3); Second Ellis Decl. (ECF No. 39-1); CRM’s Vaughn
24 Index (ECF No. 39-2); Second Myrick Decl. (ECF No. 40); DEA’s Vaughn Index (Exhibit J to
25 Second Myrick Decl.); Second Hardy Decl. (ECF No. 41); Third Hardy Decl. (Exhibit K to Second
26 Myrick Decl.); Fourth Hardy Decl. (ECF No. 52); Third Myrick Decl. (ECF No. 53); First
27 Cunningham Decl. (ECF No. 54).

28 ³ As noted in Defendant’s opening brief, the Government’s motion does not address certain
materials that the components referred to other government entities for processing. It is the
understanding of Government counsel that EFF is evaluating whether to challenge the adequacy of
the processing decisions made by other government entities. *See* Def.’s Renewed MSJ at 5 n.3.

NO. 10-CV-4892-RS

DEFENDANT’S REPLY IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT

1 motion for summary judgment expressly confirm that the components completed this review and
2 concluded that their prior scoping determinations were correct. *See* Fifth Hardy Decl. (ECF 63-1)
3 ¶ 7; Fourth Myrick Decl. (ECF 63-2) ¶¶ 5-6; Second Cunningham Decl. (ECF 63-3) ¶ 4. EFF is
4 mistaken that “the government appears to have ignored the Court’s direction that ‘the presumption
5 should be that information located on the same page, or in close proximity to undisputedly
6 responsive material is likely to qualify as information” that should be produced, absent an
7 applicable exemption. Pl.’s Renewed MSJ at 7 (quoting 10/30/12 Order at 4-5). As the Court
8 made clear, this was only a presumption, not a requirement that such information be treated as
9 responsive. *See* 10/30/12 Order at 5. Here, the components simply confirmed that their original
10 scoping decisions were correct.
11

12 Notwithstanding this fact, pursuant to its administrative discretion, DEA released 14 pages
13 that it deemed to be outside the scope of Plaintiff’s FOIA request. Fourth Myrick Decl. ¶ 6. FBI
14 processed all previous “outside the scope” redactions made to a page if the page also contained
15 responsive information. Fifth Hardy Decl. ¶ 7. However, it determined that this information was
16 exempt from release. *Id.* While CRM did not release the non-responsive information put at issue
17 by EFF, it has previously provided detailed explanations for why it deemed this information to be
18 outside the scope of Plaintiff’s FOIA request. *See* Cunningham Decl. ¶¶ 4-7.
19

20 In short, the components complied with this Court’s order, but a dispute remains between
21 the parties regarding the proper interpretation of EFF’s requests.
22

23 **B. Defendant’s Interpretation of Plaintiff’s FOIA Requests Were**
24 **Reasonable.**

25 Unless exempt, an agency must provide records in response to a FOIA request that
26 “reasonably describes such records.” 5 U.S.C. § 552(a)(3)(A)(i). Courts thus assess the adequacy
27 of an agency’s interpretation of a FOIA request based on a reasonableness standard. *See, e.g.,*

1 *Judicial Watch, Inc. v. DOD*, No. 05-00390 (HHK), 2006 WL 1793297, at *3 (D.D.C. Jun. 28,
2 2006) (agency reasonably interpreted request for names of corporations involved in particular
3 activity not to include all documents regarding that activity). Furthermore, “[a]n agency may
4 decide to limit the scope of an ambiguous request as long as the narrowed scope is a reasonable
5 interpretation of what the request seeks.” *See Wilson v. U.S. Dep’t of Transportation*, 730 F. Supp.
6 2d 140, 154-55 (D.D.C. 2010); *Moghan v. Dep’t of Homeland Security*, No. 06-2045, 2007 WL
7 2007502, at *3 (D.D.C. July 10, 2007); *Adamowicz v. IRS*, 552 F. Supp. 2d 355, 362 (S.D.N.Y.
8 2008). Moreover, an agency is required to read a FOIA request as drafted, “not as either [an]
9 agency official or [requester] might wish it was drafted.” *See Miller v. Casey*, 730 F.2d 773, 777
10 (D.C. Cir. 1984).

11
12 Because EFF contends that the components withheld information that was within the scope
13 of its September 28, 2010 request, *see* Pl.’s Renewed MSJ at 8, it is helpful to repeat the language
14 of the request in its entirety. The September 2010 request sought “all agency records created on or
15 after January 1, 2006 (including, but not limited to, electronic records) discussing, concerning, or
16 reflecting”:

- 17
18
- 19 1. any problems, obstacles or limitations that hamper the DOJ’s current ability to
20 conduct surveillance on communications systems or networks including, but not
21 limited to, encrypted services like Blackberry (RIM), social networking sites like
22 Facebook, peer-to-peer messaging services like Skype, etc.;
 - 23 2. any communications or discussions with the operators of communications systems
24 or networks (including, but not limited to, those providing encrypted
25 communications, social networking, and peer-to-peer messaging services), or with
26 equipment manufacturers and vendors, concerning technical difficulties the DOJ has
27 encountered in conducting authorized electronic surveillance;
 - 28 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;

- 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
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).

September 28, 2010 Request, Ex. 1 to Declaration of Kristin L. Ellis (“First Ellis Decl.”) at 2 (ECF No. 19-2).

Defendant treated information that “discuss[ed], concern[ed], or reflect[ed] specific or technical problems that hamper[ed] the [component’s] current ability to conduct surveillance on communication systems or networks” as within the scope of EFF’s request. *See* Third Myrick Decl. ¶ 7 (ECF No. 53); Cunningham Decl. ¶ 5; Fourth Hardy Decl. ¶ 7. At the same time, information that “consisted solely of internal proposals to amend current surveillance law,” which did not also address problems conducting electronic surveillance, was deemed to be non-responsive. *See* Third Myrick Decl. ¶ 7 (ECF No. 53); Fourth Hardy Decl. ¶ 7. As seen below, this interpretation is the basis for most of the scoping determinations that remain in dispute between the parties. It was reasonable to treat such internal DOJ discussions as falling outside the scope of Plaintiff’s request for information regarding problems conducting electronic surveillance. In paragraph 1, Plaintiff did not ask for internal DOJ discussions about proposed responses and legislative solutions untethered to discussions of “problems, obstacles or limitations that hamper the DOJ’s current ability to conduct electronic surveillance.” *See* September 2010 Request ¶ 1,

1 Ex. 1 to Declaration of Kristin L. Ellis (“First Ellis Decl.”) at 2 (ECF No. 19-2). It was only in
2 paragraph 6 of the request that EFF sought “briefings, discussions, or other exchanges between
3 DOJ officials and members of the Senate or House of Representatives” regarding legislative
4 solutions, including “proposed amendments to the Communications Assistance for Law
5 Enforcement Act (‘CALEA’).” *Id.* ¶ 6. Ex. 1. While EFF could have requested all internal DOJ
6 deliberations concerning discussions about proposed solutions or legislative responses to the Going
7 Dark issue, it chose not to do so. September 2010 Request ¶ 6. It is possible that EFF did so
8 because it realized that purely internal pre-decisional deliberations within DOJ on this topic would
9 be protected by the deliberative process privilege. Whatever the reason, however, Defendant’s
10 interpretation of the plain language of the request was reasonable. *Miller*, 730 F.2d at 777 (agency
11 required to read request as drafted, “not as either [an] agency official or [requester] might wish it
12 was drafted”); *Wilson*, 730 F. Supp. 2d at 154-55 (where multiple interpretations are possible
13 because request is ambiguous, agency is only required to provide reasonable interpretation of
14 request).
15
16

