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

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff,

vs.

DEPARTMENT OF JUSTICE,

Defendant.

Case No. 10-CV-4892-RS

**DEFENDANT’S OPPOSITION TO
PLAINTIFF’S CROSS MOTION FOR
SUMMARY JUDGMENT AND REPLY
IN SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT**

**Judge: Hon. Richard Seeborg
Date: May 31, 2012
Place: Courtroom 3, 17th Floor**

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INTRODUCTION

1
2 In its opening brief, Defendant demonstrated that the Criminal Division (“CRM”), Drug
3 Enforcement Administration (“DEA”), and the Federal Bureau of Investigation (“FBI”) conducted
4 searches reasonably calculated to uncover all responsive documents and that the components have
5 provided Plaintiff with all reasonably segregable, nonexempt information under the FOIA. With
6 the exception of a small number of documents referred out by the components that have yet to be
7 processed,¹ Defendant is entitled to summary judgment with respect to the remaining records that
8 are responsive to Plaintiff’s FOIA requests.
9

10 In Plaintiff’s Cross-Motion and Opposition to Defendant’s Motion for Summary Judgment
11 (“EFF MSJ”), EFF explains that it is not challenging Defendant’s searches or Defendant’s use of
12 Exemptions 2, 6, 7(C) or 7(F). EFF MSJ at 6 n.12. In addition, EFF is not challenging DEA’s use
13 of Exemption 3, FBI’s assertion of the attorney-client privilege, and CRM’s and DEA’s
14 withholdings under Exemption 7(D). As a result, Defendant addresses only the issues that remain
15 in dispute between the parties.
16

17 As set forth below, Defendant demonstrates that, contrary to Plaintiff’s arguments, it has
18 not improperly withheld responsive information, nor has it failed to provide reasonably segregable,
19

20 ¹ In Plaintiff’s Cross-Motion, EFF notes that several documents that FBI stated had been referred to
21 DOJ had not been produced to Plaintiff. *See* EFF’s MSJ at 5 n.11 (citing EFF/Lynch 314-27,
22 EFF/Lynch 363-66, and EFF/Lynch 727-743). In response, FBI contacted the DOJ FOIA Office,
23 part of the Justice Management Division (“JMD”), which was unable to confirm receipt of the
24 referred documents. The FBI immediately provided new copies of the documents (EFF/Lynch
25 314-27 and EFF/Lynch 727-743) to JMD, which, in turn, referred the material to the Civil
26 Division’s FOIA/PA office for processing and direct response to plaintiff. Fourth Hardy Decl. ¶ 3.
27 As for EFF/Lynch 363-66, FBI incorrectly informed Plaintiff that the document had been referred
28 to the DOJ FOIA Office; in fact, it was processed by FBI and released in part. *Id.* at ¶ 4. With
respect to the 351 pages of records referred by CRM to DOJ’s Office of Information Policy, OIP
sent a letter to Plaintiff on April 27, 2011, informing EFF that, given the need for consultations
with other Department components, it would provide a response to Plaintiff’s FOIA request by
May 29, 2012.

1 nonexempt information to Plaintiff. Defendant also shows that FBI's *Vaughn* indices, narrative
2 declarations, and annotated productions provide clear support for FBI's withholdings and that
3 EFF's facial attack on FBI's *Vaughn* indices should be rejected. Defendant then demonstrates that
4 it has properly withheld information with respect to the each of the exemptions that remain in
5 dispute.
6

7 In support of this brief, Defendant attaches supplemental declarations from each component
8 addressing specific points raised in EFF's brief. *See* Fourth Declaration of FBI's David M. Hardy
9 ("Fourth Hardy Decl.") (Ex. A); Third Declaration of DEA's Katherine L. Myrick ("Third Myrick
10 Decl.") (Ex. B); and Declaration of CRM's John E. Cunningham III ("Cunningham Decl.") (Ex.
11 C). These declarations confirm that Defendant is entitled to summary judgment.
12

13 ARGUMENT

14 **I. Defendant Did Not Withhold Responsive, Non-Exempt Information.**

15 EFF contends the components have adopted an unduly narrow interpretation of the
16 information it seeks. EFF's MSJ at 6-9. In particular, EFF contends that it is likely that the
17 components have withheld information that is responsive to its September 28, 2010 request, which
18 was directed to all three components and sought, among other things, documents regarding "any
19 problems, obstacles or limitations that hamper [each component's] current ability to conduct
20 surveillance on communications systems or networks." *Id.* at 6 (quoting FOIA request). In
21 support of this position, EFF points to specific pages the components have either redacted or
22 withheld in full based on the components' determination that the information is non-responsive or
23 "outside the scope" of Plaintiff's requests. *Id.* at 6-8. According to EFF, the titles and subject
24 matter of the documents indicate that the withheld information relates to "problems, obstacles or
25 limitations" that hamper DOJ's current ability to conduct electronic surveillance and therefore is
26

1 responsive to its September 28, 2010 request.² *Id.* at 7. As the supplemental declarations of the
2 components demonstrate, that is not the case.

3 **A. FBI Did Not Withhold Responsive, Non-Exempt Materials.**

4 EFF argues that FBI improperly redacted information contained in several slides from a
5 presentation discussing “‘examples’ of problems the Bureau is facing under CALEA.” EFF MSJ at
6

7 ² In full, this request sought “all agency records created on or after January 1, 2006 (including, but
8 not limited to, electronic records) discussing, concerning, or reflecting”:

- 9 1. any problems, obstacles or limitations that hamper the DOJ’s current ability to
10 conduct surveillance on communications systems or networks including, but not
11 limited to, encrypted services like Blackberry (RIM), social networking sites like
12 Facebook, peer-to-peer messaging services like Skype, etc.;
- 13 2. any communications or discussions with the operators of communications systems
14 or networks (including, but not limited to, those providing encrypted
15 communications, social networking, and peer-to-peer messaging services), or with
16 equipment manufacturers and vendors, concerning technical difficulties the DOJ has
17 encountered in conducting authorized electronic surveillance;
- 18 3. any communications or discussions concerning technical difficulties the DOJ has
19 encountered in obtaining assistance from non-U.S.-based operators of
20 communications systems or networks, or with equipment manufacturers and
21 vendors in the conduct of authorized electronic surveillance;
- 22 4. any communications or discussions with the operators of communications systems
23 or networks, or with equipment manufacturers and vendors, concerning
24 development and needs related to electronic communications surveillance-enabling
25 technology;
- 26 5. any communications or discussions with foreign government representatives or
27 trade groups about trade restrictions or import or export controls related to
28 electronic communications surveillance-enabling technology;
6. any briefings, discussions, or other exchanges between DOJ officials and members
of the Senate or House of Representatives concerning implementing a requirement
for electronic communications surveillance-enabling technology, including, but not
limited to, proposed amendments to the Communications Assistance for Law
Enforcement Act (CALEA).

See, e.g., Ex. 1 to Declaration of Kristin L. Ellis (“First Ellis Decl.”) at 2 (ECF No. 19-2).

1 7 (listing slides at issue). As Mr. Hardy of FBI explains, the slides were not responsive to either of
2 Plaintiff's FOIA requests. First, the slides were not responsive to Plaintiff's initial May 21, 2009
3 request, which was directed only to FBI and sought "Going Dark" materials.³ Consistent with
4 standard FOIA practice, *see* 28 C.F.R. 16.4(a), FBI determined that the slides, which were from an
5 April 2010 presentation, were not responsive to this request because they were generated well after
6 FBI began its search for responsive records in 2009. Fourth Hardy Decl. ¶ 7.

