

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

ELECTRONIC FRONTIER FOUNDATION,)	
)	
Plaintiff,)	
)	
v.)	Civil Case No. 08-1023 JSW
)	
OFFICE OF THE DIRECTOR OF NATIONAL)	
INTELLIGENCE and UNITED STATES)	
DEPARTMENT OF JUSTICE)	
)	
Defendants,)	
)	

DECLARATION OF JAMES M. KOVAKAS

I, James M. Kovakas, make the following declaration under penalty of perjury.

1. I am Attorney-In-Charge of the Freedom of Information and Privacy Acts (FOI/PA) Office, Civil Division, Department of Justice. The FOI/PA Office responds to FOI/PA requests for records of the Civil Division, Department of Justice, made under the Freedom of Information Act (FOIA), 5 U.S.C. §552 (1994), as amended by the Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. §552, and/or the Privacy Act (PA), 5 U.S.C. §552a (1994). Pursuant to Civil Division Directive No. 137-80, I am authorized to exercise the authority of the Assistant Attorney General, Civil Division, to deny requests for records under 5 U.S.C. §§ 552 and 552a. My official duties include the supervision of all processing of such requests for Civil Division records. Pursuant to my duties I am familiar with the administrative

procedures used in the processing of record requests under the FOIA and the PA at the Department of Justice. My knowledge of the processing of plaintiffs' request which is at issue in this case results from my personal review of the documents as well as information obtained in my official capacity.

Administrative Processing of the Request

2. By letter dated December 21, 2007, plaintiff, Electronic Frontier Foundation submitted a Freedom on Information Act request to the Department of Justice, Office of Information and Privacy (OIP) for "all agency records from September 1, 2007 to the present concerning briefings, discussions, or other exchanges that Justice Department Officials have had with 1) members of the Senate or House of Representatives and 2) representatives or agents of telecommunications companies concerning amendments to FISA, including any discussion of immunizing telecommunications companies or holding them otherwise unaccountable for their role in government surveillance activities."

3. On April 4, 2008, the Court in the above-captioned case granted plaintiff's motion for a preliminary injunction. The Court, *inter alia*, ordered defendants "to provide a final release of all responsive, non-exempt documents no later than April 21, 2008" and "to file with the Court and serve upon Plaintiff's counsel an affidavit or declaration attesting to Defendants' compliance and setting forth the basis for withholding any responsive documents it does not release." By my earlier declaration dated April 17, 2008, which was provided to plaintiff and the Court in accordance with the Court's April 4, 2007 order, I confirmed that Civil Division had complied with the Court's order and I identified records being withheld and the basis for their withholding.

4. On April 8, 2008 the Civil Division received from OIP the referral of three records

which had been identified as responsive to the request of plaintiff and which originated in or were received in the Civil Division. I reviewed the records which consisted of a single email (1 page) marked as OLP-6, an email chain (1 page with a 5 page attachment) marked as OAG-96, and an email chain (2 pages) marked as OAG-110 and determined that they were exempt from disclosure under 5 U.S.C. 552 (b)(5) as they constituted pre-decisional deliberative process, the disclosure of which would chill future deliberations within the Civil Division. I also determined that the records met the (b)(5) threshold as they were inter/intra agency records. Finally, I determined that there were no segregable portions that could be disclosed.

5. By letter dated April 17, 2008 I advised the requester/plaintiff of my administrative determination. A copy of that letter is attached as Exhibit A.

6. During the processing of plaintiff, Electronic Frontier Foundation's April 24, 2008, Freedom of Information Act (FOIA) request to the Department of Justice, National Security Division (NDS), seeking access to all agency records from December 21, 2007 to the present concerning briefings, discussions, or other exchanges any NSD official has had with representatives or agents of telecommunications companies concerning amendments to FISA, 22 pages of documents originating in or sent to the Civil Division were identified. These documents were referred to my office for review and direct response to the requester. I reviewed the documents, which consisted of nine emails or email chains and attachments totaling 22 pages.

