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12 **UNITED STATES DISTRICT COURT**
 13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 14 **OAKLAND DIVISION**

17	ELECTRONIC FRONTIER FOUNDATION,)	Case No. 4:11-cv-05221-YGR
)	
18	Plaintiff,)	RESPONSE TO THE COURT’S ORDER
)	RE: FURTHER SUBMISSION ON
19	v.)	CROSS-MOTIONS FOR SUMMARY
)	JUDGMENT
20	UNITED STATES DEPARTMENT OF)	
	JUSTICE,)	
21)	
	Defendant.)	
22)	
23)	

24 In compliance with this Court’s Order (ECF No. 49), defendant, the U.S. Department of
 25 Justice, now provides the Court with further specific information describing documents withheld
 26 by the National Security Division (“NSD”) as exempt from disclosure under the Freedom of
 27 Information Act.
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1 In its Order, the Court instructed defendant to provide “a further public declaration of
2 Mark Bradley, or other person with knowledge, which sets forth” certain information on a
3 document-by-document basis, “or an explanation as to why that information cannot be provided
4 on the public record.” *Id.* at 2-3. The Court specifically requested that the government provide,
5 or explain why it cannot publicly provide, the number of pages of each withheld document; a
6 description of the category of each document; the exemption or exemptions claimed; the basis
7 for claiming the exemption or exemptions; and “an explanation of why there is no reasonably
8 segregable portion of the document that can be disclosed.” *Id.* at 2.

10 In response to the Court’s Order, defendant is submitting a Supplemental
11 Declaration of Mark A. Bradley accompanied by a *Vaughn* index that lists the page
12 length of each document, the specific category of each document, and the exemption(s)
13 claimed. *See Vaughn* index, Attachment A to Supp. Bradley Decl.; *Vaughn v. Rosen*, 484
14 F.2d 820, 823-25 (D.C. Cir. 1973). In many cases, the *Vaughn* index also lists the dates
15 of withheld documents. *See Vaughn* index. In his supplemental declaration, Mr. Bradley
16 explains, to the extent possible without compromising the secrecy of the very information
17 to be withheld, the bases for claiming the cited FOIA exemptions. *See* Supp. Bradley
18 Decl. at ¶¶ 5-6 (discussing bases of Exemption 1 withholdings), ¶ 7 (discussing bases of
19 Exemption 3 withholdings); ¶¶ 14-20 (discussing bases of Exemption 5 withholding). In
20 further response to the Court’s Order, Mr. Bradley also explains why there are no
21 reasonably segregable portions of the withheld documents that may be released without
22 compromising national security. *Id.* ¶¶ 8-11.

26 The *Vaughn* index lists page totals and descriptions for all of the withheld records.
27 While it also includes dates for most of the withheld records (when the date is known),
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1 dates are not provided for certain records of the Foreign Intelligence Surveillance Court
2 (“FISC”). Mr. Bradley explains, to the extent possible on the public record, why the
3 dates of those FISC records cannot be provided consistent with, *inter alia*, national
4 security. *See* Supp. Bradley Decl. ¶¶ 6, 12. *See also* *Lewis v. IRS*, 823 F.2d 375, 378
5 (9th Cir. 1987) (declaration “need not specify its objections [to disclosure] in such detail
6 as to compromise the secrecy of the information”) (citation omitted); *Church of*
7 *Scientology of Cal. v. Dep’t of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (same).