8 The redacted information from the slides was also not responsive to Plaintiff's September
9 28, 2010 request. According to Mr. Hardy, the redacted information consisted "solely of internal
10 proposals to amend current surveillance law." *Id.* As a result, it was not responsive to Plaintiff's
11 request for records regarding "problems, obstacles or limitations" hampering DOJ's current ability
12 to conduct surveillance, or Plaintiff's request for "briefings, discussions, or other exchanges"
13 between DOJ and members of Congress regarding proposed changes to the Communications
14 Assistance for Law Enforcement Act; nor any other category in the September 28, 2010 request.
15 *See* Ex. 1 to Declaration of Kristin L. Ellis ("First Ellis Decl.") (ECF No. 19-2).

17 Similarly, the pages cited in EFF's motion that were withheld in full by FBI as
18 unresponsive to Plaintiff's FOIA requests, *see* EFF's MSJ at 6-7 and 7 n.13, were outside the "date
19 scoping" of the May 21, 2009 request, and were not responsive to the September 28, 2010 request,
20 because the information related either to purely internal proposals to amend current surveillance
21 law, or documented problems conducting electronic surveillance experienced by outside law
22 enforcement, as opposed to problems encountered by DOJ. *See* Fourth Hardy Decl. ¶ 8.

24 _____
25 ³ The "Going Dark" request sought documents from 2007 to the present concerning: (1) "[A]ll
26 records that describe the Going Dark Program"; (2) "[A]ll Privacy Impact Assessments prepared
27 for the Going Dark Program"; and (3) "[A]ll System of Records Notices ('SORNs') that discuss or
describe the Going Dark Program." *Id.* at 2-3. *See* Exhibit A to Declaration of David M. Hardy
("First Hardy Decl.") (ECF No. 19-1).

1 **B. DEA Did Not Withhold Responsive, Non-Exempt Materials.**

2 EFF contends that DEA has improperly withheld responsive material from certain slide
3 presentations. EFF's MSJ at 8. As Ms. Myrick of DEA explains in her supplemental declaration,
4 the slides put at issue by EFF fall into two categories: "(1) slides containing internal legislative or
5 policy discussions and proposed strategies regarding electronic surveillance that do not pertain to
6 specific or technical problems that hamper the DEA's current ability to conduct electronic
7 surveillance on communications systems or networks; and (2) slides containing names, titles, and
8 phone numbers of points of contacts." Third Myrick Decl. ¶¶ 6-7 (discussing Bates numbered
9 slides 26-27, 44, 48, 55, 58, 61-62, 71-77, 81, 84-85, 90-95, 126, 148-149, 191, and 20). This
10 information is not responsive to Plaintiff's September 28, 2010 request.
11

12 **C. CRM Did Not Withhold Responsive, Non-Exempt Materials.**

13 EFF also challenges CRM's determination that various documents were not responsive to
14 Plaintiff's request. EFF's MSJ at 8-9. The Criminal Division's supplemental declaration addresses
15 each of the documents put at issue by EFF and explains the rationale for the decision to treat the
16 material as being unresponsive to Plaintiff's request. *See* Cunningham Decl. ¶¶ 5-7. As this
17 declaration demonstrates, CRM correctly interpreted Plaintiff's FOIA request and has not
18 improperly withheld any nonexempt, responsive materials.
19

20 **II. EFF's Facial Attack on FBI's *Vaughn* Index Should Be Rejected.**

21 All of the components in this case have submitted detailed *Vaughn* indexes and multiple
22 declarations describing the records withheld by the components along with the rationale for
23 applying various exemptions to the materials. Although EFF does not challenge the *Vaughn*
24 indices provided by CRM and DEA, except to dispute the propriety of particular withholdings, EFF
25 does mount a facial attack on FBI's two *Vaughn* indices supporting its withholdings for each of
26
27

1 Plaintiff's two FOIA requests. *See* EFF MSJ at 9-11. In EFF's judgment, these indexes are not
2 sufficiently detailed to allow Plaintiff and the Court to assess the validity of Defendant's
3 withholdings. Below, Defendant shows that EFF's argument is mistaken.

4 An agency's declaration in support of its withholdings must "contain 'reasonably detailed
5 descriptions of the documents and [] facts sufficient to establish an exemption.'" *Kamman v. IRS*,
6 56 F.3d 46, 48 (9th Cir. 1995). In other words, it is the function, not the form, of the *Vaughn*
7 index that is important. *See Judicial Watch, Inc. v. Food & Drug Administration*, 449 F.3d 141,
8 146-147 (D.C. Cir. 2006). As a result, a *Vaughn* index, like the one submitted by DEA and FBI,
9 that groups documents into categories is permitted as long as the index, along with any agency
10 declarations, "provide[] a relatively detailed justification" for any withholdings. *Id.* at 146
11 (internal quotation marks omitted); *see also id.* at 147 (explaining there is no requirement that a
12 *Vaughn* index "treat each document individually"). As shown below, FBI's *Vaughn* indices and
13 supporting declarations "afford the FOIA requester a meaningful opportunity to contest, and the
14 district court an adequate foundation to review, the soundness of the withholding." *Weiner v. FBI*,
15 943 F.2d 972, 977 (9th Cir. 1991).

16 FBI's *Vaughn* indices, which are organized into categories based on the FBI office from
17 which the materials originated, provide detailed summaries of each document category. For
18 instance, the entry for "Category 1B," which is comprised of 179 pages of materials from FBI's
19 Office of Congressional Affairs, contains the following detailed description, which is worth
20 quoting at length given EFF's charge that the descriptions in the indices are cursory boilerplate:
21
22
23

24 **FBI Office of Congressional Affairs (OCA) Response: Talking Points, Discussion**
25 **Papers, Internal E-mails, and Legislative Proposals.** Responsive material consists
26 mostly of internal deliberative talking points and discussion papers concerning the FBI's
27 strategic policy development process relating to surveillance challenges posed by emerging
28 technologies. These 179 pages include assessments and opinions concerning surveillance
challenges faced by the FBI and the law enforcement community, as well as various

1 recommendations, proposals, and advice on multi-point strategies or actions FBI should, or
2 could, adopt, pursue, or consider in order to resolve these challenges. The material includes
3 internal discussions between FBI and DOJ on proposals to change policy, legislation,
4 resources, and FBI operational techniques/procedures as well as detailed identification,
5 analysis, and discussion of technical, legal, policy, and resource impediments to FBI
6 electronic intercept operations. 88 of the 179 Bates pages are unsigned talking
7 points/discussion papers to prepare FBI leadership and personnel for internal strategy
8 meetings and/or guide discussion of FBI participants in the consideration/formulation of
9 strategies or initiatives to address emerging technology issues. 4 of the 179 Bates pages
10 comprise 2 e-mail chains w/attachments between FBI personnel, forwarding talking points
11 to prepare the FBI Director for his annual threat assessment hearing in February 2008, and a
Senate Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies
hearing on June 4, 2009. 79 of the 179 Bates pages are unsigned, edited “redline” versions
of proposed legislation, and internal discussion of proposals for amending CALEA to
enhance ELSUR capabilities. 8 of the 179 Bates pages are summary briefings prepared by
OCA staff members after meetings with Congressman, Senators, and/or congressional
staffers concerning budget discussions and sharing updates on topics such as “Going Dark
Initiative.”