7. By letter dated October 10, 2008 I advised plaintiff that pursuant to my review the subject documents were being withheld under 5 U.S.C. 552 (b)(5) as pre-decisional deliberative process. A copy of my letter is attached as Exhibit B.

Description of Documents Withheld

8. The Civil Division withheld 12 documents responsive to the plaintiff's request. These records are emails or email chains, including attachments and are described as follows. For each email chain, the first email identified is the email that initiated the chain.

9. Document 1, is an email (one page) from a Civil Division attorney to various individuals within Department of Justice offices including Office of Legal Policy, Office of Legislative affairs and National Security Division. The email is part of an ongoing agency deliberation regarding amendments to the Foreign Intelligence Surveillance Act (FISA). The record meets the inter/intra agency requirement of exemption 5 of the FOIA as it was not disclosed outside executive branch. The substance of the email is a deliberative discussion of possible amendments to the FISA, following a meeting with a legislative representative. The email is exempt pursuant to the presidential communications privilege as Civil Division attorneys were functioning as the President's advisors and agents relating to the development of prospective FISA reform legislation and its impact on pending litigation. The email is also exempt pursuant to the inter-branch joint deliberative privilege embodied in exemption 5. The document predates any final decision on how the agency should respond to the legislative initiative. The entire record is exempt under 5 U.S.C. 552(b)(5) as part of the pre-decisional deliberative process within the Department of Justice on how to respond to the proposed FISA legislation. Disclosure of the record would have a chilling effect on individuals engaged in agency deliberations and would likely preclude the free flow of recommendations and discussion necessary to facilitate effective deliberations in the future. No factual or other portions of the records could be segregated for disclosure. The record is properly withheld from disclosure

under 5 U.S.C. 552 (b)(5).

10. Document 2, is an email chain of two emails (one page) and an attachment consisting of 5 pages. The first email, is from counsel for co- defendants with the United States in the case In RE National Security Agency Telecommunications Records Litigation, No. M:06-cv-01791-VRW, N.D. CA,¹ to a Civil Division attorney. This email transmits a 5 page attachment relating to amendments to the Foreign Intelligence Surveillance Act (FISA) and requests responsive comments. The second email, was sent by a Civil Division attorney transmitting the earlier received 5 page attachment to three other attorneys within the Department of Justice, Office of Legal Policy, Civil Division, Office of the Deputy Attorney General and to counsel in the Office of Director of National Intelligence. It provides legal analysis of the attachment as its proposed provisions might apply to the pending referenced litigation and solicits comments. Both emails and the attachment constitute attorney work product and pre-decisional deliberative process. The communications reflect the legal analysis and legal reasoning of attorneys defending the pending litigation. Disclosure of any part of the 6 page record would disclose attorney work product and thereby unfairly prejudice the defendants legal representation and have a chilling effect on the internal agency deliberations regarding the FISA legislation and subject litigation. These deliberations pre-date any final decision by the agency on the FISA amendments legislation. No factual or other portions of either email or the

¹The Government has intervened in numerous cases brought against the telecom carrier defendants which are now part of the MDL proceeding In RE National Security Agency Telecommunications Records Litigation, No. M:06-cv-01791-VRW, N.D. CA. Intervention was ordered on April 24, 2007. The first intervention was granted on June 23, 2006 in Hepting v. AT&T et al., then again in July 2006 in Terkel, then again in April 2007 for all MCI/Verizon cases.

attachment could be segregated for disclosure. The emails are also exempt pursuant to the presidential communications privilege as Civil Division attorneys were functioning as the President's advisors and agents relating to the development of prospective FISA reform legislation and its impact on pending litigation. The record is properly withheld from disclosure under 5 U.S.C. 552 (b)(5). As a co-party defendant, the United States through its counsel in the Department of Justice Civil Division received the first email in this chain from co-party counsel. This relationship meets the threshold requirement of 5 U.S.C. 552 (b)(5) and permits its assertion to preclude the disclosure of the entire record, including the two emails and the 5 page attachment.

