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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, Defendant.	Case No. 4:16-cv-02041-HSG Hon. Haywood S. Gilliam, Jr. Hearing Date: November 8, 2018 Hearing Time: 2:00 p.m. Courtroom 2, Oakland Courthouse **DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

NOTICE OF MOTION

PLEASE TAKE NOTICE that on November 8, 2018, at 2:00 p.m. in Courtroom 2, 4th Floor, United States Courthouse, 1301 Clay Street, Oakland, California 94612, Defendant U.S. Department of Justice, by and through undersigned counsel, will move this Court for partial summary judgment in the above-captioned action.

MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant United States Department of Justice hereby moves the Court for partial summary judgment regarding six documents it has withheld in full pursuant to Exemptions 1, 3, 6, 7(A), (7)(C), and (7)(E) to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b), for the reasons more fully set forth in the following Memorandum of Points and Authorities.

Dated: July 26, 2018

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Plaintiff brings this Freedom of Information Act ("FOIA") case for the purpose of asking this Court to adopt its favored interpretation of the USA FREEDOM Act of 2015, which Plaintiff claims precludes the Government from withholding in full any of the six documents at issue in this motion even if they are properly exempt from disclosure under FOIA. Plaintiff is wrong.

These six documents—the only documents being withheld in full of the 80 that are responsive to Plaintiff's FOIA request—are classified orders and opinions issued by the Foreign Intelligence Surveillance Court ("FISC"). The Government has submitted herewith detailed declarations from the Office of the Director of National Intelligence ("ODNI") and the Federal Bureau of Investigation ("FBI") discussing why the specific information in the documents properly fits within Exemptions 1, 3, 7A, and 7E. Each of the documents contains classified information relating to sources, methods, and techniques used by various elements of the Intelligence Community in conducting electronic surveillance and other intelligence-gathering activities. In a FOIA action, the Court's determination regarding these exemptions is dispositive; once it has been determined that information falls within one of FOIA's statutory exemptions, a court has no jurisdiction to order its disclosure. *See Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 139 (1980); *Minier v. CIA*, 88 F.3d 796, 803 (9th Cir. 1996).

Plaintiff ignores this jurisdictional bar and urges the Court to look beyond application of FOIA's exemptions to a separate—and importantly different—statute: the USA FREEDOM Act. But there is no basis to conflate these two statutes. Section 402 of the USA FREEDOM Act requires the Government to conduct a declassification review of the FISC opinions and orders to which it applies, and release redacted versions of those documents, or create an unclassified summary of those opinions and orders that cannot be released in redacted form. *See* 50 U.S.C. § 1872. Although Plaintiff attempts to use this FOIA action to enforce its interpretation that Section 402 should apply retroactively to FISC orders and opinions issued prior to its enactment, and therefore to the six documents at issue in this case, there are no grounds in that law—or in FOIA—

to conclude that Congress intended private parties to enforce that provision, whether through FOIA or otherwise, or that the statute could *sub silentio* supplant the statutory exemptions under FOIA. Indeed, the relief that arguably would be applicable under Section 402—the creation of an unclassified summary of those opinions and orders that cannot be released in redacted form—is simply not available as a FOIA remedy under black letter law. Finally, even if the Court were to reach the issue of whether Section 402 applied to FISC opinions and orders issued prior to its enactment, there is no indication whatsoever that Congress intended the law to apply retroactively.

For all these reasons, Defendant respectfully requests that the Court grant the Defendant's motion for partial summary judgment.

BACKGROUND

In a letter dated March 7, 2016, Plaintiff submitted a request to the United States Department of Justice seeking:

- Any "decision, order, or opinion issued by the [FISC][1] or the Foreign Intelligence Surveillance Court of Review[2] [("FISCR")] (as defined in section 601(e))," issued from 1978 to June 1, 2015, "that includes a significant construction or interpretation of any provision of law, 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).[3]

[1] In 1978, when it enacted FISA, Congress established the FISC, an Article III court of U.S. district judges with authority to consider applications for and grant orders authorizing electronic surveillance and other forms of intelligence-gathering by the Government. *See* 50 U.S.C. § 1803(a), (b). Congress enacted FISA "to regulate the use of electronic surveillance within the United States for foreign intelligence purposes," S. Rep. No. 95-604(I), at 7 (1977), placing certain types of foreign intelligence surveillance under the oversight of the FISC, *see* 50 U.S.C. § 1803.

[2] The FISCR is a court of review that has jurisdiction to review the decisions of the FISC. *See* 50 U.S.C. § 1803(b). No FISCR orders or opinions remain at issue here.

[3] On June 2, 2015, Congress enacted the USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 ("the USA FREEDOM Act"), which, *inter alia*, "requires a declassification review of each decision, order, or opinion issued by the [FISC] or the [FISCR] . . . that includes a significant construction or interpretation of any provision of law." *See id.* § 402(a). The USA FREEDOM Act also requires that the FISC and the FISCR "appoint an individual . . . to serve as amicus curiae to assist such court in the consideration of any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law, unless the court issues a finding that such appointment is not appropriate[.]" 50 U.S.C. § 1803(i)(2)(A).

- Any "decision, order, or opinion issued by the [FISC] or the [FISCR] (as defined in section 601(e))," issued from June 2, 2015 to present, "that includes a significant construction or interpretation of any provision of law, 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).

See ECF No. 12, Answer, Exhibit B ("March 7, 2016 Request") at 1. The requester and the Department were unable to resolve the request, and Plaintiff filed suit alleging a single cause of action for violation of the FOIA. *See* ECF No. 1, Compl. ¶¶ 38-41; ECF No. 29-1, Decl. of G. Bradley Weinsheimer ¶¶ 5-6.[4] Subsequently, with regard to Part II of the March 7, 2016 FOIA request, Defendant disclosed eight responsive documents, and Plaintiff is not challenging either the adequacy of the search or any of the redactions in that production. *See id.* ¶ 8.

