

EXHIBIT 1

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

ELECTRONIC FRONTIER FOUNDATION,)	
)	
Plaintiff,)	
)	
v.)	
)	
UNITED STATES DEPARTMENT OF JUSTICE,)	Case No. 3:16-cv-02041-SK
)	
)	
Defendant.)	
)	
)	
)	

DECLARATION OF G. BRADLEY WEINSHEIMER

I, G. Bradley Weinsheimer, declare as follows:

1. I am the Acting Chief of Staff and the Director of Risk Management and Strategy for the National Security Division (“NSD”) of the United States Department of Justice (“DOJ” or “Department”). NSD is a component of the Department which formally began operations on October 2, 2006, by consolidating the resources of the Office of Intelligence Policy and Review (“OIPR”)¹ and the Criminal Division’s Counterterrorism Section (“CTS”) and Counterespionage Section (“CES”). I have served as Director of Risk Management and Strategy since March 2016, prior to which time I served as the Deputy Counsel in the DOJ’s Office of Professional Responsibility from June 2011 until March 2016, and as an Assistant U.S. Attorney in the District of Columbia from June 1991 until June 2011.

2. Among other responsibilities, in my capacity as the Director of Risk Management and Strategy, I supervise the Freedom of Information (“FOIA”) and Declassification Unit (“NSD

¹ OIPR is now known as the Office of Intelligence

1 FOIA”), which is responsible for responding to requests for access to NSD records and information
 2 pursuant to the FOIA, 5 U.S.C. § 552 and the Privacy Act of 1974. The FOIA and Declassification
 3 Unit also processes the NSD records which are responsive to FOIA requests received by other
 4 Executive Branch agencies. Through the exercise of my official duties, I have become familiar
 5 with this action and the underlying FOIA requests. The statements contained in this declaration are
 6 based upon my personal knowledge and information provided to me in the course of my official
 7 duties.

8 3. I submit this declaration in support of the Department’s Motion for Partial Summary
 9 Judgment in this proceeding. The purposes of this declaration are to (1) explain why NSD cannot
 10 process part one of the requester’s March 7, 2016 request; and (2) explain how and why the other
 11 part of the request was processed.²

12 **I. The March 7, 2016 FOIA Request**

13 4. In a letter dated March 7, 2016, the requester Electronic Frontier Foundation
 14 (“requester”) submitted a FOIA request seeking the following:

- 16 • Any “decision, order, or opinion issued by the Foreign Intelligence
 17 Surveillance Court or the Foreign Intelligence Surveillance Court of Review³
 18 (as defined in section 601(e)),” issued from 1978 to June 1, 2015, “that
 19 includes a significant construction or interpretation of any provision of law,
 20 including any novel or significant construction or interpretation of the term
 ‘specific selection term.’” USA FREEDOM Act, Pub. L. 114-23, § 402(a)
 (2015), codified at 50 U.S.C. § 1872(a).
- 21 • Any “decision, order, or opinion issued by the [FISC] or the [FISCR]
 22 (as defined in section 601(e)),” issued from June 2, 2015 to present, “that
 23 includes a significant construction or interpretation of any provision of law,
 24 including any novel or significant construction or interpretation of the term
 ‘specific selection term.’” USA FREEDOM Act, Pub. L. 114-23, § 402(a)
 (2015), codified at 50 U.S.C. § 1872(a).

25 ² Plaintiff submitted another FOIA request dated October 8, 2015, which I understand is
 26 also at issue in the above-captioned case. However, I also understand that the Department’s
 27 Motion for Partial Summary Judgment addresses only the March 7, 2016 request. Accordingly,
 28 this declaration does not address Plaintiff’s October 8, 2015 request.

³ Hereinafter, the Foreign Intelligence Surveillance Court will be referred to as the “FISC,”
 and the Foreign Intelligence Surveillance Court of Review will be referred to as “FISCR.”

1 This request was assigned NSD FOI/PA #16-106. In a letter dated, March 14, 2016, NSD FOIA
2 acknowledged receipt of this request.

3 5. On March 25, 2016, Department employees spoke with the requester to try to
4 narrow the scope of the March 7, 2016 FOIA request. The requester declined to narrow the scope
5 of the request, and instead sought release of any responsive records on a prioritized schedule.

