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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND 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 REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

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INTRODUCTION

This is a Freedom of Information Act ("FOIA") case. But you would not think so upon reading Plaintiff's Cross-Motion for Partial Summary Judgment and Opposition to Defendant's Motion for Partial Summary Judgment ("Pl.'s Br."), ECF No. 68. That is because the central conceit of the brief is that Section 402 of the USA FREEDOM Act applies retroactively to require all FISC[1] opinions issued since 1978 that contain a significant interpretation of law—including the six withheld in full here—to be subject to declassification review and, if they cannot be publicly released in part, for an unclassified summary to be created. From this, Plaintiff argues that the transparency provisions of this statute "inform" how Defendant must discharge its FOIA obligations. That is, because Defendant did not release redacted versions of these withheld opinions or produce an unclassified summary of them, Plaintiff insists that Defendant failed to comply with the USA FREEDOM Act and so cannot meet its burden under FOIA.

The loose thread in all of this is the notion that Plaintiff can enforce in this FOIA case the declassification provisions of the USA FREEDOM Act in the first place. It cannot. Once that loose thread is tugged, Plaintiff's whole argument begins to unravel. Courts do not enforce other disclosure statutes in FOIA actions, nor, at any rate, can Defendant be compelled in a FOIA action to create a document such as an unclassified summary in order to comply with the USA FREEDOM Act, even if the statutory mandate were to apply to these six documents retroactively. The better reading of the statute is that Congress did not intend for the declassification review mandate to apply retroactively. The Court need not, and should not, reach that issue of statutory interpretation, however, because the statute cannot be enforced in this FOIA case.

The USA FREEDOM Act so pervades Plaintiff's analysis that, once it is discarded, there is not much left to decide. Plaintiff's arguments as to the propriety of Defendant's withholdings are easily brushed aside because the Government's supporting declarations are reasonably detailed and easily satisfy Defendant's obligations under Exemptions one, three, and seven. Likewise,

[1] The acronyms and abbreviated references not defined herein have the meanings assigned to them in Defendant's opening brief.

Defendant has carried its burden of showing there is no reasonably segregable portion of the six documents that it should have disclosed. As a result, there is no need for an *in camera* inspection.

ARGUMENT

I. Plaintiff Cannot Enforce Section 402's Provisions through the Guise of this FOIA Action.

Regardless of whether Section 402 of the USA FREEDOM Act was intended to apply to the six FISC opinions at issue here, the fundamental flaw in Plaintiff's entire argument is that Plaintiff cannot enforce that provision in this FOIA action. This is so for three reasons. First, the law is clear that a FOIA court will not interpret and enforce another disclosure statute. Second, having withheld these six FISC opinions in full, as the Government is permitted to do both under FOIA and under Section 402, a court exercising its FOIA jurisdiction cannot require Defendant to create an unclassified summary of the opinions in accordance with the USA FREEDOM Act because FOIA cannot compel Defendant to create a document that does not exist. Third, Plaintiff's contention that Section 402's "declassification review" mandate precludes Defendant from withholding in full the six FISC opinions pursuant to Exemptions one and three is without merit.

A. FOIA Courts Do Not Enforce Other Disclosure Statutes.

In its initial motion, Defendant showed that Section 402 did not override the Government's proper withholding of the six opinions pursuant to applicable FOIA exemptions because, *inter alia*, Congress created no private right of action to enforce Section 402, and Plaintiff cannot achieve the same result here through the subterfuge of a FOIA action. *See* Def.'s Br. at 17-19. In response, Plaintiff acknowledges that "this case sounds only in FOIA" and that it "is not seeking to enforce a private right of action under USA FREEDOM." Pl.'s Br. at 8. Plaintiff maintains, nevertheless, that this Court may import the statutory obligations of Section 402 into this action because "laws, outside of FOIA, may color the Court's assessment of whether the Government has satisfied its burden to withhold records." *Id.* at 1, 8.

Section 402 requires that the Government conduct a declassification review of certain FISC (and FISCR) opinions and that it then either release a redacted version of the opinion, or, upon a determination by the DNI and the Attorney General that a national security waiver is appropriate to

"protect . . . properly classified intelligence sources or methods," it makes "publicly available an unclassified statement" summarizing the opinion. 50 U.S.C. § 1872. Plaintiff argues that these "transparency requirements inform how the government must meet its burden" here, Pl.'s Br. at 8, and, because Defendant has "failed to produce declassified versions" of these six opinions withheld in full "or to provide a *Vaughn* index containing a declassified summary of them," *Id.* at 7, Defendant has not met its burden under FOIA.

The terms of Section 402's declassification review mandate and its related disclosure provisions cannot be grafted onto Defendant's obligations to comply with FOIA, however. *See* Def.'s Br. at 17-19. Defendant has already shown why this is so. *See id.* at 17-19. The JFK Act, for example, like Section 402, is a statute that requires the Government to review certain records and publicly disclose them, if appropriate. *See Minier v. CIA*, 88 F.3d 796, 802-03 (9th Cir. 1996); *Assassination Archives & Research Ctr. v. DOJ*, 43 F.3d 1542, 1543-44 (D.C. Cir. 1995); *see also* Def.'s Br. at 17-18. Neither the Ninth Circuit nor the D.C. Circuit, however, found that Congress intended the substantive standards for disclosure set forth in the JFK Act to "inform" the Government's disclosure obligations in the FOIA actions, as Plaintiff would have this Court find. *See Minier*, 88 F.3d at 802; *Assassination Archives & Research Ctr.*, 43 F.3d at 1544. To the contrary, the courts rejected the notion that the provisions of the other statute could override a properly taken exemption under FOIA. *See Minier*, 88 F.3d at 802 ("There is nothing to suggest that Congress intended the JFK Act to override [the agency's] ability to claim proper FOIA exemptions."); *Assassination Archives & Research Ctr.*, 43 F.3d at 1544-45 (declining to review the FOIA withholdings in light of the provisions of the JFK Act because that would be "judicially hybridizing the two acts"). And that was so even though the records at issue in the FOIA case were also within the parameters of the JFK Act. Contrary to Plaintiff's assertion, therefore, it is of no moment that this "litigation concerns the very records USA FREEDOM requires the government" to review and disclose. Pl.'s Br. at 8. The plaintiffs in these cases could no more enforce the provisions of the JFK Act in their FOIA suits than can Plaintiff enforce here the provisions of Section 402 in its FOIA suit.