9 Upon further careful review of one withheld document, Document No. 98 on the
10 *Vaughn* index, NSD determined that the document is properly withheld pursuant to FOIA
11 Exemption 5 as well as Exemption 1. As defendant has explained, Exemption 5 protects
12 from disclosure “inter-agency or intra-agency memorandums or letters which would not
13 be available by law to a party . . . in litigation with the agency.” 5 U.S.C. § 552(b)(5).
14 Such a record is exempt from disclosure if it would be “normally privileged in the civil
15 discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).
16 Exemption 5 thus incorporates the privileges that are available to a government agency in
17 civil litigation, the three principal ones being the deliberative process privilege, the
18 attorney-client privilege, and the attorney work product doctrine. *See id.* at 148-49.
19 Document No. 98 is an internal NSD legal memorandum prepared in anticipation of
20 litigation before the FISC. Supp. Bradley Decl. ¶¶ 14-20. It is therefore subject to the
21 deliberative process privilege and the attorney work product doctrine.
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25 Defendant discussed the deliberative process privilege in its prior filings, and
26 incorporates those discussions by reference here. *See* Def. Summary Judgment Mem.,
27 ECF No. 40, at 12-17; Def. Summary Judgment Consolidated Opposition/Reply, ECF
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1 No. 44, at 19-24. As Mr. Bradley explains, the internal NSD legal memorandum is a
2 predecisional, deliberative document. Supp. Bradley Decl. ¶¶ 14-18. In particular:

3 The memo considered whether to proceed with a certain argument before the
4 FISC in connection with the submission of an application seeking tangible things,
5 and recommended to the decision maker a course to take. The memorandum is
6 predecisional in that it preceded a final decision, and deliberative because it
7 played a part in the process by which decisions were made in the relevant matter
8 before the FISC.

9 *Id.* at ¶ 18. The internal NSD legal memo is therefore properly withheld under
10 Exemption 5. *E.g., Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1082, 1093-
11 95 (9th Cir. 1997).

12 Document No. 98 is also properly withheld pursuant to Exemption 5 under the
13 attorney work product doctrine, which protects materials prepared by an attorney or
14 others in anticipation of litigation, including government attorneys. *See* Fed. R. Civ. P.
15 26(b)(3); *Sears, Roebuck & Co.*, 421 U.S. at 154; *Hickman v. Taylor*, 329 U.S. 495, 509-
16 10 (1947). Document No. 98 is a memorandum prepared by attorneys within NSD
17 discussing whether and how to proceed with a certain argument before the FISC,
18 addressed to and making a recommendation for senior attorneys, including then-Deputy
19 Assistant Attorney General Matthew Olsen. Supp. Bradley Decl. ¶¶ 14-16, 20. The
20 internal memorandum analyzes “a particular legal question involving the FISA, discusses
21 the legal question, and makes a recommendation as to how the Department of Justice
22 should proceed in relevant litigation before the FISC.” *Id.* at ¶ 16. The memo is
23 therefore subject to the attorney work product doctrine, and properly withheld in full
24 pursuant to Exemption 5 as well as Exemption 1. *See Pac. Fisheries, Inc. v. United*
25 *States*, 539 F.3d 1143, 1148 (9th Cir.2008) (the attorney work product doctrine “shields
26 both opinion and factual work product from discovery. Therefore, if a document is
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1 covered by the attorney work-product privilege, the government need not segregate and
2 disclose its factual contents.”) (internal citations omitted); *Judicial Watch v. Dep’t of*
3 *Justice*, 432 F.3d 366, 370-72 (D.C. Cir. 2005) (“If a document is fully protected as work
4 product, then segregability is not required.”).¹

5 6 CONCLUSION

7 With this filing, the government respectfully submits that it has complied with the
8 Court’s Order (ECF No. 49). Further, the government respectfully urges the Court to view its
9 classified, *ex parte* submission *in camera* for a “fuller explanation of the highly significant
10 intelligence sources, methods and activities at issue and the harm to national security that would
11 result from the disclosure of this information.” Supp. Bradley Decl. ¶ 7. *See Pollard v. FBI*, 705
12 F.2d 1151, 1153-54 (9th Cir. 1983) (*in camera* review of *ex parte* affidavit appropriate in FOIA
13 case); *cf. Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003) (when classified national security
14 information is at issue, “in camera review of affidavits, followed if necessary by further judicial
15 inquiry, will be the norm.”) (citation omitted).

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¹ Defendant will not object to a timely request by plaintiff to file a memorandum discussing
Exemption 5 in response to this filing.

1 Dated: April 18, 2013

Respectfully submitted,

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