12 Cardozo *Vaughn* Index (ECF No. 41-8) at 1-2.

13 In addition to this description, the *Vaughn* index shows the specific exemptions claimed for
14 Category 1B, the number of pages to which the individual exemptions were applied, how many
15 pages were released in full and withheld in part, and the date and Bates range of the records. *Id.*
16 Furthermore, codes for each exemption appear on the pages that were produced to Plaintiff, which
17 are correlated with the specific portions of the page to which the exemption applies.⁴ *See* Exhibit 4
18 (collecting EFF/Cardozo 67-125 from Category 1B). In addition, where pages were withheld in
19 full, FBI provided deleted page information sheets, listing the exemptions supporting the
20 withholding and providing a further description of the specific material withheld. *Id.* at
21 EFF/Cardozo 109-122.
22

23 The information contained in these documents (i.e., the *Vaughn* index and FBI’s annotated
24

25 ⁴ As noted by EFF (MSJ at 11), some of the pages in FBI’s production mistakenly grouped the
26 exemption codes at the top of the produced pages, rather than next to the portion of the page to
27 which the exemption was applied. This has now been corrected in a supplemental production that
is filed as an exhibit to this brief. Exhibit 5 (Clustered Exemptions Corrections).

1 productions) work in tandem with FBI's narrative declaration. While FBI has now submitted four
2 declarations in this case, it is Mr. Hardy's 170-page Second Declaration (ECF No. 41) that
3 primarily describes the nature of the information FBI withheld and the rationale for doing so. This
4 declaration provides an overview of the rationale for all of the exemptions invoked in this case, *see*
5 Second Hardy Decl. ¶¶ 23-84, offers detailed descriptions of the documents contained in each
6 category, *see, e.g., id.* at ¶¶ 85, 91, and contains the justification for invoking the particular
7 exemptions that were applied to the materials in each category. For instance, with respect to FBI's
8 application of the deliberative process privilege to 14 pages in the Category 1B records, the
9 narrative declaration explains that the "protected material contained draft deliberative talking
10 points and discussion papers, and internal e-mail chains w/attachments, concerning the FBI's
11 development of a strategic policy relating to surveillance challenges posed by emerging
12 technologies." Second Hardy Decl. ¶ 93. "This material also includes assessments and opinions
13 concerning surveillance challenges faced by the FBI and the law enforcement community, as well
14 as various recommendations, proposals, and advice on multi-point strategies or actions FBI should,
15 or could, adopt, pursue, or consider in order to resolve these challenges." *Id.* As FBI explains,
16 "[r]elease of this type of information would have an inhibitive effect upon the development of
17 policy and administrative direction of an agency because it would chill the full and frank
18 discussion between agency personnel regarding a decision." *Id.* Contrary to Plaintiff's
19 suggestions, there is no confusion here regarding what materials FBI has withheld, nor any doubt
20 about the validity of FBI's application of the deliberative process privilege to these records.
21
22
23

24 FBI has spent months preparing its *Vaughn* indices and narrative declaration. Along with
25 the information provided in the produced pages to EFF, FBI has provided extensive information
26 about the materials it withheld and the reasons for doing so. As a result, FBI has met its
27

1 obligations to support the exemptions invoked in this case. EFF offers no persuasive reason for
2 rejecting the entirety of FBI's *Vaughn* indices and narrative declaration.

3 **III. Defendant Has Provided All Reasonably Segregable, Non-Exempt**
4 **Information.**

5 FOIA requires that "[a]ny reasonable segregable portion of a record shall be provided to
6 any person requesting such record after deletion of the portions which are exempt under this
7 subsection." 5 U.S.C. § 552(b). This provision, however, does not require the disclosure of non-
8 exempt information that would be meaningless. *See, e.g., Nat'l Sec. Archive Fund, Inc. v. CIA*, 402
9 F. Supp. 2d 211, 220-21 (D.D.C. 2005). In addition, "[a]gencies are entitled to a presumption that
10 they complied with their obligation to disclose 'any reasonably segregable portion of a record.'"
11 *See Boyd v. Criminal Div. of U.S. Dep't of Justice*, 475 F.3d 381, 382 (D.C. Cir. 2007) (quoting 5
12 U.S.C. § 552(b)).
13

14 The components have each represented in their declarations that they have engaged in a
15 line-by-line review of all responsive records and that they have provided Plaintiff with all
16 reasonably segregable, non-exempt information.⁵ Despite these representations, EFF contends that
17 "it is a near certainty that Defendant has withheld more information that is otherwise justifiable."
18 EFF's MSJ at 35. But EFF offers no persuasive reason to think so. As the produced pages to EFF
19 reveal, the components have carefully applied the redactions in order to release all reasonably
20

21
22 ⁵ As required by the FOIA, CRM, DEA and FBI have provided all "reasonably segregable"
23 responsive information that is not protected by an exemption. 5 U.S.C. § 552(b). *See* Second Ellis
24 Decl. (ECF No. 39-1) ¶ 30 ("CRM conducted an exacting, line-by-line review of the records
25 located during our wide-ranging search to identify any non-exempt information that could
26 reasonably be segregated and released without adversely affecting the Government's legitimate law
27 enforcement interests."); Second Myrick Decl. (ECF No. 40) ¶ 9j (stating that "[a]ll responsive
28 pages were examined to determine whether any reasonably segregable information could be
released"); Second Hardy Decl. (ECF No. 41) ¶ 22 (stating that "FBI has taken all reasonable
efforts to ensure that no segregable, nonexempt portions were withheld from plaintiff.").

1 segregable, non-exempt information to Plaintiff. *See, e.g.*, Ex. 4 (EFF/Cardozo 67-69). It is also
2 no surprise that much of the information sought by EFF has been withheld given that Plaintiff's
3 request sought information about problems hampering DOJ's current ability to conduct electronic
4 surveillance, which effectively ensured that much of what Plaintiff sought would be exempt under,
5 *inter alia*, Exemption 7(E), since disclosure of this factual information risks circumvention of the
6 law. *See infra*, Section IV.

8 As the components' declarations, *Vaughn* indices and annotated productions demonstrate,
9 the components have complied with their obligations to provide all reasonably segregable, non-
10 exempt information. Defendant will address EFF's additional exemption-specific segregability
11 arguments below.

12 **IV. Defendant Has Properly Withheld Sensitive Law Enforcement Information**
13 **Pursuant to Exemption 7.**

14 **A. Defendant Properly Withheld Information Under Exemption**
15 **7(E).**

16 1. *Contrary to EFF's Suggestions, Defendant Did Not Invoke*
17 *Exemption 7(E) To Withhold Information About Law Enforcement*
Techniques and Procedures That Are Well-Known To The Public.

18 The components properly invoked Exemption 7(E) to withhold detailed information
19 regarding problems and difficulties that are hampering the components' current ability to conduct
20 lawful electronic surveillance. *See* Def's MSJ (ECF No. 39) at 31-33. As Defendant's opening
21 brief demonstrated, and as set forth in detail in the declarations and *Vaughn* indices of the
22 components, all of the legal requirements for withholding information under Exemption 7(E) are
23 met here. *First*, it is undisputed that all of the materials withheld pursuant to Exemption 7(E) were
24 compiled for law enforcement purposes. *Id.* at 22-24. *Second*, the components have provided
25 detailed explanations for why the release of information regarding problems experienced by DOJ
26 while conducting lawful electronic surveillance, efforts by criminal entities to exploit these

1 vulnerabilities, and counter-measures taken by DOJ in response, would provide a detailed road
2 map for criminal entities to evade lawful electronic surveillance and risk circumvention of the law.
3 *Id.* at 31-33; *see also, e.g.*, Second Ellis Decl. ¶ 39 (stating that “release of this information would
4 provide a detailed road map that would permit criminals to evade lawful electronic surveillance by
5 law enforcement and thwart investigative efforts, thus posing a real and significant threat of
6 circumvention of the law”). As a result, the components properly invoked Exemption 7(E) to
7 withhold this information. *See* 5 U.S.C. § 552(b)(7)(E) (stating that Exemption 7(E) authorizes an
8 agency to withhold “records or information compiled for law enforcement purposes,” where
9 release of such information “would disclose techniques and procedures for law enforcement
10 investigations or prosecutions, or would disclose guidelines for law enforcement investigations or
11 prosecutions if such disclosure could reasonably be expected to risk circumvention of the law”).
12
13

