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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. 15-cv-03186-MEJ **PLAINTIFF'S REPLY IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGEMENT** Date: May 19, 2016 Time: 10:00 a.m. Courtroom: B, 15th floor Hon. Maria-Elena James

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INTRODUCTION

EFF, in its opening brief, identified many deficiencies in DOJ's evidentiary showing; DOJ corrected none of them. Instead, DOJ failed to satisfy its well-established burden to support its claims of exemption, and effectively asked this Court to place the burden of proving the non-exempt nature of the documents on EFF. This misstatement of EFF's burden distracts from the fundamental problem with DOJ's reply brief: it failed to provide any of the information necessary to justify its withholdings under FOIA Exemptions 5 and 7, or to establish adequate segregation and release of non-exempt information.

EFF is thus entitled to summary judgment.

ARGUMENT

I. DOJ must affirmatively prove the validity of its exemptions, even as to EFF's cross-motion, and EFF is entitled to summary judgment because DOJ failed to do so.

The parties agree "Defendant bears the burden of proving that records have been properly withheld." DOJ Reply at 4, citing 5 U.S.C. § 552(a)(4)(B). *Accord* EFF Mot. at 6.

The Court, however, should reject DOJ's suggestion that this burden somehow shifts to EFF when it cross-moves for summary judgment. *See* DOJ Reply at 4 (erroneously asserting that "[w]here parties file cross motions for summary judgment, courts apply the same summary judgment standard to each motion"). As the Supreme Court held in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), the seminal decision regarding the interplay of summary judgment and burdens of proof: "the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." In such cases, "we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id.* at 323 (emphasis in original).

In the FOIA context:

> On cross motions for summary judgment, the burdens faced by opposing parties vary with the burden of proof they will face at trial. When the moving party will have the burden of proof at trial [as the government does in a FOIA case], his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party. . . . In contrast, a moving party who

> will not have the burden of proof at trial [such as the requester in a FOIA case] need only point to the insufficiency of the other side's evidence . . . .

Gabel v. IRS, 879 F. Supp. 1037, 1038 (N.D. Cal. 1994) (internal citation and quotations omitted). *See also Feshbach v. SEC*, 5 F. Supp. 2d 774, 779, 787 (N.D. Cal. 1997); *Case v. DOJ*, 2013 WL 6587918, *3 (E.D. Wash. 2013).[1]

II. DOJ improperly withheld records under Exemption 5.

DOJ failed to meet its burden of proving that Exemption 5 justifies the withholding, in full, of seven records comprising 35 pages. *See* EFF Mot. at 7 (listing and describing these records).

A. DOJ failed to prove that five records are inter- or intra-agency records.

DOJ cannot withhold five records under Exemption 5 because, as EFF showed in its opening memorandum, DOJ did not prove that these documents meet the exemption's threshold requirement that they be "inter-agency or intra-agency" records. 5 U.S.C. § 552(b)(5). Because DOJ failed to prove that the records were not circulated outside the federal government, it may not withhold them under Exemption 5. *See Vaughn* index at 4, 6, 7, 25, & 32.

DOJ's claim that its extra-agency dissemination of the records falls within the "consultant corollary" exception must be rejected. DOJ Reply at 4-5. That narrow exception applies only to an agency's outside consultant that "does not represent an interest of its own"; whose "only obligations are to truth and its sense of what good judgment calls for"; and that "functions just as an employee [of the agency] would be expected to do." *Interior Dep't v. Klamath Water Ass'n*, 532 U.S. 1, 11 (2001).

