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

ELECTRONIC FRONTIER FOUNDATION,)	Case No. 4:11-cv-05221-YGR
)	
Plaintiff,)	PLAINTIFF’S RESPONSE TO
)	DEFENDANT’S FURTHER
v.)	SUBMISSIONS
)	
DEPARTMENT OF JUSTICE,)	Hon. Yvonne Gonzalez Rogers
)	Courtroom 5 - 2nd Floor
Defendant.)	
)	
)	
)	

1 Pursuant to this Court’s Order (ECF No. 52), Plaintiff Electronic Frontier Foundation
2 (“EFF”) respectfully submits its response to Defendant’s supplemental filings in support of its
3 motion for summary judgment (ECF Nos. 51, 51-1). Despite the submission of additional
4 information about the withheld records at issue in this case, Defendant has still failed to provide an
5 adequate basis for summary judgment in its favor.

6 This Court ordered Defendant to provide, among other information, a document-by-
7 document accounting of (1) the number of pages in each withheld document, (2) a general
8 description of the document,¹ and (3) the exemption claimed for its withholding. Order Re: Further
9 Submissions on Cross-Motions for Summary Judgment (“Order”) at 3 (ECF No. 49). EFF does not
10 contest Defendant’s compliance with this portion of the Court’s Order. And, based on Defendant’s
11 provision of this information, EFF can further narrow the scope of the litigation by withdrawing its
12 challenges to the following documents: Document 3 (Briefing paper for Congress at issue in *N.Y.*
13 *Times v. Dep’t of Justice*, 872 F. Supp. 2d 309 (S.D.N.Y. 2012)), Document 50 (a draft, internal
14 Executive branch memorandum), Document 63 (an internal Executive branch email), Document 64
15 (a draft internal, Executive branch memorandum), and Document 98 (internal Executive branch
16 memorandum drafted in anticipation of a filing before the FISC).² See Second Supp. Decl. of Mark
17 Bradley (“Third Bradley Decl.”), Exhibit A (“*Vaughn* Index”) (ECF No. 51-1) at 1, 6, 7, 11.
18 Nevertheless, and despite EFF’s best attempt to further narrow the scope of the litigation,
19 Defendant continues to withhold 3,142 pages of responsive records in their entirety.

20 Beyond basic information about the requested records, this Court’s Order further required
21 Defendant to provide document-by-document descriptions of Defendant’s purported justification
22 for withholding records, as well as particularly tailored segregability analyses. Order at 3.

24 ¹ The Order actually required Defendant to identify, consistent with the format employed in
25 Defendant’s earlier declarations, the “specific category” for each document. Order at 3. Instead of
26 providing the category, Defendant’s *Vaughn* index provides a general description of each
document that, in many cases, is more descriptive than the categorical descriptions previously
employed.

27 ² These documents—constituting drafts, emails, specific descriptions of intelligence methods, and
28 memos prepared in anticipation of litigation—are not the type of final, binding legal opinions and
analyses that EFF seeks in this case.

1 Without explanation, Defendant failed to provide these document-by-document assessments, in
 2 spite of the Court’s clear directive. Compounding matters, even the additional information
 3 provided by Defendant still constitutes little more than the type of “conclusory,” “overly vague,”
 4 and “sweeping” statements that “will not, standing alone, carry the government’s burden.” *Int’l*
 5 *Counsel Bureau v. Dep’t of Defense*, 723 F. Supp. 2d 54, 63 (D.D.C. 2010); *see also Weiner v.*
 6 *FBI*, 943 F.2d 972, 982 (9th Cir. 1991); Pl. Mem. for Summ. J. (“Pl. Mem.”) at 9-10, 12-17 (ECF
 7 No. 41); Pl. Rep. at 3-5 (ECF No. 45). While “producing a properly detailed *Vaughn* Index [may be
 8 a] considerable burden” for Defendant, “Congress, in enacting FOIA, has chosen to place this
 9 burden upon agencies, giving them a clear, if difficult, choice:” either properly describe the
 10 withheld records and the justification for their withholding, or disclose the records. *Judicial Watch*
 11 *v. USPS*, 297 F. Supp. 2d 252, 271 (D.D.C. 2004). Defendant simply cannot choose to do nothing.

