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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. 16-cv-02041-HSG **NOTICE OF MOTION AND CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT** Date: November 8, 2018 Time: 2:00 pm Courtroom: Courtroom 2, Oakland Courthouse Hon. Haywood S. Gilliam Jr.

NOTICE OF MOTION

PLEASE TAKE NOTICE that on November 8, 2018 at 2:00 pm in Courtroom 2, 4th Floor, United States Courthouse, 1301 Clay Street, Oakland, California 94612, Plaintiff Electronic Frontier Foundation ("EFF"), will, and hereby does, cross move this Court for partial summary judgment.

Pursuant to Federal Rule of Civil Procedure 56, EFF seeks a court order requiring the government to release records under the Freedom of Information Act, 5 U.S.C. § 552. EFF respectfully asks that this Court issue an order requiring the government to process and release all records improperly withheld from the public. This cross motion is based on this notice of motion, the memorandum of points and authorities in support of this cross motion, and all papers and records on file with the Clerk or which may be submitted prior to or at the time of the hearing, and any further evidence which may be offered.

DATED: August 23, 2018

Respectfully submitted,

/s/ Aaron Mackey

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INTRODUCTION

Secret law is inconsistent with American democratic traditions. Yet, for nearly forty years, an important body of secret law was allowed to accumulate. Article III judges, serving on the Foreign Intelligence Surveillance Court ("FISC"), issued secret decisions that interpreted federal surveillance statutes and the Constitution—sometimes in ways that shaped the rights of millions of Americans.

This Freedom of Information Act ("FOIA") lawsuit seeks disclosure of those important FISC opinions. The records at issue, six "significant" decisions of the FISC ("Six Opinions"), have been improperly withheld from the public in their entirety. Disclosure of these records in the agency's possession—records that document and describe interpretations of federal law that have the potential to affect millions of Americans—epitomizes the central purpose of FOIA: ensuring "an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

But the fact that this is a FOIA case does not mean it exists in a legal vacuum, as the government asks this Court to believe. To the contrary, and just like any other FOIA case, additional facts or laws, outside of FOIA, may color the Court's assessment of whether the Government has satisfied its burden to withhold records.

That is precisely the situation here: another statute, the USA FREEDOM Act, Pub. L. No. 114-23, 129 Stat. 268 (2015) ("USA FREEDOM"), requires the government to undertake a declassification process for each and every "significant" FISC opinion ever issued—the very type of record at issue in this case. That process requires the government to either declassify and release the opinions or to produce and release declassified summaries.

The government's obligations under USA FREEDOM carry consequences for this FOIA case. Each of the FISC opinions at issue in this case should have been subjected to the process USA FREEDOM requires. That means that either the government should have declassified the opinions, or it should have created an unclassified summary of each of the opinions. But whichever path the government chose, it should have produced more information in response to EFF's request. The government can choose to declassify and release versions of the Six Opinions it currently withholds in full; or, as part of the government's *Vaughn* index, it can reproduce the declassified summary that USA FREEDOM obligates the government to create. But the government *cannot* carry its burden under FOIA—either substantively or procedurally—without demonstrating compliance with USA FREEDOM's requirements.

Instead, the government has elected to ignore its responsibilities. It has withheld the opinions in full, and in violation of USA FREEDOM, it has provided only a cursory and non-specific description of the opinions as part of its *Vaughn* index. That decision fails to satisfy its burden under FOIA and, as explained in depth below, entitles EFF to partial summary judgment.

Congress passed FOIA *and* USA FREEDOM to end the very type of secret law at issue in this case. DOJ should not be allowed to avoid its statutory obligations any longer. Accordingly, EFF respectfully urges the Court to grant its motion for partial summary judgment, to order the release of responsive opinions, or alternatively, the provision of a sufficiently specific *Vaughn* index.

BACKGROUND

I. EFF files this FOIA request seeking declassified FISC opinions that Congress required to be released after passing the USA FREEDOM Act.

EFF filed a FOIA request on March 7, 2016 (the "request") seeking all significant FISC opinions the court had ever issued. It was the fourth FOIA request EFF had filed seeking to make public decades of secret surveillance law. *See EFF v. Dep't of Justice*, No. 11-cv-5221-YGR (N.D. Cal) (seeking release of "significant" FISC opinions concerning Section 215); *EFF v. Dep't of*

Justice, No. 11-cv-0441-ABJ (D.D.C.) (seeking release of *[Caption Redacted]*, 2012 WL 9189263 (FISC Sept. 1, 2012)); *EFF v. Dep't of Justice*, No. 14-cv-00760-RMC (D.D.C.) (seeking release of multiple FISC opinions).

Although the previous FOIA requests had sought one or more FISC opinions, this request sought all FISC opinions that included significant interpretations of the law or Constitution. This wording was intentional, as the language in the request mirrored a provision of USA FREEDOM, Pub. L. No. 114-23, 129 Stat. 268 (2015), signed into law in 2015.

Specifically, the request sought:

> Any "decision, order, or opinion issued by the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review (as defined in section 601(e))," [. . .] "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).

ECF No. 12-2, Exhibit B. EFF divided its request into two different time periods, with Part 1 seeking all significant opinions issued from 1978 to June 1, 2015. *Id*. Part 2 sought all significant opinions issued from June 2, 2015 to present. *Id*. Only Part 1 of the Request is at issue in this motion.