DOJ did not provide any information–not even the identity of the unnamed consultants–to prove that the consultant exception applies. In the cases cited by DOJ, unlike here, the agency proffered specific facts showing that named consultants satisfied the *Klamath* test. DOJ Reply at 5, citing *Sakamoto v. EPA*, 443 F. Supp. 2d 1182, 1191 (N.D. Cal. 2006) (EPA hired named consultants "to perform audits to be used by EPA to inform the agency's decision-making

[1] Not to the contrary are DOJ's cases, which addressed neither FOIA litigation nor the impact of different burdens of proof on cross-motions for summary judgment. *See* DOJ Reply at 4, citing *Pintos v. Pacific Creditors Ass'n*, 605 F.3d 665, 674 (9th Cir. 2009), and *Ingram v. AAA Ins.*, 2013 WL 1826359, *2 (D. Ore. 2013).

processes"); *EPIC v. DHS*, 892 F. Supp. 2d 28, 36, 46 (D.D.C. 2012) (DHS contracted with named consultants "to provide information and analysis" about cutting edge security technologies); and *Citizens for Responsibility v. DHS*, 514 F. Supp. 2d 36, 44-45 (D.D.C. 2007) (FEMA consulted with named state counterparts to "coordinate evacuation plans"). *See also Center for Int'l Envt'l Law v. Trade Rep.*, 237 F. Supp. 2d 17, 25-30 (D.D.C. 2002) (cited by DOJ) (holding that a foreign government did not fall within the consultant corollary).

B. DOJ failed to prove the applicability of the deliberative process privilege.

DOJ's boilerplate statement that the deliberative process privilege applies to five records is insufficient. Rather than justifying its withholdings, DOJ merely recites the legal conclusion that the records were "intended to facilitate or assist development of the agency's final position on policies and procedures regarding use of Hemisphere" and do not "establish a final policy." DOJ Reply at 9. Because DOJ failed to meet its burden of proof, the documents withheld under the deliberative process privilege must be released. *See Vaughn* index at 1, 4, 6, 7, & 32.

As set forth in EFF's opening memorandum, agencies asserting the deliberative process privilege must provide specific information about each record and deliberative process, including the process involved, the role of the documents, and the role of the documents' authors and recipients. EFF Mot. at 8-10. DOJ does not dispute this burden or cure this failure of proof.

Moreover, an agency asserting deliberative process privilege "must identify a specific decision to which the document is predecisional." *Maricopa Audubon Soc. v. Forest Service*, 108 F.3d 1089, 1094 (9th Cir. 1997). *See also Bay Area Lawyers Alliance v. State Dep't*, 818 F. Supp. 1291, 1300 (N.D. Cal. 1992) (criticizing a declaration's failure to give "the requisite factual background" about "what 'decision' the analysis assisted"). DOJ does not provide this information.

DOJ's reliance on dicta from a footnote in *NLRB v. Sears*, 421 U.S. 132, 151 n.18 (1975), regarding the "continuing process" of agency self-examination, DOJ Reply at 8, 10, is unavailing. *See Maricopa* 108 F.3d at 1094 (characterizing this *Sears* language as "dictum" and then holding the agency must identify "a specific decision").

Defendant attempts to buttress its withholding of one record on the grounds it is a draft. DOJ Reply at 9. However, although an agency asserting this privilege over a draft "need not necessarily identify a corresponding final document," it must, and DOJ did not, "provide adequate description of the document to demonstrate that it was genuinely part of the agency's deliberative process." *EPIC*, 928 F. Supp. 2d at 152.

C. DOJ failed to prove the applicability of the work product privilege.

DOJ failed to meet its burden of proving that four records fall within the work product privilege. *See Vaughn* index at 1, 4, 25, & 27. This is because it did not "identify the litigation for which the document was created." *Church of Scientology v. DOJ*, 30 F.3d 224, 237 (1st Cir. 1994).

Rather than identifying the litigation for which the document was created, as required by FOIA, DOJ proposed a less stringent standard: "the lawyer must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable." DOJ Reply at 8, quoting *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998), and citing *Martin v. Bally's Hotel*, 983 F.2d 1252, 1260-61 (3rd Cir. 1993). But DOJ did not even meet its lower standard, as it proffered insufficient proof of either element. Instead, DOJ only summarily stated that the documents were prepared in anticipation of litigation. DOJ Reply at 7. Courts have rejected government assertions of the work product privilege when there is far more explanation. *See, e.g., ACLU v. DOJ*, 70 F. Supp. 3d 1018, 1034-35 (N.D. Cal. 2014) (ordering disclosure of parts of a "reference guide for federal prosecutors" that instruct "how to obtain location tracking information").[2]