11. Document 3, is an email chain of three emails (2 pages). The first email was sent by counsel for co-defendants with the United States in the case In RE National Security Agency Telecommunications Records Litigation, No. M:06-cv-01791-VRW, N.D. CA, (see footnote 1 above) to a Civil Division attorney and copied to two other attorneys within his firm. This email discusses specific language in the proposed FISA legislative amendments and their potential impact on the pending litigation. The second email in the chain, is dated October 17, 2007 and was sent from the Civil Division attorney who was the addressee of the first email to thirteen attorneys within the Department of Justice and other federal agencies. The offices and agencies include, National Security Division, Office of Legal Policy, Office of the Deputy Attorney General, Office of Director of National Intelligence and National Security Agency. This email discusses the legal implications of the FISA amendments discussed in the first email and solicits comments on further implications of the amendments to the pending litigation. The third email, is a response to the second email and is addressed to the same individuals as is email two. As a

co-party defendant, the United States through its counsel in the Department of Justice Civil Division received the first email in this chain from co-party counsel. This relationship brings outside counsel for the non-governmental defendant under the threshold requirement of 5 U.S.C. 552 (b)(5) and permits its assertion to preclude the disclosure of the entire record, as both attorney work product and pre-decisional deliberative process. The communications reflect the legal analysis and legal reasoning of attorneys defending the pending litigation. Disclosure of any part of the 2 page record would disclose attorney work product and thereby unfairly prejudice the defendants legal representation and have a chilling effect on the internal agency deliberations regarding the FISA legislation and subject litigation. The deliberations pre-date any final decision by the agency on the FISA legislation. No factual or other portions of either email could be segregated for disclosure. The emails are also exempt pursuant to the presidential communications privilege as Civil Division attorneys were functioning as the President's advisors and agents relating to the development of prospective FISA reform legislation and its impact on pending litigation. The entire record is properly withheld from disclosure under 5 U.S.C. 552 (b)(5).

12. Document 4 is an email chain of four emails (one page) and an attachment (two pages). Each of the four emails is from and between a Civil Division attorney and five other DOJ attorneys in offices including, Office of Attorney General, Office of Deputy Attorney General and National Security Division. The first email transmits a draft of talking points for an upcoming meeting with U.S. Senator Feinstein on the FISA legislation. The three remaining emails exchange comments between the same individuals as part of the deliberation on the talking points which relate to the FISA amendments. The emails are exempt pursuant to the

presidential communications privilege as Civil Division attorneys were functioning as the President's advisors and agents relating to the development of prospective FISA reform legislation and its impact on pending litigation. The emails are also exempt pursuant to the inter-branch joint deliberative privilege embodied in exemption 5. The deliberation pre-dates any final decision by the agency on the FISA legislation. No segregable portions were appropriate for disclosure. Disclosure of any of the emails in this chain or the attachment would chill the deliberative process within the Department of Justice and therefore are properly withheld under 5 U.S.C. 552(b)(5).

13. Document 5 is an email chain of three emails (one page) and an attachment (four pages) which request and transmit the latest talking points relating to the FISA amendments. The first email is from a Civil Division attorney to three other DOJ attorneys in the National Security Division and requests a copy of the talking points. The second email responds and attaches a set of talking points. The third email responds to the second. All of the emails are between the same DOJ attorneys described in email 1. The record is exempt pursuant to the presidential communications privilege as Civil Division attorneys were functioning as the President's advisors and agents relating to the development of prospective FISA reform legislation and its impact on pending litigation. The email chain is also exempt pursuant to the inter-branch joint deliberative privilege embodied in exemption 5. Disclosure of any of the three emails or the attachment would chill the deliberative process within DOJ and therefore they are properly withheld under 5 U.S.C. 552(b)(5). The deliberation pre-dates any final decision of the agency on the FISA legislation. No segregable portions were appropriate for disclosure.