After EFF filed this lawsuit, the parties cross-moved for partial summary judgment regarding Part 1 of the request. *See* ECF Nos. 29, 32. Before briefing was complete, the parties agreed to stay the pending cross-motions, vacate the hearing date, and confer regarding whether the government would process records in response to Part 1 of the request. *See* ECF No. 39. The parties reached an agreement and the government began to process records in response to the request. *Id*.

The government identified 79 FISC opinions that were responsive to EFF's request, and it initially released 42 of them in three batches throughout 2017 and early 2018. *See* ECF Nos. 49, 53,

57 (describing the various production dates).[1] The government withheld the remaining 38 documents in full, but subsequently determined that it would re-process and release another 31 FISC opinions. ECF No. 62. The parties agreed to cross-move for partial summary judgment regarding the remaining six FISC opinions ("Six Opinions") the government continues to withhold in full. ECF No. 65.

II. Section 402 of the USA FREEDOM Act unambiguously requires the declassification and disclosure of all "significant" FISC opinions.

On June 2, 2015, USA FREEDOM became law. Pub. L. No. 114-23, 129 Stat. 268 (2015). The law was the culmination of nearly two years of congressional and public debate concerning the scope and propriety of our nation's foreign intelligence surveillance laws and practices. *See, e.g.*, H.R. Rep. No. 114-109 (2015).

USA FREEDOM worked reforms to various aspects of the nation's foreign intelligence surveillance authorities, including changes to controversial surveillance programs operated under the "business records" and pen-register/trap and trace provisions of the Foreign Intelligence Surveillance Act ("FISA"). 50 U.S.C. § 1801 *et seq.*; USA FREEDOM, §§ 101-110, §§ 201-202 (2015).

Relevant here, USA FREEDOM imposed a variety of increased transparency and reporting requirements on the intelligence community, *see, e.g.*, §§ 108, 601-605, and it instituted reforms to the procedures of the FISC, the statutorily created court, composed of Article III judges, that reviews the legality of government applications to conduct foreign intelligence surveillance. *See id.* at §§ 401-402; s*ee also* H.R. Rep. No. 114-109, pt. 1, at 2.

Section 402 of USA FREEDOM ended the secrecy shrouding important opinions of the FISC. *See* H.R. Rep. No. 114-109, pt. 1, at 2. Section 402 states that "the Director of National

[1] The government's memorandum in support of its cross-motion for partial summary judgment states that 80 FISC opinions were responsive to EFF's request. Def. Mem. at 3. In correspondence with EFF since the filing of its motion, the government clarified that in its most recent production, it had miscounted a FISC order and its attachment as two separate documents, rather than as one. Hence it released 31 opinions to EFF on August 20, for a total of 79 records responsive to the request.

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

The need for greater transparency surrounding FISC decisions owed, at least in part, to the FISC's evolving role in the nation's foreign intelligence surveillance regime. *See* Walter F. Mondale et al., *No Longer a Neutral Magistrate: The Foreign Intelligence Surveillance Court in the Wake of the War on Terror*, 100 Minn. L. Rev. 2251, 2263-69 (2016) ("*No Longer a Neutral Magistrate*"). Congress originally established the FISC to serve as a neutral magistrate reviewing and approving applications for individualized foreign surveillance targets. *Id*. at 2262-63.

But in the wake of the Sept. 11 attacks and subsequent amendments to FISA in 2008, the FISC's role began to shift. In addition to approving individual applications to conduct surveillance, the FISC became a "meta-arbiter," approving broad surveillance programs or the procedures used by the government to implement those programs. Mondale, *No Longer a Neutral Magistrate*, 100 Minn. L. Rev. at 2263-68. Although these significant matters only constitute a "small handful" of the FISC's caseload, they have disproportionate effects: these cases often involve novel surveillance techniques, complicated technical or legal questions, or implicate the privacy interests of large numbers of people. *See Comments of the Judiciary on Proposals Regarding the Foreign Intelligence Surveillance Act*, filed by the Hon. John D. Bates, Director of the Administrative Office of the United States Courts (Jan. 10, 2014) at 1, 3.[2]

Section 402 sought to shed light on these important FISC decisions. As explained above, EFF's request sought disclosure of the FISC opinions subject to Section 402.

[2] *Available at* https://www.fjc.gov/sites/default/files/2015/TRFISC02.pdf.

ARGUMENT

I. FOIA establishes a presumption of disclosure, and the government bears the burden of demonstrating that withheld records are clearly exempt.

FOIA safeguards the American public's right to know "what their government is up to." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). "[D]isclosure, not secrecy, is the dominant objective of the Act." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001).

FOIA requires disclosure of all agency records at the request of the public unless the records fall within one of nine narrow exemptions. *See* 5 U.S.C. § 552(b).

Once the agency has received the request, it is obligated to search for and process responsive records, and to disclose any information that does not fall within one of the Act's exemptions. *See* 5 U.S.C. § 552(a)(3), (a)(6). The exemptions "have been consistently given a narrow compass," and agency records that "do not fall within one of the exemptions are 'improperly' withheld." *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989).

In FOIA cases, a court reviews the government's decision to withhold records *de novo*, and the government bears the burden of proving records have been properly withheld. 5 U.S.C. § 552(a)(4)(B); *Reporters Comm.*, 489 U.S. at 755. Even national security claims do not alter a court's "independent responsibility" to undertake a thorough *de novo* evaluation of the government's withholdings. *Goldberg v. Dep't of State*, 818 F.2d 71, 76-77 (D.C. Cir. 1987) (noting Congress amended FOIA to clarify its "intent that courts act as an independent check on challenged classification decisions").