With regard to Part I of the FOIA request, Defendant submitted a motion for partial summary judgment, *see* ECF No. 29; Plaintiff cross-moved for summary judgment, *see* ECF No. 32 ("Pl.'s Br."); and Defendant filed its combined response and reply, *see* ECF No. 33. Subsequently, however, the parties sought to stay further briefing and vacate the then-scheduled argument, because Plaintiff had agreed to narrow the scope of Part I of its March 7, 2016 request and Defendant had agreed to process and respond to that narrowed request. *See* Stipulation and [Proposed] Order, ECF No. 39. The narrowed request seeks "all decisions, orders, or opinions of the FISC or the FISC-R submitted to Congress by the Attorney General pursuant to Section 6002 of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. section 1871(a)(5)); 50 U.S.C. sections 1871(c)(1) & (2); and 50 U.S.C. section 1881f(b)(1)(D) between July 1, 2003 and June 1, 2015, which have not been previously declassified and made public (to include those decisions, orders, or opinions previously identified by the Department of Justice to the Brennan Center, https://www.brennancenter.org/sites/default/files/publications/The_New_Era_of_Secret_Law.pdf), that remain classified." *Id.* at 2. This is now the operative FOIA request in this case.

The Government identified 80 documents that were responsive to Plaintiff's narrowed

[4] Plaintiff's Complaint also alleges violations of FOIA with respect to a second FOIA request, submitted on October 8, 2015. *See* Compl. ¶¶ 20–30. The parties have resolved any issues related to that request, *see* ECF No. 41, Joint Status Report, at 2, however, and it is not addressed herein.

request, and produced in part 42 documents. *See* Decl. of Rodney Patton, Exh. A, Decl. of Patricia Gaviria ("Gaviria Decl.") ¶ 14. The Government also initially withheld in full 38 responsive documents; subsequently, however, the Government determined that 32 of these documents could be reprocessed and released in part on or before August 20, 2018. *See* Gaviria Decl. ¶ 15. In the interim, the parties proposed, and the Court ordered, that briefing on motions for partial summary judgment proceed, only as to those documents that will remain withheld in full. *See* ECF Nos. 62, 63. Defendant is withholding in full six documents pursuant to, as applicable, FOIA Exemptions (b)(1), (b)(3), (b)(6), (b)(7)(A), (b)(7)(C), and (b)(7)(E) as follows:

Document Number	**Type of Document**	**Exemptions**	**Number of Pages**	**Categories of Information Withheld**
1	FISC Supplemental Order	(b)(1), (b)(3), (b)(6), (b)(7)(A), (b)(7)(C), (b)(7)(E)	3	All categories
2	FISC Primary Order	(b)(1), (b)(3), (b)(6)	9	All categories
3	FISC Amendment to Primary Order	(b)(1), (b)(3), (b)(6)	4	All categories
4	FISC Primary Order	(b)(1), (b)(3), (b)(6)	9	All categories
5	FISC Supplemental Opinion	(b)(1), (b)(3), (b)(6)	6	All categories
6	FISC Order	(b)(1), (b)(3)	15	All categories

Plaintiff has indicated that it does not intend to challenge the adequacy of the Government's search, or its withholding of information under FOIA Exemptions (b)(6) and (b)(7)(C). Accordingly, those issues are not addressed herein. Plaintiff has indicated, however, that it intends to challenge the other withholdings and reassert its argument that it is entitled to relief in this case based on a retroactive application of Section 402 of the USA FREEDOM Act, *see* ECF No. 32, Pl.'s Br., at 1–5, 17–21. For the reasons explained herein, the Government's position remains that the USA FREEDOM Act has no application to this FOIA action; that it would not entitle Plaintiff to relief even if it were applicable; and that the Government has complied with its FOIA obligations with respect to the six documents at issue here.

ARGUMENT

I. The Government Properly Complied with its Obligations under FOIA.

A. FOIA Statutory Background and Standard of Review

FOIA "seeks to ensure an informed citizenry, vital to the functioning of a democratic society." *ACLU of N. Cal. v. FBI*, 881 F.3d 776, 778 (9th Cir. 2018). To that end, it "requires that federal agencies make records within their possession promptly available to citizens upon request." *Id.* "But, this command is not absolute." *Id.* "Rather, because 'Congress recognized . . . transparency may come at the cost of legitimate governmental and privacy interests . . . [FOIA] provides for nine specific exemptions.'" *Id.* Despite the "liberal congressional purpose" of FOIA, the Supreme Court has recognized that these exemptions are intended to have "meaningful reach and application." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). "A district court only has *jurisdiction* to compel an agency to disclose *improperly withheld* agency records," *i.e.*, records that do "not fall within an exemption." *Minier*, 88 F.3d at 803. Thus, "[r]equiring an agency to disclose exempt information is not authorized by FOIA." *Id.*

As this Court recently noted, "FOIA cases are typically decided on motions for summary judgment because the facts are rarely in dispute." *Freedom of the Press Found. v. U.S. Dep't of Justice*, 241 F. Supp. 3d 986, 994 (N.D. Cal. 2017) (Gilliam, J.). "Upon a motion for summary judgment, a district court analyzes the withholding of documents *de novo*." *Id.* "FOIA's strong presumption in favor of disclosure places the burden on the government to show that an exemption properly applies to the records it seeks to withhold." *Id.* at 996.

The Government may meet that "burden by submitting a detailed affidavit showing that the information logically falls within the claimed exemptions." *Minier*, 88 F.3d at 800. "Where the government invokes FOIA exemptions in cases involving national security issues, [courts] are required to accord substantial weight to the agency's affidavits." *Freedom of the Press Found.*, 241 F. Supp. 3d at 997; *see also id.* at 995 ("[b]ecause of courts' limited institutional expertise on intelligence matters' and the risk of adversaries aggregating even 'small pieces' of intelligence data, [a]ffidavits submitted by an agency to demonstrate the adequacy of its response are presumed

to be in good faith when submitted in the national security context."); *see also Hamdan v. Dep't of Justice*, 797 F.3d 759, 773 (9th Cir. 2015) ("emphasiz[ing] the importance of deference to executive branch judgments about national security secrets"). The agency affidavits "must describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemptions, and show that the justifications are not controverted by contrary evidence in the record or by evidence of [agency] bad faith.'" *Freedom of the Press Found.*, 241 F. Supp. 3d at 997.

However, while the Government "may not rely upon conclusory and generalized allegations of exemptions," it "need not specify its objections in such detail as to compromise the secrecy of the information." *Binion v. U.S. Dep't of Justice*, 695 F.2d 1189, 1193 (9th Cir. 1983). Indeed, "[i]n the area of national security," this Court has recognized that "it is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency." *Freedom of the Press Found.*, 241 F. Supp. 3d at 997. "[A]n agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Id.* at 998. "If the affidavits contain reasonably detailed descriptions of the documents and allege facts sufficient to establish an exemption, the district court need look no further." *Id.*

For the reasons set forth below, the attached declarations amply demonstrate that the Government has appropriately withheld the documents remaining at issue in this case.