Plaintiff protests, however, that the cases upon which Defendant relies are "unhelpful" and "inapposite." Pl.'s Br. at 8. "Asking this Court to construe" Section 402's declassification review mandate and its "consequences for the government's withholdings," Plaintiff maintains, is "no different than asking federal courts to construe federal tax law for its implications in a FOIA case or, more relevant here, the Executive Order governing classification." *Id.* at 7-8 (citing *Long v. IRS*, 742 F.2d 1173, 1177 (9th Cir. 1984) (tax law); *ACLU v. Dep't of Def.*, 628 F.3d 612, 619-25 (D.C. Cir. 2011) (Executive Order)). In the *ACLU* case, the D.C. Circuit considered the parameters of the Executive Order establishing the criteria for classification of information for purposes of determining whether the agency had satisfied Exemption one, *see ACLU*, 628 F.3d at 619-25; and, in *Long*, the Ninth Circuit was interpreting certain tax laws to determine whether they qualified as Exemption three statutes, *see Long*, 742 F.2d at 1177-79.

None of this is remarkable. Exemption one to FOIA necessarily requires FOIA courts to examine whether the information withheld pursuant to that exemption satisfies the "criteria established by an Executive order to be kept secret" and is "in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). In short, we know information is exempt under (b)(1) if it meets the standards for classification under the operative executive order. FOIA courts look to the operative executive order for that reason. Congress did not, however, make Section 402 an integral part of determining whether the Government had satisfied its obligations under Exemption one. Likewise, Exemption three necessarily requires a FOIA court to determine whether non-disclosure statutes, like the laws in *Long*, "specifically exempt[] from disclosure" the information at issue and thus qualify as Exemption three statutes. *Id.* § 552(b)(3). What Plaintiff asks the Court to do here, however, is the inverse of what it is statutorily required to do when analyzing non-FOIA statutes for Exemption three purposes: determine whether a different disclosure statute—rather than a non-disclosure statute—compels the disclosure of the information an agency seeks to protect under FOIA exemptions. There is no warrant in FOIA for the Court to do such a thing. Accordingly, it is Plaintiff, and not Defendant, that is citing case law that is "unhelpful" and "inapposite."

B. FOIA Does Not Obligate Defendant to Create Unclassified Summaries of the Six FISC Opinions it is Withholding in Full.

Section 402 requires, where it applies, that the Government create a specific kind of unclassified summary of certain FISC opinions when the DNI, in consultation with the Attorney General, determines that no part of those opinions may be made public. *See* 50 U.S.C. § 1872(c). The Government has not created these unclassified summaries for the six FISC opinions withheld in full, and Defendant has already shown, *see* Def.'s Br. at 18-19—and Plaintiff does not contest, *see* Pl.'s Br. at 19 n.9—that black letter FOIA law does not require an agency to create a document that does not exist. That should be the end of the matter.

But Plaintiff argues that this Court is not without recourse to issue a remedy here. This is so, Plaintiff contends, because "FOIA, effectively, requires the same" unclassified summary as Section 402 requires, *see id.* at 17, and so "as part of the government's *Vaughn* index," the Government "can reproduce the declassified summary that USA FREEDOM obligates the government to create." *Id.* at 2. The two requirements are not the same, however. Section 402 requires that the Government "make publicly available an unclassified statement," when no redacted version of a relevant FISC opinion can be put on the public record, which specifically "summarize[es] the significant construction or interpretation of any provision of law, which shall include, to the extent consistent with national security, 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." 50 U.S.C. § 1872(c)(2). And the unclassified statement must also "specif[y] that the statement has been prepared by the Attorney General and constitutes no part of the opinion of the" FISC or FISCR. *Id.* § 1872(c)(2)(B).

FOIA, by contrast, does not require Defendant's *Vaughn* index or declaration be "prepared by the Attorney General," *see, e.g.*, *Freedom of the Press Found. v. DOJ*, 241 F. Supp. 3d 986, 997-99 (N.D. Cal. 2017) (Gilliam, J.); *EFF v. DOJ*, 2014 WL 3945646, at *1 (N.D. Cal. Aug. 11, 2014). Nor does FOIA require that the specific types of information enumerated in Section 402 be included in Defendant's FOIA declarations and *Vaughn* index. Instead, FOIA declarations "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." *Hamdan v. DOJ*, 797 F.3d 759, 769 (9th Cir. 2015). This means that there is no FOIA requirement that Defendant's declarations must specifically include a summary of any interpretation of the law contained in any of the six withheld in full FISC opinions, nor that the declarations specifically include a "description of the context in which the matter arises." 50 U.S.C. § 1872(c)(2). Plaintiff's efforts to graft these statutory requirements onto the well-settled standard for FOIA declarations necessarily must fail. *See Lane v. Dep't of Interior*, 523 F.3d 1128, 1135-36 (9th Cir. 2008) ("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.").

Accordingly, Plaintiff cannot require Defendant to create a document that does not exist, and thus bypass FOIA's prohibition on such a remedy, under the pretense that Defendant was already required by FOIA to provide that information in its FOIA declarations or *Vaughn* index. Because that remedy is not available in FOIA cases, the Court is without jurisdiction to issue such an order. *See Kissinger v. Reporters' Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980).

C. Section 402 Does Not Preclude Defendant from Withholding in Full these Six FISC Opinions.

Plaintiff argues (Pl.'s Br. at 15-17) that Defendant cannot withhold in full these six FISC opinions under Exemptions one and three because the Government has failed to comply with the terms of Section 402. Plaintiff is wrong on both counts.

As for Exemption one, Plaintiff argues that "the government cannot show that the Six Opinions have been properly classified to Exemption one's standard because [it has] not demonstrated that [it has] complied with USA FREEDOM's declassification review requirements." Pl.'s Br. at 15. Section 402, however, does not alter in any way the standards for classification set forth in Executive Order 13526. The statutory provision requires that a "declassification review" of certain FISC opinions occur, but it does not require any information in those opinions to be declassified. *See* 50 U.S.C. § 1872(c). Instead, in the event the Government determines that none of the information can be released in accordance with the governing executive order—a

determination Defendant has made in this case, *see* Def.'s Br. at 6-9, 15-16—the only statutory requirement is that the Government make an unclassified summary of those opinions available to the public. *See* 50 U.S.C. § 1872(c)(2). This requirement is not applicable in this FOIA case, as we have shown, *see supra*, at 5-6, but even if it were, making an unclassified summary publicly available in no way alters the propriety of the classified information withheld in any FISC opinion subject to Section 402 or to these six withheld in full FISC opinions.

