

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELECTRONIC PRIVACY)
INFORMATION CENTER,)
)
Plaintiff,)
)
v.)
)
UNITED STATES)
DEPARTMENT OF JUSTICE,)
)
Defendant.)
_____)

Case No. 1:13-cv-01961-KBJ

**DEFENDANT’S RESPONSE TO PAINTIFF’S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE DISPUTE, AND COUNTER-STATEMENT
OF ADDITIONAL MATERIAL FACTS NOT IN DISPUTE**

Pursuant to LCvR 7(h) and paragraph 5(d) of this Court’s Appendix to its Standing Order and Guidelines for Civil Cases, defendant, the United States Department of Justice, submits this Consolidated Response to plaintiff’s Statement of Material Facts as to Which There is No Genuine Dispute and defendant’s further Counter-Statement of Additional Material Facts Not in Dispute.

Defendant’s Responses to Plaintiff’s Statement of Facts

14. EPIC requested expedited processing of the FOIA request at issue in this action, asserting that the request met the criteria for expedited processing under 5 U.S.C. § 552(6)(E)(ii) because the request “pertains to a matter about which there is an urgency to inform the public about an actual or alleged federal government activity,” and because “EPIC is ‘primarily engaged in disseminating information.’” Pl’s Mot. Prelim. Inj., Ex. A (ECF No. 3-2).

Response: Undisputed, but not material.

15. The NSD granted EPIC's request for expedited processing on November 5, 2013, on the grounds that EPIC "demonstrated that there is a particular urgency to inform the public about an actual or alleged federal government activity." Pl's Mot. Prelim. Inj., Ex. C (ECF No. 3-4).

Response: Undisputed, but not material.

16. In 2013, the Government declassified an April 1, 2011 Memorandum sent from the NSA to the Senate Select Committee on Intelligence regarding the agency's collection of cell site location information pursuant to the FISA. *See* Press Release, James R. Clapper, Director of National Intelligence, *DNI Clapper Declassifies Additional Intelligence Community Documents Regarding Collection Under Section 501 of the Foreign Intelligence Surveillance Act* (Oct. 28, 2013), <http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/954-dni-clapper-declassifies-additional-intelligence-community-documents-regarding-collection-under-section-501-of-the-foreign-intelligence-surveillance-act>.

Response: Undisputed that the Director of National Intelligence issued the linked press release, which is not material. Defendant disputes plaintiff's characterization of the partially-declassified April 1, 2009 document, to which defendant respectfully refers the Court for a full and accurate statement of its contents.

http://www.dni.gov/files/documents/501/NSA%20CSLI%20Gottzman%20Response_SealedFINAL.pdf.

17. The NSA Memorandum acknowledges that it has obtained "geolocation information" from cell phone call records and is considering using that information to gather intelligence. *See* Memorandum from Office of the General Counsel (Intelligence Law), Nat'l

Sec. Agency, to the Senate Select Committee on Intelligence (Apr. 1, 2011), *available at*

http://www.dni.gov/files/documents/501/NSA%20CSLI%20Gottsman%20Response_SealedF%20INAL.pdf.

Response: Defendant disputes plaintiff's characterization of the partially-declassified April 1, 2009 document, which does not mention FISA PR/TT authority and to which defendant respectfully refers the Court for a full and accurate statement of its contents.

http://www.dni.gov/files/documents/501/NSA%20CSLI%20Gottsman%20Response_SealedF%20INAL.pdf.

18. The Government has declassified and released two Foreign Intelligence Surveillance Court ("FISC") opinions regarding the use of FISA Pen Register and Trap and Trace surveillance that include detailed discussions of the statutory and constitutional issues related to that surveillance, the FISC's jurisdiction, the FISA process, and compliance issues presented by the Government's improper use of the data it collected. *See* James R. Clapper, Dir. of Nat'l Intelligence, *DNI Clapper Declassifies Additional Intelligence Community Documents Regarding Collection Under Section 501 of the Foreign Intelligence Surveillance Act* (Nov. 18, 2013), <http://icontherecord.tumblr.com/post/67419963949/dni-clapper-declassifies-additional-intelligence>.