6 6. In an email dated April 5, 2016, the requester offered some “suggestions for
7 prioritization of opinions” responsive to its request. These included the following:

- 8 (1) opinions that authorize particularly novel surveillance techniques or
9 actions, or techniques that affect significant numbers of people;
- 10 (2) opinions addressing violations of laws or court orders;
- 11 (3) opinions that established new rules, or authoritatively construed laws, and
12 that remain in current use by the FISC and IC;
- 13 (4) opinions that, within NSD or the IC, are considered foundational or
14 otherwise critical to understanding government national security
15 surveillance authorities; and
- 16 (5) recently issued opinions (e.g., those issued after 2001).

17 My understanding is that these suggested priorities were not intended to narrow the scope
18 of the original FOIA request.

19 7. On April 19, 2016, the requester filed this lawsuit in the Northern District of
20 California, San Francisco Division.

21 8. With respect to Part 2 of the request, that portion which sought FISC and FISCR
22 decisions, orders, and opinions issued after June 2, 2015 (hereinafter “Part 2” of the request), the
23 Department has processed the request, and has produced to the requester eight responsive records:

- 24 (1) *In re A U.S. Person*, PR/TT 15-52 (June 18, 2015);
- 25 (2) [Redacted], (Nov. 6, 2015);
- 26 (3) *In re Application of the FBI for Orders Requiring the Production of Call Detail
27 Records*, [Redacted] (Dec. 31, 2015);
- 28 (4) *In re Applications of the FBI for Orders Requiring the Production of Tangible Things*,
BR 15-77, 15-78 (June 17, 2015);

1 (5) *In re Application of the FBI for an Order Requiring the Production of Tangible Things*,
2 BR 15-75 (June 29, 2015);

3 (6) *In re Application of the FBI for an Order Requiring the Production of Tangible Things*,
4 BR 15-99 (Nov. 24, 2015);

5 (7) *In re A U.S. Person*, PR/TT 2016 (Feb. 12, 2016); and

6 (8) *In re Certified Question of Law*, FISCR 16-01 (Apr. 14, 2016).

7 Where these records have been redacted in part, the redactions were taken to protect classified
8 information and in part to protect information protected by statute. I understand that the redacted
9 information is exempt from disclosure under FOIA Exemptions (b)(1) and (b)(3) and that the
10 requester is not challenging these withholdings.

11 **II. Reasons Why Plaintiff's Request for Records from 1978 through June 1, 2015 Cannot**
12 **Be Processed as a FOIA Request**

13 9. In preparing this declaration, I have consulted with the appropriate supervisory
14 officials within NSD and the NSD's Office of Intelligence regarding the March 7, 2016 request
15 for records from 1978 through June 1, 2015 (hereinafter "Part 1" of the request). NSD's Office of
16 Intelligence is divided into three sections: Operations, Oversight, and Litigation. In general, the
17 Operations Section handles NSD's intelligence operations workload, including representing the
18 government before the FISC. The Operations Section is responsible for preparing and filing all
19 applications for court orders pursuant to FISA. The mission of the section is to ensure that the
20 Federal Bureau of Investigation ("FBI") and other United States Intelligence Community agencies
21 have the legal tools necessary to conduct intelligence operations that adhere to the requirements
22 and safeguards of the law. The Department of Justice is responsible for the legal oversight of the
23 foreign intelligence, counterintelligence and other national security activities of the Intelligence
24 Community, to ensure compliance with the Constitution, statutes, and Executive Branch policies.
25 The Oversight Section is charged with meeting this responsibility by monitoring the activities of
26 various Intelligence Community elements. The Litigation Section ensures that sufficient
27 resources are devoted to FISA-related litigation, including ensuring that attorneys with specialized
28 expertise are available to assist prosecutors with evidentiary issues in such matters. The Litigation

1 Section reviews and prepares requests for authorization by the Attorney General to use FISA
2 information in criminal and non-criminal proceedings. The Section also drafts motions and briefs,
3 and responds to criminal defense attorneys' motions to disclose FISA applications or suppress the
4 fruits of FISA collection. Finally, the Section works to ensure the consistent application of FISA
5 in trial and appellate courts nationwide.

6 10. The supervisory officials with whom I consulted are among the most senior
7 attorneys within the Office of Intelligence who, in addition to their supervisory responsibilities,
8 collectively possess extensive institutional knowledge of both the Office of Intelligence and its
9 predecessor, the Office of Intelligence Policy and Review.