14 In response, EFF argues that the withheld information about law enforcement techniques
15 and procedures is well-known to the public, and then based on this unsupported claim, contends it
16 may not be withheld under Exemption 7(E). EFF’s MSJ at 32 (citing *Rosenfeld v. DOJ*, 57 F.3d
17 803, 815 (9th Cir. 1995) (finding that DOJ could not withhold use of so-called pretext phone calls
18 under Exemption 7(E) because this technique “would leap to the mind of the most simpleminded
19 investigator”). EFF is mistaken. The Criminal Division expressly stated in its declaration that the
20 information it withheld under Exemption 7(E) is not publicly known. According to Ms. Ellis of the
21 Criminal Division, “[a]lthough electronic surveillance is a well-known law enforcement technique,
22 the particulars of when and how such surveillance is conducted, and more specifically, of
23 difficulties in conducting electronic surveillance, are not well-known to the public.” Second Ellis
24 Decl. ¶ 37. Specifically, CRM withheld information pursuant to Exemption 7(E) that “implicitly or
25 explicitly reveals the parameters of the Department’s surveillance techniques and guidelines;
26
27

1 details the difficulties, vulnerabilities, and/or technical limitations of conducting such surveillance
2 on specific carriers/service providers or on specific devices; and describes the exploitation of such
3 vulnerabilities or limitations by child predators, drug cartels and traffickers, and other criminal
4 elements.” *Id.* “Plaintiff’s request, by its very terms, seeks information that would detail how to
5 evade lawful electronic surveillance by law enforcement. This information necessarily implicates
6 surveillance techniques and guidelines that are not well-known to the public.” Ellis Decl. ¶ 38.
7
8 EFF offers no reason to cast doubt on the Criminal Division’s conclusion that this information is
9 not well known to the public and that its release would risk circumvention of the law.

10 With respect to DEA and FBI, the components’ previous descriptions of the Exemption
11 7(E) materials make it apparent that this information is not widely known to the public. *See* Def’s
12 MSJ at 31-33. In addition, FBI and DEA each confirm in their supplemental declarations that the
13 information they withheld under Exemption 7(E) is not widely known. According to DEA, the
14 Exemption 7(E) material “consists of detailed information regarding the problems, obstacles, or
15 limitations that hamper DEA’s current ability to conduct surveillance on communications systems
16 or networks, as well as DEA’s countermeasures to these limitations and obstacles. This
17 information is not publicly known.” Third Myrick Decl. ¶ 12. FBI explains that, “[w]hile there
18 have been public reports indicating the government has had trouble conducting electronic
19 surveillance, it is the FBI’s understanding that the specific and detailed information withheld under
20 Exemption 7(E) by the FBI in this case is not widely known to the public.” Fourth Hardy Decl. ¶

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22
23 17

24 EFF mistakenly assumes that because the components have *released* some information
25 about techniques and technologies that are known to the public, this indicates that the government
26 is improperly *withholding* similar information under Exemption 7(E). *See* EFF’s MSJ at 34 (noting

1 government has released information about techniques and technologies known to the public, such
2 as references to “email, VoIP (Voice over IP), Peer-to-Peer networks, Skype and Blackberry
3 services, and HTTPS”). What this demonstrates, however, is a careful effort to segregate and
4 provide well-known information about law enforcement techniques and procedures, while
5 protecting information that is not widely known and whose release could risk circumvention of the
6 law. *See, e.g.*, Third Myrick Decl. ¶ 12 (stating that “DEA has segregated and released information
7 pertaining to techniques and technologies that are widely known,” including producing the “names
8 of a wide variety of communications providers and the methods employed by those providers in
9 today’s market,” while withholding information that is not well known to the public and whose
10 disclosure risks circumvention of the law).

11
12 2. *EFF Is Wrong That FBI’s Vaughn Index Fails To Support The Bureau’s*
13 *Exemption 7(E) Withholdings.*

14 EFF argues that FBI’s *Vaughn* index fails to adequately explain why the release of the
15 information it withheld under Exemption 7(E) would risk circumvention of the law. EFF’s MSJ at
16 31-32. According to EFF, “[t]he paragraphs in the Hardy Declaration offer ‘little more than a
17 generic assertion that disclosure’ could lead to circumvention and are ‘insufficient to carry the
18 FBI’s burden with respect to Exemption 7(E) withholdings.’” EFF MSJ at 31 (quoting *ALCU v.*
19 *ODNI*, 2011 U.S. Dist. LEXIS 132503 at *34-35 (S.D.N.Y., Nov. 15, 2011)). That is not the case.
20 For instance, in his second declaration, Mr. Hardy explains that the Exemption 7(E) materials
21 contain “information regarding the employment of specific surveillance techniques, the procedures
22 employed by FBI, DOJ, and other law enforcement agencies for the conduct of such surveillance;
23 the difficulties, vulnerabilities, and /or limitations of conducting such surveillance in technical and
24 specific carrier/service-provider contexts; and the exploitation of such vulnerabilities or limitations
25 by criminal and terrorists elements, and child pornography predators.” Second Hardy Decl. ¶ 84.

1 In addition, “[t]he responsive pages also include guidance on how to conduct investigations of
2 communications systems or networks to work around intercept difficulties and/or how to employ
3 countermeasures to intercept evasion practices employed by criminal and terrorist elements, and
4 child pornography predators.” *Id.* This declaration leaves no doubt the nature of the materials
5 withheld or the threat their release would pose to law enforcement.
6

7 In sum, EFF’s arguments that the components have improperly invoked Exemption 7(E)
8 should be rejected. It is readily apparent that requiring the components to release detailed, non-
9 public information about vulnerabilities and problems encountered by FBI, DEA and CRM in
10 conducting lawful electronic surveillance would create a serious risk of circumvention of the law,
11 since criminal entities would likely use the information in an attempt to evade surveillance.
12 Exemption 7(E) was designed to protect precisely this kind of information.
13

14 **B. Defendant Has Properly Withheld Information Under Exemption 7(A).**

15 All three components have withheld information from criminal cases under Exemption
16 7(E), which authorizes the withholding of information “compiled for law enforcement purposes,”
17 where release “could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C.
18 § 552(b)(7)(A). Defendant has demonstrated that the information it withheld under Exemption
19 7(A) was compiled for law enforcement purposes and relates to ongoing criminal investigations.
20 Def’s MSJ at 24-26. Furthermore, the components have clearly articulated why the release of this
21 information would interfere with enforcement proceedings. *Id.* Therefore, all the legal
22 requirements for withholding under Exemption 7(A) have been met. 5 U.S.C. § 552(b)(7)(A).
23

24 In response to this showing, EFF offers only the purely speculative charge that the
25 components could likely release Exemption 7(A) protected information without interfering with
26 enforcement proceedings if the components redacted out identifying information in the documents
27

1 such as names and dates. EFF's MSJ at 26-27. However, Exemption 7(A) extends to *all*
2 information gathered from ongoing criminal cases that could interfere with enforcement
3 proceedings. *See* 5 U.S.C. § 552(b)(7)(A). In this case, for example, the Criminal Division
4 invoked Exemption 7(A) to withhold several pages containing "operational details of an ongoing
5 transnational criminal investigation conducted by both foreign law enforcement entities and U.S.
6 law enforcement agencies." Cunningham Decl. ¶ 8 (discussing CRM 15-19). As a consequence,
7 "even if CRM redacted the names of individuals from the document, the release of the remaining
8 non-redacted information would still interfere with an ongoing enforcement proceeding because
9 the information would highlight those countries who are actively engaged in cooperating with U.S.
10 law enforcement agencies and possibly allow those persons being targeted to learn of the
11 investigation and to possibly elude detection." *Id.*

12
13
14 Moreover, EFF's argument also overlooks that, in addition to Exemption 7(A), the
15 components have applied other exemptions to these documents, including Exemption 7(E). All
16 three components have made clear that they have provided all reasonably segregable non-exempt
17 information. Second Ellis Decl. ¶ 30 ("CRM conducted an exacting, line-by-line review of the
18 records located during our wide-ranging search to identify any non-exempt information that could
19 reasonably be segregated and released without adversely affecting the Government's legitimate law
20 enforcement interests."); Second Myrick Decl. ¶ 9j (stating that "[a]ll responsive pages were
21 examined to determine whether any reasonably segregable information could be released"); Second
22 Hardy Decl. ¶ 22 (stating that "FBI has taken all reasonable efforts to ensure that no segregable,
23 nonexempt portions were withheld from plaintiff."). These determinations are accorded a
24 presumption good faith and EFF offers no basis to undermine this presumption here. *Boyd*, 475
25 F.3d at 382.