FOIA disputes involving the propriety of agency withholdings are commonly resolved on motions for summary judgment. *See Animal League Defense Fund v. FDA*, 836 F.3d 987, 989 (9th Cir. 2016) (en banc). As with any case, summary judgment is proper when the moving party shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a

matter of law." Fed. R. Civ. P. 56 (a); *see also Feshbach v. SEC*, 5 F. Supp. 2d 774, 779 (N.D. Cal. 1997) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

II. The Government has not met its burden to withhold the Six Opinions under FOIA because the records are either improperly classified or the Vaughn index provided by the Government is inadequate.

In passing USA FREEDOM, Congress required the government to declassify and release all significant FISC opinions, including the Six Opinions it withholds in this case, or alternatively, to provide a declassified summary of those opinions. EFF's FOIA request sought the fruits of the transparency requirements Congress mandated in USA FREEDOM. Because the government has not complied with USA FREEDOM's declassification requirements, it has failed to meet its burden under FOIA to withhold the Six Opinions.

The government mischaracterizes EFF's request and its arguments regarding the import of USA FREEDOM. The government argues that EFF is seeking relief under Section 402 independent of FOIA. Def. Mot. at 16-17 (ECF No. 66). This is incorrect. Section 402 is relevant because Congress has required the Executive Branch to proactively review and declassify all significant FISC opinions, or to produce declassified summaries in cases where declassification was not possible. EFF's request simply asks the government to provide copies of the significant FISC opinions it has declassified.

In light of Congress commanding the Executive Branch to review and declassify significant FISC opinions to the greatest extent possible, the government cannot satisfy its burden in response to EFF's FOIA request by claiming that the opinions can be withheld in their entirety because they are properly classified under Exemption 1, or that other statutes bar their release under Exemption 3. As explained below, the government has failed to produce declassified versions of the opinions or to provide a *Vaughn* index containing a declassified summary of them; thus it has not met its obligations to withhold the Six Opinions under FOIA. Asking this Court to construe USA

FREEDOM and its consequences for the government's withholdings is thus no different than asking federal courts to construe federal tax law for its implications in a FOIA suit or, more relevant here, the Executive Order governing classification. *See Long v. IRS*, 742 F.2d 1173, 1177 (9th Cir. 1984); *ACLU v. Dep't of Def.*, 628 F.3d 612, 619-25 (D.C. Cir. 2011) (interpreting Executive Order 12958, which at the time governed classification, in a FOIA case).

The government's reliance on cases such as Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980) and Assassination Archives and Research Center v. Dep't of Justice, 43 F.3d 1542 (D.C. Cir. 1995) are thus unhelpful because EFF is not seeking to enforce a private right of action under USA FREEDOM. Def. Mem. at 16-18. EFF agrees with the government that this case sounds only in FOIA. Id. at 16. But, as explained above, USA FREEDOM's transparency requirements inform how the government must meet its burden in this case, given that this litigation concerns the very records USA FREEDOM requires the government to declassify.

Moreover, FOIA requires this Court to interpret USA FREEDOM because it bears precisely on the question of whether the government has improperly withheld the specific agency records at issue in this case. Because interpreting USA FREEDOM does not require the court to "devise remedies" or otherwise enjoin the government outside the scope of FOIA, the cases cited by the government such as *Tax Analysts*, 492 U.S. 136 (1989), and *Minier v. CIA*, 88 F.3d 796, 803 (9th Cir. 1996) are inapposite. Indeed, as explained in this cross-motion, determining whether the government has complied with USA FREEDOM resolves the question of whether it has complied with FOIA.

A. USA FREEDOM requires the government to either declassify and release significant FISC opinions, like the Six Opinions, or to create a declassified summary of those opinions.

The plain text of Section 402 places an affirmative obligation on the government to review and declassify all "significant" opinions issued by the FISC or to create a declassified summary.

Specifically, in full, Section 402 of the Act states:

> **Declassification Required** -- Subject to subsection (b), 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 Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review (as defined in section 601(e)) 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.

USA FREEDOM § 402(a) (codified at 50 U.S.C. § 1872).

Section 402 thus requires the government to "conduct a declassification review" and "make publicly available to the greatest extent practicable" all FISC opinions that include a "significant construction or interpretation of any provision of law." *Id*. Section 402 allows the opinions to be released in redacted form, *see* § 402(b), and it provides an alternative to disclosure—the creation of a declassified summary—when the government determines national security concerns prevent it from releasing the opinion, even in redacted fashion. *See* § 402(c)(2).

Significantly, Section 402 does not allow the Government to withhold "significant" opinions in their entirety—as they have done here.

1. The Six Opinions are "significant" and thus fall within the statute's reach.

By definition, all of the FISC opinions responsive to EFF's request are significant. As the parties agreed, the FISC opinions processed in response to EFF's request included those the government submitted to Congress because they include a "significant" construction or interpretation of the Foreign Intelligence Surveillance Act ("FISA"), "any [other] provision of law," or were subject to other congressional reporting requirements about the FISC's activities. *See* 50 U.S.C. §§ 1871(a)(5), (c)(1) & (c)(2); 50 U.S.C. § 1881f(b)(1)(D); ECF No. 39. Further, the government had previously identified all of the opinions processed here as significant. Elizabeth

Gotein, *The New Era of Secret Law*, Brennan Center for Justice 6 (Oct. 18, 2016).[3]

2. USA FREEDOM applies to each and every significant FISC opinion, without regard to the date the opinions were issued, including the Six Opinions.