[2] In DOJ's cases holding that records were work product, there was significant evidence of anticipated litigation, unlike here. *See* DOJ Reply at 6-8, citing *ACLU*, 70 F. Supp. 3d at 1033-34 (DOJ memos about the impact of *Jones* on GPS tracking and other investigative techniques, including "possible arguments" and "litigation risks"); *Feshbach*, 5 F. Supp. 2d at 782, 783 (SEC memos in an investigation seeking "to build a case against the suspected wrongdoer"); *In re Sealed Case*, 146 F.3d at 886 (legal advice to a political fund after the FEC announced it was "investigating cases" and the fund was publicly accused of wrongdoing); *Martin*, 983 F.2d at 1254 (an expert report, delivered "exclusive[ly]" to an employer's general counsel, obtained to "prepar[e] a defense" against an OSHA investigation); *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992) (NLRB memos about "how to litigate" against fee-shifting statutes, including "instructions on preparing and filing pleadings"); *Delaney, Migdail & Young v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987) (IRS memo addressing "the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome").

Moreover, there is cause to doubt that the DEA anticipated litigation about Hemisphere. The government kept the program "under the radar" by using it only as a "pointer system," then used "parallel subpoenas" to obtain records by traditional means, thus seeking to "wall off" the original Hemisphere records. Lynch Decl., Ex. 1 at 9, 11, 12; Ex. 2 at 21.

D. DOJ failed to prove the applicability of the attorney-client privilege.

DOJ failed to meet its burden of proving with a specific factual showing that three records fall within the attorney-client privilege. *See Vaughn* index at 1, 4, & 27.

To sustain its assertion of the attorney-client privilege, DOJ must prove specific facts about the particular records, including the absence of waiver, and the circulation of the records only to those authorized to speak or act for the agency on the subject at issue. EFF Mot. at 11. *See also Center for Medicare Advocacy v. DHS*, 577 F. Supp. 2d 221, 238 (D.D.C. 2008) (holding it is "critical" that the agency "identif[y] the source and recipient of the communications").

DOJ's reply brief added nothing to its meager, conclusory showing in its opening brief that the records fall within the privilege. EFF Mot. at 11.

For example, it is impossible to glean from the DOJ's reply brief how broadly the records were disseminated, including to whom and for what reason, thus leaving open the possibility of waiver. Document #1 is "confidential legal advice" about unnamed "features" of Hemisphere. DOJ Reply at 6. Document #4 is "confidential legal advice" in a draft memo about "procedures used to obtain information through Hemisphere." *Id.* Although DOJ asserted it was "intended to assist senior DEA management," *id.*, DOJ did not assert anything about who actually received it. Document #28 is "confidential legal advice" about Hemisphere subpoenas. *Id.*

DOJ's contention that this level of detail was found sufficient in other cases misreads that authority. DOJ Reply at 5. The descriptions of the disputed records in those cases are far more illuminating than DOJ's descriptions here. Also, in some of those cases, and unlike here, the requesters were parties to particular government proceedings who were seeking the government's confidential legal positions in those proceedings. For example, in *Performance Coal Co. v. Labor Dep't*, 847 F. Supp. 2d 6, 15 (D.D.C. 2012), the requester was a mine owner seeking the government's confidential legal communications about a particular mine disaster, including "the

appropriate method to utilize in responding to [the owner]'s allegations while ensuring appropriate mine safety enforcement," "settlement recommendation documents," and "strategies about matters that are at some stages of litigation"). *See also Tourasi v. DOJ*, 78 F. Supp. 3d 332, 345 (D.D.C. 2015) (the target of a particular criminal investigation and potential prosecution sought the government's confidential legal communications about it). In defendant's other cases, the requester likewise sought the government's confidential legal positions in specific matters. *See Odland v. FERC*, 34 F. Supp. 3d 3 (D.D.C. 2014) (as to an application for a permit to build a utility structure, seeking records about "the legal merit of a motion filed"); *Judicial Watch v. HUD*, 20 F. Supp. 3d 247, 258 (D.D.C. 2014) (as to federal fair housing enforcement in St. Paul, seeking records "weighing approaches to take in possible forthcoming litigation"); *Judicial Watch v. Treasury Dep't*, 802 F. Supp. 2d 185, 200-01 (D.D.C. 2011) (as to AIG's application for TARP funds, seeking a "draft issues list" and "legal analysis of AIG's proposed compensation structures").