B. Defendant Properly Withheld the Six Documents Under Exemption 1.

Defendant, through the declaration of Patricia Gaviria of the ODNI, has shown that the six documents at issue comprise classified national security information protected by FOIA Exemption 1, 5 U.S.C. § 552(b)(1).[5] FOIA Exemption 1 protects records that are: "(A) specifically authorized

[5] Ms. Gaviria is the Director of the Information Management Division under the Strategy and Engagement Directorate for the ODNI, which handles, among other responsibilities, FOIA requests. *See* Gaviria Decl. ¶¶ 1–2. The ODNI assists the Director of National Intelligence ("DNI") in carrying out his duties; subject to the authority, direction, and control of the President, the DNI serves as the head of the United States Intelligence Community and the principal adviser to the President and the National Security Council for intelligence matters related to national security. *See id.* ¶¶ 5, 8.

under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy[,] and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); *accord, e.g.*, *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139, 144 (1981). Under Exemption 1, properly classified information is exempt from disclosure. *Id.* at 144–45.

For information to be properly classified pursuant to Exemption 1, it must meet the requirements of Executive Order 13,526, "Classified National Security Information," 75 Fed. Reg. 707 (Dec. 29, 2009):

> (1) an original classification authority is classifying the information;
> (2) the information is owned by, produced by or for, or is under the control of the United States Government;
> (3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and
> (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

Id. § 1.1, 75 Fed. Reg. at 707; *see also* Gaviria Decl. ¶ 21. The Executive Order lists three classification levels for national security information: top secret, secret, and confidential. Exec. Order No. 13,526 § 1.2, 75 Fed. Reg. at 707–08. Ms. Gaviria is an original classification authority and is, therefore, authorized to make "classification and declassification decisions for intelligence information up to and including the Top Secret level." Gaviria Decl. ¶ 3.

To meet its burden of showing that the withheld information logically falls within Exemption 1, *see Hamdan*, 797 F.3d at 769, 773–74; *Minier*, 88 F.3d at 800; *Freedom of the Press Found.*, 241 F. Supp. 3d at 998, the Government's declaration needs to describe the documents withheld; identify the exemption claimed; identify the kind of classified information found in the document; and provide a particular explanation of the injury to national security that would follow from the disclosure of the withheld information in the document. *See Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991); *see also Freedom of the Press Found.*, 241 F. Supp. 3d at 998 (citing, with approval, FBI's declaration "explain[ing] the specific rationale for withholding" materials).

Patricia Gaviria's declaration more than satisfies this burden. Ms. Gaviria states that

"[c]onsistent with E.O. 13526 and FOIA Exemption 1, the information withheld pursuant to Exemption 1 is currently and properly classified as it satisfies the substantive requirements of E.O. 13526 governing classification." Gaviria Decl. ¶ 23. She further attests that the information is owned and under the control of the United States Government and falls under one or more of the categories of classified information listed in Section 1.4 of Executive Order 13526. *See id.* Ms. Gaviria also enumerated and then described six categories of information present in each of the six documents and provided an explanation of the injury to national security that would result if the information were disclosed, *see id.* ¶¶ 26-47.

First, the Government is withholding the identities of surveillance targets and related information, the disclosure of which would alert the targets and associates of the existence of the surveillance and allow them to take countermeasures and would "provide our adversaries with valuable insight into the Intelligence Community's targeting tradecraft and methods." *Id.* ¶¶ 27-28.

Second, the Government is withholding "certain types of communications and data that are collected" because disclosure of this information would, *inter alia*, reveal the specific methods employed and alert targets to the vulnerabilities of their communications and thus "result in a loss of information crucial to the national security." *Id.* ¶ 30.

Third, the Government is withholding "some of the most sensitive methods used by the Intelligence Community to surveil national security targets." *Id.* ¶ 33. Disclosure of these methods "would provide our adversaries with a 'roadmap' of when and how elements within the Intelligence Community were able to first employ these methods" and could "allow[] them to thwart surveillance and use types of communications and/or methods the Intelligence Community may not currently be capable of collecting." *Id.*

Fourth, the Government is withholding "other operational details and capabilities" such as information about collection equipment as well as the limitations of the Intelligence Community's capabilities to target and acquire certain communications. *See id.* ¶¶ 37. Disclosing such information would reveal those limitations to our adversaries who "could attempt to develop countermeasures to frustrate our intelligence methods and technologies." *Id.* ¶ 38.

Fifth, the Government is withholding the "identities of entities that provide assistance pursuant to FISA orders." *Id.* ¶¶ 40-44. Disclosure of these identities "would reveal to foreign adversaries" whether a particular Intelligence Community element used "particular intelligence sources and methods" and thus allow adversaries to try to avoid detection by "switching" their communications to "an entity that has not been officially identified as having been subject to specific FISC orders under specific FISA authorities." *Id.* ¶¶ 41, 43.

Finally, the Government is withholding the docket numbers and dates in these documents because, in these circumstances, this information "could reveal to a sophisticated adversary the existence and use of particular intelligence-gathering activities or sources and methods, including their use during certain times of the year," *id.* ¶ 45, which, in turn, could prove "invaluable" to adversaries' ability to "determin[e] communication security vulnerabilities." *Id.* ¶ 46.

Based on the foregoing, Ms. Gaviria concludes that "disclosure of this material could reasonably be expected to cause serious damage, and, in some instances, exceptionally grave damage to national security," *id.* ¶ 24, and this information is, accordingly, properly classified SECRET and TOP SECRET pursuant to E.O. 13526, respectively." *Id.* ¶¶ 29-30, 36, 39, 44, 47. This conclusion is well supported by her declaration, and her judgment is entitled to "substantial weight," *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992), and this Court's deference. *Hamdan*, 797 F.3d at 773.[6]

[6] *See also Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982) ("'[T]he Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse [effects] might occur as a result of public disclosure of a particular classified record.'") (quoting S. Rep. No. 1200, 93rd Cong., 2d Sess. 12 (1974)); *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980) ("[T]he court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions; to do so would violate the principle of affording substantial weight to the expert opinion of the agency.").