17 Below, Defendant addresses EFF’s specific challenges to the components’ scoping
18 decisions.

19 **C. DEA Did Not Withhold Responsive, Non-Exempt Materials.**

20 EFF challenges DEA’s decision to withhold 20 pages from several slide presentations as
21 outside the scope of its September 2010 request.⁴ EFF’s Renewed MSJ at 8-9. EFF appears to
22 argue that because the slides were contained in presentations that also contained responsive
23

24
25 ⁴ These slides were withheld from presentations identified in Category 5C of DEA’s
26 Vaughn Index. Third Myrick Decl. ¶ 3. Originally, DEA withheld 29 pages of slides as being
27 unresponsive to Plaintiff’s FOIA request. However, after conducting the secondary review ordered
28 by this Court of the materials, DEA released 9 pages of the slides pursuant to its administrative
discretion. *See* EFF’s Renewed MSJ at 9.

1 information, the withheld slides must also be responsive. *Id.* That is not the case. As DEA has
2 explained, each slide was “self-contained, which allowed DEA to review and scope the content of
3 the slide against Plaintiff’s six-item FOIA request.” Third Myrick Decl. ¶ 7. The particular slides
4 from these presentations that were found to be non-responsive fell into two categories: “(1) slides
5 containing internal legislative or policy discussions and proposed strategies regarding electronic
6 surveillance that do not pertain to specific or technical problems that hamper the DEA’s current
7 ability to conduct electronic surveillance on communications systems or networks; and (2) slides
8 containing names, titles, and phone numbers of points of contacts.” *Id.* (discussing Bates
9 numbered slides 26-27, 44, 48, 55, 58, 61-62, 71-77, 81, 84-85, 90-95, 126, 148-149, 191, and
10 203). For the reasons explained above, this information is not responsive to Plaintiff’s September
11 28, 2010 request.⁵

12
13
14 **D. CRM Did Not Withhold Responsive, Non-Exempt Materials.**

15 EFF challenges certain documents withheld by CRM as falling outside the scope of
16 Plaintiff’s request. It contends that CRM improperly withheld several paragraphs and one full page
17 from a five-page email chain entitled “24/7 Trace of Threat Email” as outside the scope of
18 Plaintiff’s request. Pl.’s Renewed MSJ at 9 (citing CRM-000055-59). CRM has explained that
19 “the portions of CRM-000055-59 marked as non-responsive . . . consist solely of server log lists.”
20 Cunningham Decl. ¶ 5 (ECF No. 54). “The server logs are outside the scope of the Plaintiff’s
21 request because they do not discuss, concern, or reflect specific or technical problems that hamper
22 CRM’s current ability to conduct surveillance on communications systems or networks.” *Id.*

23
24 EFF also complains that CRM deemed as unresponsive “two paragraphs of handwritten

25 ⁵ EFF states that is unclear from DEA’s Vaughn index why the 20 pages were withheld.
26 However, as explained by DEA, non-responsive pages were not identified in DEA’s Vaughn index.
27 Instead, the Bates numbers of the unresponsive slides were identified in the Third Myrick Decl. ¶
28 6.

1 notes from a March 18, 2010 meeting with ‘Main Justice’ on ‘Going Dark.’” Pl.’s Cross MSJ at 9.
2 However, as the Criminal Division explained in a declaration filed back on April 27, 2012, CRM
3 decided to treat this information as responsive but clarified its intention to withhold the information
4 pursuant to Exemption 5 and 7(E). Cunningham Decl. ¶ 4. As explained by CRM, “the
5 handwritten notes contain a discussion concerning a particular surveillance problem and offer a
6 proposed solution — they are clearly both predecisional and deliberative.” *Id.* Thus, the
7 information was properly protected under both Exemption 5 and 7(E).⁶

9 CRM’s April 27, 2012 declaration contains a detailed response to the materials EFF
10 contended were improperly withheld as outside the scope of its requests. *See* Cunningham Decl. ¶¶
11 4-7. The Court is respectfully referred to the declaration, which shows that EFF is mistaken when
12 it claims that CRM has failed to respond to the issues it raised in its original Cross-Motion. EFF’s
13 Renewed MSJ at 10.

14
15 **E. FBI Did Not Withhold Responsive, Non-Exempt Materials.**

16 As it did in its original motion for summary judgment, EFF argues that FBI improperly
17 withheld over 100 pages of records as outside the scope of its requests. EFF’s Renewed MSJ at 8.
18 FBI has already explained the basis for its scoping decisions with respect to the information put at
19 issue by EFF. As FBI’s April 27, 2012 declaration explained, the information in question was not
20

21 ⁶ EFF states that CRM “may also be withholding other information as not responsive.”
22 EFF’s Cross MSJ at 9. According to EFF, “[f]or several documents the agency appears to be
23 claiming an exemption for only a portion of the document, even though it withheld the entire
24 document in full.” *Id.* The only example given is CRM’s decision to withhold 12 lines of text
25 from a two-page document (CRM 000013-14) that addressed particular limitations on the
26 Government’s ability to lawfully intercept certain communications. *Id.* EFF’s complaint is that it
27 is not clear from CRM’s Vaughn index “whether the two pages only contain 12 lines of text or
28 whether they contain more text but the agency only chose to claim exemptions for those 12 lines
(without noting specifically) [that] the other text [is] not responsive.” *Id.* However, CRM has
already clarified that the entire two-page document was treated as responsive but was withheld in
full pursuant to Exemption 5 and 7(E). Cunningham Decl. ¶¶ 6, 8.