As for Exemption three, Plaintiff argues that Defendant's reliance on 50 U.S.C. section 3024(i)(1) and 50 U.S.C. section 3605(a) "also falls short of meeting [its] burden to withhold records under Exemption 3." Pl.'s Br. at 16. Plaintiff asserts that, while section 3024(i)(1) requires the DNI to "protect sources and methods from *unauthorized* disclosure," doing so here "would not lead to the 'unauthorized' disclosure of intelligence sources and methods in any sense" because "disclosure is specifically mandated" by statute. Pl.'s Br. at 16. We have covered this already. Section 402 does not mandate disclosure of any FISC opinion; it mandates "declassification review" of certain FISC opinions, leaving to the Government to decide which parts of the opinions are classified and whether any of the opinions can be disclosed in redacted form or not. *See* 50 U.S.C. § 1872.

Plaintiff also claims that Defendant cannot rely on 50 U.S.C. section 3605(a) as an Exemption three statute because, as the "later, more specific statute concerning disclosure of the records at issue here," Pl.'s Br. at 16, Section 402 "cannot be interpreted in a way that permits withholding the very same information that USA FREEDOM requires the government to disclose in this case." *Id.* at 17. But Section 402 is not in tension with section 3605(a) because the former does not mandate the public disclosure of any of the FISC opinions to which it applies (much less the six FISC opinions at issue here), and it is "well established" that the latter "qualifies as an Exemption 3 withholding statute," *EPIC v. DOJ*, 296 F. Supp. 3d 109, 121 (D.D.C. 2017). To the extent Plaintiff's argument is that the two statutes are in tension because the Government should have created, in these circumstances, an unclassified summary of the six FISC opinions, we have already shown that a court exercising its jurisdiction under FOIA cannot impose this statutory requirement, *see supra*, at 5-6.

For all of these reasons, and the reasons set forth in Defendant's initial motion, *see* Def.'s Br. at 16-19, Plaintiff cannot enforce Section 402's provisions in this FOIA action.

II. In Any Event, the USA FREEDOM Act Does Not Apply to FISC Opinions Issued Before its Enactment, Including these Six Opinions, Because Congress Did Not Intend the Act to Apply Retroactively.

If the Court agrees with Defendant that it cannot enforce the provisions of Section 402 in this FOIA action, then it should not reach the issue of whether Congress intended that statutory provision to apply retroactively to FISC opinions issued prior to its enactment. Indeed, not only should the Court not do so, it cannot do so. Opining on the meaning of a law where it is not applicable would be a text-book advisory opinion. *See, e.g., Little Italy Dev., LLC v. Chicago Title Ins. Co.*, 2011 WL 4944259, at *3 (N.D. Ohio Oct. 17, 2011) ("To address the issue in the reverse order, *i.e.*, interpreting the scope of the statute before determining whether the statute is applicable, would often result in an advisory opinion."); *Friends of Potter Marsh v. Peters*, 371 F. Supp. 2d 1115, 1125 (D. Alaska 2005) (declining to issue "an advisory opinion" on whether a particular interpretation of a statute was the correct one when the question was "an abstract" one). And the issuance of advisory opinions is prohibited and has been "disapproved by" the Supreme Court "from the beginning." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998).

In any event, as Defendant demonstrated in its initial submission, Section 402 of the USA FREEDOM Act does not apply retroactively to FISC opinions issued prior to its enactment and thus it does not apply to the six FISC opinions at issue here. *See* Def.'s Br. at 19-25. This is so for two reasons. First, the Court can draw the "comparably firm conclusion," *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006), that Congress did not intend for Section 402 to be applied retroactively, and, if the Court so finds, there is no need for further inquiry. *See* Def.'s Br. at 20-22. Second, in the event the Court needs to reach this point, applying Section 402 to FISC opinions issued prior to its enactment would have an impermissible retroactive effect thus triggering the presumption against retroactivity, which Plaintiff has not rebutted. *See id.* at 23-25.

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

The ruling of the only court to date that has addressed this question has agreed that

Congress did not intend for Section 402 to apply retroactively. *See EPIC*, 296 F. Supp. 3d at 127. In *EPIC* the FOIA court ruled that the USA "FREEDOM Act was enacted in June 2015 . . . and there is nothing to indicate that Congress intended the statute to apply retroactively to prior FISC decisions." *Id.* As Defendant noted in its opening brief, this Court should rule the same. *See* Def.'s Br. at 19.

Plaintiff acknowledges the decision in a footnote, but suggests that this Court "should decline to follow" the same path here because the decision is "incomplete and poorly reasoned." Pl.'s Br. at 15 n.7. Plaintiff offers three reasons why. First, the documents at issue in *EPIC* were submissions to the FISC and portions of some reports issued to Congress, including summaries of FISC opinions, and not, as here, the FISC opinions themselves. *See id.*; *see also EPIC*, 296 F. Supp. 3d at 112. True, but the plaintiff in *EPIC* was making the same argument there as Plaintiff is here: look to the language of the USA FREEDOM Act, which promotes transparency and not to the declarations the agency submitted in support of its withholdings. *See EPIC*, 296 F. Supp. 3d at 127; Pl.'s Br. *generally*. The *EPIC* court correctly dismissed the statutory "invocation" of Section 402 as "fall[ing] far short of rebutting the reasoned assessments" of the agency declarants. *See EPIC*, 296 F. Supp. 3d at 127. Second, Plaintiff also observes that the plaintiff in *EPIC* appears to have "misread[] . . . the statute" as requiring opinions to be "released without qualification." Pl.'s Br. at 15 n.7. While there is no indication of that in the opinion, *see id.*, it has no bearing on whether the *EPIC* court's decision was correct. Plaintiff's final argument why *EPIC* was wrongly decided is that the court's "brief statement" on the retroactivity issue "failed to address the plain language of the statute."[2] *Id.*

Plaintiff believes that the "plain language" of Section 402 is that the declassification review mandate applies to all qualifying FISC opinions issued since 1978. *See* Pl.'s Br. at 10-12. This is

[2] Plaintiff's final point also includes the argument that the *EPIC* court failed to recognize that Section 402 "applied to the present classification status of FISC opinions, rather than the date they were issued." Pl.'s Br. at 15 n.7. That is, presumably, Plaintiff is arguing that the "predicate action[s]," *Fernandez-Vargas*, 548 U.S. at 44, for determining whether the statute has an impermissible retroactive effect should be the current classification status of the FISC opinions and not the dates upon which the opinions were issued. We address this point in the next section.

so, Plaintiff maintains, because "[t]here is no temporal restriction on the FISC opinions to be reviewed in the statute," and the "most straightforward reading" of this statute is that it applies to all significant FISC opinions "no matter when those opinions were written." *Id.* at 10. That is not correct, however. While it is true that the statutory text itself is not explicit on the mandate's "temporal reach," *Fernandez-Vargas*, 548 U.S. at 37, it is also not "clear" that the language "could sustain only one interpretation." *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997). Plaintiff insists that the "plain meaning of the word 'each'" in the statute means "'every'" one of them. Pl.'s Br. at 10. And that is true as far as it goes. But it begs the question: each and every one of *which* set of opinions? Each and every one of those satisfying the statutory criteria that were issued by the FISC and FISCR since 1978, or each and every one of those opinions meeting the statutory criteria that were issued after the statute was enacted? Plaintiff's preferred interpretation is that it means all of the relevant opinions dating back to 1978, but that is not the only possible, or indeed the most likely, interpretation. Prospective application of the statutory mandate makes more sense. When an opinion is issued after the enactment of the statute its legal significance can be determined in the context of the law when it was issued. In contrast, for opinions issued from 1978 until June 2015, when the statute was enacted, when should the legal significance of the opinion be measured? At the time of issuance, the date of the statute's enactment, or when the declassification occurs? Congress does not say. Nor does Plaintiff.