14. Document 6 is an email chain of eight emails (three pages) which discuss the details

of a meeting to discuss FISA legislation. The first email was sent by a Civil Division attorney to seventeen attorneys in various DOJ offices and the offices of counsel representing co-defendants with the United States in the case In RE National Security Agency Telecommunications Records Litigation, No. M:06-cv-01791-VRW, N.D. CA. (See foot note 1 above). DOJ offices include the Civil Division, Office of Associate Attorney General, National Security Division. The emails was sent to 8 counsel for co-parties in the subject litigation. The email discusses the scheduling of a meeting on the FISA legislation. The second email is from a Civil Division attorney to seven attorneys in the Civil Division and one individual each, in the National Security Division and the Office of Associate Attorney General. This email raises three questions relating to the proposed meeting on FISA legislation. The third email is from an attorney in the Office of Associate Attorney General to eight attorneys in the Civil Division and one attorney in the National Security Division and it responds to the three questions raised in the previous email relating to the proposed FISA meeting. The fourth email is from the Civil Division attorney who initiated the email chain and is addressed to the same individuals as was the first email. This email sets a time and place for the FISA meeting. The fifth email is sent from a Civil Division attorney to seven attorneys in the Civil Division, one attorney in the Office of Associate Attorney General and one attorney in the National Security Division. This emails raises several additional questions regarding the FISA meeting. Emails six, seven, and eight are between the same individuals in email 5 and raise and respond to questions relating to the FISA meeting. The disclosure of any of the emails within document 6 would identify the individuals participating in the meeting which is part of the agency deliberation on the issues of the FISA legislation. This disclosure would chill the participation and candid flow of ideas and thereby harm the

deliberative process. Disclosure of these emails would also disclose our attorney work product by identifying who government counsel met with to discuss litigation strategy. The deliberation pre-dates any final decision of the agency on the FISA legislation. The records are also exempt pursuant to the presidential communications privilege as Civil Division attorneys were functioning as the President's advisors and agents relating to the development of prospective FISA reform legislation and its impact on pending litigation. The emails in document 6 are properly withheld under 5 U.S.C. 552(b)(5). No segregable portions were identified that could be released.

15. Document 7 is an email chain of two emails (one page). The first email is a duplicate of the fourth email described in document 6 above which announces the schedule of the FISA meeting. The second email in this chain, is a response from counsel representing co-defendants with the United States in the case In RE National Security Agency Telecommunications Records Litigation, No. M:06-cv-01791-VRW, N.D. CA. (See foot note 1 above), which identifies individuals who will attend the meeting on behalf of one of the co-defendants. The disclosure of either of the emails within document 7 would identify the individuals participating in the meeting which is part of the agency deliberation on the issues of the FISA legislation. This disclosure would chill the participation and candid flow of ideas and thereby harm the deliberative process. The deliberation pre-dates any final decision by the agency on the FISA legislation. The record is also exempt pursuant to the presidential communications privilege as Civil Division attorneys were functioning as the President's advisors and agents relating to the development of prospective FISA reform legislation and its impact on pending litigation. The emails in document 6 are properly withheld under 5 U.S.C. 552(b)(5). No segregable portions

were identified that could be released.

16. Document 8 is an email chain of three emails (two pages) relating to a meeting on the FISA legislation. The first email is a duplicate of the fourth email described in document 6 above which announces the schedule of the FISA meeting. The second email in this chain, is a response to the addressees of the first email, from counsel representing co-defendants with the United States in the case In RE National Security Agency Telecommunications Records Litigation, No. M:06-cv-01791-VRW, N.D. CA. (See footnote 1 above), identifying individuals from their firm who will attend the meeting on behalf of one of the parties. The third email is from counsel representing co-defendants with the United States in the case In RE National Security Agency Telecommunications Records Litigation, No. M:06-cv-01791-VRW, N.D. CA., to the addressees in email 2, which identifies individuals who will attend the meeting on behalf of one of the co-defendants. The disclosure of any of the emails within document 8 would identify the individuals participating in the meeting which is part of the agency deliberation on the issues of the FISA legislation. This disclosure would chill the participation and candid flow of ideas and thereby harm the deliberative process. The deliberation pre-dates any final decision by the agency on the FISA legislation. The emails are also exempt pursuant to the presidential communications privilege as Civil Division attorneys were functioning as the President's advisors and agents relating to the development of prospective FISA reform legislation and its impact on pending litigation. The emails in document 8 are properly withheld under 5 U.S.C. 552(b)(5). No segregable portions were identified that could be released.