USA FREEDOM applies to the Six Opinions at issue in this case, regardless of when the opinions were written.

Section 402 is clear: the declassification requirement extends to "each" significant FISC opinion. 50 U.S.C. § 1872(a). The statute requires 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 FISCR] that includes a significant construction or interpretation of any provision of law." *Id*. (emphasis added).

The plain meaning of the word "each" is "*every one* of two or more people or things considered separately." Merriam-Webster Dictionary (emphasis added).[4] "Similarly, the Oxford English Dictionary (2d ed.1989) defines the word 'each' as meaning 'every.'" *Optivus Tech., Inc. v. Ion Beam Applications S.A.*, No. 03-cv-2052, 2004 WL 5700631, at *13 (C.D. Cal. Aug. 31, 2004); *see also Metro One Commc'ns, Inc. v. C.I.R.*, 704 F.3d 1057, 1061 (9th Cir. 2012) ("To ascertain the plain meaning of terms, we may consult the definitions of those terms in popular dictionaries."). There is no temporal restriction on the FISC opinions to be reviewed in the statute. The *only* limitation is that the FISC opinion must contain a "significant construction or interpretation" of the law. 50 U.S.C. § 1872(a)

Accordingly, the most straightforward reading of Section 402 is that the government must undertake a declassification review of "each," and every one, of the FISC's "significant" opinions—no matter when those opinions were written. The government must then disclose those opinions "to the greatest extent practicable," 50 U.S.C. § 1872(a), including the Six Opinions at issue in this

[3] *Available at* https://www.brennancenter.org/sites/default/files/publications/The_New_Era_of_Secret_Law_0.pdf.
[4] *Available at* http://www.merriam-webster.com/dictionary/each.

motion.

Because the plain text of Section 402 is unambiguous, the court need not consider the legislative history of USA FREEDOM to construe the statute. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009) (citation omitted) (noting the court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous"). Nonetheless, the legislative history of USA FREEDOM supports that the plain language of Section 402 requires the government to declassify all existing significant FISC opinions. The chief drafter of USA FREEDOM, Rep. Jim Sensenbrenner (R-Wisc.), stated that Section 402 was written to bring "an end to secret laws" by requiring the declassification of "significant legal decisions." 161 Cong. Rec. H2916 (daily ed. May 13, 2015).[5] The government's interpretation of USA FREEDOM would permit nearly forty years of significant FISC opinions to remain secret, a far cry from bringing an end to secret law as intended by the statute's drafters.

Further, the House Judiciary Committee's report on USA FREEDOM states that Section 402 was enacted to create "greater transparency of national security programs operated pursuant to FISA." H.R. Rep. No. 114-109, pt. 1, at 2 (2015). Section 402 accomplishes this goal by requiring the Executive Branch "to conduct a declassification review of *each* decision, order, or opinion of the FISC or FISCR that includes a significant construction or interpretation of law." *Id*. at pt. 1, 23 (emphasis added).

3. USA FREEDOM presents no retroactivity concerns.

Because the text of Section 402 explicitly mandates the review and declassification of *all* significant FISC opinions, there is no question about whether Congress intended the provision to require the disclosure of FISC decisions issued before USA FREEDOM was passed. The

[5] Rep. Bob Goodlatte (R-Va.), chairman of the House Judiciary Committee, identified Rep. Sensenbrenner as "the chief sponsor of this legislation." 161 Cong. Rec. H2916 (daily ed. May 13, 2015).

government's arguments to the contrary require the Court to look beyond the plain text of the statute and should thus be rejected. *See* Def. Mem. at 20-25.

The plain text of Section 402 directs that the government "*shall* conduct a declassification review" of significant FISC decisions. 50 U.S.C. § 1872(a) (emphasis added). The statute thus imposes a new, mandatory, and forward-looking transparency obligation on the government—an obligation that extends to any "significant" and currently classified FISC decision. Section 402 presents no retroactivity concerns because it reaches only those FISC opinions that are *currently* classified. The provision thus regulates the present classification status of FISC opinions, not the dates they were issued.

By advocating for some type of temporal scope, what the government really asks this Court to do is add language to the statute—language limiting the government's declassification obligations to those "significant" opinions written *after* the statute was passed. Def. Mem. at 20-22.

There is only one problem: the language of the statute. Section 402 applies to *all* classified FISC decisions—those in existence when the statute was passed and those written in the future. As explained above, the only limitation to Section 402's reach is that the opinions requiring declassification review must be "significant."

The government complains that applying USA FREEDOM to FISC opinions written before the law was passed would make the statute operate retroactively. But a statute is "not made retroactive merely because it draws upon antecedent facts for its operation"; nor is a statute retroactive simply because it "unsettle[s]" expectations about past events. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 n. 24 (1994) (citation omitted). As the Supreme Court recognized in *Landgraf*, a new law that changes zoning regulations may upset the expectations of someone who previously purchased affected property, and a law banning gambling can harm a developer who had begun to build a casino. *Id*. But the fact that the law imposes new, prospective burdens or alters

expectations going forward does not, by itself, mean the law has an impermissible retroactive effect.

So too here: simply because significant FISC opinions were issued before USA FREEDOM's enactment does not mean Section 402's prospective obligation to declassify those opinions operates retroactively, *even if* it unsettles the government's expectations about the secrecy of those opinions.