This question has real-world consequences. In the earlier partial summary judgment briefing in this case, Defendant outlined in detail for the Court that adopting Plaintiff's preferred interpretation of Section 402 would require Defendant to review more than 30,000 dockets dating back to 1978 to determine which contained a "significant construction or interpretation of any provision of law," 50 U.S.C. § 1872(a), and that the "meaning and import of such historical decisions, orders, or opinions may not be readily apparent from its content." Second Decl. of G. Bradley Weinsheimer ("Second Weinsheimer Decl."), ECF No. 33-2 ¶¶ 12, 13; *see also* Def.'s Mot. for Partial Summ. Jdgmt., ECF No. 29, at 2, 9-10, 11-13; Decl. of G. Bradley Weinsheimer ("Weinsheimer Decl."), ECF No. 29-1 ¶¶ 11-16; Def.'s Reply in Supp. of its Mot. for Partial

Summ. Jdgmt and Opp'n to Pl.'s Cross-Mot. for Partial Summ. Jdgmt, ECF No. 33, at 7, 15-18.[3] Mr. Weinsheimer concluded that the process of identifying qualifying historical orders and opinions would involve "a significant full-time effort that could take years." Weinsheimer Decl. ¶ 16. This is what Plaintiff's "most straightforward reading of Section 402," Pl.'s Br. at 10, would entail, and Plaintiff insists that Congress intended to impose this mandate on the Government without explicitly saying so. Congress "does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). But Plaintiff's interpretation assumes Congress did just that.

Plaintiff has nothing else to say about the plain text of Section 402. But Defendant has explained that Congress's declassification review mandate included those FISC opinions that contained "any novel or significant construction or interpretation of the term 'specific selection term.'" 50 U.S.C. § 1872(a); *see also* Def.'s Br. at 21. This was the only example Congress gave of the kind of FISC decision it considered significant, and so the inclusion of this requirement is key to determining the temporal reach of Section 402. Plaintiff's "plain text" interpretation of Section 402 ignores this statutory language—as Plaintiff ignored this argument in its brief—and it does so because the phrase "specific selection term" was only added to FISA by the USA FREEDOM Act in 2015. This means that the only FISC opinions that would address specific selection terms would be those issued after the enactment of Section 402. Given that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause is rendered superfluous, void, or insignificant," *Young v. UPS*, 135 S. Ct. 1338, 1352 (2015), Plaintiff's interpretation of the temporal reach of Section 402 should not prevail when it would make this key statutory example of a significant FISC opinion superfluous to all FISC opinions issued from 1978 to June 2015.

[3] According to Mr. Weinsheimer, to "determine the import" of historical FISC opinions, decisions, and orders, a person would "need to identify and then carefully review related documents (*e.g.*, applications, memoranda of law, etc.) and then would likely, in many instances, have to conduct independent legal research in order to determine the significance (or lack thereof) of the order in the context of the law as it existed at the time the opinion was issued." Second Weinsheimer Decl. ¶ 12.

The Court can also "draw a comparably firm conclusion," *Ixcot v. Holder*, 646 F.3d 1202, 1208 (9th Cir. 2011), that Congress did not intend Section 402 to apply to FISC opinions issued prior to its enactment by comparing the language used in that section to that in the companion amicus provision in the USA FREEDOM Act. Section 401 provides that the FISC "shall appoint . . . [an] 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). It is self-evident that Congress imposed this requirement prospectively; it would make no sense to appoint an amicus for FISA applications upon which the FISC has already ruled. And the language used in Sections 401 and 402 is too similar to ignore. Section 401 requires the FISC, unless the court determined it was unnecessary, to appoint an amicus when presented with a "novel or *significant interpretation of* the *law*," *id.* (emphasis added), whereas in Section 402 Congress mandated declassification review of FISC opinions that "include[] a *significant* construction or *interpretation* of any provision *of law*." 50 U.S.C. § 1872(a) (emphasis added). Besides the similar language, applying the two sections prospectively and in tandem resolves the question of how to determine which FISC opinions contain significant interpretations of law: the FISC opinions that are subject to the declassification review are readily identifiable as those FISC opinions where the FISC appoints an amicus under Section 401, or those where the FISC "issues a finding that such [an] appointment is not appropriate," 50 U.S.C. § 1803(i)(2)(A).

Reading Sections 401 and 402 in tandem is also supported by the legislative history. In the debate in the House of Representatives, Congressman Jerrold Nadler stated of House bill 2048 (which later became the USA FREEDOM Act):

> This bill further requires the government to promptly declassify and release each novel or significant opinion of the Foreign Intelligence Surveillance Court. *In the future*, if the government advances a similarly dubious legal claim,[4] there will be an advocate in court to oppose it. If the court should agree with the novel claim, *the public will know about it almost immediately*, and the responsibility will lie with us to correct it just as

[4] Here Congressman Nadler was referencing a Second Circuit opinion that disagreed with the Government's argument, and the FISC's repeated rulings, that Section 215 of the USA PATRIOT Act authorized the NSA's bulk telephony metadata program.

quickly.

161 Cong. Rec. H2916 (daily ed. May 13, 2015) (statement of Rep. Nadler) (emphasis added). This is how Congress envisioned Sections 401 and 402 to work together.

In arguing to the contrary, Plaintiff points to a statement by Representative Jim Sensenbrenner that "Section 402 was written to bring an 'end to secret laws.'" Pl.'s Br. at 11. This is the same sentiment expressed in H.R. 2475 and S. 1130, both introduced in the wake of Edward Snowden's unauthorized disclosures and both entitled "Ending Secret Law Act." S. 1130, 113th Cong. (1st Sess. 2013); H.R. 2475, 113th Cong. (1st Sess. 2013). Notwithstanding that the bills embodied the same sentiment expressed by Representative Sensenbrenner, both bills nonetheless would have imposed a declassification mandate only for certain FISC opinions issued after the date of enactment and for those opinions issued since 2004 for which Congress had imposed a requirement that they be submitted to certain Congressional committees. *See id.*[5] While Plaintiff chides the Government that its interpretation of Section 402 would "permit nearly forty years of significant FISC opinions to remain secret," Pl.'s Br. at 11, the bills whose express purpose was to "End[] Secret Law" would have left untouched a quarter century of FISC opinions issued between 1978 and 2004.