1 responsive to either of Plaintiff's FOIA requests. Fourth Hardy Decl. ¶¶ 7-8; *see also* Fifth Hardy
2 Decl. ¶ 7. First, the materials were not responsive to Plaintiff's initial May 21, 2009 request, which
3 was directed only to FBI and sought Bureau records related to the "Going Dark" program.⁷

4 Consistent with standard FOIA practice, *see* 28 C.F.R. 16.4(a), FBI determined that the materials
5 were not responsive to this request because they were generated after FBI began its search for
6 responsive records in 2009. Fourth Hardy Decl. ¶¶ 7-8. The redacted information was also not
7 responsive to Plaintiff's September 28, 2010 request because it "consisted solely of internal
8 proposals to amend current surveillance law." *Id.* For the reasons discussed above, these scoping
9 decisions were based on a reasonable interpretation of Plaintiff's requests.
10

11 **II. Defendant Has Provided All Reasonably Segregable, Non-Exempt Information.**

12 FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to
13 any person requesting such record after deletion of the portions which are exempt under this
14 subsection." 5 U.S.C. § 552(b). This provision, however, does not require the disclosure of non-
15 exempt information that would be meaningless. *See, e.g., Nat'l Sec. Archive Fund, Inc. v. CIA*, 402
16 F. Supp. 2d 211, 220-21 (D.D.C. 2005). In addition, "[a]gencies are entitled to a presumption that
17 they complied with their obligation to disclose 'any reasonably segregable portion of a record.'" *Boyd v. Criminal Div. of U.S. Dep't of Justice*, 475 F.3d 381, 382 (D.D.C. 2007) (quoting 5 U.S.C.
18 § 552(b)).
19
20
21

22 The components have each represented in their declarations that they engaged in a line-by-
23 line review of all responsive records and that they provided Plaintiff with all reasonably
24

25 ⁷ The "Going Dark" request sought documents from 2007 to the present concerning: (1)
26 "[A]ll records that describe the Going Dark Program"; (2) "[A]ll Privacy Impact Assessments
27 prepared for the Going Dark Program"; and (3) "[A]ll System of Records Notices ('SORNs') that
28 discuss or describe the Going Dark Program." *Id.* at 2-3. *See* Exhibit A to Declaration of David
M. Hardy ("First Hardy Decl.") (ECF No. 19-1).

1 segregable, non-exempt information.⁸ Despite these representations, EFF contends that “it is a
2 near certainty that Defendant has withheld more information than is otherwise justifiable.” EFF’s
3 Renewed MSJ at 30. But EFF offers no persuasive reason to think so. As the produced pages to
4 EFF show, the components have carefully applied redactions in order to ensure the release of all
5 reasonably segregable, non-exempt information to Plaintiff. *See, e.g.*, ECF No. 41-4 (EFF/Cardozo
6 67-69). It is also no surprise that much of the information sought by EFF has been withheld given
7 that Plaintiff’s request sought information about problems hampering DOJ’s current ability to
8 conduct electronic surveillance, which effectively ensured that much of what Plaintiff sought
9 would be exempt under, *inter alia*, Exemption 7(E), since disclosure of this factual information
10 risks circumvention of the law. *See infra*, Section V.
11

12 As the components’ declarations, Vaughn indices and annotated productions demonstrate,
13 the components have complied with their obligations to provide all reasonably segregable, non-
14 exempt information. Defendant will address EFF’s additional exemption-specific segregability
15 arguments below.
16

17 **III. Defendant Has Properly Withheld Information Pursuant to Exemption 4.**

18 Exemption 4 authorizes withholding “trade secrets and commercial or financial information
19 obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). To withhold
20 information under Exemption 4, the government agency must demonstrate that the materials in
21 question contain “(1) commercial and financial information, (2) obtained from a person or by the
22

23 ⁸ *See* Second Ellis Decl. ¶ 30 (“CRM conducted an exacting, line-by-line review of the
24 records located during our wide-ranging search to identify any non-exempt information that could
25 reasonably be segregated and released without adversely affecting the Government’s legitimate law
26 enforcement interests.”); Second Myrick Decl. ¶ 9j (stating that “[a]ll responsive pages were
27 examined to determine whether any reasonably segregable information could be released”); Second
28 Hardy Decl. ¶ 22 (stating that “FBI has taken all reasonable efforts to ensure that no segregable,
nonexempt portions were withheld from plaintiff”).

1 government, (3) that is privileged or confidential.” *GC Micro Corp. v. Def. Logistics Agency*, 33
2 F.3d 1109, 1112 (9th Cir.1994); *see also Critical Mass Energy Project v. Nuclear Regulatory*
3 *Comm’n*, 975 F.2d 871, 879 (D.C.Cir.1992) (en banc) (“financial or commercial information
4 provided to the Government on a voluntary basis is ‘confidential’ for the purpose of Exemption 4 if
5 it is of a kind that would customarily not be released to the public by the person from whom it was
6 obtained.”).

8 Commercial or financial matters are “confidential” for purposes of this exemption if
9 disclosure of the information is likely to have either of the following effects: it will (1) “impair the
10 Government’s ability to obtain necessary information in the future; or (2) [] cause substantial harm
11 to the competitive position of the person from whom the information was obtained.”⁹ *GC Micro*
12 *Corp.*, 33 F.3d at 1112. Here, both prongs provide separate and independent grounds to support
13 the FBI’s and DEA’s use of Exemption 4. This is because the information withheld under
14 Exemption 4 was provided by the companies voluntarily to DEA and FBI, and the companies have
15 represented to the Government that disclosure of their information would both inhibit the
16 government’s ability to receive similar information in the future and would result in substantial
17 competitive injury to the companies.
18

19 As an initial matter, EFF argues that the declarations offered by the components in support
20 of the use of Exemption 4 are inadmissible because they contain hearsay, since the government
21 declarants repeat information that was provided to them by the companies involved. EFF’s
22 Renewed MSJ at 13. The Ninth Circuit has previously rejected this argument and stated that, for
23

24
25 ⁹ The government need not show that releasing the documents would cause “actual
26 competitive harm.” *Lion Raisins Inc. v. United States Dep’t of Agriculture*, 354 F.3d 1072, 1079
27 (9th Cir. 2004). “Rather, the government need only show that there is (1) actual competition in the
28 relevant market, and (2) a likelihood of substantial competitive injury if the information were
released.” *Id.*

1 purposes of Exemption 4, “[c]ourts can rely solely on government affidavits so long as the affiants
2 are knowledgeable about the information sought and the affidavits are detailed enough to allow the
3 court to make an independent assessment of the government’s claim.” *Lion Raisins*, 354 F.3d at
4 1079; *see also Gerstein v. DOJ*, No. 03-4893, 2005 U.S. Dist. Lexis 41276, at *13-14 (N.D. Cal.
5 Sept. 30, 2005) (rejecting argument that declaration was inadmissible because it contained hearsay;
6 rather, the government’s declaration “permissibly includes facts relayed from individuals who had
7 first-hand knowledge”); *Barnard v. DHS*, 598 F. Supp. 2d 1, 19 (D.D.C. 2009) (rejecting argument
8 that declarations contained inadmissible hearsay because “FOIA declarants may include statements
9 in their affidavits based on information that they have obtained in the course of their official
10 duties”).

11
12 EFF is also wrong that the declarations offer only “conclusory restatements of speculative
13 expected harm.” EFF’s Renewed MSJ at 11. As shown below, the declarants based their
14 statements on information provided by the relevant companies. This information is specific and
15 detailed and makes clear that the information in question is “confidential” for purposes of
16 Exemption 4. *See Bowen v. U.S. Food & Drug Admin.*, 925 F.2d 1225, 1227 (9th Cir. 1991)
17 (holding that affidavits that described documents withheld, the statutory exemptions claimed, and
18 the specific reasons for the agency’s withholding provided adequate factual basis for application of
19 “trade secrets” exemption).
20

21
22 ***DEA Materials.*** DEA invoked Exemption 4 to protect information voluntarily provided by
23 five companies to DEA regarding their internal operations, technical and product capabilities, and
24 compliance plans that was used to help DEA solve particular intercept issues encountered during
25

1 electronic surveillance operations.¹⁰ Third Myrick Decl. ¶ 8.