Even applying the government's proposed retroactivity analysis, the government's ability to classify a FISC opinion is not the type of completed past event that can give rise to retroactivity concerns. Def. Mem. at 23-24. The presumption against retroactivity ensures that new legal consequences are not unfairly attached to completed events in ways that "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. The issuance of an opinion, by an Article III court, and the government's ongoing secrecy assertions concerning that opinion, fail to raise the type of concerns about the government's "rights," "liability" or completed "transactions" that are at the center of the cases cited by the government. Def. Mem. at 23-24. EFF is not aware of a single case, and the government has not provided any, where a statute was found to impair a government "right," let alone establish that such a right extends to an expectation that classified materials will remain so.[6]

Ultimately, Section 402 is akin to any other statute that imposes new transparency requirements on the government, much like FOIA. FOIA was first passed in 1966 and requires

[6] The cases cited by the government all concern whether subsequent changes in law retroactively impaired an individual person's legal rights or liabilities. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006), considered whether retroactive application of stricter immigration laws impaired an immigrant's ability to seek naturalization under an earlier, less punitive standard. *Vartelas v. Holder*, 566 U.S. 257 (2012), considered whether amendments to immigration laws prohibiting permanent residents with felony convictions from traveling abroad applied to a resident whose conviction predated the change in law, as the previous statute allowed for such travel. *Landgraf*, 511 U.S. 244, considered whether changes to Title VII of the Civil Rights Act that permitted jury trials and recovery for damages could apply to a pending suit that concerned acts occurring prior to the amended law's passage.

federal agencies to make records public upon request—including requests for agency records that existed prior to FOIA's passage. *See, e.g.*, *Halpern v. FBI*, 181 F.3d 279, 285 (2d Cir. 1999) (seeking agency records from the 1930s). To EFF's knowledge, the government has never argued that FOIA's disclosure regime is limited to records created after FOIA was passed; yet that is exactly what the government argues with respect to Section 402. To the contrary, Section 402, like FOIA, applies without regard to the date the records were written.

That the government resorts to the legislative history of other bills, that were not a part of USA FREEDOM, and were never enacted (let alone voted on) to support their retroactivity claims demonstrates their shortcomings. Def. Mem. at 21-22. The intent of the Congress that enacted Section 402 controls its interpretation, however, not some earlier intention by a previous Congress that did not act. *See Oscar Mayer Co. v. Evans*, 441 U.S. 750, 758 (1979). DOJ's argument ignores the plain text of an act duly passed by Congress in favor of a bill that never became law. Then, DOJ asks that this Court find more persuasive the legislative history of the bill that did not pass, rather than the legislative history of USA FREEDOM that EFF describes above. But "[i]nferences from legislative history cannot rest on so slender a reed." *United States. v. Price*, 361 U.S. 304, 313 (1960).

Finally, the government's comparison of the language of 50 U.S.C. 1871 (c)(2) with USA FREEDOM's transparency provisions supports a finding that Section 402 applies to all significant FISC opinions without respect to time. Def. Mem. 21-22. The government argues that because section 1871 (c)(2) requires disclosure to Congress of FISC opinions authorized during the previous five years, the fact that USA FREEDOM includes no similar temporal provision means that Section 402 is not retroactive. But, as discussed above, the fact that Section 402 contains no temporal provision demonstrates precisely that Congress sought much broader public transparency from the

FISC than section 1871 (c)(2)'s congressional reporting requirement.[7]

B. Because USA FREEDOM Applies to the Six Opinions, the Government has failed to satisfy its burden to withhold the records under FOIA.

The application of USA FREEDOM to the Six Opinions carries consequences for this FOIA case—consequences the government would prefer this Court ignore. Specifically, the government's obligations under USA FREEDOM require either: (1) that the government declassify and release the Six Opinions in redacted form, or (2) that, as part of its *Vaughn* index, the government reproduce declassified summaries of the opinions. Because the government has not released the Six Opinions or included a detailed declassified summary of the withheld opinions in its *Vaughn* index, it has either failed to satisfy its substantive burden to withhold records or its procedural obligations under FOIA.

1. The Six Opinions cannot be withheld in full under Exemptions 1 or 3.

The government cannot withhold the Six Opinions in full under Exemption 1 because the exemption only protects from disclosure information that is "properly classified." 5 U.S.C. § 552(b)(1). The government cannot show that the Six Opinions have been properly classified to Exemption 1's standard because they have not demonstrated that they have complied with USA FREEDOM Act's declassification review requirements. Def. Mem. 6-8.

[7] The Court should decline to follow *EPIC v. Dep't of Justice*, 296 F. Supp. 3d 109, 127 (D.D.C. 2017) because the decision is incomplete and poorly reasoned. Def. Mem. 19. First, the records at issue in the *EPIC* decision concerned government briefing submitted to the FISC and reports sent to Congress about certain national security activities, and not FISC opinions themselves like those at issue here. *Id*. at 115. Second, even though the relevance of USA FREEDOM to the documents at issue in that case is unclear, the plaintiff in *EPIC* appeared to argue that the statute required that the materials be released without qualification. *Id*. at 127. This is a misreading of the statute because, as described throughout, USA FREEDOM requires declassification of FISC opinions to the greatest extent practicable or, alternatively, that the government release a declassified summary. Third, the court's brief statement that Congress did not intend for USA FREEDOM to apply retroactively failed to address the plain language of the statute and that it applied to the present classification status of FISC opinions, rather than the date they were issued.