III. DOJ improperly withheld records under Exemption 7.

DOJ also failed to meet its burden of proving that Exemption 7 justifies its withholding of all 27 records comprising 259 pages. *See* EFF Mot. at 12 (listing and describing these records). DOJ withholds about half of these pages in full, and heavily redacted the remainder.

A. DOJ did not show how disclosure could reasonably be expected to interfere with a law enforcement proceeding, as required by Exemption 7(A).

DOJ failed to provide the required specific information about the impact on enforcement proceedings of disclosing the 21 documents it withheld under Exemption 7(A). *See Vaughn* index at 1-2, 4-12, 14, 17, 19, 22-23, 26-29, 34.

EFF previously showed that DOJ cannot withhold records under Exemption 7(A) unless it proves that disclosure will potentially interfere with currently pending or concretely anticipated law enforcement proceedings. EFF Mot. at 13-14. *See, e.g., Bevis v. State Dep't*, 801 F.2d 1386, 1389 (D.C. Cir. 1986).

As an initial matter, DOJ has failed to identify any specific "enforcement proceedings," 5 U.S.C. § 552(b)(7)(A), whether currently pending or concretely anticipated, that might be adversely affected by disclosure of the disputed records. It is not enough for DOJ to cite EFF's

showing that many police agencies use Hemisphere. DOJ Reply at 11. Nor is DOJ excused by its claim that DEA does not "own" Hemisphere (*id.* at 12): EFF showed that DEA uses it, EFF Mot. at 3, and DOJ does not dispute this. To the extent that DOJ objects that disclosure would interfere with the entire set of current and future enforcement proceedings that use Hemisphere, that concern implicates Exemption 7(E) and not Exemption 7(A).

Moreover, DOJ admittedly failed to provide any specific proof that disclosure will result in interference, asserting instead that it need only provide "generic determinations that disclosure of certain types of documents are likely to interfere with enforcement proceedings." DOJ Reply at 11. DOJ's generic statements must be rejected as insufficient. To withhold records under Exemption 7(A), agencies must provide specific detail regarding the impact of disclosure. EFF Mot. at 13, discussing *Sussman v. Marshals Service*, 494 F.3d 1106, 1114 (D.C. Cir. 2007). This is especially true here because potential targets of the Hemisphere program already have access to substantial publicly available information showing that police can use a vast call records database that is capable of rapidly and accurately identifying social networks and "burner" phones. In cases such as the present one, where the existence of the program is already publicly known, the Court cannot defer to the agency's blanket and nonspecific assertion that disclosure will interfere with investigations.

DOJ's own authority holds that the agency must submit "specific information about the *impact of disclosure*." *Sussman*, 494 F.3d at 1114 (emphasis added). In *Sussman*, the D.C. Circuit thus vacated a ruling upholding the exemption claim because it was "impossible to determine whether disclosure would in fact impede" the investigation. *Id.* In *Lewis v. IRS*, 823 F.2d 375, 380 (9th Cir. 1987), the exemption claim was upheld only because the agency produced specific proof that the investigative file addressed "the limits and scope of the IRS's case against Lewis, the names of third parties whom the IRS had contacted as well as the names of actual and potential

witnesses," and thus supported a claim of interference.[3] DOJ's conclusory assertions of generalized interference, on the other hand, are insufficient.

B. DOJ did not show that the companies involved in Hemisphere were confidential sources, as required by Exemption 7(D).

DOJ did not provide evidence to support its claim that companies participate in Hemisphere under either an express or an implied assurance of confidentiality, as required to withhold records under Exemption 7(D). *See Roth v. DOJ*, 642 F.3d 1161, 1184 (D.C. Cir. 2011) (when an agency asserts express assurances, it must "present sufficient evidence that such an assurance was in fact given"); *Wiener v. FBI*, 943 F.2d 972, 986 (9th Cir. 1991) (when an agency asserts implied assurances, it must provide facts sufficient to allow "the court to engage in a highly contextual, fact-specific inquiry"). The Court should thus order the disclosure of the parts of 25 records identifying the participating companies. *See Vaughn* index at 1-2, 4-8, 10, 12, 14, 16-19, 22-23, 25-32, 34.