17. Document 9 is an email chain of twelve emails (three pages). The first email is from a Civil Division attorney to three other attorneys in the Civil Division, one attorney in the Office

of Associate Attorney General and one attorney from the National Security Division. The email relates to a suggested meeting regarding litigation in the telecom matter. The email relates to the agency deliberation of the pending litigation. The remaining eleven emails are exchanged between the same individuals as in the first email and discuss various individuals availability and other aspects of the meeting including whether to reserve a particular room and whether to hold a pre-meeting. The disclosure of any of the emails within document 9 would identify the individuals participating in the meeting which is part of the agency deliberation on the Telecom litigation, In RE National Security Agency Telecommunications Records Litigation, No. M:06-cv-01791-VRW, N.D. CA.(see footnote 1 above). This disclosure would chill the participation and candid flow of ideas and thereby harm the deliberative process. The deliberation pre-dates any final decision on the subject litigation. Disclosure would also disclose government attorney work product by disclosing who we met with to discuss the litigation. The emails are also exempt pursuant to the presidential communications privilege as Civil Division attorneys were functioning as the President's advisors and agents relating to the development of prospective FISA reform legislation and its impact on pending litigation. The emails in document 9 are properly withheld under 5 U.S.C. 552(b)(5). No segregable portions were identified that could be released.

18. Document 10 is an email chain of four emails (two pages). All four of the emails are duplicates of emails contained in document 9. The duplicates are of the first, second, third and fourth emails in document 9. As described above, they discuss a meeting to discuss the Telecom litigation and the particular arrangements for the meeting. As such they are part of the agency deliberative process and attorney work product and are properly withheld under 5 U.S.C.

552(b)(5). The emails are also exempt pursuant to the presidential communications privilege as Civil Division attorneys were functioning as the President's advisors and agents relating to the development of prospective FISA reform legislation and its impact on pending litigation. No segregable portions were identified that could be released.

19. Document 11 is an email chain of seven emails (two pages). All of the emails are duplicates of emails contained in document 9 as email one through seven. As described above, they discuss a meeting to discuss the Telecom litigation and the particular arrangements for the meeting and are part the agency deliberative process and also reflect attorney work product. They are properly withheld under 5 U.S.C. 552(b)(5). The emails are also exempt pursuant to the presidential communications privilege as Civil Division attorneys were functioning as the President's advisors and agents relating to the development of prospective FISA reform legislation and its impact on pending litigation. No segregable portions were identified that could be released.

20. Document 12 is an email chain of four emails (one page). The first second and third are duplicates of emails two three and four in document 9. The fourth email in document 12 is a response to the litigation meeting email and is addressed to the same individuals as the emails in document 9. This email indicates that the sender will not be available to attend the meeting. As described above, these emails relate to a meeting to discuss the Telecom litigation and the particular arrangements for the meeting. As such they are part of the agency deliberative process and also reflect attorney work product. The emails are also exempt pursuant to the presidential communications privilege as Civil Division attorneys were functioning as the President's advisors and agents relating to the development of prospective FISA reform legislation and its

impact on pending litigation. They are properly withheld under 5 U.S.C. 552(b)(5). No segregable portions were identified that could be released.