Section 402 requires that the "the Director of National Intelligence, in consultation with the Attorney General," conduct a declassification review of the Six Opinions and that they make them "publicly available to the greatest extent practicable." 50 U.S.C. § 1872(a). Because the government does not indicate that the Director of National Intelligence and Attorney General conducted the declassification review required by Section 402, it cannot meet its burden to show that Six Opinions remain properly classified. Def. Mem. 6-8. Notably, one of the declarants works in the Office of the Director of National Intelligence and is silent on undertaking Section 402's declassification review. Declaration of Patricia Gaviria ¶¶ 20-47 ("Gaviria Decl."), ECF 66-1, Exhibit A.

The government's reliance on the National Security Act of 1947, 50 U.S.C. § 3024(i)(1), and the National Security Act of 1959, 50 U.S.C. § 3605, also fall short of meeting their burden to withhold records under Exemption 3. Def. Mem. 10-11; Gaviria Decl. ¶¶ 48-51.

With respect to 50 U.S.C. § 3024(i)(1), the statute requires the Director of National Intelligence to "protect sources and methods from *unauthorized* disclosure" (emphasis added). USA FREEDOM, however, not only authorizes the Director of National Intelligence to disclose the records at issue here, but requires him to disclose them "to the greatest extent practicable" or to certify that they cannot be disclosed and to create a declassified summary of them. 50 U.S.C. § 1872(a), (c). Disclosure of the Six Opinions thus would not lead to the "unauthorized" disclosure of intelligence sources and methods in any sense. Rather, disclosure is specifically mandated. As a result, Section 3024(i)(1), through Exemption 3, does not apply.

With respect to 50 U.S.C. § 3605, although the statute restricts disclosure of certain information concerning National Security Agency activities, it does not supplant the government's duties to review and disclose, to the greatest extent possible, the FISC opinions at issue here as required by another duly passed law. To the extent the two statutes are in tension, USA FREEDOM—a later, more specific statute concerning disclosure of the records at issue here—

governs. *See United States v. Estate of Romani*, 523 U.S. 517, 532 (1992) (applying the statutory interpretation canon that in interpreting two statutes, the later, more specific statute governs). So although Section 3605 authorizes withholding records under Exemption 3, it cannot be interpreted in a way that permits withholding the very same information that USA FREEDOM requires the government to disclose in this case.[8]

Just as the government makes no mention of whether it conducted a declassification review under USA FREEDOM for purposes of its Exemption 1 claims, it also fails to indicate whether it considered the statute's substantive transparency requirements in the context of its Exemption 3 claims. Def. Mem. 10-11; Gaviria Decl. ¶¶ 48-51. In light of this failure, the government must either release the opinions as required by Section 402 or, as explained below, indicate that it cannot do so and release a declassified summary in its *Vaughn* index.

2. Alternatively, the Government's *Vaughn* index is inadequate because it fails to provide as much information as possible about the withheld records.

USA FREEDOM requires that, if the government determines that it cannot release one or more of the Six Opinions, it must alternatively produce a declassified summary of those FISC opinions. FOIA, effectively, requires the same.

[8] The government also withholds Document 1 under Exemptions 7(A) and 7(E). Def. Mem. 12-15; Declaration of David M. Hardy ¶¶ 18-23 ("Hardy Decl."). At the outset, in light of USA FREEDOM's requirement that the Six Opinions be declassified and released to the greatest extent practicable, withholding Document 1 in full under Exemptions 7(A) and 7(E) is incompatible with the statute's transparency mandate. Hardy Decl. ¶ 25 (determining that Document 1 must be withheld in full pursuant to Exemptions 7(A) and 7(E)). In any event, the government has failed to meet its burden to withhold the record under both exemptions because it has not demonstrated that disclosure would harm an ongoing law enforcement investigation or that the FISC opinion discloses law enforcement techniques or procedures, or guidelines for prosecution. The discussion of both exemptions in Mr. Hardy's declaration is too conclusory and insufficiently detailed. *See EFF v. Dep't of Justice*, No. 15-cv-03186-MEJ, 2016 WL 7406429 *13, *19 (N.D. Cal. Dec. 22, 2016) (holding government's declarations fall short of meeting burden under Exemptions 7(A) and 7(E)). Additionally, a described below, the government's also fails to meet its burden to withhold the records under Exemptions 7(A) and 7(E) because it has failed to segregate and disclose non-exempt material in the FISC opinion.

To satisfy its procedural obligations under FOIA, agencies are required to produce a specialized type of affidavit, known as a *Vaughn* Index, which catalogues and describes the documents withheld from the requester. *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991). The purpose of an agency's *Vaughn* index and accompanying affidavits is to "afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *Id*. (citation omitted).

Critically, the *Vaughn* index must "*reveal as much detail as possible*" about the withheld documents. *Oglesby v. U.S. Dep't of the Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996) (emphasis added). In *King v. Dep't of Justice*, the D.C. Circuit reviewed the case law applying *Vaughn*, emphasizing that:

> [s]pecificity is the defining requirement of the *Vaughn* index and affidavit . . . . To accept an inadequately supported exemption claim "would constitute an abandonment of the trial court's obligation under the FOIA to conduct a *de novo* review."