In its reply, DOJ stated that it withheld company names under Exemption 7(D) "based on information provided by Defendant personnel familiar with Hemisphere that pertains specifically to the companies whose identities are at issue." DOJ Reply at 13. This statement is insufficient and conclusory, as a declaration in support of Exemption 7(D) must be made by a person with direct personal knowledge. *See Maydak v. DOJ*, 254 F. Supp. 2d 23, 44 (D.D.C. 2003) (rejecting as inadequate a declaration by an agency employee lacking "personal knowledge"). Nowhere in its briefing, declarations, or *Vaughn* index did DOJ show that the companies involved with Hemisphere were expressly granted confidentiality, or provide detailed facts indicating that it implied confidentiality. In fact, it is unclear whether DOJ's theory is based on an express or implied assurance of confidentiality.

DOJ's statement that the sources had an "express *expectation*" of confidentiality, DOJ Reply at 13 (emphasis added), gets the requirements of Exemption 7(D) backwards. The agency must prove the government actually provided an "express assurance" of confidentiality to the

[3] Neither *Sussman* nor *Lewis* involved general records about a large program utilized in numerous investigations. Rather, each dealt only with records of the specific investigation of the requestor or their associates. 494 F.3d at 1114; 823 F.2d at 377.

source, *Rosenfeld v. DOJ*, 57 F.3d 803, 814 (9th Cir. 1995), not merely that the source subjectively expected it. *See also id.* (requiring the agency to "establish the informant was told [their] name would be held in confidence").

Moreover, even DOJ's unexplained assertions about the companies' expectations of confidentiality were inadequately supported. DOJ did not offer the required testimony reflecting "the personal knowledge of an official familiar with the sources." *Campbell v. DOJ*, 164 F.3d 20, 34 (D.C. Cir. 1999) (cited in DOJ Reply at 13). DOJ's declarant, Ms. Myrick, provided no evidence that she had any direct personal knowledge of the agency's relationships with the companies. *Id*. Even if she had asserted such familiarity, her declaration would still be insufficient because it failed to provide enough details showing that the government expressly or impliedly granted confidentiality to the companies involved in Hemisphere.

C. DOJ did not show how disclosure of the withheld records could create a risk of circumvention of law, as required by Exemption 7(E).

DOJ cannot withhold the disputed records pursuant to Exemption 7(E) because it failed to demonstrate how, given the substantial existing public knowledge about Hemisphere, disclosure of these records could create a risk of circumvention of the law.[4]

When a FOIA plaintiff points out the insufficiency of an agency's evidence for withholding documents under Exemption 7(E), the agency must respond by presenting "substantial evidence" of a circumvention risk to satisfy its burden of proof. *Feshbach*, 5 F. Supp. 2d at 787. EFF's opening brief established that, pursuant to the Ninth Circuit's decision in *Rosenfeld*, 57 F.3d at 815, DOJ's assertions regarding potential circumvention of the law were insufficient because so much is already publicly known about Hemisphere. When the particular techniques, procedures, and guidelines at issue are well known, the agency must "explain for each specific withholding regarding a law enforcement technique that the information withheld goes beyond a generally known technique." *EFF v. CIA*, 2013 WL 5443048, *23 (N.D. Cal. 2013).

[4] EFF agrees with DOJ that the records in question are "law enforcement techniques, procedures, [and] guidelines" related to Hemisphere. DOJ Reply at 14.