12 I. *Defendant Failed to Comply with the Court’s Order to Further Articulate*
 13 *the Alleged Harm to National Security Threatened by Disclosure*

14 Defendant’s articulation of the harm that purportedly would flow from disclosure of
 15 responsive records is identical to the description it initially provided—and that the Court already
 16 rejected as insufficient. *See* Order at 2 (noting the Bradley Declaration’s “one blanket justification
 17 for withholding” did “not provide sufficient information and specificity”). Defendant’s original
 18 (and insufficient) justification stated that “[d]isclosure of [requested records] would provide our
 19 adversaries and foreign intelligence targets with insight into the United States Government’s
 20 foreign intelligence collection capabilities, which in turn could be used to develop the means to
 21 degrade and evade those collection capabilities.” Decl. of Mark Bradley (“First Bradley Decl.”)
 22 ¶ 10 (ECF No. 40-1). Identically, the “additional” information provided by Defendant states:
 23 “Disclosure of [requested records] would provide our adversaries and foreign intelligence targets
 24 with insight into the United States Government’s foreign intelligence collection capabilities, which
 25 in turn could be used to develop the means to degrade and evade those collection capabilities.” For
 26 all practical purposes, Defendant simply repeated the original description verbatim.³ *Compare* First

27 _____
 28 ³ The two descriptions contain some minor variations in phrasing. *Compare* First Bradley Decl. ¶¶ 9-10, *with* Third Bradley Decl. ¶¶ 5-6.

1 Bradley Decl. ¶¶ 9-10, *with* Third Bradley Decl. ¶¶ 5-6. Defendant clearly failed to comply with
2 the Court’s Order.⁴

3 Defendant still makes no attempt to explain why the government has been able to provide
4 information about the use of Section 215 in other contexts, but somehow is unable to provide even
5 *general* information about the provision’s use here. *See* Pl. Rep. at 4-5. Defendant again asserts
6 that the documents contain “*specific* descriptions of highly sensitive intelligence activities, sources
7 and methods.” Third Bradley Decl. ¶ 6 (emphasis added). But, from the outset, EFF has made clear
8 it does not seek disclosure of *specific* information concerning sources or methods: EFF only seeks
9 the release of *generalized* information—whether through adequate *Vaughn* descriptions or through
10 segregating and releasing information—about the scope of the government’s authority under the
11 provision. *See* Order at 2; Pl. Mem. at 1 (“EFF has not requested, nor does it seek, the disclosure of
12 specific intelligence sources, methods, activities, or targets of national security investigations.”).

13 Further, Defendant also asserts that the disclosure of dates for specific FISC materials
14 would “tend to reveal classified information.” Third Bradley Decl. ¶ 12. Mr. Bradley asserts that
15 disclosure of the particular dates would allow the public to “extrapolate how and when, and how
16 often, the government has used its Section 215 authority[.]” Third Bradley Decl. ¶ 12. But “when”
17 and “how often” the government used Section 215 is already publicly known: in 2004, the FBI
18 used its Section 215 authority seven times; in 2005, 155 times; in 2006, 44 times. *See* Supp. Decl.
19 of Mark Rumold, Ex. 1 (ECF No. 45-1). Indeed, the Department of Justice recently released the
20 number of times the government used its Section 215 authority in 2012. Letter from Peter J.
21 Kadzik, Principal Deputy Assistant Attorney General, Department of Justice, to the Honorable
22 Harry Reid, Senate Majority Leader (Apr. 30, 2013)⁵ (noting the “Government made 212
23 applications to the FISC for access to certain business records (including the production of tangible
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26 ⁴ Defendant also failed to provide its assessment of the alleged harm to national security on a
27 document-by-document basis, as required by the Court’s Order. *See* Third Bradley Decl. ¶¶ 5-6;
28 Order at 3. Even if there is less document-by-document variability in the purported rationale for its
exemption claims, Defendant, at minimum, should have explained its decision to provide only a
second “blanket” justification.

⁵ *Available at* <https://www.fas.org/irp/agency/doj/fisa/2012rept.pdf>.

1 things)” during 2012). And Mr. Bradley offers no explanation for his claim that disclosure of a date
2 would reveal “how” the government employs its authority under Section 215. Finally, and without
3 explanation, Defendant provides dates for *some* material submitted to the FISC while withholding
4 others. *Compare Vaughn* Index at 5, 6, 8, 10 (providing dates for Documents 42, 55, 77, and 95),
5 *with id.* at 4, 5 (providing date ranges for Documents 33-39).

6 It is precisely this type of arbitrary and unexplained inconsistency—coupled with
7 Defendant’s failure to comply with the Court’s order—that undermines the deference that might
8 otherwise be owed Defendant’s declarations. As such, Defendant is not entitled to summary
9 judgment.

10 II. *Defendant Failed to Comply with the Court’s Order to Provide an*
11 *Adequate Segregability Analysis*

12 This Court also directed Defendant to “particularly address,” on a document-by-document
13 basis, “why there is no reasonably segregable portion of [any] document that can be disclosed.”
14 Order at 3. Defendant’s additional submissions do nothing to cure the defects originally identified
15 by the Court. Most fundamentally, and in contravention of the Court’s order, Defendant again
16 refuses to provide both EFF and the Court with a *document-by-document* segregability analysis.
17 *See* Third Bradley Decl. ¶¶ 8-11 (providing blanket segregability analysis).