830 F.2d 210, 219 (D.C. Cir. 1987) (citations omitted); see also Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep't of State, 818 F. Supp. 1291, 1296 (N.D. Cal. 1992) (quoting King, 830 F.2d at 224).

The general requirements of specificity in agency affidavits and *Vaughn* indices are no less applicable in cases involving national security-sensitive information. "Even when applying [E]xemption 1, 'conclusory affidavits that . . . are overly vague or sweeping will not, standing alone, carry the government's burden.'" *Int'l Counsel Bureau v. Dep't of Defense*, 723 F. Supp. 2d 54, 63 (D.D.C. 2010) (quoting *Larson v. Dep't of State*, 565 F. 3d 857, 864 (D.C. Cir. 2009)). "The description and explanation the agency offers should reveal as much detail as possible as to the nature of the document, without actually disclosing information that deserves protection." *Oglesby*, 79 F.3d at 1176.

This is especially true when the agency has withheld documents in their entirety. *Fiduccia v. Dep't of Justice*, 185 F.3d 1035, 1043 (9th Cir. 1999). In these circumstances, "the requester needs a *Vaughn* index of *considerable specificity* to know what the agency possesses but refuses to produce." *Id*. (emphasis added). Ultimately, "[u]nless the agency discloses 'as much information as possible without thwarting the [claimed] exemption's purpose, the adversarial process is unnecessarily compromised.'" *Wiener*, 943 F.2d at 979 (second alteration in original) (citation omitted).

The government's *Vaughn* index falls far short of FOIA's requirements, as it could have provided much more detail about the Six Opinions it withholds in full. The *Vaughn*'s inadequacy is particularly striking in light of USA FREEDOM's requirement that the government produce a declassified summary of FISC opinions that it determines it cannot publicly release. 50 U.S.C. § 1872(c). Thus, to provide "as much detail as possible" about the withheld records here, *Oglesby*, 79 F.3d at 1176, the government should have included within its *Vaughn* index the "unclassified statement . . . summarizing the significant construction or interpretation" for each of the Six Opinions. 50 U.S.C. § 1872(c)(2)(A). That summary should also include "a description of the context in which the matter arises and any significant construction or interpretation of any statute, constitutional provision, or other legal authority relied on by the decision." *Id*. Because the *Vaughn* index submitted by the government does not include these summaries, it has failed to satisfy its procedural obligations under FOIA.[9]

Even apart from USA FREEDOM's requirements, the government's *Vaughn* index is deficient by any measure. *See Wiener*, 943 F.2d at 979. The government's description of the Six

[9] To be clear, EFF is not seeking the creation of records through FOIA, which the law does not allow. *Kissinger*, 445 U.S. at 152 ("The Act does not obligate the agencies to create or retain documents."). Rather, those summaries should already exist. To the extent the government seeks to withhold the Six Opinions, those summaries should be included in the government's *Vaughn* index here.

Opinions consists of a short table in its motion and declaration that describes the documents as follows:

- Document 1: "FISC Supplemental Order"
- Document 2: "FISC Primary Order"
- Document 3: "FISC Amendment to Primary Order"
- Document 4: "FISC Primary Order"
- Document 5: "FISC Supplemental Opinion"
- Document 6: "FISC Order"

Def. Mem. 4; Gaviria Decl. ¶ 16; Hardy Decl. ¶ 7.

The declarations submitted in support of withholding the Six Opinions do not provide much further detail regarding the context or subject of the FISC records. The description of the classified materials within the Six Opinions does not go beyond identifying general categories of information that can be classified under Executive Order 13526, such as "intelligence activities" and "intelligence sources or methods." Gaviria Decl. ¶¶ 27-47. This failure extends to the government's withholding of Document 1 under Exemptions 7(A) and 7(E), as the bare descriptions in the government's *Vaughn* index do not afford EFF "a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *Wiener*, 943 F.3d at 977. The government has thus failed to meet its burden to adequately describe the Six Opinions it withholds.

C. By withholding the Six Opinions in full, the Government has failed to comply with its obligation to segregate and release non-exempt information.

Even setting aside that the government cannot justify withholding the Six Opinions as described above, it has also failed to meet its burden for an additional, independent reason: it has not to properly segregated exempt material and otherwise disclosed the records.

Because the "focus of the FOIA is information, not documents," FOIA's segregability requirement ensures that agencies do not use exemption claims to broadly shield otherwise releasable information from disclosure, even in otherwise exempt records. *Mead Data Cent., Inc. v. Dep't of the Air Force,* 566 F.2d 242, 260 (D.C. Cir. 1977). FOIA thus 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). This prevents agencies from relying on "sweeping, generalized claims of exemption for documents," even if some portions of those documents could be disclosed. *Mead Data Cent., Inc.*, 566 F.2d at 260. Yet that is likely what has happened here.

The government claims that it has reviewed the Six Opinions and determined that it cannot release a single word of the withheld records. Def. Mem. 15-16; Gaviria Decl. ¶¶ 54-56. That claim is a familiar one to EFF, and the Court should not view the government's claims here in isolation. Indeed, in two separate cases litigated by EFF involving the withholding of other FISC opinions—*EFF v. Dep't of Justice*, No. 11-cv-5221-YGR (N.D. Cal.) and *EFF v. Dep't of Justice*, No. 12-cv-1441-ABJ (D.D.C.)—the agency asserted functionally identical, and overbroad, claims. *In both cases*, once EFF successfully secured the release of the opinions at issue, it was apparent that the agency's earlier exemption claims went much further than the law allowed.