2 The companies at issue explained that the information provided to DEA is not customarily
3 released to the public and that release of the information “would adversely impact DEA’s ability to
4 obtain any such information in the future.” Third Myrick Decl. ¶¶ 8-9. According to DEA, the
5 companies’ statements that disclosure would inhibit cooperation in the future is “particularly
6 problematic” because “[w]ithout the cooperation of the companies, DEA would have been unable
7 to legally compel the companies to provide this type of proprietary information for the purpose of
8 solving particular intercept issues.” Third Myrick Decl. ¶¶ 8-9. These representations satisfy the
9 requirements for treating material as “confidential” within the meaning of Exemption 4. *See GC*
10 *Micro Corp.*, 33 F.3d at 1112 (material is “confidential” under Exemption 4 if it is likely to “impair
11 the Government’s ability to obtain necessary information in the future”); *see also Critical Mass*
12 *Energy Project*, 975 F.2d at 879 (“financial or commercial information provided to the
13 Government on a voluntary basis is ‘confidential’ for the purpose of Exemption 4 if it is of a kind
14 that would customarily not be released to the public by the person from whom it was obtained.”).

17 Furthermore, DEA explains that the objections raised by the companies, all of which
18 operate in the communications market, demonstrate that disclosure of their proprietary information
19 would damage their competitive positions. Third Myrick Decl. ¶ 10. This provides a separate
20 reason for treating the information as “confidential.” One company stated that, given the highly
21 competitive nature of the communications market, which is characterized by a small number of
22 competitors, the disclosure of the proprietary information provided to DEA “could readily enable a
23 competitor to differentiate its product, services, technology, or market position, and seek a higher
24 percentage of the relevant market.” *Id.* ¶ 10. Therefore, because the release of this information is

26 ¹⁰ Four of these pages are also exempt under Exemption 7D as they contain information
27 supplied to DEA under an express, confidentiality agreement. Second Myrick Decl. ¶ 21b(2).

1 likely to cause substantial competitive injury, it was properly withheld under Exemption 4. *GC*
2 *Micro Corp.*, 33 F.3d at 1112; *Lion Raisins*, 354 F. 3d at 1079.

3 ***FBI Materials.*** FBI invoked Exemption 4 to protect proprietary information submitted by
4 the RAND Corporation describing a proposed contract relating to the “FBI’s Going Dark Initiative
5 Surveillance Analyst Project.” Fourth Hardy Decl. ¶ 10. FBI has supported its Exemption 4
6 withholding of RAND Corporation documents based on representations made by the company that
7 the cost projections and other information it provided in its proposed contract to FBI were
8 confidential, proprietary information. Fourth Hardy Decl. ¶ 11 (noting that “draft proposal
9 specifically states that RAND expects its information to remain confidential under the restrictions
10 provided in the proposed contract”). In addition, as FBI explains, “[d]isclosure of specific details
11 of RAND’s project proposal and cost analysis would give competitors an unfair advantage over
12 RAND in developing requirements, counter proposals and lower cost analyses that would
13 undermine RAND’s ability to compete for contracts.” *Id.* Consequently, disclosure of the
14 information would likely discourage companies from making similar contract proposals to FBI
15 “out of concern that their proprietary information would become publicly available to
16 competitors.” *Id.* Because disclosure would likely result in competitive injury to RAND and
17 prevent FBI from obtaining similar information in the future, the material was properly treated as
18 “confidential” under Exemption 4. The Ninth Circuit has previously extended the protections of
19 Exemption 4 to this kind of commercial, proprietary information, which could be used by
20 competitors to undercut a rival’s prices. *See Lion Raisins*, 354 F.3d at 1081 (upholding use of
21 Exemption 4 for information that raisin company could use to cut its prices in order to underbid
22 other companies); *see also Gulf & W. Indus. v. United States*, 615 F.2d 527, 530 (D.C. 1979)
23 (holding that information that would permit competitors to estimate and undercut bids causes
24
25
26
27

1 “substantial competitive harm”).

2 As seen above, FBI and DEA properly withheld information under Exemption 4 because
3 release of the information will likely inhibit the components’ ability to obtain such information in
4 the future and creates a likelihood of substantial competitive harm.

5 **IV. Defendant Has Properly Withheld Information Under Exemption 5.**

6 The deliberative process privilege applies to “decisionmaking of executive officials
7 generally,” and protects documents containing deliberations that are part of the process by which
8 governmental decisions are formulated. *In re Sealed Case*, 121 F.3d 729, 737, 745 (D.C. Cir.
9 1997). A document may be withheld on the basis of the deliberative process privilege if it is both
10 pre-decisional and deliberative. *Nat’l Wildlife Federation v. U.S. Forest Serv.*, 861 F.2d 1114,
11 1117 (9th Cir. 1988). A document is “predecisional” if it is “generated before the adoption of an
12 agency policy” and “deliberative” if it “reflects the give-and-take of the consultative process.”
13 *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The privilege
14 “thus covers recommendations, draft documents, proposals, suggestions, and other subjective
15 documents which reflect the personal opinions of the writer rather than the policy of the agency.”
16 *Id.*

17 Below, Defendant responds to EFF’s arguments that it has improperly invoked the
18 deliberative process privilege to withhold purely factual material, final agency positions, and
19 documents shared with non-Executive personnel. Defendant also responds to EFF’s argument that
20 FBI has improperly invoked the deliberative process privilege to withhold drafts, and that the
21 Criminal Division improperly invoked the attorney work product privilege.

22 **A. Defendant Did Not Invoke The Deliberative Process Privilege To** 23 **Withhold Segregable Non-Exempt Factual Material.**

24 EFF states that given the number of pages to which the components have applied the

1 deliberative process privilege, “it is a near-certainty” that the components have improperly
2 withheld segregable, non-exempt factual material. EFF’s Renewed MSJ at 19. As noted above, a
3 component’s segregability determinations are entitled to a presumption of regularity, *see Boyd*, 475
4 F.3d at 382, and here the components have provided sworn declarations stating that all reasonably
5 segregable factual information was provided to EFF. Second Ellis Decl. ¶ 30; Second Myrick
6 Decl. ¶ 9j; Second Hardy Decl. ¶ 22. In addition, most the records withheld under the deliberative
7 process privilege were also withheld under other exemptions, including Exemption 7(E), which
8 expressly protects factual information whose disclosure could risk circumvention of law. *See, e.g.*,
9 Second Hardy Decl. ¶ 84; Second Myrick Decl. ¶ 9(g). Given the overlap between Exemptions 5
10 and 7, it is unsurprising that substantial amounts of factual material regarding the components’
11 problems conducting electronic surveillance were withheld.¹¹

12
13
14 EFF’s argument is based on mere speculation that the components have improperly applied
15 the deliberative process privilege to withhold non-deliberative and segregable factual material, and
16 the two examples it offers in the text of its brief do not substantiate this claim. For instance, EFF
17 takes issue with DEA’s application of Exemption 5 to a “Case Example Discussion Paper.” Pl.’s
18 Renewed MSJ at 20 (citing DEA 4 48-52). According to EFF, “[n]othing in DEA’s description
19 suggests that these case studies are ‘deliberative’ in any way; thus, the factual portions of these
20 case summaries cannot be withheld under Exemption 5.” *Id.* In reality, DEA clearly explained
21 why Exemption 5 was applied to the document. “Concerning Exemption 5, the discussion paper
22 was prepared by a DEA official, representing the views of DEA, at the request of the Department
23 for the consideration and use of a DOJ policy working group.” Second Myrick Decl. ¶ 18b.