1 Finally, EFF includes an additional argument directed only at FBI: namely, that FBI's
2 *Vaughn* indices do not adequately support the Exemption 7(A) withholdings because the document
3 categories are not organized by topic, but instead are organized based on the office that provided
4 the information. EFF's MSJ at 27-28. According to EFF, the categorization in the *Vaughn*
5 "should be clear enough to permit a court to ascertain 'how each . . . category of documents, if
6 disclosed, would interfere with the investigation.'" EFF's MSJ at 28 (quoting *In re DOJ*, 999 F.2d
7 1302, 1310 (8th Cir. 1993)).

9 Contrary to Plaintiff's allegations, FBI has adequately demonstrated how the release of the
10 information it has withheld under Exemption 7A would interfere with law enforcement
11 proceedings. *See, e.g., Second Hardy Decl.* ¶ 74 (stating that release of the Exemption 7(A)
12 information would reveal the scope, direction, nature and pace of the investigations as well as
13 reveal information that could harm prospective and/or ongoing government prosecutions in these
14 matters. If the information is released, the individuals and/or entities, who are of investigative
15 interest in the cases could use the information to develop alibis, take steps to circumvent the law,
16 create factitious defenses or intimidate, harass or harm potential witnesses.").

18 **C. FBI Properly Withheld Information Under Exemption 7(D).**

19 FBI properly applied Exemption 7(D), at times in conjunction with Exemption 1, to
20 withhold information provided to the FBI by certain companies during the course of FBI's
21 intelligence investigations. *See Second Hardy Decl.* ¶¶ 76-78.

23 Exemption 7(D) authorizes the withholding of information in law enforcement records that
24 "could reasonably be expected to disclose the identity of a confidential source," as well as
25 information "furnished by a confidential source" if it was "compiled by [a] criminal law
26 enforcement authority in the course of a criminal investigation or by an agency conducting a lawful
27

1 national security investigation[.]” 5 U.S.C. § 552(b)(7)(D). Exemption 7(D) applies if the agency
2 establishes that a source has provided information under either an express or implied promise of
3 confidentiality. *U.S. Dep’t of Justice v. Landano*, 508 U.S. 165, 172 (1993). For assertions of
4 implied promises of confidentiality, the agency must “describe circumstances that can provide a
5 basis for inferring confidentiality.” *Davin v. U.S. Dep’t of Justice*, 60 F.3d 1043, 1063 (3d Cir.
6 1995). As Defendant explained in its opening brief, the circumstances here show that the
7 companies provided this information under an implied assurance of confidentiality that their
8 identities would not be revealed. Def.’s MSJ at 31.

9
10 EFF contends that these communications were not made under an implied assurance of
11 confidentiality. EFF’s MSJ at 29-30. Plaintiff asserts that the sources did not provide
12 information to the FBI “related to a violent crime” and did not have “a relationship to the possible
13 criminal activity that could place them in harm’s way.” *Id.* at 30. Although such factors have been
14 found by courts to support a finding that a source spoke under an implied assurance of
15 confidentiality, *see id.* at 29 (discussing decisions), these factors are not dispositive. Rather, the
16 key question is whether it is reasonable to conclude given the particular circumstances of the case
17 that the source spoke to law enforcement under an implied promise of confidentiality. *See*
18 *Landano*, 508 U.S. at 179.
19

20
21 Here, as Mr. Hardy explains in his declaration, although the companies were under a legal
22 obligation to provide the information to the FBI in connection with an ongoing investigation, “an
23 implied assurance of confidentiality was nevertheless critical to ensuring that these companies did
24 not unnecessarily resist that obligation, thereby increasing the FBI’s burden of obtaining important
25 lawfully-available investigative material.” Second Hardy Decl. ¶ 78. According to Mr. Hardy, the
26 companies “would pay a high price if it were known that they were providing information about
27

1 their customers to the FBI.” *Id.* Under these circumstances, where the companies faced a clear
2 economic cost to providing the information, there is every reason to believe they provided the
3 information expecting that their identities would remain confidential. Indeed, had they understood
4 otherwise, they would have been extremely unlikely to voluntarily provide the information given
5 that its disclosure so clearly threatens their economic interests.
6

7 **V. Defendant Has Properly Withheld Information Under Exemption 5.**

8 The deliberative process privilege applies to “decisionmaking of executive officials
9 generally,” and protects documents containing deliberations that are part of the process by which
10 governmental decisions are formulated. *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997). A
11 document may be withheld on the basis of the deliberative process privilege if it is both pre-
12 decisional and deliberative. *Nat’l Wildlife Federation v. U.S. Forest Serv.*, 861 F.2d 1114, 1117
13 (9th Cir. 1988). A document is “predecisional” if it is “generated before the adoption of an agency
14 policy,” and “deliberative” if it “reflects the give-and-take of the consultative process.” *Coastal*
15 *States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The privilege “thus
16 covers recommendations, draft documents, proposals, suggestions, and other subjective documents
17 which reflect the personal opinions of the writer rather than the policy of the agency.” *Id.*
18

19 Below, Defendant responds to EFF’s arguments that Defendant has improperly invoked the
20 deliberative process privilege to withhold purely factual material, drafts, final agency positions,
21 and documents shared with non-Executive personnel. In addition, Defendant responds to EFF’s
22 argument that the Criminal Division has improperly invoked the attorney work product privilege.
23 With respect to EFF’s arguments that FBI’s *Vaughn* indices do not adequately support its
24 deliberative process withholdings, Defendant respectfully refers the Court to Section II, *supra*,
25 which demonstrates that FBI has provided detailed information in support of its deliberative
26
27

1 process assertions.

2 **A. Defendant Did Not Invoke The Deliberative Process Privilege To**
3 **Withhold Segregable, Non-Exempt Factual Material.**

4 As EFF correctly observes, “purely factual material contained in deliberative memoranda
5 and severable from its context” may not be withheld under the deliberative process privilege. EFF
6 MSJ at 24 (quoting *EPA v. Mink*, 410 U.S. 73, 88-989 (1973)). EFF speculates that given the large
7 number of pages to which the components have applied the deliberative process privilege, “it is a
8 near-certainty” that the components have improperly withheld segregable, non-exempt factual
9 material. EFF MSJ at 24. As noted above, a component’s segregability determinations are entitled
10 to a presumption of regularity. *See Boyd*, 475 F.3d at 382. Here, the components have all provided
11 sworn declarations stating that all reasonably segregable, nonexempt factual information was
12 provided to EFF. Second Ellis Decl. ¶ 30; Second Myrick Decl. ¶ 9j; Second Hardy Decl. ¶ 22.