Plaintiff's other nugget of legislative history that it says supports its interpretation is a generic statement about "greater transparency" made in the Judiciary Committee House Report. *See* Pl.'s Br. at 11. The report states that the USA FREEDOM Act—not Section 402 specifically, as Plaintiff suggests, *see id.*—"creates greater transparency of national security programs operated pursuant to FISA." H.R. Rep. No. 114-109, Pt. 1, at 2 (2015). This greater transparency can be achieved not only by mandating declassification review of the relevant set of FISC opinions issued after the statute is enacted, but also by five amendments to FISA's existing "Transparency and

[5] Congress imposed this statutory reporting requirement under Section 601(c) of FISA beginning in 2004. *See* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, Title VI, § 6002(a)(2), 118 Stat. 3638 (codified as amended at 50 U.S.C. § 1871(a)(5)). While section 601(c) itself did not impose a declassification mandate, the two un-enacted bills would have tied a retroactive declassification mandate to those FISC opinions within the temporal reach of section 601(c) by requiring the declassification of those opinions that had been furnished to Congress under that statutory reporting requirement since 2004.

Reporting Requirements" (of which Section 402 is not part) contained in the statute. *See* USA FREEDOM Act, Pub. L. 114-23, §§ 601-05, 129 Stat. 268, 291-98 (June 2, 2015). This piece of legislative history thus cannot bear the weight Plaintiff puts on it.

Besides offering its own legislative history to support its position, Plaintiff also criticizes Defendant's reliance on the language of an un-enacted bill and characterizes this argument as asking the Court to "find more persuasive the legislative history of the bill that did not pass, rather than the legislative history of USA FREEDOM." Pl.'s Br. at 14. Defendant was not asking the Court to do anything of the sort, however. The point was to compare the un-enacted bill that contained specific language making clear its retroactive application (as well as its prospective application) to the USA FREEDOM Act, which omitted any language specifying retroactive application.[6] And that argument was related to the next one, where Congress enacted a reporting requirement with specific retroactive language but chose not to do so in Section 402. *See* Def.'s Br. at 21-22. Congress clearly knows how to make such declassification requirements retroactive, and, in enacting Section 402, Congress chose not to include such retroactive language. Given that "Congress' choice of words is presumed to be deliberate," *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2519, 2529 (2013), these examples of proposed and un-enacted language is some evidence of Congress' intent not to make Section 402's mandate retroactive. *See Bull v. City & Cty. of San Francisco*, 758 F. Supp. 2d 925, 935 (N.D. Cal. 2010) ("[L]egislative inaction is simply one piece of evidence, among others, that militates in favor of a conclusion that the Legislature did not intend" a particular result).

For all of these reasons, and for the reasons set forth in Defendant's initial submission, this Court should find that Congress did not intend to require the Government to review all FISC opinions issued from 1978 until June 2, 2015, to find those that contained a significant

[6] Other un-enacted bills relating to the declassification of certain FISC opinions contain similar retroactive language. *See* H.R. 2440, 113th Cong. § 4(a)(2)(B) (1st Sess. 2013) (mandating declassification of "each decision issued prior to the date of the enactment [of the bill] that was required to be submitted to committees of Congress" since 2004); S. 1467, 113th Cong. § 6(a) (1st Sess. 2013) (mandating public disclosure of "all decisions issued by the FISA Court or the FISA Court of Review after July 20, 2003, that include a significant construction or interpretation of law").

interpretation of law and then subject that set of opinions to declassification review and, if appropriate, public disclosure. And if the Court so finds, then it "need not address the second step" of the retroactivity inquiry at all. *United States v. Reynard*, 473 F.3d 1008, 1014 (9th Cir. 2007).

B. Applying Section 402 to FISC Opinions Issued Prior to its Enactment would have an Impermissible Retroactive Effect thus Triggering the Presumption Against Retroactivity, which Plaintiff has not Rebutted.

Only if the Court concludes that it can enforce the provisions of Section 402 in this FOIA action and that it cannot come to the "comparably firm conclusion" that the statutory provision was meant to apply prospectively (and not retroactively), does the Court need to proceed to this step of the analysis. In its initial motion, Defendant explained that applying the statute in the manner in which Plaintiff seeks to do would have the retroactive consequence in the disfavored sense of imposing a new burdensome obligation on the Government to review nearly forty years of FISC opinions to determine which ones should be subject to mandatory declassification review. *See* Def.'s Br. at 23-24. That being the case, the presumption, deeply rooted in the jurisprudence of our Republic, is that "Congress intends its laws to govern prospectively only." *Vartelas v. Holder*, 132 S. Ct. 1479, 1491 (2012); *see also* Def.'s Br. at 24-25.

In response, Plaintiff makes three arguments. First, Plaintiff suggests that "Section 402 presents no retroactivity concerns because it reaches only those FISC opinions that are *currently* classified" in that the requirement "regulates the present classification status of FISC opinions, not the dates they were issued." Pl.'s Br. at 12. By so arguing, Plaintiff is saying that the pertinent "acts," "events," or "predicate actions" for retroactivity purposes are not, as Defendant described (Def.'s Br. at 23), the issuance of the FISC opinions—readily discernible dates—but the "classification status" of all qualifying FISC opinions on the date of enactment. This suggestion has no support in the statutory text or the legislative history. Nor does it make sense because the "classification status" of these FISC opinions is no "event" or "act" or "predicate action" at all. The classification of information can change over time in light of subsequent official disclosures. Plaintiff's proposal is simply to take a snapshot of the "classification status" of each FISC opinion on the date of the statute's enactment and then consider that date to be the "predicate action" for retroactivity purposes. This, however, is really just a reformulation of its already debunked

argument that Congress intended for all FISC opinions, no matter when issued, to be subject to mandatory declassification review if they contain a significant construction or interpretation of any provision of law.