Exemption 5

21. Exemption 5 of the FOIA, provides for the withholding of inter and intra agency communications that would not be available to a party in litigation with the agency. This section has been interpreted to apply the privileges available in civil discovery to the FOIA. Under this interpretation agencies may withhold records that constitute attorney work product, pre-decisional deliberative process or are attorney client privileged. The threshold requirement for the application of exemption 5 is that the records must not have been disclosed outside the inter agency or intra agency relationship. The threshold has also been interpreted to be met and to allow withholding when records have been exchanged with contractors or consultants working for federal agencies. Relationships such as those created by common interest agreements when the government is a co-party in litigation have been held to be within the threshold permitting the application of exemption 5. As to records at issue in this litigation, the government is a co-party defendant in litigation (see footnote 1 above) with the parties represented by counsel with whom records were exchanged. This exchange falls within the threshold of exemption 5 and properly brings co-parties and their counsel within the threshold and permits its application to protect exchanges of documents that contain attorney work product, attorney client privilege and pre-decisional deliberative process. The exemption also protects from disclosure, documents subject to the presidential communications privilege and the inter-branch joint deliberation privilege embodied in exemption 5.

Deliberative Process Privilege

22. As described above, the emails and attachments at issue in this case were exchanged only within and between government agencies and co-party counsel. They are therefore intra-agency or inter-agency documents and meet the threshold for withholding under 5 U.S.C. §552(b)(5). The records being withheld under the deliberative process privilege incorporated within this exemption to disclosure relate to the deliberation of issues relating to the passage of legislation regarding the FISA and provision of assistance by the telecommunications industry to the U.S. government's intelligence community. The communications predate the finalization of any decision regarding the legislation and are therefore pre-decisional. The withheld documents reflect the thoughts, suggestions, views, and analyses of the participants regarding the issues to be resolved.. The privilege from public disclosure under exemption 5 is intended to promote and protect the candid exchange between government personnel and others that fall within the ambit of the threshold including co-parties and final decision makers. Disclosure of internal agency deliberations would clearly chill the full participation by agency personnel and minimize the quality of information available to decision makers. As such, the documents so identified above, as part of the deliberative process are properly withheld from public disclosure under 5 U.S.C. 552(b)(5).

Attorney Work Product Privilege

23. This privilege protects the thoughts, opinions, and strategies of attorneys in preparing for litigation or possible litigation. The documents at issue here, reflect the thoughts of attorneys about legal issues relating to the pending telecom legislation which will impact pending litigation involving the provision of records of telephone and other electronic communications to

the government by private companies. Because the documents reflect the thoughts, opinions, planning and legal reasoning of agency attorneys and co-party counsel in litigation, they clearly fall within the traditional meaning of attorney work product and are exempt under the attorney work product privilege of Exemption 5.

Presidential Communications Privilege

24. The presidential communications privilege protects communications made by federal agency personnel acting as agents of the President, in support of the President's performance of his official responsibilities in the process of shaping policies and making decisions. The presidential communications privilege ensures the President's ability to effectively discharge his constitutional powers. The documents identified above, which are protected by the privilege are emails relating to the FISA amendments that were exchanged between Executive Branch staff or with co-party counsel, for the purpose of assisting the President in his decision making with respect to the FISA reform legislation. The privilege protects the documents from compelled public disclosure. The confidentiality guaranteed by this privilege affords the participants in the email exchanges and the information exchanges reflected in these protected documents, as well as the President, the freedom necessary to explore alternatives in the process of participating in the legislative process and developing legislation. Thus, the confidentiality of these documents is necessary to protect the integrity of the Executive Branch decision-making process in general, and the President's decision-making process in particular.

Inter-Branch Joint Deliberative Privilege

25. Documents one, four and five above have been withheld pursuant to the inter-branch joint deliberative privilege embodied in exemption 5. This privilege protects joint deliberations

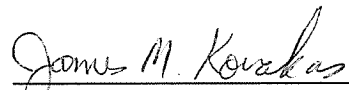
between the Executive and Legislative Branches relating to the development of legislation. Maintaining the confidentiality of such deliberations is essential for the Executive and Legislative Branches to work effectively together in developing legislation—a function at the heart of the constitutional system that is rooted in the constitutional authorities of each Branch. Therefore, the privilege must protect these joint deliberations from public disclosure.