C. Defendant Properly Withheld the Six Documents Under Exemption 3.

The Government also has properly invoked Exemption 3, which "protects information 'specifically exempted from disclosure by statute . . . if that statute (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue: or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld: and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to the paragraph.'"[7] *Freedom of the Press Found.*, 241 F. Supp. 3d at 998 (quoting 5 U.S.C. § 552(b)(3)). In promulgating FOIA, Congress included Exemption 3 to recognize the existence of collateral statutes that limit the disclosure of information held by the government, and to incorporate such statutes within FOIA's exemptions. *See Baldrige v. Shapiro*, 455 U.S. 345, 352–53 (1982); *Hamdan*, 797 F.3d at 775 ("Exemption 3 protects records exempt from disclosure pursuant to a separate statute."). "In determining whether information has been properly withheld under Exemption 3, the Court asks 'whether the statute identified by the agency is a statute of exemption within the meaning of Exemption 3' and 'whether the withheld records satisfy the criteria of the exemption statute.'" *Freedom of the Press Found.*, 241 F. Supp. 3d at 998–99.

Here, the Government has properly withheld the six documents at issue pursuant to two statutes. First, the Government has withheld information in each document that "would tend to reveal an intelligence source or method," as described more fully, *supra*, at 8-9. This information "falls squarely within the protection" of Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. § 3024(i)(1). *See* Gaviria Decl. ¶¶ 49-50. This statute mandates that the DNI "shall protect intelligence sources and methods from unauthorized disclosure," 50 U.S.C. § 3024(i)(1), and it indisputably qualifies as an Exemption 3 statute. *See ACLU v. Dep't of*

[7] FOIA requires that, if the Exemption 3 statute was enacted after the date of enactment of the OPEN FOIA Act of 2009, the subsequently enacted statute must specifically cite to 5 U.S.C. section 552(b)(3). The OPEN FOIA Act of 2009 was enacted on October 28, 2009, Pub. L. 111-83, 123 Stat. 2142, 2184; 5 U.S.C. § 552(b)(3)(B), after both of the two Exemption 3 statutes upon which the Government relies here. Accordingly, the OPEN FOIA Act requirement has no application in this case.

Defense, 628 F.3d 612, 619 (D.C. Cir. 2011); *Larson v. Dep't of State*, 565 F.3d 857, 868 (D.C. Cir. 2009); *N.Y. Times Co. v. Dep't of Justice*, 872 F. Supp. 2d 309, 316-17 (S.D.N.Y. 2012).[8]

Second, the Government has also properly withheld information in several of the documents pursuant to Section 6 of the National Security Agency Act of 1959, codified at 50 U.S.C. § 3605. This statute provides that "[n]othing in this [Act] or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof . . . ." 50 U.S.C. § 3605.[9] The "plain language of a statute stating that no law shall require disclosure of certain records indisputably satisfies the criteria of Exemption 3." *Hamdan*, 797 F.3d at 776. So, too, here, where Section 6 states unequivocally that, notwithstanding any other law—including FOIA—the Government cannot be compelled to disclose NSA information with respect to the NSA's activities. *See Hayden v. NSA*, 608 F.2d 1382, 1389–90 (D.C. Cir. 1979) (upholding assertion of Section 6 as an Exemption 3 withholding statute); *EPIC v. Dep't of* Justice, 296 F. Supp. 3d 109, 121 (D.D.C. 2017) ("well established" that Section 6 "qualifies as an Exemption 3 withholding statute"). Ms. Gaviria concluded that "[b]ecause each of the categories of information enumerated above relates to the NSA's conduct of intelligence-gathering activities, that information is protected from public disclosure by 50 U.S.C. § 3605(a)." Gaviria Decl. ¶ 51. Accordingly, the information must be protected from disclosure pursuant to Section 6 and is thus properly withheld under Exemption 3. *See id.*

D. Defendant Properly Withheld Information in a Document under Exemption 7.

FOIA Exemption 7 protects from disclosure "records or information compiled for law enforcement purposes" when production of the records or information "would cause one of six

[8] Section 102(A)(i)(1) of the National Security Act was previously codified at 50 U.S.C. § 403(i)(1). As a result of the reorganization of Title 50 of the United States Code, section 102(A)(i)(1) is now codified at 50 U.S.C. § 3024(i)(1).

[9] "The protection afforded by Section 6 is, by its very terms, absolute. If a document is covered by Section 6, NSA is entitled to withhold it . . . ." *Linder v. NSA*, 94 F.3d 693, 698 (D.C. Cir. 1996); *accord Houghton v. NSA*, 378 Fed. Appx. 235, 238–239 (3d Cir. 2010); *Roman v. NSA*, 2009 WL 303686, at *5-6 (E.D.N.Y. 2009), *aff'd* 354 Fed. Appx. 591 (2d Cir. 2009).

enumerated harms." *ACLU of N. Cal.*, 881 F.3d at 778. "Thus a court must first decide whether a document was 'compiled for law enforcement purposes' before turning to whether an enumerated harm exists." *Id.* The Ninth Circuit has "stressed" that "an agency which has a clear law enforcement mandate, such as the FBI, need only establish a 'rational nexus' between enforcement of a federal law and the document for which an exemption is claimed . . . or a 'rational nexus' between [the agency's] law enforcement duties and such documents." *Id.* The Court of Appeals further instructs that "[l]aw enforcement agencies such as the FBI should be accorded special deference in an Exemption 7 determination." *Id.* at 779.

Here, there is a rational nexus between these FISC opinions and orders and the enforcement of federal law. The information protected by Exemption 7 "details the FBI's request" to the FISC to use a "sensitive law enforcement technique" in electronic surveillance to gather foreign-intelligence information pertaining to an ongoing FBI national security investigation involving terrorists. *See* Decl. of Rodney Patton, Exh. B, Decl. of David M. Hardy ("Hardy Decl.") ¶ 10.[10]

Once an agency establishes the threshold requirement by demonstrating that the records or information at issue were compiled for law enforcement purposes, the agency must show that releasing the records or information would lead to one or more of the harms identified in subsections (7)(A)–(F). Here, the harms identified in subsection 7(A) and 7(E) are likely to result from the disclosure of the document at issue. Each exemption is discussed, in turn, below.

1. Defendant Properly Withheld Information in Document 1 Pursuant to Exemption 7(A)

Records compiled for law enforcement purposes are properly withheld under Exemption 7(A) if disclosure of those records "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). "Foremost among the purposes of this Exemption was *to prevent harm to the Government's case in court.*" *Shannahan v. IRS*, 672 F.3d 1142, 1150 (9th Cir. 2012) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978)).

[10] Mr. Hardy is the Section Chief of the Record/Information Dissemination Section of the Information Management Division of the FBI. *See* Hardy Decl. ¶ 1. His duties include being familiar with the FBI's procedures when responding to FOIA requests and referrals from other government agencies. *See id.* ¶ 3.