Second, Plaintiff observes that "the government's ability to classify a FISC opinion is not the type of completed past event that can give rise to retroactivity concerns," and the Government has not provided "a single case" "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." Pl.'s Br. at 13. At bottom, the "inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *Martin v. Hadix*, 527 U.S. 343, 357-58 (1999). One type of "new legal consequence[]" is the "creat[ion of] a new obligation" or the imposition of "a new duty." *INS v. St. Cyr*, 533 U.S. 289, 321 (2001). Common sense says that before June 2, 2015, when the USA FREEDOM Act was enacted, the Government was under no statutory obligation or duty to conduct a declassification review for public release of FISC opinions meeting certain criteria issued at any time. After June 2, 2015, it was. Applying that mandate retroactively to FISC opinions issued over the last forty years would impose a new onerous obligation and duty on the Government to engage in "a significant full-time effort that could take years" to complete. Weinsheimer Decl. ¶ 16. That the Government has not pointed the Court to precedent that is directly on point to a case such as this is of no moment. By the same token, Plaintiff has not pointed the Court to a case holding that it cannot and should not apply this common sense retroactivity analysis to this set of facts.

Third, Plaintiff says the declassification review mandate in Section 402 is "akin to any other statute that imposes new transparency requirements" such as FOIA, which, Plaintiff observes, the Government does not argue applies only to documents created after the statute was enacted. *See* Pl.'s Br. at 13, 14. The Government does not make that argument in FOIA cases because the operative temporal fact there is not when the record was created but whether the FOIA request was made after the enactment of the statute creating the right of public access in the first place. Here, in contrast, the operative temporal fact is whether the FISC opinion was issued before or after the

enactment of the USA FREEDOM Act.

For the foregoing reasons, and those set forth in Defendant's initial brief, *see* Def.'s Br. at 23-24, the application of Section 402's declassification mandate to FISC opinions issued prior to its enactment would have a retroactive effect. As such, the presumption against retroactivity applies, a presumption Plaintiff does not and cannot rebut through evidence of an "unambiguous directive" from Congress that the mandate was intended to apply retroactively. *See id.* at 24-25.

III. Setting aside the Inapplicable Provisions of the USA FREEDOM Act, This FOIA Case is Readily Resolved Because Defendant Has Satisfied Its FOIA Obligations.

Once the Court has dealt with Plaintiff's efforts to shoehorn the USA FREEDOM Act into this FOIA case and has then exorcised all references to (and incorporation of) Section 402's transparency standards, there is not much else to do. Plaintiff devotes comparably little effort to an unadorned challenge under the standards of FOIA to Defendant's showing that it has satisfied its obligations to withhold in full the six FISC opinions under Exemptions one, three, and seven. *See* Def.'s Br. at 5-16; Pl.'s Br. at 18-24. Dutifully, though, Plaintiff argues that Defendant failed to properly justify its withholdings under those three exemptions, that it failed to properly segregate portions of the withheld documents, and, as a result, the Court should conduct an *in camera* review of the documents at issue. We turn now to these more familiar issues.

A. Defendant Has Submitted Reasonably Detailed Declarations Establishing that the Six Opinions Were Appropriately Withheld in Full Pursuant to Exemptions 1, 3, and 7.

In support of its initial motion, Defendant demonstrated that the information in the six withheld in full FISC Opinions was properly withheld under Exemptions one, three, and seven because the information was properly classified under Executive Order 13526, was properly exempt under 50 U.S.C. sections 3024(i)(1) and 3605(a), and that one of the withheld documents also contained information that could reasonably be expected to interfere with enforcement proceedings and could also reveal a law enforcement technique that is not generally known to the public. *See* Def.'s Br. at 6-15.

Plaintiff's response to all of this is perfunctory. It claims that Defendant's *Vaughn* index "is deficient by any measure" and consists of "a short table," only partially replicated by Plaintiff

in its brief, *see* Pl.'s Br. at 19-20,[7] and that the declarations do "not provide much further detail regarding the context or subject of the FISC records." *Id.* Plaintiff adds that this failure as to Exemptions one and three "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" are not sufficient, *id.*, and the FBI's declaration is "too conclusory and insufficiently detailed." *Id.* at 17 n.8. With the exception of one further sentence (addressed momentarily) about perceived insufficiencies of Defendant's Exemption one withholdings specifically, *see id.* at 20, this is the sum of Plaintiff's challenge to Defendant's withholdings when arguments about the applicability of the USA FREEDOM Act have been stripped away. These few conclusory sentences are not enough, however, to support a finding that Defendant's declarations are "too conclusory."

To the contrary, Defendant has more than satisfied its obligations under FOIA. With regard to Exemption one, Plaintiff's sole specific criticism of this declaration is that the description of the classified documents "does not go beyond identifying general categories of information that can be classified under Executive Order 13526." Pl.'s Br. at 20. That is not so. Section 1.4 of the executive order lists eight categories of classified information, *see* Exec. Order No. 13526, § 1.4, 75 Fed. Reg. 707, 708 (Dec. 29, 2009), only one of which—"intelligence methods"—is listed both as one of the six categories in Ms. Gaviria's declaration and as a subset of a Section 1.4 category in Executive Order 13526. With regard to each of the six categories of information withheld, Ms. Gaviria describes in "reasonably specific detail," *Hamdan*, 797 F.3d at 769, the type of information withheld "without thwarting the claimed exemption's purpose," *id.* at 775, and has provided for each category an explanation why disclosure would "result in damage to the nation's security." *Wiener v. FBI*, 943 F.2d 972, 980 (9th Cir. 1991). In the context of Exemption one, "the

[7] Defendant provided a chart listing the six withheld in full documents by identifying the type of FISC order or opinion involved, the exemptions that applied to each document, the number of pages of each document, and a column which showed that all six categories of classified information discussed in detail in Ms. Gaviria's declaration were present in all six documents. The dates of the orders and opinions, as well as the docket numbers for the cases, could not be listed because that information remains classified. *See* Decl. of Patricia Gaviria ("Gaviria Decl.") ¶¶ 45-47, ECF No. 66-1, Ex. A. This chart is, of course, intended to be read in tandem with the detailed 22-page declaration of Ms. Gaviria and the detailed 9-page declaration of Mr. Hardy. *See generally* Gaviria Decl.; Decl. of David M. Hardy ("Hardy Decl."), ECF No. 66-1, Ex. B.

government's burden is a light one." *ACLU*, 628 F.3d at 624. And Ms. Gaviria's declaration carries it easily. *See* Gaviria Decl. ¶¶ 20-47.

First, category 1 consists of the identities of targets and related information. Ms. Gaviria explained that this withheld information "identifies or tends to reveal the identities, or nature of, the targets from which communications were collected or targeted" under FISA. Gaviria Decl. ¶ 27. Ms. Gaviria went on to outline likely harms from disclosing this information. She explained that disclosure of this information "would alert [the target] and their associates to the existence of the surveillance and the fact that their communications were being targeted and collected." *Id.* This, in turn, "would allow them to adopt countermeasures to avoid and thwart the surveillance," which, of course, could result in a loss of access to "valuable intelligence and potential evidence." *Id.* At a macro level, such disclosures "would also provide our adversaries with valuable insight into the Intelligence Community's targeting tradecraft and methods." *Id.* ¶ 28. All of this, Ms. Gaviria concludes, is likely to harm national security. *See id.* ¶ 29.