Response: Undisputed that the Director of National Intelligence issued the linked press release, which is not material. It is unclear what two FISC orders plaintiff is characterizing, and plaintiff's statement does not comply with ¶ 5(d)(vi) of the Appendix to this Court's Order and Guidelines for Civil Cases. The Court should, accordingly, disregard plaintiff's Statement No. 18.

19. The Government has declassified a recent report detailing compliance issues with surveillance conducted under the FISA. *See* Office of the Dir. of Nat'l Intelligence, *Semi-Annual Assessment of Compliance with the Procedures and Guidelines Issued Pursuant to Section 702 of the Foreign Intelligence Surveillance Act, Submitted by the Attorney General and the Director of National Intelligence* (Aug. 21, 2013), <http://icontherecord.tumblr.com/post/58944252298/dni-declassifies-intelligence-community-documents>.

Response: Undisputed that the Director of National Intelligence issued the linked press release, which is not material. Defendant respectfully refers the Court to the cited report for a full and accurate statement of its contents, but notes the report discusses compliance issues under a separate section of the FISA (“Section 702”), not FISA PR/TT authority.

<http://www.dni.gov/files/documents/Semiannual%20Assessment%20of%20Compliance%20with%20procedures%20and%20guidelines%20issued%20pursuant%20to%20Sect%20702%20of%20FISA.pdf>

20. The semiannual reports partially released by the NSD contain summaries of significant FISC legal interpretations. *See, e.g.*, Ex. 1 (“Released Portions of Semiannual Reports”) at 000137, 000155, 000181.

Response: Undisputed. *See* Exhibit to 3d Bradley Decl.

21. The semiannual reports partially released by the NSD contain summaries of “FISA Process Improvements” and discussions of the “Scope of the FISC’s Jurisdiction.” *See, e.g., id.* at 000139, 000160, 000190.

Response: Undisputed.

22. The semiannual reports partially released by the NSD contain aggregate

statistical information about the number of pen register applications filed and the number of U.S. persons targeted. *See* 50 U.S.C. § 1846(b).

Response: Undisputed.

23. The NSD has redacted certain aggregate statistical information in some of the semiannual reports, *see, e.g.*, Ex. 1 (“Released Portions of Semiannual Reports”) at 000152, 000179, 000287, 000296, but has disclosed aggregate statistical information in some of the other reports, *see, e.g., id.* at 000306, 000315, and the Second Bradley Declaration does not explain the reason for this disparate treatment of aggregate statistical information.

Response: Disputed. Defendant has released statistical information that was redacted in error, including two mistakes pointed out by plaintiff for the first time in its summary judgment filing and one subsequently discovered by defendant as it re-reviewed the semiannual reports in light of those administrative errors. 3d Bradley Decl. ¶¶ 5-7 & Exhibit thereto.

24. The Oversight Section of the NSD’s Office of Intelligence is not a law enforcement agency. *See* Press Release, Dep’t of Justice, *National Security Division Launches New Office of Intelligence* (Apr. 30, 2008), available at http://www.justice.gov/archive/opa/pr/2008/April/08_nsd_360.html; Nat’l Sec. Div., U.S. Dep’t of Justice, *Office of Intelligence*, <http://www.justice.gov/nsd/office-intelligence> (last visited Nov. 21, 2014); *see also* 1 Kris & Wilson, *National Security Investigations & Prosecutions* § 1.8 (2d ed. 2012).

Response: This paragraph contains a conclusion of law which is disputed.

25. Document number 68 contains “a discussion on the legal standards, citing particular case law, highlighting the legislative history as well as articulating policy

considerations” related to an application for FISA surveillance. Second Declaration of David M. Hardy ¶ 12.

Response: Undisputed.