In its reply, DOJ declined to provide additional facts or more detailed justifications that a risk of circumvention remains notwithstanding public knowledge of Hemisphere. Instead, DOJ restated its conclusory assertions that any further disclosure would create a circumvention risk. DOJ Reply at 14-17. DOJ also relied on two out-of-circuit authorities arguably holding agencies to a somewhat lower standard than what is required by the Ninth Circuit's *Rosenfeld* decision. *Id.* at 14-15, citing *Mayer Brown LLP v. IRS*, 562 F.3d 1190 (D.C. Cir. 2009), and *PHE, Inc. v. DOJ*, 983 F.2d 248 (D.C. Cir. 1993). This Court cannot follow those authorities to the extent they conflict with *Rosenfeld*. In any event, DOJ also failed to meet the legal standard under *Mayer Brown* and *PHE, Inc.* because it has not "'demonstrate[d] logically how the release of [the requested] information might create a risk of circumvention of the law.'" *Mayer Brown*, 562 F.3d at 1194, quoting *PHE, Inc.*, 983 F.2d at 251.

For example, DOJ did not explain how releasing details regarding the cities and states of Hemisphere operations could create a circumvention risk in light of the fact that the public already knows several of these locations. EFF Mot. at 17. DOJ's argument that just because "some criminals may know some information about Hemisphere does not mean that all criminals know everything about Hemisphere," DOJ Reply at 15, misses the point. FOIA requires DOJ to explain why disclosing the remaining locations would pose a circumvention risk beyond what is already publicly known. *EFF*, 2013 WL 5443048, *23.

Similarly, DOJ did not explain how disclosing the names of companies that participate in Hemisphere creates a risk of circumvention given that it is publicly known that AT&T participates in the program and that any call records data that crosses an AT&T switch, regardless of the phone company a customer uses, is also swept up into Hemisphere. Lynch Decl., Ex. 1 at 3. Contrary to DOJ's claim (DOJ Reply at 16), EFF does not assert that DOJ waived Exemption 7(E). Rather, EFF argues that public knowledge of AT&T's involvement in Hemisphere refutes the logic of DOJ's circumvention claims because criminals already have the ability to find out that AT&T call records and any calls crossing AT&T switches are captured by Hemisphere. EFF Mot. at 17-21.

DOJ also did not prove that withholding the names of other law enforcement agencies involved in Hemisphere creates a circumvention risk. EFF showed that, because the identities of

many of the participating federal, state, and local law enforcement agencies are public, criminals already have access to information showing that Hemisphere is used by all levels of law enforcement and all over the country. EFF Mot. at 18-19.

Rather than make the requisite factual showing, DOJ seeks to avoid its burden of proof by relying on two cases, *Pons v. Customs Serv.*, 1998 U.S. Dist. LEXIS 6084 (D.D.C. Apr. 23, 1998) and *Light v. DOJ*, 968 F. Supp. 2d 11 (D.D.C. 2013), that EFF previously distinguished. EFF Mot. at 18-19. Moreover, the court's statement in *Pons* that an agency can withhold records that "could betray some of the secrets of the agency, and could aid would-be lawbreakers in evading the law" *supra* at *20, merely restates the legal test under Exemption 7(E). But agencies must demonstrate how secrets, if disclosed, would create a circumvention risk. *See Feshbach*, 5 F. Supp. 2d at 787 ("In order to justify non-disclosure, the [agency] must provide non-conclusory reasons why disclosure of each category of withheld documents would risk circumvention of law."). To the extent that *Pons* can be read as allowing an agency to nakedly claim a circumvention risk without evidence or further explanation, the case was wrongly decided. Additionally, *Light* does not help DOJ because DOJ did not show any circumvention risk, unlike the FBI's showing in *Light*. 968 F. Supp. 2d at 29.

Finally, DOJ failed to show *how* criminals could use information about Hemisphere requests, processing, responses, and capabilities to circumvent the law. DOJ instead attempted to shift the burden of persuasion to EFF, arguing that because EFF "does not actually know what DEA withheld, Plaintiff cannot credibly argue that the release of the information will not cause harm." DOJ Reply at 17. But EFF need only demonstrate that DOJ failed to meet its burden to demonstrate that such a risk could reasonably exist. *Feshbach*, 5 F. Supp. 2d at 779, 787. Indeed, the informational asymmetry inherent in all FOIA cases, which DOJ seeks to exploit here, is the very reason the government bears the burden of proof to sustain its withholdings with detailed declarations and *Vaughn* indexes that allow plaintiffs and reviewing courts to independently assess the agency's claims. *See, e.g., Pickard v. DOJ*, 2015 WL 926183, *1-2 (N.D. Cal. 2015), citing *Wiener*, 943 F.2d at 977-79.