24
25
26
27
28

¹¹ Generally, “factual summaries do not qualify as deliberative,” but facts may nonetheless
be withheld under Exemption 5 if releasing them would reveal the mental processes of agency
employees or deter the agency from gathering such information. *See Wolfe v. U.S. Dep’t of Health
and Human Servs.*, 839 F.2d 768, 774 (D.C. Cir. 1988).

1 “Release would be tantamount to divulging DEA’s deliberations regarding what specific intercept
2 problems are worthy of consideration at the Department level.” *Id.* Furthermore, DEA’s *Vaughn*
3 index explains that this information was also withheld under Exemption 7(D), (E) and (F), which
4 demonstrates that there was no requirement to segregate out factual information from the
5 document. *See* DEA Vaughn Index at 9.
6

7 EFF also complains about DEA’s use of Exemption 5 to withhold an “Issue and Proposal
8 Matrix.” Pl.’s Renewed MSJ at 20. EFF again ignores the explanation for why DEA applied
9 Exemption 5 to the document. According to DEA, the matrix “was antecedent to the adoption of a
10 formal agency strategy” and “is highly deliberative in content as it provides the opinion and
11 analysis of the program expert about specific technical intercept impediments juxtaposed against
12 existing statutory and regulatory frameworks; and includes proposals for legislative and policy
13 change, none of which were specifically adopted by DEA or DOJ leadership.” Second Myrick
14 Decl. ¶ 11c. In addition, the entire document was properly withheld under Exemption 7(E) because
15 it addressed “several technical intercept impediments, including comments on the exploitation of
16 such impediments by drug-trafficking organizations to evade detection.” *Id.* As noted, there is no
17 requirement to segregate out factual information to which Exemption 7(E) is properly applied.
18

19 In sum, EFF’s argument that Defendant failed to properly segregate out non-exempt factual
20 information to which it applied the deliberative process privilege is unfounded, ignores the specific
21 explanations for withholding these documents provided in the components’ declarations and
22 Vaughn indexes, and is at odds with the presumption of regularity afforded to an agency’s
23 segregability decisions.
24

25 **B. Defendant Did Not Invoke The Deliberative Process Privilege To**
26 **Withhold Final Agency Positions.**

27 EFF contends that FBI and DEA improperly invoked the deliberative process privilege to

1 withhold documents reflecting final agency positions or opinions. EFF's Renewed MSJ at 17-18.
2 In support, EFF contends that DEA and FBI "talking points" memos and "Question and Answers
3 (Q and As)" likely reflect final agency positions. *Id.* at 17-18. That is not the case.

4 The declarations provided by FBI and DEA expressly state that the "talking points" memos,
5 otherwise known as "discussion papers," "do not reflect final agency action or decision." Second
6 Hardy Decl. ¶ 46; Second Myrick Decl. 9c; *see also* Fourth Hardy Decl. ¶ 12 (stating that "FBI has
7 not applied the deliberative process privilege to withhold documents reflecting final agency
8 positions").

9
10 With respect to DEA's Q&A put at issue by EFF in its brief, Pl.'s Renewed MSJ at 18,
11 DEA explained that there were several draft versions of the document that contained "editorial
12 comments and/or textual edits." Second Myrick Decl. ¶ 23. DEA also explained that the
13 document was prepared by a subordinate for Acting Administrator Leonhart to prepare to testify
14 before Congress, but "the content of these drafts were not disclosed in public testimony." *Id.*
15 According to DEA, "[r]elease of this draft, advisory material would diminish efficient preparation
16 of the DEA Administrator in formulating DEA policy and positions before Congress as well as
17 generate public confusion as they do not relate to final agency actions." *Id.* Thus, contrary to
18 EFF's claims, the Q&A did not embody a final agency action, and instead was a predecisional and
19 deliberative document and hence was properly protected under the deliberative process privilege.
20
21 *See Coastal States*, 617 F.2d at 866.

22
23 EFF also challenges DEA's withholding of a two-page internal bulletin, which, according
24 to EFF, likely represents the final position of the DEA. Pl.'s Renewed MSJ at 17 (discussing DEA
25 7-1-7). But as DEA explains, the draft bulletin, which addressed a particular intercept issue,
26 reflected the thoughts and opinions of a subordinate that were not ultimately adopted by DEA.

1 Third Myrick Decl. ¶11. “Thus, information contained in the bulletin did not represent the final
2 agency position of DEA. Accordingly, DEA properly withheld the bulletin under Exemption 5
3 because it was an internal agency document containing deliberative information.” *Id.*

4 With respect to FBI, EFF contends that the Bureau has improperly applied the deliberative
5 process privilege to EFF/Lynch 329-331. Pl.s’ Renewed MSJ at 17. The FBI’s original
6 description of the document as containing “definitions” may have implied that these “definitions”
7 were adopted as agency standards. Fourth Hardy Decl. ¶ 16. In reality, however, this was a
8 “discussion paper article” that was part of FBI’s ongoing deliberations about how to formulate
9 policy in response to challenges experienced by law enforcement in conducting electronic
10 surveillance. *Id.* Importantly, no policy decisions were enacted in response to the article during
11 the date-scoping period. *Id.* Thus, because the document is both predecisional and deliberative,
12 and does not reflect a final agency position, it is properly protected under the deliberative process
13 privilege.
14
15

16 As demonstrated above, FBI and DEA have made clear that the documents put at issue by
17 EFF “do not reflect final agency action or decision.” Second Hardy Decl. ¶ 46; Second Myrick
18 Decl. 9c; *see also* Fourth Hardy Decl. ¶ 12.

19 C. **EFF Is Wrong That DEA And FBI Improperly Applied The Deliberative**
20 **Process Privilege To Withhold Information Shared With Personnel Outside**
21 **The Agency.**

22 Exemption 5 applies to “inter-agency or intra-agency” records. 5 U.S.C. § 552(b)(5). This
23 means that, “[i]n general, this definition establishes that communications between agencies and
24 outside parties are not protected under Exemption 5.” *Ctr. For Int’l Env’tl. Law v. Office of the U.S.*
25 *Trade Rep*, 237 F. Supp. 2d 17, 25 (D.D.C. 2002). Here, EFF contends that DEA and FBI have
26 invoked the deliberative process privilege to improperly withhold materials that “were likely
27

1 shared outside the executive branch, and, thus, have waived their protection under Exemption 5.”
2 Pl.’s Renewed MSJ at 15. As set forth below, EFF is mistaken.