13
14 In addition, as noted above, the redacted pages produced to EFF show a careful effort on the part of
15 the components to provide as much non-exempt information as possible. Moreover, most of the
16 records withheld under the deliberative process privilege were also withheld under other
17 exemptions, including Exemption 7(E), which expressly protects factual information whose
18 disclosure could risk circumvention of law. *See, e.g.*, Second Hardy Decl. ¶ 84; Second Myrick
19 Decl. ¶ 9(g). Given the overlap between Exemptions 5 and 7, it is unsurprising that substantial
20 amounts of factual material regarding the components’ problems conducting electronic surveillance
21 were withheld. EFF offers no grounds for concluding that the components have improperly
22 withheld segregable factual matter from the deliberative materials. *Id.* at ¶ 45 (explaining that
23 “factual, final product, or public source information” was segregated for release from deliberative
24 materials).
25
26

1 **B. FBI Did Not Invoke The Deliberative Process Privilege To Withhold**
2 **Draft Documents Merely Because the Documents Were Drafts.**

3 EFF mistakenly contends that FBI withheld draft documents under the deliberative process
4 privilege simply because the documents were drafts. EFF's Br. at 23. As FBI has made clear, it
5 applied the deliberative process privilege only to predecisional, deliberative material. Second
6 Hardy Decl. ¶¶42-48; *id.* at ¶ 45 (noting that draft material in this case "is replete with edits, strike-
7 through and other formatting changes, marginal suggestions and comments, and/or embedded
8 questions regarding content). FBI confirms in the supplemental Hardy Declaration that it "has not
9 applied the deliberative process privilege to any drafts merely because the documents were drafts
10 but, instead, because the substance of the drafts were found to be both predecisional and
11 deliberative." Fourth Hardy Decl. ¶ 12.

12 **C. DEA And FBI Did Not Waive The Deliberative Process Privilege.**

13 Exemption 5 applies to "inter-agency or intra-agency" records. 5 U.S.C. § 552(b)(5). This
14 means that, "[i]n general, this definition establishes that communications between agencies and
15 outside parties are not protected under Exemption 5." *Ctr. For Int'l Env'tl. Law v. Office of the U.S.*
16 *Trade Rep*, 237 F. Supp. 2d 17, 25 (D.D.C. 2002). Here, EFF contends that DEA and FBI have
17 invoked the deliberative process privilege to improperly withhold materials that "were likely
18 shared outside the executive branch, and, thus, have waived their protection under Exemption 5."
19 EFF's MSJ. at 19.

20 *FBI Materials.* EFF puts at issue two FBI documents as well as pages relating to a meeting
21 of law enforcement professionals convened by the FBI. *See* EFF MSJ at 19 (citing EFF/Lynch
22 347-360; EFF/Lynch 308; and EFF/Lynch 1241-1323). As FBI's supplemental declaration
23 explains, the first document (EFF/Lynch 347-360) is "an internal draft of proposed testimony
24 prepared by the [FBI's Office of Congressional Affairs] for the Director for his review and
25

1 approval in anticipation of an appearance before a closed session of the Senate Select Intelligence
2 Committee.” Fourth Hardy Decl. ¶ 13. This document also contains classified information and is
3 partially withheld under Exemption 1 and withheld in full under Exemption 7(E). *Id.*

4 The second document (EFF/Lynch 308) is an internal document summarizing the results of
5 a meeting between DOJ personnel and a staff employee of the Senate Judiciary Committee. *Id.* at ¶
6 14. According to Mr. Hardy, “[t]he internal staff briefing summary reflects the views of the [FBI]
7 author as to what portions of the meeting were relevant and was compiled to assist the FBI in its
8 ongoing deliberations about how to respond to challenges experienced by law enforcement in
9 conducting electronic surveillance.” *Id.*

11 The remaining materials put at issue by EFF are an internal executive summary of meeting
12 notes and a copy of internal presentations given at a June 25, 2009 “Law Enforcement Executive
13 Forum (“LEEF”). *Id.* at ¶ 15. LEEF was established by the FBI “as a way to bring federal, state,
14 and local law enforcement personnel from around the country to the FBI to act as consultants on
15 particular topics of interest to the FBI.” *Id.* Although the presentations were shared with outside
16 law enforcement, the information is still properly protected under the deliberative process privilege
17 under the “consultant corollary” established by the Supreme Court in *Dep’t of the Interior v.*
18 *Klamath Water Users Protective Ass’n*, 532 U.S. 1 (2001).

21 In *Klamath*, the Supreme Court recognized that the deliberative process privilege may
22 “extend[] to communications between Government agencies and outside consultants hired by
23 them.” 532 U.S. 1, 10 (2001). According to the D.C. Circuit, “[t]ypically, the relationship is
24 evidenced by the fact that the agency seeks out the individual consultants and affirmatively solicits
25 their advice in aid of agency business.” *National Institute of Military Justice v. DoD*, 512 F.3d
26 677, 685-686 (D.C. Cir. 2008). In addition, the communications must be treated as confidential.

1 *Id.* at 685. In short, where the government solicits the assistance of persons who provide the
2 government disinterested advice or information that becomes an integral part of an agency’s
3 predecisional, deliberative decision-making, these communications will be treated as “intra
4 agency” records. *Klamath*, 532 U.S. at 10.

5
6 According to Mr. Hardy, the “June 25, 2009 discussion topic [at LEEF] concerned the
7 FBI’s development of a unified electronic surveillance strategy which the invited law enforcement
8 community attendees were asked to review and provide input.” *Id.* at ¶ 15. Because FBI solicited
9 the views of these outsiders to offer input on the development of the Bureau’s electronic
10 surveillance policy, *see also id.* at ¶ 15 (noting that only attendees from the law enforcement
11 community and FBI staff were present, and the materials were not made public), the law
12 enforcement personnel were acting as consultants within the meaning of the *Klamath* decision.
13 Consequently, these communications should be treated as “intra-agency” records and the feedback
14 provided by these consultants that became part of FBI’s ongoing deliberations about how to shape
15 its future policy is properly protected by the deliberative process privilege.

17 ***DEA Materials.*** EFF contends that DEA improperly invoke the deliberative process
18 privilege to withhold 26 pages describing communications between DEA and six “carrier, service
19 provider, and/or consultant/vendor companies regarding specific technical intercept difficulties
20 encountered during intercept operations.” EFF MSJ at 19 (citing DEA 6-5-31). Ms. Myrick of
21 DEA states that “DEA initiated contact with these companies seeking their expertise, advice, and
22 voluntary assistance in solving particular intercept issues and to flesh-out DEA needs and
23 requirements.” Second Myrick Decl. ¶ 21b(1)(b). In other words, DEA sought out the expertise of
24 these outside consultants to assist DEA in ongoing deliberations about how to resolve particular
25 intercept issues. Therefore, the deliberations are properly protected by the deliberative process
26

1 privilege under the consultant corollary established in *Klamath*.

2 EFF also puts at issue 8 pages of internal reports documenting “meetings between
3 designated DEA personnel and representative personnel of communication carriers, service
4 providers, or communications industry consultants.” EFF MSJ at 19 (describing DEA 6-32-40).
5 The meetings were initiated by DEA “to seek the understanding, advice, and cooperation of
6 industry operators and experts, so that DEA could obtain a more in-depth understanding of
7 particular emerging technology intercept challenges.” Second Myrick Decl. ¶ 21b(1)(b)DEA
8 *Vaughn* Index at 14-15. The internal reports are properly protected by the deliberative process
9 privilege because they contain DEA’s analysis of the meetings and internal recommendations
10 regarding solutions to intercept problems. In addition, the representative of these companies were
11 acting as *Klamath* consultants, because they were providing expert input at the request of DEA to
12 assist the component in formulating decisions and policy relating to electronic surveillance.
13
14

15 **D. Defendant Did Not Invoke The Deliberative Process Privilege To**
16 **Withhold Final Agency Positions.**

17 EFF accuses FBI and DEA of improperly invoking the deliberative process privilege to
18 withhold documents reflecting final agency positions or opinions. EFF MSJ at 21. In support, EFF
19 contends that withheld “talking points” memos and “question and answers (Q and As)” “likely”
20 reflect final agency positions. EFF MSJ at 22.