Thus, DOJ failed to meet its burden of proving that 27 records fall within Exemption 7(e).

See Vaughn index at 1-2, 4-12, 14, 16-19, 22-23, 25-32, 34.

IV. DOJ failed to segregate and release non-exempt information.

DOJ failed to prove that it adequately segregated exempt and non-exempt material from the withheld records. FOIA requires DOJ to provide specific facts regarding its segregability analysis, particularly when, as here, an agency withheld more than 100 pages in full and heavily redacted large portions of more than 150 additional pages. *See, e.g. Nat'l Wildlife Fed'n v. Forest Service*, 861 F.2d 1114, 1118 (9th Cir. 1988) ("purely factual material contained in deliberative memoranda and severable from its context would generally be available"); *Kowack v. Forest Service*, 766 F.3d 1130, 1135 (9th Cir. 2014) ("factual material that does not reveal the deliberative process is not protected"); *Bay Area Lawyers Alliance*, 818 F. Supp. at 1300 ("it appears improbable that long documents are *entirely* 'analytical,' and do not contain any segregable *factual* material") (emphasis in original).

Moreover, DOJ must provide the court with evidence sufficient to allow the court to "make a specific finding that no information contained in each document or substantial portion of a document withheld is segregable." *See Wiener*, 943 F.2d at 988. DOJ did not do so.

The Court should reject DOJ's argument that it met its obligations under FOIA merely by filing a *Vaughn* index and a declaration stating without explanation that it reviewed the withheld materials and determined it cannot disclose additional information. DOJ Reply at 17-18. Instead of specific facts, DOJ only proffered boilerplate. *Id.* at 18 (asserting it "reviewed the responsive materials to ensure that reasonably segregable information was released"); DOJ Mot. at 22 (asserting it "processed and released all reasonably segregable information"); Myrick Decl. at 18 (asserting "[a]ll responsive records (305 pages) were examined to determine whether any reasonably segregable information could be released"). DOJ did not *explain* why the more than 100 pages it withheld in full and the more than 150 pages it redacted in nearly their entirety do not contain additional releasable information. Nor did DOJ allege that non-exempt material is inextricably intertwined with exempt material.

DOJ cannot avoid its segregability burden of proof under the Ninth Circuit's *Wiener* decision by citing non-binding authority such as *Sussman*, 494 F.3d at 1117, *Johnson v. EOUSA*,

310 F.3d 771, 776 (D.C. Cir. 2002), *Hodge v. FBI*, 703 F.3d 575, 582 (D.C. Cir. 2013), and *Loving v. DOD*, 550 F.3d 32, 41 (D.C. Cir. 2008). These decisions directly conflict with *Wiener*'s "specific finding" requirement, 943 F.2d at 988, to the extent they are read to permit an agency to meet its segregability obligation by merely supplying a *Vaughn* index and stating without explanation in a declaration that it released all segregable material. Moreover, these cases actually support EFF's argument. *Sussman* requires district courts to "make specific findings of segregability regarding the documents to be withheld." 494 F.3d at 1116. *Hodge* held that an agency "cannot justify withholding an entire document simply by showing that it contains some exempt material." 703 F.3d at 582. *Johnson* required an agency to put forward "a detailed justification" for its inability to segregate material. 310 F.3d at 776. And *Loving* held that the agency has the "burden of demonstrating that no reasonably segregable information exists" in any withheld records. 550 F.3d at 41.

V. EFF's factual assertions are pertinent and supported by the record.

The summary judgment record shows that Hemisphere is a massive dragnet telephone surveillance program funded and coordinated by federal agencies including the DEA, and that police use Hemisphere to rapidly identify the associates, phone numbers, and locations of suspects, typically with no judicial review. *See generally* EFF Mot. at 1-4; Lynch Decl., Exs. 1-10. DOJ's characterization of Hemisphere as "a law enforcement tool used by various law enforcement agencies," DOJ Mot. at 14, does not help this Court assess whether the records at issue are exempt from disclosure under FOIA.