3 **FBI Materials.** EFF puts at issue two FBI documents as well as pages relating to a meeting
4 of law enforcement professionals convened by the FBI. See EFF’s Renewed MSJ at 16 (citing
5 EFF/Lynch 347-360; EFF/Lynch 308; and EFF/Lynch 1241-1323). As the FBI has previously
6 explained, the first document (EFF/Lynch 347-60) is “an internal draft of proposed testimony
7 prepared by the [FBI’s Office of Congressional Affairs] for the Director for his review and
8 approval in anticipation of an appearance before a closed session of the Senate Select Intelligence
9 Committee.” Fourth Hardy Decl. ¶ 13. Therefore, the document is both predecisional and
10 deliberative. In addition, it contains classified information and is partially withheld under
11 Exemption 1 and withheld in full under Exemption 7(E). *Id.*

12
13
14 The second document (EFF/Lynch 308) is also an internal document summarizing the
15 results of a meeting between DOJ personnel and a staff employee of the Senate Judiciary
16 Committee. *Id.* at ¶ 14. “The internal staff briefing summary reflects the views of the [FBI] author
17 as to what portions of the meeting were relevant and was compiled to assist the FBI in its ongoing
18 deliberations about how to respond to challenges experienced by law enforcement in conducting
19 electronic surveillance.” *Id.*

20
21 The remaining materials put at issue by EFF are an internal executive summary of meeting
22 notes and a copy of presentations given at a June 25, 2009 “Law Enforcement Executive Forum
23 (“LEEF”). EFF’s Renewed MSJ at 16. LEEF was established by the FBI “as a way to bring
24 federal, state, and local law enforcement personnel from around the country to the FBI to act as
25 consultants on particular topics of interest to the FBI.” Fourth Hardy Decl. ¶ 15. Although the
26 presentations were shared with outside law enforcement, the information is still properly protected
27

1 under the deliberative process privilege under the “consultant corollary” established by the
2 Supreme Court in *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1
3 (2001).

4 In *Klamath*, the Supreme Court recognized that the deliberative process privilege may
5 “extend[] to communications between Government[] agencies and outside consultants hired by
6 them.” 532 U.S. 1, 10 (2001). As the D.C. Circuit has explained, typically this kind of
7 “relationship is evidenced by the fact that the agency seeks out the individual consultants and
8 affirmatively solicits their advice in aid of agency business.” *Nat’l Institute of Military Justice v.*
9 *DoD*, 512 F.3d 677, 686 (D.C. Cir. 2008). In addition, the communications must be treated as
10 confidential. *Id.* at 685.

11
12 According to the FBI, the “June 25, 2009 discussion topic [at LEEF] concerned the FBI’s
13 development of a unified electronic surveillance strategy which the invited law enforcement
14 community attendees were asked to review and provide input.” Fourth Hardy Decl. ¶ 15. Because
15 FBI solicited the views of these outsiders to offer input on the development of the Bureau’s
16 electronic surveillance policy, *see id.* (noting that only attendees from the law enforcement
17 community and FBI staff were present, and the materials were not made public), the law
18 enforcement personnel were acting as consultants within the meaning of the *Klamath* decision.
19 Consequently, these communications and the feedback provided by these consultants that became
20 part of FBI’s ongoing deliberations with respect to its future policy are properly protected by the
21 deliberative process privilege. *Klamath*, 532 U.S. at 10; *Nat’l Institute of Military Justice*, 512
22 F.3d at 685-86.

23
24
25 In addition, the FBI has explained that Exemption 7(E) was applied to all of these materials.
26 *See* Fourth Hardy Decl. ¶ 15.

1 *DEA Materials.* EFF contends that DEA improperly invoked the deliberative process
2 privilege to withhold 26 pages describing communications between DEA and six “carrier, service
3 provider, and/or consultant/vendor companies regarding specific technical intercept difficulties
4 encountered during intercept operations.” EFF Renewed MSJ at 15 (citing DEA 6-5-31). DEA
5 has explained that it “initiated contact with these companies seeking their expertise, advice, and
6 voluntary assistance in solving particular intercept issues and to flesh-out DEA needs and
7 requirements.” Second Myrick Decl. ¶ 21b(1)(b). In short, DEA sought out the expertise of these
8 outside consultants to assist DEA in ongoing deliberations about how to resolve particular intercept
9 issues. Therefore, the deliberations are properly protected by the deliberative process privilege
10 under the consultant corollary established in *Klamath*.
11

12 EFF also puts at issue 8 pages of internal reports documenting “meetings between
13 designated DEA personnel and representative personnel of communication carriers, service
14 providers, or communications industry consultants.” EFF’s Renewed MSJ at 15-16 (describing
15 DEA 6-32-40). These meetings were initiated by DEA “to seek the understanding, advice, and
16 cooperation of industry operators and experts, so that DEA could obtain a more in-depth
17 understanding of particular emerging technology intercept challenges.” Second Myrick Decl. ¶
18 21b(1)(c). The internal reports are properly protected by the deliberative process privilege because
19 they contain DEA’s analysis of the meetings and internal recommendations regarding solutions to
20 intercept problems. *Id.* In addition, the representatives of these companies were acting as *Klamath*
21 consultants because they were providing expert input at the request of DEA to assist it in
22 formulating decisions and policy relating to electronic surveillance. *Id.*
23
24

25 **D. FBI Did Not Improperly Invoke The Deliberative Process Privilege To**
26 **Withhold Draft Documents.**

27 EFF mistakenly suggests that FBI withheld draft documents under the deliberative process

1 privilege solely because the documents were drafts. Pl.s' Renewed MSJ at 19. As FBI has long
 2 made clear, it applied the deliberative process privilege exclusively to predecisional, deliberative
 3 material. Fourth Hardy Decl. ¶ 12 (confirming that FBI "has not applied the deliberative process
 4 privilege to any drafts merely because the documents were drafts but instead because the substance
 5 of the drafts were found to be both predecisional and deliberative"); *see also* Second Hardy Decl.
 6 ¶¶ 42-48; *id.* ¶ 45 (noting that draft material in this case "is replete with edits, strike-through and
 7 other formatting changes, marginal suggestions and comments, and/or embedded questions
 8 regarding content").¹² EFF offers no basis to dispute FBI's representations.

10 **E. The Criminal Division Properly Applied The Attorney Work Product**
 11 **Doctrine.**

12 EFF challenges the Criminal Division's application of the attorney work product doctrine.
 13 Pl.'s Renewed MSJ at 21-22. The attorney work product doctrine protects materials prepared by
 14 an attorney in anticipation of litigation, including the materials of government attorneys generated
 15 in litigation and pre-litigation counseling. *See* Fed. R. Civ. P. 26(b)(3); *In re Grand Jury Subpoena*
 16 *(Mark Torf/Torf Environmental Management)*, 357 F.3d 900, 907 (9th Cir. 2004). EFF argues that
 17 the Criminal Division has failed to demonstrate that the materials it treated as protected by the
 18 attorney work product doctrine were created in response to actual or anticipated litigation, as
 19 opposed to being created merely in the "agency's ordinary course of business." Pl.'s Renewed
 20 MSJ at 21 (quoting *Public Citizen, Inc. v. Dep't of State*, 100 F. Supp. 2d 10, 30 (D.D.C. 2000)).