21 The declarations provided by FBI and DEA expressly state that the release of the “talking
22 points” memos, otherwise known as “discussion papers,” would confuse the public “as they do not
23 reflect final agency action or decision.” *See* Second Hardy Decl. ¶ 46; Second Myrick Decl. ¶ 9c
24 (same); *see also* Fourth Hardy Decl. ¶ 12 (stating that “FBI has not applied the deliberative process
25 privilege to withhold documents reflecting final agency positions”).
26

27 With respect to the Q&A put at issue by EFF, DEA explained that there were several draft

1 versions of the document that contained “editorial comments and/or textual edits.” *Id.* ¶ 23.
2 Furthermore, the document was prepared by a subordinate for Acting Administrator Leonhart to
3 prepare to testify before Congress. However, “the content of these drafts were not disclosed in
4 public testimony.” *Id.* According to DEA, “[r]elease of this draft, advisory material would
5 diminish efficient preparation of the DEA Administrator in formulating DEA policy and positions
6 before Congress as well as generate public confusion as they do not relate to final agency actions.”
7 *Id.* This description shows that the Q&A did not embody a final agency action and was both
8 predecisional and deliberative and hence is properly protected under the deliberative process
9 privilege. *Coastal States*, 617 F.2d at 866.
10

11 EFF also challenges DEA’s withholding of a two-page internal bulletin, which, according
12 to EFF, likely represents the final position of the DEA. EFF MSJ at 2 (discussing DEA 7-1-7).
13 According to DEA’s supplemental declaration, the draft bulletin, which addressed a particular
14 intercept issue, reflected the thoughts and opinion of a subordinate that were ultimately not adopted
15 by DEA. Third Myrick Decl. ¶ 11. “Thus, information contained in the bulletin did not represent
16 the final agency position of DEA. Accordingly, DEA properly withheld the bulletin under
17 Exemption 5 as the document was an internal agency document containing deliberative
18 information.” *Id.*
19

20 EFF also challenges FBI’s application of the deliberative process privilege to EFF/Lynch
21 329-331. EFF MSJ at 22. In the FBI’s supplemental declaration, Mr. Hardy clarifies that FBI’s
22 description of the document as containing “definitions” implied that these “definitions” were
23 adopted as standards. Fourth Hardy Decl. ¶ 16. In reality, however, this was a “discussion paper
24 article” that was part of FBI’s ongoing deliberations about how to formulate future policy in
25 response to challenges experienced by law enforcement in conducting electronic surveillance. *Id.*
26

1 No policy decisions were enacted in response during the date-scoping period. *Id.* Because the
2 document is both predecisional and deliberative, it is properly protected under the deliberative
3 process privilege.

4 **E. Criminal Division Properly Applied The Attorney Work Product**
5 **Privilege.**

6 EFF challenges the Criminal Division's application of the attorney work product privilege.
7 EFF's MSJ at 25-26. The attorney work product doctrine protects materials prepared by an
8 attorney in anticipation of litigation, including the materials of government attorneys generated in
9 litigation and pre-litigation counseling. *See* Fed. R. Civ. P. 26(b)(3); *In re Grand Jury Subpoena*
10 (*Mark Torf/Torf Environmental Management*), 357 F.3d 900, 907 (9th Cir. 2004). EFF argues that
11 the Criminal Division has failed to demonstrate that the materials it has treated as protected by the
12 attorney work product privilege were created in response to actual or anticipated litigation, as
13 opposed to being created merely in the "agency's ordinary course of business." EFF MSJ at 26
14 (quoting *Public Citizen, Inc. v. Dep't of State*, 100 F. Supp. 2d 10, 30 (D.D.C. 2000), overruled on
15 other grounds in *Public Citizen v. Department of State*, 276 F.3d 634, (D.C. Cir. 2002)).
16

17 The Criminal Division's declarations and *Vaughn* index demonstrate that the four
18 documents it withheld under the attorney work product privilege were all generated in direct
19 response to ongoing or anticipation litigation. *See* Second Ellis Decl. ¶ 43 (listing attorney work
20 product materials as CRM-000003; CRM-000042-43; CRM-000052; and CRM-000053-54); *see*
21 *also* CRM's *Vaughn* Index at 3 (explain CRM-000003 contained two emails between CRM
22 employee and AUSA regarding intercept issues related to particular criminal investigation); *id.* at 6
23 (explaining that CRM-000042 to CRM-000043 contained information regarding sex offenders' use
24 of a certain technology gathered as part of particular criminal prosecution); *id.* at 7 (explaining that
25 CRM-0000053-54 contained an email from AUSA to a CRM employee regarding law
26
27 CRM-0000053-54 contained an email from AUSA to a CRM employee regarding law

1 enforcement's ability to intercept certain types of communications, which the AUSA was seeking
2 in furtherance of particular case he was working on); *see* Cunningham Decl. at 9 (explaining CRM-
3 50-52 contained discussion among Department attorneys in relation to ongoing case under
4 investigation).

5
6 These descriptions clearly demonstrate that the withheld information was generated in
7 direct response to ongoing or anticipated litigation. As a result, the materials were properly
8 withheld under the attorney work product privilege.

9 **VI. Defendant Has Properly Withheld Information Pursuant to Exemption 4.**

10 Exemption 4 authorizes withholding "trade secrets and commercial or financial information
11 obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). DEA invoked
12 Exemption 4 to protect information voluntarily provided by five companies to DEA regarding their
13 internal operations, technical and product capabilities, and compliance plans that was used to help
14 DEA solve particular intercept issues encountered during electronic surveillance operations. Third
15 Myrick Decl. ¶ 8. FBI invoked Exemption 4 to protect proprietary information submitted by the
16 RAND Corporation describing a proposed contract relating to the "FBI's Going Dark Initiative
17 Surveillance Analyst Project." Fourth Hardy Decl. ¶ 10.

18
19 EFF's asserts that the components have improperly invoked Exemption 4, because their
20 declarations are not based on personal knowledge and offer only "conclusory restatements of
21 speculative expected harm." EFF's MSJ at 16-17. As seen below, that is incorrect.

22
23 ***DEA Materials.*** In the case of DEA, the companies explained that the information
24 provided to DEA is not customarily released to the public and that release of the information
25 "would adversely impact DEA's ability to obtain any such information in the future." Third
26 Myrick Decl. ¶¶ 8-9. These representations satisfy the requirements for treating material as

1 “confidential” within the meaning of Exemption 4. *See GC Micro Corp. v. Def. Logistics Agency*,
2 33 F.3d 1109, 1112 (9th Cir. 1994) (information “confidential” and properly withheld under
3 Exemption 4 if it would have either of the following effects: “(1) to impair the Government’s
4 ability to obtain necessary information in the future; or (2) to cause substantial harm to the
5 competitive position of the person from whom the information was obtained.”) According to DEA,
6 the companies’ statements that disclosure would inhibit cooperation in the future is “particularly
7 problematic,” because “[w]ithout the cooperation of the companies, DEA would have been unable
8 to legally compel the companies to provide this type of proprietary information for the purpose of
9 solving particular intercept issues.” Third Myrick Decl. ¶¶ 8-9.
10