"Under Exemption 7(A) the government is not required to make a specific factual showing with respect to each withheld document that disclosure would *actually interfere* with a particular enforcement proceeding." *Id.* Rather, an agency "need only make a general showing that disclosure of its investigatory records would interfere with its enforcement proceedings." *Id.* This is because "Congress intended that Exemption 7(A) would allow the federal courts to determine that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings." *Id.*; *see also id.* at 1151 (characterizing Exemption 7(A) as "a general exclusion" "which is dependent on the category of the requested records rather than the individual subject matters contained within each document").

Information in Document 1 is properly withheld pursuant to Exemption 7(A) because that information "is related to several different pending national security investigations." Hardy Decl. ¶ 12. The information consists of "fairly detailed, non-public descriptions of the specific target of a national security investigation, facilities the target was using, and a specific sensitive technique," *id.* ¶ 13, and is "so intertwined with ongoing national security investigations that disclosure of this information, in the midst of such active and pending investigations, could reasonably be expected to interfere with these investigations as well as any resulting criminal prosecutions that may ultimately result from the investigation." *Id.* ¶ 14. This is because disclosure of such information "would alert the target and the target's associates of their status as FBI subjects" so they could then "take measures to evade FBI scrutiny" and "destroy potential evidence." *Id.* ¶ 15. This is also because public disclosure of the details about the FBI's sensitive law enforcement technique, including how it is implemented and under what authority it is used, would "alert the target and the target's associates" to how the FBI obtained their communications and prompt them to "take measures to evade further FBI scrutiny of their communications to the detriment of several, related ongoing national security investigations and subsequent potential prosecutions." *Id.*

Accordingly, this information is properly withheld under Exemption 7(A).

2. Defendant Properly Withheld Information in Document 1 Pursuant to Exemption 7(E)

"Exemption 7(E) protects from disclosure 'records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.'" *ACLU of N. Cal. v. U.S. Dep't of Justice*, 880 F.3d 473, 491 (9th Cir. 2018). "The statutory requirement that the government show that disclosure 'could reasonably be expected to risk circumvention of the law' applies only to guidelines for law enforcement investigations or prosecutions, not to techniques and procedures." *Id.*

"Exemption 7(E) only exempts investigative techniques not generally known to the public." *Id.* (quoting *Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 815 (9th Cir. 1995)). "If an agency record discusses 'the application of [a publicly known technique] to . . . particular facts,' the document is not exempt under 7(E)." *Id.* "But if a record describes a 'specific means . . . rather than an application' of deploying a particular investigative technique, the record is exempt from disclosure under FOIA." *Id.* "Likewise, records that provide a 'detailed, technical analysis of the techniques and procedures used to conduct law enforcement investigations' may properly be withheld under Exemption 7(E)." *Id.*

Information in Document 1 is properly withheld pursuant to Exemption 7(E) because it involves "a law enforcement technique that is not generally known to the public, and that, if publicly released, would disclose this sensitive technique used in national security investigations." Hardy Decl. ¶ 18. Indeed, beyond noting that it is a technique the FBI uses in its conduct of electronic surveillance, *id.*, Mr. Hardy attests that providing further "details on the public record" would "highlight the very information the FBI seeks to protect pursuant to Exemption 7(E)." *Id.* ¶ 21. He further attests that disclosing this "sensitive law enforcement technique" would "damage the FBI's ability to effectively use this technique in current and future national security

investigations because the targets could develop and use countermeasures to evade the collection . . . through the use of this technique." *Id.*

Accordingly, this information is properly withheld under Exemption 7(E).

E. There Are No Reasonably Segregable Portions of these Six Documents.

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b)(9). While the Government has the burden to show that it has discharged this obligation, *see Pacific Fisheries, Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir. 2008), it is "entitled to a presumption that [it] complied with the obligation to disclose reasonably segregable material." *Freedom of the Press Found.*, 241 F. Supp. 3d at 1004. The Court "may rely on an agency's declaration in making its segregability determination" and "need not conduct a page-by-page review of an agency's work." *Id.*

The Government is withholding in full only six of the 80 documents that are responsive to Plaintiff's FOIA request. *See* Gaviria Decl. ¶ 52. Each of these six documents was reviewed by multiple Intelligence Community elements during the processing of the second and third batches of responsive documents that were disclosed in September 2017 and January 2018, and the Government determined these documents could not be released in part. *See id.* ¶ 54. Then, in preparation for this motion for partial summary judgment, these documents were again reviewed by multiple Intelligence Community elements which—after reviewing "these six documents line-by-line to determine if they could be released in part"—again determined that the documents do not contain any reasonably segregable information that could allow the documents to be released in part. *See id.* ¶ 55.

And now, Ms. Gaviria has also "reviewed each of these six documents" and "agree[s] that there is no meaningful, segregable, non-exempt information that can be released to Plaintiff." *Id.* ¶ 56. Additionally, Ms. Gaviria attested that that "[d]isclosure of even those portions of the documents that may be unclassified or otherwise seemingly innocuous, when considered in conjunction with other publicly available information, could reasonably be expected to assist a

sophisticated adversary in deducing the existence and use of particular intelligence-gathering activities or sources and methods." *Id.*

As a result, these documents must be withheld in full pursuant to Exemptions 1, 3, 7(A), and 7(E).

II. Section 402 of the USA FREEDOM Act Does Not Prevent the Government from Withholding these Documents in Full.

Plaintiff has insisted throughout this litigation that it is entitled to relief based on Section 402 of the USA FREEDOM Act. But Plaintiff has not asserted a claim under Section 402, and, indeed, Plaintiff could not have done so because Congress did not create a private right of action to enforce that provision. Rather, Plaintiff's claim in this action sounds only in FOIA. As to Plaintiff's FOIA claim, the law is clear: the analysis set forth in Section I above, *i.e.* the application of the statutory exemptions that Congress provided in FOIA, is dispositive. Binding precedent provides that once a court determines a record is properly withheld under one of the exemptions enumerated in FOIA, the court has no jurisdiction to order that record's disclosure. *See Kissinger*, 445 U.S. at 139. There is no reason to think that Congress intended to disturb this well-established rule when it enacted Section 402. On the contrary, because the relief Plaintiff seeks under Section 402 is not available in a FOIA action, there is good reason to conclude that Congress would have expressly said so in the USA FREEDOM Act (or at least its legislative history) had it intended to radically alter the FOIA landscape by (1) mandating the disclosure of exempt information, and (2) requiring a form of relief never before permitted in a FOIA case. Congress's silence on this point confirms what it clear from the text of the statutes—Section 402 has no bearing on the disposition of Plaintiff's FOIA claim. And, even if none of this were so, there is no basis in the text of the statute nor the legislative history of Section 402 to conclude that its declassification mandate was intended to apply to opinions and orders of the FISC issued before its enactment, all the way back to 1978.