22 The Criminal Division's declarations and *Vaughn* index demonstrate that the four

23 _____
 24 ¹² "[D]raft documents by their very nature, are typically predecisional and deliberative, because
 25 they reflect only the tentative view of their authors; views that might be altered or rejected upon
 26 further deliberation either by their authors or by superiors." *In re Apollo Group, Inc. Securities*
 27 *Litigation*, 251 F.R.D. 12, 31 (D.D.C. 2008) (non-FOIA case) (quotations omitted); *see also Pub.*
 28 *Employees for Env'tl Responsibility v. Bloch*, 532 F. Supp. 2d 19, 22 (D.D.C. 2008) ("FOIA
 provides public access to the [decision documents] that were finally created, not the draft text
 considered along the way.")

1 documents it withheld under the attorney work product privilege were all generated in direct
2 response to ongoing or anticipation litigation. *See* Second Ellis Decl. ¶ 43 (listing attorney work
3 product materials as CRM-000003; CRM-000042-43; CRM-000052; and CRM-000053-54); see
4 also CRM’s Vaughn Index at 3 (explain CRIM-000003 contained two emails between CRM
5 employee and AUSA regarding intercept issues related to particular criminal investigation); *id.* at 6
6 (explaining that CRM-000042 to CRM-000043 contained information regarding sex offenders’ use
7 of a certain technology gathered as part of criminal prosecution); *id.* at 7 (explaining that CRM-
8 0000053-54 contained an email from AUSA to a CRM employee regarding law enforcement’s
9 ability to intercept certain types of communications, which the AUSA was seeking in furtherance
10 of a particular case he was working on); *see* Cunningham Decl. ¶ 9 (explaining that CRM-0000052
11 contained discussion among Department attorneys in relation to ongoing case under investigation).
12 As a result, the materials were properly withheld under the attorney work product doctrine. *In re*
13 *Grand Jury Subpoena*, 357 F.3d at 907.

14
15
16 **V. Defendant Has Properly Withheld Sensitive Law Enforcement Information Pursuant to Exemption 7.**

17 **A. Defendant Has Properly Withheld Information Under Exemption**
18 **7(A).**

19 All three components have withheld information from criminal cases under Exemption
20 7(A), which authorizes the withholding of information “compiled for law enforcement purposes,”
21 where release “could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C.
22 § 552(b)(7)(A). Defendant has demonstrated that the information it withheld under Exemption
23 7(A) was compiled for law enforcement purposes and relates to ongoing criminal investigations.
24 Def.s’ Renewed MSJ at 20-23. Furthermore, the components have clearly articulated why the
25 release of this information would interfere with enforcement proceedings. *Id.* Therefore, all of the
26
27

1 legal requirements for withholding under Exemption 7(A) have been met. 5 U.S.C. §
2 552(b)(7)(A).

3 In response to this showing, EFF offers the purely speculative charge that the components
4 could likely release Exemption 7(A) protected information without interfering with enforcement
5 proceedings if the components redacted out identifying information in the documents. EFF's
6 Renewed MSJ at 23. However, Exemption 7A extends to *all* information gathered from ongoing
7 criminal cases that could interfere with enforcement proceedings. 5 U.S.C. § 552(b)(7)(A). In
8 this case, for example, the Criminal Division invoked Exemption 7(A) to withhold several pages
9 containing "operational details of an ongoing transnational criminal investigation conducted by
10 both foreign law enforcement entities and U.S. law enforcement agencies." Cunningham Decl. ¶ 8
11 (discussing CRM 15-19). As a consequence, "even if CRM redacted the names of individuals from
12 the document, the release of the remaining non-redacted information would still interfere with an
13 ongoing enforcement proceeding because the information would highlight those countries [that] are
14 actively engaged in cooperation with U.S. law enforcement agencies and possibly allow those
15 persons being targeted to learn of the investigation and to possibly elude detection." *Id.*

16 Moreover, EFF's argument also overlooks that, in addition to Exemption 7(A), the
17 components have applied other exemptions to these documents, including Exemption 7(E). All
18 three components have made clear that they have provided all reasonably segregable non-exempt
19 information. Second Ellis Decl. ¶ 30 ("CRM conducted an exacting, line-by-line review of the
20 records located during our wide-ranging search to identify any non-exempt information that could
21 reasonably be segregated and released without adversely affecting the Government's legitimate law
22 enforcement interests."); Second Myrick Decl. ¶ 9j (stating that "[a]ll responsive pages were
23 examined to determine whether any reasonably segregable information could be released"); Second
24

1 Hardy Decl. ¶ 22 (stating that “FBI has taken all reasonable efforts to ensure that no segregable,
2 nonexempt portions were withheld from plaintiff”). These determinations are accorded a
3 presumption of good faith and EFF offers no basis to undermine this presumption here. *Boyd*, 475
4 F.3d at 382.

5
6 **B. FBI Properly Withheld Information Under Exemption 7(D).**

7 FBI properly applied Exemption 7(D), at times in conjunction with Exemption 1, to
8 withhold information provided to the FBI by certain companies during the course of FBI’s
9 intelligence investigations. *See* Second Hardy Decl. ¶¶ 76-78.

10 Exemption 7(D) authorizes the withholding of information in law enforcement records that
11 “could reasonably be expected to disclose the identity of a confidential source,” as well as
12 information “furnished by a confidential source” if it was “compiled by [a] criminal law
13 enforcement authority in the course of a criminal investigation or by an agency conducting a lawful
14 national security investigation[.]” 5 U.S.C. § 552(b)(7)(D). Exemption 7(D) applies if the agency
15 establishes that a source has provided the information under either an express or implied promise
16 of confidentiality. *U.S. Dep’t of Justice v. Landano*, 508 U.S. 165, 12 (1993). For assertions of
17 implied promises of confidentiality, the agency must “describe circumstances that can provide a
18 basis for inferring confidentiality.” *Davin v. U.S. Dep’t of Justice*, 60 F.3d 1043, 1063 (3d Cir.
19 1995). As Defendant explained in its opening brief, the circumstances here show that the
20 companies provided this information under an implied assurance of confidentiality that their
21 identities would not be revealed. Def’s Renewed MSJ at 23-24.

22
23
24 EFF contends that these communications were not made under an implied assurance of
25 confidentiality. EFF’s Renewed MSJ at 23. Plaintiff asserts that the sources did not provide
26 information to the FBI “related to a violent crime” and did not have “a relationship to the possible
27

1 criminal activity that could place them in harm's way." *Id.* at 24. Although such factors have been
2 found by courts to support a conclusion that a source spoke under an implied assurance of
3 confidentiality, *see id.* at 24 (discussing decisions), they are not exhaustive. Rather, the key
4 question is whether it is reasonable to conclude given the particular circumstances of the case that
5 the source spoke to law enforcement under an implied promise of confidentiality. *See Landano*,
6 508 U.S. at 179.