Second, category 2 consists of the types of communications and data acquired pursuant to the withheld FISC orders. Ms. Gaviria explains that disclosing this kind of information would "reveal the specific methods employed by the Intelligence Community as well as the scope of the Government's activities" under particular FISA authorities. *Id.* ¶ 30. Disclosing the Intelligence Community's "capability to acquire specific types of communications and data would alert targets to the vulnerabilities of their communications," and, relatedly, which of their communications were not vulnerable. *Id.* This, in turn, may lead to the loss of access to these communications and thus the loss of crucial information. *See id.* Ms. Gaviria then concludes, as a result, that disclosing this information would harm national security. *See id.*

Third, category 3 consists of intelligence methods, or operational tradecraft. These intelligence methods "are the means by which an intelligence agency accomplishes its objectives," *id.* ¶ 31, and Ms. Gaviria explains that the methods described in the withheld documents "represent some of the most sensitive methods used by the Intelligence Community to surveil national security targets, including extremely sensitive foreign intelligence targets." *Id.* ¶ 33. That said, Ms. Gaviria was able explain further that one of the six documents relates to the NSA's use of a

particular method of "conduct[ing] queries of metadata" obtained pursuant to NSA's now-discontinued FISC-authorized bulk telephony metadata program. *See id.* ¶¶ 34-35. And disclosing this particular "intelligence method may allow our adversaries to undertake countermeasures" that would "degrad[e] the effectiveness" of this "method in various intelligence gathering contexts" beyond the context of the particular program in which it was described in the withheld document. *Id.* ¶ 35. As for the other methods described in the withheld documents, Ms. Gaviria explains that the nature of these methods means that their disclosure "would provide our adversaries a 'roadmap' of when and how elements within the Intelligence Community were able to first employ these methods." *Id.* ¶ 33. Further, "[d]isclosure of this information would allow our adversaries to understand what type of methods elements of the Intelligence Community are currently capable of using, allowing them to thwart surveillance and use types of communications and/or methods the Intelligence Community may not currently be capable of collecting." *Id.* As a result, Ms. Gaviria concludes that such disclosures are likely to harm the national security. *See id.* ¶ 36.

Fourth, category 4 consists of classified information about operational details and the capabilities (and limitations) of the Intelligence Community. Ms. Gaviria details the information included within this category as "collection equipment; collection capabilities and technological limitations, including limitations that impact our capability to target and acquire certain communications and our ability to exploit certain communications channels as well as technological solutions that we employ to overcome such limitations"; "types of communications and target-specific communication channels; [and] analytic techniques that we apply to the data" as well as "storage, access, and database use, capabilities, and functionality." *Id.* ¶ 37. Ms. Gaviria goes on to explain that disclosing this withheld information "would reveal to our adversaries our technical capabilities and limitations," which our adversaries could use to try to "develop countermeasures to frustrate" our efforts to gather intelligence. *See id.* ¶ 38. As a result, she concludes, disclosure of this information would likely harm national security. *See id.* ¶ 39.

Fifth, category 5 consists of the identities of entities that provide assistance to the Intelligence Community pursuant to the particular FISC orders at issue here. That information is properly classified, *see id.* ¶ 40; *see also EFF*, 2014 WL 3945646, at *5-7, and Ms. Gaviria details

the risks of harm to national security that could reasonably be expected to result from revealing such information. *See* Gaviria Decl. ¶¶ 41-44. In sum, revealing that information "would replace speculation with certainty for hostile foreign adversaries who are balancing the risk that a particular channel of communications may not be secure against the need to communicate efficiently." *Id.* ¶ 41. Once "alerted, targets could potentially frustrate Intelligence Community collection under other programs by switching to an entity that has not been officially identified as having been subject to specific FISC orders under specific FISA authorities," resulting in a denial of access to those communications and a loss of intelligence. *See id.* ¶ 43. Ms. Gaviria concludes this would result in harm to national security. *Id.* ¶ 44.

Finally, category 6 consists of the dates of issue for each of the FISC orders withheld and the docket numbers associated with those orders. Disclosing when a specific element of the Intelligence Community "focuses significantly on securing specific types of FISA authority for specific targets would provide insight into how active that element was in using a particular FISA authority during a particular time of the year or up to that point" in time. *Id.* For "particularly sophisticated adversaries who engage in advanced operational security techniques," knowledge of when their communications may be safe from collection and when they may not be safe "would be invaluable" to assessing their own "communication security vulnerabilities." *Id.* ¶ 46. As a result, Ms. Gaviria concludes that disclosing this information would harm national security. *Id.* ¶ 47.

In sum, withholding this classified information under Exemption one is well supported by Ms. Gaviria's detailed declaration. And decades of precedent firmly establish that this Court must defer to the Executive's predictions of national security harm that may attend public disclosure of records so long as the predictions appear logical or plausible, as they do here. *See, e.g.*, *CIA v. Sims*, 471 U.S. 159, 179 (1985) ("worthy of great deference"); *Hamdan*, 797 F.3d at 773 (emphasizing the "importance of deference"); *Center for Nat. Sec. Studies v. DOJ*, 331 F.3d 918, 927 (D.C. Cir. 2003) ("consistently reiterated the principle of deference").

With regard to Exemptions three and seven, Plaintiff fails to rebut the arguments set forth in Defendant's initial brief. *See* Def.'s Br. at 10-15. This is because, once Plaintiff's brief has been scrubbed of its attempts to import the USA FREEDOM Act into this case, it is clear that Plaintiff

makes no specific challenge at all to Defendant's Exemption three withholdings, such as by arguing that the two statutes upon which we rely are not proper exemption statutes or that the information detailed in Ms. Gaviria's declaration, Gaviria Decl. ¶¶ 48-51, does not fall within their ambit. Moreover, with regard to Exemption seven—applicable to only one of the six documents—Plaintiff does no more than state that the FBI's declaration is "too conclusory and insufficiently detailed" because it does not demonstrate "that disclosure would harm an ongoing law enforcement investigation or that the FISC opinion discloses law enforcement techniques or procedures, or guidelines for prosecution." Pl.'s Br. at 17 n.8. Plaintiff provides no further details. And so Defendant will not belabor the point here. Defendant has set forth in detail the reasons why it has met the requirements of Exemption 7A and 7E, *see* Def.'s Br. at 12-15, and those reasons find sufficient evidentiary support in Mr. Hardy's 9-page declaration about the withholding of one document. *See* Hardy Decl. ¶¶ 8-23.