10 11. For several reasons, Part 1 of the request cannot reasonably be processed by the
11 Department as a FOIA request. First, Part 1 of the FOIA request seeks certain documents (e.g.,
12 decisions, orders, or opinions issued by the FISC that include a significant interpretation of any
13 provision of law) from a time period that spans 37 years. During that time frame, and based upon
14 publicly disclosed information, the number of approved FISA applications since 1978 by the FISC
15 is in excess of 30,000. The number of decisions, orders and/or opinions issued by the FISC in
16 response to those applications would collectively be well in excess of 30,000, because each
17 application may result in the issuance of more than a single order, opinion, or decision.⁴

18 12. Second, in order to responsibly process Part 1 of the request, each of those
19 documents would have to be reviewed manually, one by one in order to determine whether or not
20 they include a significant interpretation of any provision of law within the meaning of the request.
21 This is because potentially responsive documents could not be retrieved through an electronic
22 search of a database by using carefully crafted search terms. Nothing in the language of Part 1 of
23 the request suggests specific search terms that could be reasonably designed to capture all of the
24 documents potentially responsive to the request. For example, there is no reason to believe that the
25 FISC, before June 2, 2015, would have routinely used words like "significant" or "novel" (or some
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27 ⁴ It is my understanding that since its inception, the FISC has convened on three occasions
28 to consider matters either appealed from the FISC or certified to it by the FISC. The FISC has
issued three substantive opinions in response to those matters, all of which have been publicly
released in redacted form.

1 other searchable descriptor) when rendering a decision or opinion or issuing an order that, at the
2 time would have identified the document as containing a “significant construction or
3 interpretation” of law.⁵

4 13. Third, in the course of that document by document review, the meaning and
5 import—and thus the potential responsiveness to Part 1 of the FOIA request— of each decision,
6 order, or opinion may not be readily apparent from its content. For example, a reviewer may find
7 an order from 1985 authorizing the use of a particular surveillance technique “as described in the
8 application.” To determine the import of that order, and thus whether it was responsive to Part 1 of
9 the FOIA request, the reviewer would need to identify and then carefully review related documents
10 (e.g., applications, memoranda of law, etc.) and then may have to conduct independent legal
11 research in order to determine the significance (or lack thereof) of the order. Not only would this
12 significantly add to the processing time each time a reviewer encountered such an order, but it
13 underscores the point that responsive documents cannot be located simply by entering search terms
14 into a database.

15 14. Fourth, a reviewer conducting a review of each opinion, order, and decision issued
16 from 1978 to June 2, 2015, would have no objective criteria with which to determine whether any
17 given decision, order, or opinion constituted a “significant” or “novel” interpretation of law.
18 Unless the FISC specifically labeled a decision, order, or opinion as “significant” or “novel” for
19 some reason, such a determination would be wholly subjective. It is also a legal determination that
20 would need to be made by an attorney or attorneys knowledgeable in not just FISA law but other
21 areas of the law as well because Part 1 of the request seeks, among other things, decisions, orders,
22 or opinions containing “significant construction or interpretation of *any provision of law*.” Most
23 critically, that subjective, legal determination would need to be made in the context of the law *at*
24 *the time the opinion, order, or decision was issued*. A particular interpretation of law may not be
25 novel or significant in 2016, but it could very well have been in 2005 or in 1980. Accordingly, a
26 reviewer would potentially have to place each decision, order or opinion into its proper historical

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28 ⁵ Section 401 of the USA FREEDOM Act, enacted on June 2, 2015, now requires the FISC
and FISCR to identify such cases by appointing an *amicus curiae*, or by explaining why no amicus
was appointed.

1 context (e.g., was this the first time a particular surveillance technique was authorized by the FISC;
2 were there Fourth Amendment implications regarding its use; were other provisions of federal law
3 implicated and if so how... ?); conduct legal research to identify applicable law; and then analyze
4 that document against the state of applicable law at that time in order to determine whether it was
5 “significant” or “novel” from a legal perspective. That reviewer either would have to possess an
6 encyclopedic knowledge of FISA law, as well as any other potentially applicable constitutional and
7 federal law, and be able to assess for each particular order, opinion, or decision how it fits into that
8 legal framework *at the time it was issued*, or, the reviewer would need to conduct extensive legal
9 research to try to understand the state of the law at the time the decision was issued. Only in this
10 manner could a reviewer begin to assess whether any given FISC or FISCR decision was novel or
11 significant when it was issued.