8 Here, as Mr. Hardy explains in his declaration, although the companies were under a legal
9 obligation to provide the information to the FBI in connection with an ongoing investigation, "an
10 implied assurance of confidentiality was nevertheless critical to ensuring that these companies did
11 not unnecessarily resist that obligation, thereby increasing the FBI's burden of obtaining important
12 lawfully-available investigative material." Second Hardy Decl. ¶ 78. According to Mr. Hardy, the
13 companies "would pay a high price if it were known that they were providing information about
14 their customers to the FBI." *Id.* Upon learning of such information, the companies' customers
15 might choose to take their business elsewhere. Under these circumstances, where the companies
16 faced a clear economic cost to providing the information in question, there is every reason to
17 believe they provided the information expecting that their identities would remain confidential. As
18 a consequence, the information was properly withheld under Exemption 7(D).

20 **C. Defendant Properly Withheld Information Pursuant to**
21 **Exemption 7(E).**

22 The components properly invoked Exemption 7(E) to withhold detailed information
23 regarding problems and difficulties that are hampering the components' current ability to conduct
24 lawful electronic surveillance. See Def's Renewed MSJ at 24-27. As Defendant's opening brief
25 demonstrated, and as set forth in detail in the declarations and *Vaughn* indexes of the components,
26 all of the legal requirements for withholding information under Exemption 7(E) are met here.

1 First, it is undisputed that all of the materials withheld pursuant to Exemption 7(E) were compiled
2 for law enforcement purposes. *Id.* at 20. Second, the components have provided detailed
3 explanations for why the release of information regarding problems experienced by DOJ while
4 conducting lawful electronic surveillance, efforts by criminal entities to exploit these
5 vulnerabilities, and counter-measures taken by DOJ in response would provide a detailed road map
6 for criminal entities to evade lawful electronic surveillance and risk circumvention of the law. *Id.*
7 at 25-26. As a result, the components properly invoked Exemption 7(E) to withhold this
8 information. 5 U.S.C. § 552(b)(7)(E) (stating that Exemption 7(E) authorizes an agency to
9 withhold “records or information compiled for law enforcement purposes,” where release of such
10 information “would disclose techniques and procedures for law enforcement investigations or
11 prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if
12 such disclosure could reasonably be expected to risk circumvention of the law”).
13
14

15 In response, EFF argues that the withheld information about law enforcement techniques
16 and procedures is well-known to the public, and based on this unsupported claim, contends it may
17 not be withheld under Exemption 7(E). EFF’s Renewed MSJ at 26 (citing *Rosenfeld v. DOJ*, 57
18 F.3d 803, 815 (9th Cir. 1995) (holding that DOJ could not withhold use of so-called pretext phone
19 calls under Exemption 7(E) because this technique “would leap to the mind of the most
20 simpleminded investigator”). EFF is mistaken. The Criminal Division expressly stated in its
21 declaration that the information it withheld under Exemption 7(E) is not publicly known.
22 According to Ms. Ellis of the Criminal Division, “[a]lthough electronic surveillance is a well-
23 known law enforcement technique, the particulars of when and how such surveillance is conducted,
24 and more specifically, of difficulties in conducting electronic surveillance, are not well-known to
25 the public.” Second Ellis Decl. ¶ 37. Specifically, CRM withheld information pursuant to
26
27

1 Exemption 7(E) that “implicitly or explicitly reveals the parameters of the Department’s
2 surveillance techniques and guidelines; details the difficulties, vulnerabilities, and/or technical
3 limitations of conducting such surveillance on specific carriers/service providers or on specific
4 devices; and describes the exploitation of such vulnerabilities or limitations by child predators,
5 drug cartels and traffickers, and other criminal elements.” *Id.* ¶ 39. “Plaintiff’s request, by its very
6 terms, seeks information that would detail how to evade lawful electronic surveillance by law
7 enforcement. This information necessarily implicates surveillance techniques and guidelines that
8 are not well-known to the public.” *Id.* ¶ 38. EFF offers no reason to cast doubt on the Criminal
9 Division’s conclusion that this information is not well known and that its release would risk
10 circumvention of the law.
11

12 With respect to DEA and FBI, these components have also stated that the information they
13 withheld under Exemption 7(E) is not widely known. According to DEA, the Exemption 7(E)
14 material “consists of detailed information regarding the problems, obstacles, or limitations that
15 hamper DEA’s current ability to conduct surveillance on communications systems or networks, as
16 well as DEA’s countermeasures to these limitations and obstacles. This information is not publicly
17 known.” Third Myrick Decl. ¶ 12. FBI explains that, “[w]hile there have been public reports
18 indicating the government has had trouble conducting electronic surveillance, it is the FBI’s
19 understanding that the specific and detailed information withheld under Exemption 7(E) by the FBI
20 in this case is not widely known to the public.” Fourth Hardy Decl. ¶ 17
21

22 EFF appears to mistakenly assume that because the components have released some
23 information about techniques and technologies that are known to the public, this somehow
24 indicates that the government is improperly withholding similar information under Exemption
25 7(E). *See* EFF’s Renewed MSJ at 28 (noting that government has released information about
26
27

1 techniques and technologies known to the public, such as references to “email, VoIP (Voice over
2 IP), Peer-to-Peer networks, Skype and Blackberry services, and HTTPS”). What this
3 demonstrates, however, is a careful effort to segregate and provide well-known information about
4 law enforcement techniques and procedures, while protecting information that is not widely known
5 and whose release risks circumvention of the law. *See, e.g.*, Third Myrick Decl. ¶ 12 (stating that
6 “[c]ontrary to Plaintiff’s contentions, DEA has segregated and released information pertaining to
7 techniques and technologies that are widely known,” including producing the “names of a wide
8 variety of communications providers and the methods employed by those providers in today’s
9 market,” while withholding information that is not well known to the public and whose disclosure
10 risks circumvention of the law).

11 12 **CONCLUSION**

13
14 For the reasons stated above as well as those set forth in Defendant’s Renewed Motion for
15 Summary Judgment, Defendant respectfully requests that the Court grant its Motion for Summary
16 Judgment with respect to the materials found to be exempt by the Defendant.

17 Dated: March 21, 2013

Respectfully Submitted,

18 STUART F. DELERY
19 Principal Deputy Assistant Attorney General

20 MELINDA HAAG
21 United States Attorney

22 ELIZABETH J. SHAPIRO
23 Deputy Director, Federal Programs Branch

24 /s/ Nicholas Cartier
25 NICHOLAS CARTIER, CA Bar #235858
26 Trial Attorney, Federal Programs Branch
27 Civil Division
28 20 Massachusetts Ave NW, 7224
Washington, DC 20044
Tel: 202-616-8351

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

Fax: 202-616-8470
email: nicholas.cartier@usdoj.gov
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2013, 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