For all of these reasons, and the reasons set forth in its initial motion, *see* Def.'s Br. at 6-15, Defendant has shown that it has satisfied its obligations to withhold these six FISC opinions pursuant to Exemptions one, three, and seven.

B. Defendant has carried its Burden of Showing that there are No Reasonably Segregable Portions of the Six FISC Opinions Withheld in Full.

Defendant explained in detail in its initial motion, and in supporting declarations, that it had conducted a segregability analysis of the six documents and that no portion of the documents could be disclosed. *See* Def.'s Br. at 15-16; Gaviria Decl. ¶¶ 52-56; Hardy Decl. ¶¶ 24-25. These supporting declarations are "sufficiently detailed" so that the Court may take them "at face value" and rely on them "in making its segregability determination." *Hamdan*, 797 F.3d at 779.

Plaintiff's response to all of this is to pay no heed to any of the facts in these declarations and to suggest instead that the Court discount them and presume that Defendant has "done the same [thing] here" as Plaintiff says Defendant did in a few cases it cites where the district courts found that the agency's segregability determinations were incorrect. *See* Pl.'s Br. at 22-23. The thrust of Plaintiff's argument is that Defendant has, in those other cases, taken exemptions and otherwise failed to reasonably segregate information "to prevent disclosure of descriptions of

repeated violations of the FISC's orders," Pl.'s Br. at 21, or for other nefarious purposes. *Id.*

Defendant does not have the space here to detail the facts of each of these cases and explain, where necessary, why certain documents were initially withheld in full. But, regardless of the merits of the withholdings in the cases Plaintiff cites, the insinuation has no merit here. Defendant has not taken redactions in order to hide criticisms of Defendant's actions by the FISC, as is evidenced by the press releases Plaintiff issued after receiving the released opinions, some of which contain FISC criticism of certain Government actions. *See* EFF, Newly Released Surveillance Orders Show That Even with Individualized Court Oversight, Spying Powers Are Misused, available at https://www.eff.org/deeplinks/2018/02/newly-released-surveillance-orders-show-even-individualized-court-oversight-spying; EFF, New Surveillance Orders Show that even Judges have Difficulty Understanding and Limiting Government Spying, available at https://www.eff.org/deeplinks/2018/09/new-surveillance-court-orders-show-even-judges-have-difficulty-understanding-and (blogs highlight opinions containing FISC criticism of Government).

Plaintiff's effort to divert the Court's attention to segregability determinations in other cases and not this one has not rebutted the "presumption that [Defendant] complied with the obligation to disclose reasonably segregable material." *Freedom of the Press Found.*, 241 F. Supp. 3d at 1004. That presumption is buttressed by Defendant's good faith decision to re-evaluate 31 previously withheld in full FISC opinions, then release all of those documents in part, and ultimately only withhold in full six of the 79[8] responsive FISC opinions.[9] And, like the Court of Appeals in *Hamdan*, this Court may look to the "partially redacted documents" Defendant produced "to observe [its] approach to redaction" as part of the segregability analysis. *Hamdan*, 797 F.3d at 780, 781. Two examples of the 73 documents released in part will make the point. In Exhibit A,

[8] Defendant's brief and its declarations erroneously listed the number of responsive documents as 80 and not 79. Defendant concurs with Plaintiff's explanation for this discrepancy, *see* Pl.'s Br. at 4 n.1, and it apologizes for the error.

[9] Defendant also notes that it is not appropriate for Plaintiff to take the opposite position. Courts "emphatically reject" lines of argument that "would work mischief in the future by creating a disincentive for an agency to reappraise its position, and when appropriate, release [information] previously withheld." *Military Audit Project v. Casey*, 656 F.2d 724, 754 (D.C. 1981).

Defendant took only light redactions to protect exempt information; whereas, in Exhibit B Defendant had to heavily redact much of the opinion to protect exempt information, which it did rather than seek to withhold the opinion in full.

For all of these reasons, and the reasons set forth in Defendant's initial brief, *see* Def.'s Br. at 15-16, Defendant has complied with its obligations to reasonably segregate information in these six withheld in full FISC opinions.

C. The Court Need Not Resort to *In Camera* Review of the Six Opinions Withheld in Full to Decide this Case.

District courts have discretion to determine whether it is appropriate to conduct *in camera* review of documents the government is withholding pursuant to applicable FOIA exemptions. *See* 5 U.S.C. § 552(a)(4)(B); *Lane v. Dep't of Interior*, 523 F.3d 1128, 1136 (9th Cir. 2008). This discretion should be "rarely exercised," *Lane*, 523 F.3d at 1136, and should "not be resorted to lightly," *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). "*In camera* inspection is particularly a last resort in national security situations like this case—a court should not resort to it routinely on the theory that 'it can't hurt.'" *ACLU*, 628 F.3d at 626. And where, as here, the Government "has sustained its burden of proof on the claimed exemption[s] by public testimony or affidavits," then the Court "need not and should not make in camera inspections." *Lewis*, 823 F.2d at 378.

Plaintiff makes only a tepid argument in favor of *in camera* inspection. *See* Pl.'s Br. at 23-24. Citing *Allen v. CIA*, 636 F.2d 1287 (D.C. Cir. 1980), Plaintiff argues that the "overriding public interest" in these withheld opinions makes the case for *in camera* inspection "particularly acute." Pl.'s Br. at 24. In *Allen* the D.C. Circuit "outline[d] some of the considerations that trial courts should take into account in exercising" their discretion whether to conduct an *in camera* review of the documents at issue. *Allen*, 636 F.2d at 1297. The court listed "strong public interest in disclosure" as only one of five considerations, the others being judicial economy, the conclusory nature of agency affidavits, agency bad faith, and agency concurrence in *in camera* inspection. *See id.* at 1298-99. As Defendant has demonstrated here and in its initial brief, the other considerations do not counsel in favor of *in camera* review. And, with regard to the consideration involving a strong public interest in disclosure, the *Allen* Court observed that the "need for in camera

inspection is greater" in those instances where the agency "deems it in its best interest to stifle or inhibit" a requester's efforts to "ascertain whether" the agency "is properly serving its public function." *Allen*, 636 F.2d at 1299. There is no indication that is the case here.

For these reasons, *in camera* review of the six withheld in full documents is not appropriate.

CONCLUSION

For all of these reasons, and the reasons set forth in Defendant's Motion for Partial Summary Judgment, the Court should grant the Defendant's Motion for Partial Summary Judgment, deny Plaintiff's Cross-Motion for Partial Summary Judgment, and enter partial judgment for the Defendant.

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Respectfully submitted,

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