Indeed, the facts of Hemisphere's massive breadth and scope are highly relevant, undermining DOJ's legal theory for withholding records under FOIA. Among other things, these facts show that the public already knows a great deal about Hemisphere, despite DOJ's claims that it is a secret.

DOJ also errs by characterizing EFF's factual presentation as inaccurate. DOJ Reply at 2-4. EFF stands by the accuracy of each of the factual assertions disputed by DOJ, including these:

- **Authenticity of *Los Angeles Hemisphere*.** The *New York Times* published this slide report,[5] and stated in an accompanying article that "Federal officials confirmed that the slides are authentic."[6] Ms. Lynch's declaration accurately states that its Exhibit 1 is a "true and correct" copy of the report published by the *Times*. The declaration does not represent that the report is an authentic government record, but federal officials did so in the *Times* article. Inasmuch as this report is hearsay, it falls within the exception for public records that set out a public office's activities or matters observed. *See* FRE 803(8)(A)(i) & (ii). *Cf.* DOJ Reply at 3-4.
- **Frequency of DEA use.** EFF wrote that the DEA "is one of the most frequent Hemisphere requesters." In support, EFF cited the fact that the DEA made more than half of the Hemisphere requests to the Northwest HIDTA in 2012-2013. Lynch Decl., Ex. 1 at 17. While this pattern might not hold, the characterization is fair.
- **DEA connection to a training.** EFF wrote that "the DEA was 'the lead agency' in a task force that provided Hemisphere training." Indeed, the DEA is "the lead agency" in the Southern California Drug Task Force. EFF Mot. at 3 n.12, citing ONDCP, *Los Angeles HIDTA*.[7] And according to an email from this Task Force, this Task Force arranged a training about Hemisphere. Lynch Decl., Ex. 5.
- **Years covered by *Los Angeles Hemisphere.*** EFF wrote that activity in this report occurred "[b]etween 2007 and 2013." EFF Mot. at 3. Indeed, the report addresses activity beginning in 2007, Lynch Decl., Ex. 1 at 5, and continuing through 2013, *id.* at 5, 14, 16-19, 25-27. The *Times* published the report in 2013. *Supra* at note 6.

[5] *Available at:* http://www.nytimes.com/interactive/2013/09/02/us/hemisphere-project.html?action=click&contentCollection=U.S.&module=RelatedCoverage&region=Marginalia&pgtype=article.

[6] *See* Scott Shane and Colin Moynihan, *Drug Agents Use Vast Phone Trove, Eclipsing N.S.A.'s*, N.Y. Times (9/1/13) , *available at:* http://www.nytimes.com/2013/09/02/us/drug-agents-use-vast-phone-trove-eclipsing-nsas.html.

[7] *Available at:* ncjrs.gov/ondcppubs/publications/enforce/hidta2001/la-fs.html.

VI. If the Court has any doubts about granting summary judgment for EFF, the Court should review the disputed records in camera.

As set forth above and in EFF's opening brief, EFF is entitled to summary judgment.

As an alternative, this Court may review the disputed records *in camera*. *See* EFF Mot. at 23-24. This suggestion does not indicate that EFF "harbors some doubts about the legal correctness of its position." DOJ Reply at 1. EFF simply asks the Court to employ this important and useful tool if the Court believes it will help it reach the correct decision.[8]

CONCLUSION

EFF respectfully asks this Court to grant its motion for summary judgment, deny DOJ's motion, and order DOJ to release the disputed records.

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[8] This Court should not accept DOJ's invitation (DOJ Reply at 19 n.6) to defer ruling until after another district court, located in another circuit, resolves the pending cross motions for summary judgment in another FOIA case involving Hemisphere records. *See EPIC v. DOJ*, 14-cv-317 (D.D.C.). As of the date of the filing of this brief, the court in that case had not yet ruled.