11 Furthermore, DEA explains that the objections raised by the companies, all of which
12 operate in the communications market, demonstrate that disclosure of their proprietary information
13 would damage their competitive positions. *Id.* ¶ 10. One company stated that, given the highly
14 competitive nature of the communications market, which is characterized by a small number of
15 competitors, the disclosure of the proprietary information provided to DEA “could readily enable a
16 competitor to differentiate its product, services, technology, or market position, and seek a higher
17 percentage of the relevant market.” *Id.* ¶ 10. Therefore, because the release of this information
18 would likely “cause substantial harm to the competitive position of the person from whom the
19 information was obtained,” it was also properly withheld under Exemption 4. *See GC Micro*
20 *Corp.*, 33 F.3d at 1112.
21
22

23 ***FBI Materials.*** FBI has supported its Exemption 4 withholding of RAND Corporation
24 documents based on representations made by the company that the cost projections and other
25 information provided to FBI were confidential, proprietary information. Fourth Hardy Decl. ¶ 10
26 (noting that “draft proposal specifically states that RAND expects its information to remain
27

1 confidential under the restrictions provided in the proposed contract”). Furthermore, as Mr. Hardy
2 explains, “[d]isclosure of specific details of RAND’s project proposal and cost analysis would give
3 competitors an unfair advantage over RAND in developing requirements, counter proposals and
4 lower cost analyses that would undermine RAND’s ability to compete for contracts.” *Id.* From
5 this it follows that disclosure of the information would likely discourage companies from making
6 similar contract proposals in the future to FBI “out of concern that their proprietary information
7 would become publicly available to competitors.” *Id.* ¶ 11. Because disclosure would likely result
8 in competitive injury to RAND and prevent FBI from obtaining similar information in the future,
9 the material was properly treated as confidential under Exemption 4. *GC Micro Corp.*, 33 F.3d
10 1112.
11

12 **VII. FBI and DEA Properly Withheld Classified Information Under Exemption 1.**

13 As Defendant’s opening brief explains, FBI and DEA have both withheld classified
14 information pursuant to Executive Order 13,526. *See* 75 Fed. Reg. 707 (Dec. 29, 2009) (amended
15 at 75 Fed. Reg. 1013). Because the one document withheld by DEA pursuant to Exemption 1 was
16 done to protect the Bureau’s own information, both FBI and DEA have supported the application
17 of Exemption 1 based on declarations provided by FBI’s Mr. Hardy. Def.’s MSJ at 11.
18

19 Mr. Hardy’s declarations demonstrate that all of the procedural and administrative
20 requirements of Executive Order 13,526 were followed. Second Hardy Decl. ¶ 28; Third Hardy
21 Decl. ¶ 9. Substantively, Mr. Hardy determined that the withheld information was exempt from
22 disclosure pursuant to Executive Order 13,526, because it falls within one or more of the categories
23 in § 1.4 of the Order and that disclosure could cause serious harm to national security. Second
24 Hardy Decl. ¶¶ 29-32; Third Hardy Decl. ¶¶ 10-11.
25

26 EFF argues that the components have not provided sufficient detail to demonstrate that the
27

1 disclosure of the information withheld under Exemption 1 would pose a threat to national security.
2 EFF's MSJ at 11-12. This is wrong. It is readily apparent from the descriptions in the declarations
3 why the release of the material in question would pose a serious threat to national security. For
4 instance, the declarations discuss "ongoing, sensitive work" by the Intelligence Community (IC) to
5 create a "decentralized communication medium which will facilitate the sharing of information and
6 collaboration across the IC." Second Hardy Decl. ¶ 31; Third Hardy Decl. ¶ 11. The declaration
7 then explains that disclosure of this information "will highlight the exact data collection and
8 ELSUR [i.e., electronic surveillance] capabilities shortfalls that the IC are encountering during
9 National Security investigations due to technology advancements in communication system
10 platforms, and encryption applications." *Id.* Given this description, the damage to national
11 security that would result from the release of this information is clear. According to Mr. Hardy,
12 "[h]ostile entities could then develop countermeasures which could severely disrupt the FBI and
13 the IC's intelligence-gathering capabilities." *Id.*

14
15
16 As these descriptions demonstrate, EFF is wrong that FBI's declarations are not tailored to
17 the specific materials at issue in this case. On the contrary, the declarations provide an adequate
18 description of the withheld materials that demonstrates the severe harm to national security that
19 would result from releasing the information. For these reasons, and those already set forth in
20 Defendant's Motion for Summary Judgment and the supporting materials provided by the
21 components, FBI and DEA have properly withheld classified information pursuant to Exemption 1.

22 **VIII. FBI Properly Withheld Information Under Exemption 3.**

23
24 DEA and FBI each withheld information pursuant to Exemption 3, which applies to records
25 that are "specifically exempted from disclosure by statute" provided the statute "requires that the
26 matters be withheld from the public in such a manner as to leave no discretion on the issue," or

1 alternatively, if the statute “establishes particular criteria for withholding or refers to particular
2 types of matters to be withheld.” 5 U.S.C. § 552(b)(3).

3 EFF limits its challenge to the materials withheld by FBI under Exemption 3. In this case,
4 FBI withheld information relating to wiretaps pursuant to Title III of the Omnibus Crime Control
5 and Safe Streets Act, 18 U.S.C. §§ 2510, and information regarding pen registers and trap and trace
6 devices, in accordance with 18 U.S.C. § 3123(d). Def.’s MSJ at 13-14. EFF does not dispute that
7 these statutes provide valid bases for withholding records under Exemption 3. EFF’s MSJ at 14.
8 Instead, according to EFF, FBI is likely withholding more information than permitted by these
9 statutes. *Id.* at 15. Yet, EFF offers no persuasive reason for this claim, except to complain that
10 FBI’s *Vaughn* indices and declaration are not as detailed as it would like. *Id.*

11
12 Mr. Hardy has explained that Exemption 3 was applied to documents containing
13 information that if disclosed “would reveal information pertaining to the authorization of
14 interception of wire, oral, or electronic communications.” *See* Second Hardy Decl. ¶ 37. Such
15 information must be withheld under Title III. In addition, FBI has asserted Exemption 3, at times
16 in conjunction with Exemption 1, to withhold information that “would reveal the existence or use
17 of a pen register or trap and trace device,” or that would “reveal the existence of an investigation
18 involving a pen register or trap and trace device,” as required by 18 U.S.C. § 3123(d). FBI’s
19 declaration therefore satisfies the “two-part inquiry [that] determines whether Exemption 3 applies
20 to a given case.” *Minier v. CIA*, 88 F.3d 796, 801 (9th Cir. 1996). Under this two-step process:
21 “First, a court must determine whether there is a statute within the scope of Exemption 3. Then, it
22 must determine whether the requested information falls within the scope of the statute.” *Id.*

23
24 Here, EFF offers no basis to overcome the presumption of regularity that FBI has done
25 what it says it has done in its *Vaughn* indices and declaration: namely, that it has applied
26

1 Exemption 3 to materials that by statute must be withheld from public disclosure.⁶

2 **CONCLUSION**

3 For the reasons stated above, as well as those set forth in Defendant’s Motion for Summary
4 Judgment, Defendant respectfully requests that the Court grant its Motion for Summary Judgment.
5

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7 Dated: April 27, 2012

Respectfully Submitted,

8 TONY WEST
Assistant Attorney General

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10 MELINDA HAAG
United States Attorney

11 ELIZABETH J. SHAPIRO
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12
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27 ⁶ The Court has authorized Defendant to file an opposition not to exceed 35 pages. (ECF No. 48).

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DEFENDANT’S OPPOSITION AND REPLY

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2012, I caused a copy of the foregoing to be served on counsel for Plaintiff via the Court’s ECF system.

/s/ Nicholas Cartier
NICHOLAS CARTIER