18 Indeed, the provision of page counts for each document underscores precisely why a
19 document-by-document explanation of segregability is necessary: for example, Document 89—
20 consisting of 236 pages of “FISC opinions and underlying documents”—likely requires a
21 substantially different segregability calculus than, for example, Document 96—three pages of
22 “[g]uidelines pertaining to implementation of [S]ection 215 authority.” *Vaughn* Index at 9, 10.

23 Further, the absence of *any* segregable information is particularly suspect where, as is the
24 case here, some of the documents contain hundreds of pages. *See, e.g., id.* at 9, 10, 11 (Document
25 82, consisting of 234 pages; Document 97, consisting of 114 pages; Document 99, consisting of
26 268 pages). Moreover, Defendant now admits that “otherwise unclassified information” exists
27 within the withheld records. Third Bradley Decl. ¶ 8. “FOIA mandates disclosure of information,
28 not solely disclosure of *helpful* information.” *Stolt-Nielsen Transp. Grp. v. United States*, 534 F.3d

1 728, 734 (D.C. Cir. 2008) (rejecting argument that redacted documents could be withheld because
2 they “would provide no meaningful information”) (emphasis added). Thus, FOIA requires the
3 disclosure of this information, even if it does not shed light on the government’s secret legal
4 interpretation of Section 215.

5 Defendant’s repeated failure to comply with the segregability requirement of FOIA and,
6 indeed, this Court’s own directive, casts substantial doubt on the propriety of Defendant’s claims
7 generally. Without a more searching segregability assessment, Defendant’s claims remain
8 incomplete and lack credibility. Nevertheless, and despite failing to comply with the Court’s Order,
9 Defendant did provide some additional, general information concerning segregability. However,
10 even with the provision of this additional information, Defendant’s claims fail to justify the
11 withholding of over 3,000 pages of responsive records in their entirety.

12 First, Defendant invokes E.O. 13,526 § 1.7(e) as a justification for withholding unclassified,
13 segregable information from responsive records. Third Bradley Decl. ¶ 10. Mr. Bradley asserts that
14 Section 1.7(e) constitutes a “recognition that seemingly mundane and non-sensitive material could,
15 when viewed in the context of other available information, reveal highly sensitive information to
16 sophisticated adversaries.” *Id.* However, Section 1.7(e) is not a justification for the classification of
17 innocuous information: indeed, Section 1.7 is titled “Classification *Prohibitions and Limitations.*”
18 E.O. 13,526 § 1.7 (emphasis added). Contrary to Defendant’s claims, Section 1.7(e) recognizes that
19 the government’s *compilation* of individually unclassified information can create a new,
20 potentially-classifiable document or record. *See* E.O. 13,526 (information classifiable only if *the*
21 *compiled* information “reveals an additional association or relationship”). Section 1.7(e) does not,
22 as Defendant suggests, provide additional, independent authority to classify information that does
23 not fall within Section 1.4’s classification categories. *See id.* (compilation may only be classified if
24 it “meets the standards for classification” and “is not otherwise revealed in the individual items of
25 information”).

26 Defendant further suggests “the disclosure of even seemingly mundane portions of FISC
27 materials, when considered in conjunction with other publicly available information, could
28

1 reasonably be expected to assist a sophisticated adversary in deducing particular intelligence
2 activities or sources.” Third Bradley Decl. ¶ 10. Thus, Defendant acknowledges two facts: (1) the
3 FISC materials contain “seemingly mundane portions” and (2) the disclosure of these “mundane
4 portions,” alone, would not disclose intelligence sources, methods, or threaten national security.
5 *See id.* At the bare minimum, Defendant can describe the *type* of “seemingly mundane”
6 information contained within the records; in reality, Defendant can likely segregate and release this
7 information.

8 Defendant further suggests that even legal analysis cannot be segregated and disclosed
9 because:

10 [L]egal analysis would tend to reveal the *legal question* being analyzed and the
11 *particular aspects of the statute being considered*, and thus would reveal how
12 *statutory authority and judicial authority is being applied in a specific context* to
13 the use or application of a particular intelligence source or method.