Segregability Requirement of the FOIA

26. I reviewed the documents withheld under Exemption 5, specifically for identification of any factual or non-exempt portions which could be segregated from the privileged portions and released. No segregable portions were identified that could be released.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on this 21st day of November, 2008.



James M. Kovakas
Attorney-In-Charge
FOI/PA Office, Civil Division
Department of Justice



U.S. Department of Justice

Civil Division

Washington, D.C. 20530

JMK:jmk#145-FOI-9502

April 17, 2008

Marcia Hofmann
Staff Attorney
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110

Dear Ms. Hofmann:

This is in response to your December 21, 2007 Freedom of Information Act (FOIA) request addressed to the Office of Information and Privacy (OIP), for records from September 1, 2007 through the present concerning briefings, discussions, or other exchanges between the Department of Justice (DOJ) and members of Congress or representative of telecommunications companies about amendments to FISA. Your request was received in OIP on December 27, 2007.

During the processing of your request, OIP identified three email records and attachments, consisting of nine pages that originated in or were received by the Civil Division. Pursuant to DOJ regulations, these records were referred to this office on April 4, 2008 for review and direct response to you.

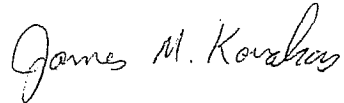
The subject records include a single email and two email chains, one with attachments. Pursuant to my review of these records under the FOIA, I have determined that they are exempt from disclosure under 5 U.S.C. 552 (b)(5) as they are pre-decisional internal deliberations disclosure of which would likely have a chilling effect on agency deliberations. These records were not exchanged outside of the executive branch and were reviewed to determine if non-exempt portions could be released..

I am aware that the this FOIA request is the subject of pending litigation, however, I am required to provide you with your administrative appeal rights as follows. You may appeal my denial of access to records as outlined above by writing within 60 working days of the receipt of this letter to Director, Office of Information and Privacy, 1425 New York Avenue, Suite 11050, United States Department of Justice, Washington, D.C. 20530. Both the letter appealing the decision and the envelope should be clearly marked "FOIA APPEAL."

Exhibit A

Thereafter, judicial review would be available in the U.S. District Court in the district in which you reside or have your principal place of business or in the United States District Court for the District of Columbia.

Sincerely,

A handwritten signature in cursive script that reads "James M. Kovakas".

James M. Kovakas
Attorney In Charge
FOI/PA Unit, Civil Division



U.S. Department of Justice

National Security Division

JMK:jmk

Washington, D.C. 20530
October 10, 2008

Kurt Opsahl
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA. 94110

Dear Mr. Opsahl:

During the processing of your April 24, 2008, Freedom of Information Act (FOIA) request to the National Security Division, seeking access to all agency records from December 21, 2007 to the present concerning briefings, discussions, or other exchanges any NSD official has had with representatives or agents of telecommunications companies concerning amendments to FISA, 22 pages of records originating in the Civil Division were identified. These records were referred to this office for review and direct response to you.

Pursuant to my review, I have determined that the records, which consist of email chains are exempt from disclosure pursuant to 5 U.S.C. 552 (b)(5). This FOIA exemption has been interpreted to preclude disclosure of inter-intra agency records that would disclose attorney work product, attorney client communications or pre-decisional deliberative process. The subject records are withheld as attorney work product and pre-decisional deliberative process.

Although your access request is the subject of litigation, you may administratively appeal this determination by writing to the Director, Office of Information and Privacy, United States Department of Justice, 1425 New York Avenue, NW, Suite 11050, Washington, D.C. 20530-0001, within sixty days from the date of this letter. Both the letter and envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in cursive script that reads "James M. Kovakas".

James M. Kovakas
Attorney In Charge
FOI/PA Unit, Civil Division

Exhibit B