For example, in a case concerning significant FISC opinions related to the business records provision of FISA, 50 U.S.C. § 1861, DOJ asserted that no information could be segregated and released from the numerous FISC opinions it withheld in full. *See EFF v. Dep't of Justice*, No. 11-cv-5221-YGR (N.D. Cal.). Once disclosed, however, it was clear the agency had used its exemption claims to prevent disclosure of descriptions of repeated violations of the FISC's orders—information that did not describe any sensitive sources or methods and that was readily segregable from any arguably sensitive content. For example, DOJ initially withheld the following sentences under

Exemptions 1 and 3:

- "The Court is exceptionally concerned about what appears to be a flagrant violation of its order in this matter[.]" Order Regarding Preliminary Notice of Compliance Incident at 4-5, *In re Production of Tangible Things*, BR 08-13 (FISC Jan. 28, 2009).
- "[T]he Court must have every confidence that the government is doing its utmost to ensure that those responsible for implementation fully comply with the Court's orders. The Court no longer has such confidence." Order at 12, *In re Production of Tangible Things*, BR 08-13 (FISC March 2, 2009).

As the district court later determined, despite the agency's sweeping exemption claims, the opinions at issue had been withheld "in their entirety when a disclosure of reasonably segregable portions of those documents would have been required." Order Re: Production of Documents for *In Camera* Review at 2, *EFF v. Dep't of Justice*, No. 11-cv-5221-YGR (N.D. Cal. June 13, 2014) (ECF No. 85).

Likewise, in another case involving yet another significant FISC opinion, the agency identically asserted, again in litigation with EFF, that the opinion was exempt in its entirety under Exemptions 1 and 3 and that no information could be segregated and released. *See* Pl.'s Cross Motion for Summary Judgment at 10-13, *filed in EFF v. Dep't of Justice*, No. 12-cv-1441-ABJ (D.D.C.) (ECF No. 18). After the FISC Opinion was eventually disclosed, it was again apparent the agency's previous exemption claims were far too broad and unsupported by law. For example, the October 3 Opinion contained the full text of the Fourth Amendment—again, information the agency claimed could not be segregated and released without threatening harm to national security. *See id*. (describing government's withholding of text of Fourth Amendment and other information).

Indeed, another district court judge—in a similar case concerning disclosure of FISC opinions—described the agency's various arguments against disclosure as "dissembling," the "hallmarks of opportunistic rummaging," and "incorrect and inconsistent." *ACLU v. Dep't of*

Justice, 59 F. Supp. 3d 584, 590-91 (S.D.N.Y. 2014). The Court noted that the government's "assertion on the initial summary judgment motion that segregating non-exempt information in FISC orders would leave only 'unintelligible sentences and phrases' was incorrect," leaving the Court with "little faith in the Government's segregability determinations." *Id*. at 591-92.

Given DOJ's repeated failure to segregate and release readily non-exempt information from FISC opinions in the past, it is likely the agency has done the same here. Absent some justification that *every word* contained within the Opinion would reveal classified or otherwise exempt information, the Six Opinions cannot be withheld in full under Exemptions 1, 3, 7(A), and 7(E).

D. *In Camera* Review of the Six Opinions is Necessary.

In conducting its *de novo* review, FOIA empowers the Court to examine "agency records *in camera* to determine whether such records or any part thereof shall be withheld." 5 U.S.C. § 552(a)(4)(B). Given the circumstances present here, EFF respectfully submits that *in camera* review of the Opinion is an appropriate means by which the Court can resolve this case.

There is a "greater call for *in camera* inspection" in "cases that involve a strong public interest in disclosure." *Allen v. CIA*, 636 F.2d 1287, 1299 (D.C. Cir. 1980). As the D.C. Circuit has explained, in language particularly pertinent here:

> When citizens request information to ascertain whether a particular agency is properly serving its public function, the agency often deems it in its best interest to stifle or inhibit the probes. It is in these instances that the judiciary plays an important role in reviewing the agency's withholding of information. But since it is in these instances that the representations of the agency are most likely to be protective and perhaps less than accurate, the need for *in camera* inspection is greater.

Id.; *see also Jones v. FBI*, 41 F.3d 238, 243 (6th Cir. 1994) (noting *in camera* inspection warranted where there is a "*strong public interest* — where the effect of disclosure or exemption clearly extends to the public at large, such as a request which may surface evidence of corruption in an important government function").

The Six Opinions concern a topic of intense public scrutiny and interest. The scope, legality, and propriety of the government's current national security surveillance practices is a topic of vigorous public debate, both in this country and abroad. In light of this overriding public interest, the need for *in camera* inspection is particularly acute.

Indeed, in two previous cases concerning FISC opinions, the court saw fit to inspect the withheld records *in camera*. *See* Order Re: Production of Documents for *In Camera* Review, Second Order Re: Production of Documents for *In Camera Review*, *EFF v. Dep't of Justice*, No. 11-cv-5221-YGR (N.D. Cal. June 13, 2014) (ECF Nos. 85, 88); Minute Order Mar. 25, 2014, *EFF v. Dep't of Justice*, No. 12-cv-1441-ABJ (D.D.C.).

CONCLUSION

This Court should not countenance the government's ongoing attempts to avoid its statutory transparency obligations. For all the foregoing reasons, EFF respectfully urges the Court to grant its motion for partial summary judgment.

DATED: August 23, 2018

Respectfully submitted,

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