A. Section 402 Does Not Override the Government's Proper Withholding of these Documents Pursuant to Applicable FOIA Exemptions.

Plaintiff maintains that even if the Government properly withheld in full these documents pursuant to FOIA exemptions, it cannot do so in light of the disclosure requirements of Section 402 of the USA FREEDOM Act. Plaintiff is incorrect. Section 402 provides that

> the Director of National Intelligence, in consultation with the Attorney General, shall conduct a declassification review of each decision, order, or opinion issued by [the FISC and the FISCR] that includes a significant construction or interpretation of any provision of law, including any novel or significant construction or interpretation of the term "specific selection term", and, consistent with that review, make publicly available to the greatest extent practicable each such decision, order, or opinion.

50 U.S.C. § 1872(a). This obligation may be satisfied by disclosing the order or opinion in redacted form, *see id.* § 1872(b), or, upon a determination by the DNI and the Attorney General that a national security waiver is appropriate, by making "publicly available an unclassified statement" that, *inter alia*, "summariz[es] the significant construction or interpretation of any provision of law." *Id.* § 1872(c).[11] Setting aside for now the question of whether this provision applies retroactively to the FISC opinions and orders at issue here, *see infra*, at 19-25, its declassification mandate cannot usurp the Government's ability to withhold these documents in full under FOIA, for several reasons.

First, as an initial matter, while Congress provided requestors under FOIA the right to seek relief from the federal courts, *see* 5 U.S.C. § 552(a)(4)(B), Congress created no private right of action under Section 402 of the USA FREEDOM Act. *See* 50 U.S.C. § 1872. To the extent that Plaintiff seeks to turn this FOIA suit into a suit under the USA FREEDOM Act, there would be no support in the law for such an action. *Cf. Kissinger*, 445 U.S. at 147–50 (no private right of action to enforce Federal Records Act in FOIA suit); *Assassination Archives and Research Ctr. v. Dep't of Justice*, 43 F.3d 1542, 1544–45 (D.C. Cir. 1995) ("The JFK Act and the FOIA are separate

[11] Therefore, even if the USA FREEDOM Act's requirements could properly inform what is required under FOIA, Plaintiff's premise—that no significant opinion may be withheld in full under the USA FREEDOM Act—is mistaken; withholding in full is permitted, so long as an unclassified summary is created and certain other conditions are fulfilled. *See* 50 U.S.C. § 1872(c).

statutory schemes with separate sets of standards and separate (and markedly different) enforcement mechanisms . . . . We thus find no statutory warrant for creating a private right of action to enforce the JFK Act . . . through the subterfuge of judicially hybridizing the two acts.").

Second, Plaintiff has pled only one cause of action in its Complaint: violation of FOIA for wrongful withholding of agency records. *See* ECF No. 1, Compl. ¶¶ 1, 38-41. It is black letter law that in FOIA, "federal jurisdiction is dependent on a showing that an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records.'" *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (quoting *Kissinger*, 445 U.S. at 150); *see also Kissinger*, 445 U.S. at 150 ("Judicial authority to devise remedies and enjoin agencies can only be invoked, under the jurisdictional grant conferred by § 552, if the agency has contravened all three components of this obligation."); *Minier*, 88 F.3d at 803 ("A district court only has *jurisdiction* to compel an agency to disclose *improperly withheld* agency records."). "An agency record is only improperly withheld if it does not fall within an exemption." *Minier*, 88 F.3d at 803. That means that "[w]hen an agency has demonstrated that it has not withheld requested records in violation of the standards established by Congress, the federal courts have no authority to order the production of such records under the FOIA." *Kissinger*, 445 U.S. at 139. And "[w]ithout jurisdiction [a] court cannot proceed at all in any cause," other than to "'announc[e] the fact and dismiss[]" the case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

Third, there is nothing in Section 402 (or its legislative history) to "suggest that Congress intended [the provision] to override the [Government's] ability to claim proper FOIA exemptions," *Minier*, 88 F.3d at 802, and Plaintiff cannot point to any authority that would support a contention that the statute could *sub silentio* supplant the statutory exemptions under FOIA. *Cf. id.* ("Had Congress intended the JFK Act to alter the procedure for reviewing FOIA requests, presumably it would have expressly said so.").

Finally, any enforcement of the relevant provision of Section 402 is not a cognizable remedy under FOIA. When, as here, the Government has determined that the FISC orders and opinions cannot be released in part due to the need to protect national security and classified

intelligence sources and methods, *see* Gaviria Decl.; *cf.* 50 U.S.C. § 1872(c), Section 402 allows the DNI, in consultation with the Attorney General, to "waive the requirement to declassify and make publicly available a particular decision, order, or opinion" and to create, instead, an "unclassified statement" "summarizing the significant construction or interpretation of any provision of law." 50 U.S.C. § 1872(c). That remedy is not available in this FOIA case, however. FOIA "does not obligate agencies to create . . . documents." *Kissinger*, 445 U.S. at 152; *see also, e.g.*, *Snyder v. Dep't of Def.*, 2015 WL 9258102, at *7 (N.D. Cal. Dec. 18, 2015) ("An agency is not required to create new documents in order to satisfy a FOIA request."). Accordingly, the relief Plaintiff seeks is not available in this FOIA action.

B. Section 402 of the USA FREEDOM Act Does Not Apply Retroactively and Therefore It Does Not Apply to FISC Opinions Issued Prior to Its Enactment.

Even if the Court were to reach the issue of whether Section 402 applied retroactively to FISC decisions issued prior to the statute's enactment, the Court should follow the lead of the only court to opine on the issue and hold that it does not. *See EPIC*, 296 F. Supp. 3d at 127. In that FOIA case, the court found that Section 402's invocation favoring declassification of FISC orders "falls far short of rebutting the reasoned assessments" of the Government's declarants. *See id.* Moreover, the Court went on to dismiss out of hand the notion that Section 402 applied retroactively because "there is nothing to indicate that Congress intended the statute to apply retroactively to prior FISC decisions." *Id.*[12] This Court should do likewise.