14 Third Bradley Decl. ¶ 11 (emphasis added). Far from a justification for non-disclosure, this is
15 precisely the type of information that cannot be withheld from the public under FOIA. *See* Pl.
16 Mem. at 10-12; Pl. Rep. 7-11; *see also Gordon v. FBI*, 388 F. Supp. 2d 1028, 1036-37 (N.D. Cal.
17 2005) (“legal basis for detaining” individual on “No Fly” list not exempt under Exemptions 2 or
18 7(E)). Indeed, the consideration of “legal question[s],” the “particular aspects of the statute being
19 considered,” and the application of “statutory authority and judicial authority” is the information
20 that enables the public to ratify or reject the government’s interpretation of public laws.

21 Indeed, Defendant’s generalized attempt to justify such an extraordinary claim is, at best,
22 half-hearted. *See* Third Bradley Decl. ¶ 11 (suggesting that “something as seemingly innocuous as
23 a particular case citation or statutory provision” could threaten disclosure of sources and methods).
24 Defendant does not—and, indeed, cannot—support the improbable contention that a citation to 50
25 U.S.C. § 1861(a)(1), or to 50 U.S.C. § 1861(b)(2)(A), or to 50 U.S.C. § 1861(g) could reveal
26 intelligence sources or methods; or, far less likely still, that disclosure of this information could
27 harm the nation’s security.

28 At its core, Defendant’s claim is that it is free to withhold any information about the use of
Section 215, “beyond the general notion that the Government may be using the provision to collect

1 information.” Third Bradley Decl. ¶ 11. But such a broad assertion of exemption is incompatible
2 with FOIA and the public’s fundamental interest in, and right to know, how the government
3 interprets public laws.

4 III. In Camera Review of Responsive Records is Both Appropriate and
5 Necessary in Light of Defendant’s Repeated Failure to Provide the Court
6 and EFF with Adequate Information

7 In light of Defendant’s failure to provide the Court and EFF with credible and consistent
8 information concerning the withheld records, Defendant has not satisfied its burden to withhold
9 over 3,000 pages of responsive records in their entirety. As EFF’s moving papers suggested, *see* Pl.
10 Rep. at 14-15, *in camera* review of responsive records is an option available to aid this Court’s
11 assessment of Defendant’s extraordinary withholding claims. Indeed, should the Court review
12 Defendant’s *ex parte* declarations, EFF respectfully urges the Court to also order the submission of
13 responsive records to supplement this Court’s *in camera* review. Defendant’s public declarations
14 have, thus far, been inaccurate, inconsistent, and unspecific: *in camera* review of withheld records
15 is the only reliable method of ensuring Defendant’s *ex parte* submissions do not suffer from similar
16 defects.

17 To best balance the voluminous number of records still at issue in this case and the Court’s
18 *de novo* review obligations, EFF respectfully submits that the production of a representative sample
19 of responsive documents for the Court’s *in camera* review may provide the best avenue for this
20 case moving forward. *See Bonner v. Dep’t of State*, 928 F.2d 1148, 1151 (D.C. Cir. 1991)
21 (“Representative sampling is an appropriate procedure to test an agency’s FOIA exemption claims
22 when a large number of documents are involved.”); *Feshbach v. SEC*, 5 F. Supp. 2d 774, 782 n. 6
23 (N.D. Cal. 1997) (employing representative sampling). If the Court believes *in camera* review
24 appropriate at this juncture, EFF respectfully suggests the Court order the submission of the
25 following documents: Documents 1, 14, 29, 36, 39, 47, 82, 88, 95, and 100. *Vaughn* Index at 1, 2,
26 4, 5, 9, 10, 11.⁶

27 ⁶ Mr. Bradley also asserts, for the first time in his third declaration in this case, that the FISC’s
28 rules and procedures prevent the release of the FISC materials at issue in this case. Third Bradley
Decl. ¶ 13. First, Mr. Bradley’s claims are without merit. *See, e.g., In re Mot. for Release of Court
Records*, 526 F. Supp. 2d 484, 496 (FISC Dec. 11, 2007) (FISC opinion rejecting First Amendment

1 Defendant's supplemental filing ignored this Court's clear order and still fails to satisfy
2 Defendant's burden at summary judgment. Consequently, the continued withholding of responsive
3 records is not justified, and EFF respectfully urges this Court to order the disclosure of responsive
4 records.

5
6 DATED: May 9, 2013

Respectfully submitted,

7
8 /s/ Mark Rumold

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25 and common law claims of access to FISC materials, but noting that the public is not
26 "foreclose[d] . . . from pursuing whatever remedies may be available to it in a district court through
27 a FOIA request addressed to the Executive Branch"). Second—because Defendant has raised a
28 legal argument in a declaration and, making matters worse, only after full briefing on summary
judgment—Defendant's improper and belated attempt to erect yet another obstacle to disclosure
should be disregarded. *Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) (*per curiam*) ("Issues
raised for the first time in the reply brief are waived.")