12 15. In light of its nature, Part 1 of the FOIA request cannot be processed by a
13 Department employee within the FOIA and Declassification Unit. At NSD, most searches for
14 records responsive to a FOIA request are conducted by non-attorney personnel. But even if the
15 reviewer were an attorney, that attorney or attorneys would by necessity have to come from the
16 Office of Intelligence, not the FOIA and Declassification Unit, because, as noted above, the
17 attorneys in the Office of Intelligence handle FISA litigation for the Government before the FISC
18 and FISCR. Nevertheless, even if a sufficient number of those attorneys were diverted from their
19 operational responsibilities (described above) in an attempt to process Part 1 of this FOIA request,
20 they would, as noted, need to either be legal historians and be familiar with the history and
21 evolution of surveillance techniques or else they would have to conduct significant legal research at
22 nearly every turn to determine whether any given decision, order, or opinion contained a novel or
23 significant interpretation of any provision of law at the time they were issued. And, to reduce the
24 risk of an inconsistent application of what constitutes a “significant” or “novel” interpretation of
25 law (which is essentially a subjective standard), the number of attorneys who could be assigned to
26 such a daunting task would by necessity have to be relatively small.

27 16. In order to process this request of unparalleled breadth, NSD attorneys would need
28 to carefully examine each order, decision, and opinion in tens of thousands of dockets over nearly

1 four decades and make subjective decisions about the legal significance of each document. That
2 processing would involve a significant full-time effort that could take years, though it is impossible
3 for me to predict with any precision how long a review of this magnitude might take, since each
4 docket contains varying numbers of orders and/or, decisions, and/or opinions, and the assessment
5 and research related to each could vary widely depending upon the content/subject of the particular
6 document (and the state of the related law). There is also no way to shorten the review period; as
7 discussed above, there are no search terms which could be entered to identify responsive records
8 and cull out those which are non-responsive. While NSD ultimately does not expect there to be a
9 voluminous set of responsive records to Part 1 of the request, NSD cannot reasonably estimate the
10 total universe of potentially responsive documents prior to conducting this exhaustive search.

11 **III. Reasons Why Plaintiff's Request for Records Dated after June 2, 2015 Does Not**
12 **Present the Same Difficulties.**

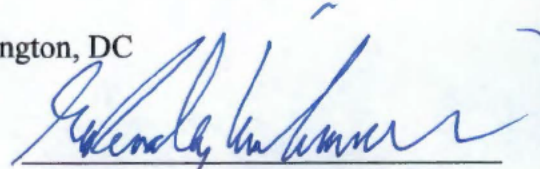
13 17. As noted above, unlike Part 1, the Department was able to process Part 2 of the
14 March 7, 2016 request. Part 2 of the request sought the same type of decisions and orders from the
15 FISC and FISCR as did Part 1, with the critical exception that Part 2 sought only those decisions
16 and orders that met the requester's criteria since June 2, 2015, following the passage of the USA
17 FREEDOM Act. FISA, as amended by Section 402 of the USA FREEDOM Act, generally
18 requires the declassification and publication of FISC and FISCR decisions, orders, or opinions that
19 include "a significant construction or interpretation of any provision of law." But the statute also
20 contains guideposts which permit the government, *on a prospective basis*, to reasonably identify a
21 decision, order, or opinion containing a "significant construction or interpretation of any provision
22 of law." For example, FISA, as amended by the USA FREEDOM Act, now requires the FISC to
23 appoint amicus curiae to assist it in the consideration of matters that in the opinion of the court
24 present a "novel or significant interpretation of the law, unless the court issues a finding that such
25 appointment is not appropriate." 50 U.S.C. § 1803(i)(2). The imposition of that requirement on
26 the FISC allows the Government to readily identify those orders, opinions, and decisions that, *in*
27 *the opinion of the FISC*, present novel or significant interpretations of law. The documents listed
28 in paragraph 8, which were disclosed to the requester as responsive to Part 2 of its request, were

1 thus readily identifiable because they were previously publicly disclosed pursuant to Section 402 of
2 the USA Freedom Act.

3 **CONCLUSION**

4 I certify, pursuant to 28 U.S.C. § 1746, under penalty of perjury that the foregoing is true
5 and correct.

6 Executed this 22nd day of September 2016, Washington, DC

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8 G. BRADLEY WEINSHEIMER

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