[12] The Privacy and Civil Liberties Oversight Board ("PCLOB") has come to the same conclusion. The PCLOB is an independent agency within the executive branch with the mission of trying to ensure that the federal government's efforts to prevent terrorism are balanced with the need to protect privacy and civil liberties. *See* History and Mission, https://www.pclob.gov/about/ (last visited July 26, 2018). In assessing the Government's compliance with the Board's prior recommendations, the PCLOB reported that "the USA FREEDOM Act now requires that the government will conduct a declassification review of *each new* decision of the FISC and FISCR" that meet the statutory criteria of Section 402. *See* PCLOB Recommendations Assessment Report (Feb. 5, 2016), at 8 (emphasis added), *available at* https://www.pclob.gov/library/Recommendations_Assessment_Report_20160205.pdf (last visited July 26, 2018). The Board made no reference to the possibility that the statute imposed such a requirement regarding FISC opinions and orders dating back to 1978.

Courts employ a "two-step test" to determine whether a statute should apply retroactively to conduct that occurred before the statute was enacted. *See United States v. Reynard*, 473 F.3d 1008, 1014 (9th Cir. 2007). The "first step in the analysis is to ask whether Congress has expressly provided that the statute in question should apply retroactively or prospectively. If Congress has made its intent express, the statute should be applied accordingly." *Scott v. Boos*, 215 F.3d 940, 943 (9th Cir. 2000); *see also Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (courts "look to whether Congress has expressly prescribed the statute's proper reach"). This "requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 268 (1994). The second step, reached only if Congress has not made its intent clear, asks whether the "statute would have retroactive effect"; for example, "whether it would . . . impose new duties with respect to transactions already completed." *Id.* at 280. If the statute would have such a retroactive effect, the "traditional presumption" is that it "does not govern absent clear congressional intent favoring such a result." *Id.*

1. Congress Did Not Intend for Section 402 to be Applied Retroactively.

The statutory text of Section 402 is silent on the "temporal reach" of that provision, *see Fernandez-Vargas*, 548 U.S. at 37. Section 402, now codified at 50 U.S.C. section 1872, requires the DNI, in consultation with the Attorney General, to "conduct a declassification review of each decision, order, or opinion issued" by the FISC or FISCR "that includes a significant construction or interpretation of any provision of law, including any novel or significant construction or interpretation of the term 'specific selection term.'" 50 U.S.C. § 1872(a). The statute provides this requirement may be satisfied by making the opinion publicly available in redacted form or, in the interests of national security, by making publicly availably an appropriate unclassified summary. *Id.* There is no textual reference suggesting, much less expressly prescribing, that the mandate applies to opinions issued before enactment.

"In the absence of language directly on point," *Ixcot v. Holder*, 646 F.3d 1202, 1208 (9th Cir. 2011), however, courts "try to draw a comparably firm conclusion about the temporal reach

specifically intended by applying . . . normal rules of [statutory] construction." *Fernandez-Vargas*, 548 U.S. at 37; *Ixcot*, 646 F.3d at 1208 (same). The Court can and should draw the "comparably firm" conclusion that Section 402 of the USA FREEDOM Act was not intended to be retroactive.

First, the text of the Section 402 suggests that Congress would not have intended the provision to apply retroactively. The statute requires the Executive to conduct a declassification review of FISC and FISCR opinions that "includes a significant construction or interpretation of any provision of law, including any novel or significant construction or interpretation *of the term* '*specific selection term.*'" 50 U.S.C. § 1872(a) (emphasis added). The phrase "specific selection term" was first added to FISA through the USA FREEDOM Act and was defined in section 107 of that Act (now codified at 50 U.S.C. section 1861(k)(4)). *See* 50 U.S.C. § 1861; ECF No. 33-2, Second Weinsheimer Decl. n.2. Courts "must interpret the statute as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders others provisions of the same statute inconsistent, *meaningless*, or *superfluous*." *Rodriguez v. Sony Computer Enter. Am., LLC*, 801 F.3d 1045, 1051 (9th Cir. 2015) (emphasis added). Plaintiff's preferred interpretation of Section 402, however, would have Congress intentionally imposing a requirement on the Executive to review all FISC and FISCR opinions issued since 1978 to determine if there was a novel or significant construction or interpretation of a term Congress just added to FISA in 2015.

Second, Section 402's legislative history suggests that its declassification mandate was not meant to apply retroactively. An earlier bill would have required certain FISC opinions issued in the five years *before* enactment to be declassified "not later than 180 days after" enactment. *See* 113th Cong., 1st Sess. S. 1130 § 4(a)(i)(2)(B) (2013). But that provision—which was specifically intended to have a similar retroactive effect as the five-year "look back" provision in 50 U.S.C. § 1871(c)(2)—ultimately was *not* included in Section 402 of the USA FREEDOM Act.

Third, Congress knows how to clearly convey its intent to make a provision retroactive; it did not do so here, but it did just that in a companion provision, 50 U.S.C. § 1871(c)(2). Through the FISA Amendments Act of 2008, Congress amended, *inter alia*, section 1871 of Title 50 of the

United States Code, to require the Attorney General to submit to certain Congressional committees "a copy of each" FISC (or FISCR) opinion involving, *inter alia*, a "significant construction or interpretation" of FISA law "that was issued during the 5-year period ending" on the date the statute was amended to incorporate this new requirement. *See* FISA of 1978 Amendments Act of 2008, Pub. L. 110-261, § 103, 122 Stat. 2436, 2460 (codified at 50 U.S.C. § 1871(c)(2)). In doing so, Congress made clear its intent that section 1871(c)(2) applied retroactively to FISC opinions issued prior to the enactment of that provision. And this intent is echoed in the legislative history of section 1871(c)(2). There, the Senate Report expressly noted that the proposed legislation would impose a retroactive requirement that "significant interpretations of law by the FISA court that were not provided to Congress over the past five years now [would] be provided." S. Rep. No. 110-258, at 7 (2007).[13]

No such retroactivity language was included in the enacted Section 402 of the USA FREEDOM Act even though the subject matter of the two provisions was similar—disclosure or production of a set of FISC opinions—and even though the two provisions now sit side by side in the same subchapter of the United States Code. *See* 50 U.S.C. §§ 1871, 1872. "Congress' choice of words is presumed to be deliberate," *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013). Given that Congress clearly "knows how to," *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003), add a retroactivity provision to a statute about the disclosure of certain FISC opinions "[w]here [it] intends to" do so, *id.*, the "absence of this language" in the same subchapter "instructs [the Court] that Congress did not intend to," *id.*, make Section 402 retroactive.

For these reasons, the Court should draw the "firm conclusion" that Congress did not intend Section 402 to apply retroactively. And if the Court so finds, then it "need not address the second step" of the inquiry at all. *See Reynard*, 473 F.3d at 1014; *see also Landgraf*, 511 U.S. at 280 ("no need to resort to judicial default rules" if first step answers the inquiry).

[13] The Supreme Court has "repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill" such as this Senate Report, "which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Garcia v. United States*, 469 U.S. 70, 76 (1984).

2. Applying Section 402 to Pre-Enactment FISC Decisions Would Have a Retroactive Effect and so the Court Should Employ the Traditional Presumption Against Retroactivity, Which Cannot Be Rebutted Absent Clear Congressional Intent Favoring Retroactivity.

But even if the Court reaches the second step of the inquiry, the Court should find that Section 402 does not apply retroactively to orders and opinions issued by the FISC and FISCR before the provision was enacted. In this second part of the test, the Court asks whether applying the statute would "have a retroactive consequence in the disfavored sense," *Fernandez-Vargas*, 548 U.S. at 37, of "impos[ing] new duties" on a party with respect to "events completed before its enactment." *Landgraf*, 511 U.S. at 270, 280. If so, then the Court applies the "presumption against retroactivity by construing the statute as inapplicable to the event or act in question owing to the 'absence of a clear indication from Congress that it intended such a result.'" *Fernandez-Vargas*, 548 U.S. at 37–38; *see also Vartelas v. Holder*, 132 S. Ct. 1479, 1491 (2012) ("The operative presumption . . . is that Congress intends its laws to govern prospectively only."); *Landgraf*, 511 U.S. at 280 ("If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.").

a. Applying Section 402 to FISC Opinions and Orders Issued Prior to its Enactment Would Impose New Duties on the Government and thus have a Retroactive Effect.

Applying Section 402 to the FISC and FISCR opinions issued before the provision was enacted would have a "disfavored" "retroactive consequence." *Fernandez-Vargas*, 548 U.S. at 37. Specifically, a requirement that the Government now conduct a declassification review of all FISC opinions issued since 1978, when FISA was enacted, in order to ensure that it is in compliance with the new declassification provisions of Section 402 would impose a new, burdensome obligation on the Government in relation to "events completed before its enactment." *Vartelas*, 132 S. Ct. at 1491; *see also* Weinsheimer Decl. ¶¶ 11–16. Here, the pertinent "events," *Vartelas*, 132 S. Ct. at 1491, "completed act[s]," or "predicate action[s]," *Fernandez-Vargas*, 548 U.S. at 44, or "considerations already past," *Landgraf*, 511 U.S. at 269, are the FISC's issuance of its opinions. Prior to enactment, the Government had no duty to submit FISC opinions for declassification

review. Requiring the Government to declassify them now would amount to the statutory imposition of a new legal obligation about considerations already past.

And Section 402 contains no "clear indication from Congress that it intended" to disrupt settled expectations in this manner. *Fernandez-Vargas*, 548 U.S. at 38. Indeed, neither the Government, which litigated *ex parte* before the FISC, nor the FISC, which wrote the classified opinions based on the Government's classified arguments, would have expected at the time that all FISC decisions about intelligence-gathering programs with highly classified operational details would be statutorily subject to declassification review and public disclosure, even in redacted form. *See* PCLOB Report at 8 (noting that these "older FISC opinions [were] drafted without [the] expectation of public release"). These expectations have, to a significant degree, changed regarding the issuance of FISC opinions since the enactment of Section 402. Now, FISC judges, aware of the requirements of Section 402, can take them into account when writing opinions. *See, e.g.*, *In re Applications of the FBI for Orders Requiring the Production of Tangible Things*, Mem. Op. Dkt. Nos. BR 15-77, 15-78, *available at* http://www.fisc.uscourts.gov/sites/default/files/BR%2015-77%2015-78%20Memorandum%20Opinion.pdf (last visited July 26, 2018). But such changes only confirm that Section 402 should not be interpreted to produce the disruption that would result from requiring the declassification review of FISC opinions that arose in the context of different disclosure obligations. *Cf. Vartelas*, 132 S. Ct. at 1491 ("Although not a necessary predicate for invoking the antiretroactivity principle, the likelihood of reliance on prior law strengthens the case for reading a newly enacted law prospectively.").

For these reasons, applying Section 402 to FISC opinions and orders prior to the statute's enactment would have an impermissible retroactive effect.

b. The Presumption against Retroactivity Cannot be Rebutted Here.

Given that application of the statutory mandate to declassify certain FISC opinions and orders would have such a retroactive effect, the "presumption against retroactive application applies." *Scott*, 215 F.3d at 943. "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."

Landgraf, 511 U.S. at 265; *see id.* at 268 ("statutory retroactivity has long been disfavored"). "[P]rospectivity remains the appropriate default rule[] [b]ecause it accords with widely held intuitions about how statutes ordinarily operate" so "a presumption against retroactivity will generally coincide with legislative and public expectations." *Id.* at 272.

This presumption can only be rebutted by "a clear indication from Congress that it intended such a result." *INS v. St. Cyr*, 533 U.S. 289, 316 (2001). That "clear indication" must be evident in an "unambiguous directive" or in an "express command." *Landgraf*, 511 U.S. at 263, 280; *see also St. Cyr*, 533 U.S. at 316 ("requisite clarity"); *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 939 (9th Cir. 2005) (Congress must "clearly express[]" its intent). The Supreme Court has cautioned that the "standard for finding such an unambiguous direction is a demanding one," *St. Cyr*, 533 U.S. at 316; *see also Garcia-Ramirez*, 423 F.3d at 939, and that "cases where this Court has found truly 'retroactive' effect adequately authorized by a statute have involved statutory language that was so clear that it could sustain only one interpretation." *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997).

Here, there is no such unambiguous Congressional directive for all the reasons set forth above. Accordingly, the traditional presumption against retroactivity remains unrebutted and Section 402 applies prospectively only to those FISC orders and opinions issued after the enactment of the USA FREEDOM Act. For this reason too, the USA FREEDOM Act has no bearing on the Government's withholding of FISC decisions issued prior to the statute's enactment.

CONCLUSION

For all of these reasons, the Court should grant the Defendant's partial motion for partial summary judgment and enter partial judgment for the Defendant.

Dated: July 26, 2018

Respectfully submitted,

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