Defendant’s Counter-Statement of Additional Material Facts Not in Dispute

98) Document no. 68 on defendant’s *Vaughn* index is a government “response to orders for additional briefing in reference to a request for” two combined Pen Register/ Trap and Trace and Business Records (“PR/BR”) Orders. *See* 2d Hardy Decl. ¶ 12; *see also* 3d Hardy Decl. ¶ 31; *Vaughn* Index, attachment to 2d Bradley Decl.

99) The intelligence method and law enforcement technique discussed in document 68 is classified pursuant to Executive Order. Third Hardy Decl. ¶¶ 8-13, 31, 42.

100) David M. Hardy, a senior FBI official with original classification authority, has determined “that disclosure of specific information describing the intelligence activities or methods that have been or are being used within these documents, and are still used by the FBI in gathering intelligence information in other cases, could reasonably be expected to cause serious damage and exceptionally grave damage to the national security for the following reasons: (1) disclosure would allow hostile entities to discover the evolution of the FBI’s intelligence gathering methods; (2) disclosure would reveal still-current, specific targets of the FBI’s national security investigations; and (3) disclosure would reveal the determination of the criteria used and priorities assigned to past and current intelligence or counterintelligence investigations. With the aid of this detailed information, hostile entities and individuals could develop countermeasures which would, in turn, severely disrupt the FBI’s intelligence gathering capabilities. This major disruption could result in severe damage to the FBI’s efforts to detect and apprehend violators of the United States’ national security and criminal laws.” 3d Hardy

Decl. ¶¶ 2, 36.

101) Release of this information in Document 68 could be reasonably expected to cause serious harm to national security and it is, therefore, classified. *Id.* ¶¶ 35-36.

102) Mr. Hardy has also determined that otherwise innocuous information in Document 68, “when read in conjunction with the other documents” at issue in this case, “would reveal critical details about an important investigative method and technique used by the FBI in national security investigations.” 2d Hardy Decl. ¶ 37; *see also* 3d Hardy Decl. ¶ 41.

103) Mr. Hardy has “determined that the Westlaw printouts attached to, and other case citations or legal analysis included in, Document 68 are properly classified due to their compilation with the balance of Document 68.” 3d Hardy Decl. ¶ 51.

104) The Government has withheld classified information from twenty-five semiannual reports that the Attorney General has submitted to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence, as well as the House and Senate Judiciary Committees, that discuss, *inter alia*, all PR/TT surveillances conducted under FISA from July 1, 2000 to December 21, 2012. 2d Bradley Decl. ¶ 9; 3d Bradley Decl. ¶ 4.

105) The withheld portions consist of three types of information: summary descriptions of intelligence targets and investigations, which specifically describe national security investigations and how they are conducted; summary descriptions of compliance incidents, which include details about United States intelligence methods; and information pertaining to intelligence sources and methods. 2d Bradley Decl. ¶ 10.

106) In some cases, intelligence sources and methods have been withheld from sections in the reports that, according to their unredacted headings, discuss significant legal interpretations by the FISC, its jurisdiction, or its procedures because the descriptions of those

compliance incidents and legal interpretations cannot be reasonably segregated from highly sensitive, classified information and then released. 3d Bradley Decl. ¶ 8.

107) After carefully reviewing the withheld paragraphs, Mr. Bradley has determined that the descriptions of the compliance incidents and legal analysis cannot reasonably be segregated and released without risking disclosure of the manner and means by which the United States Government collects intelligence information. 3d Bradley Decl. ¶ 8.

108) Mr. Bradley thus explains that “in the context of plaintiff’s FOIA request at issue in this litigation,” even otherwise seemingly “mundane and non-sensitive material” would “reveal highly sensitive information to sophisticated adversaries of the United States.” *Id.* ¶ 9.

109) Therefore, Mr. Bradley “determined that these paragraphs are not reasonably segregable, including as to the legal analysis and compliance incident descriptions they contain.” *Id.* ¶ 10.

110) A Department of Justice official with original classification authority has determined that the material withheld from the semiannual reports meets the requirement for classification under the Executive Order, § 1.1(a). *See* 3d Bradley Decl. ¶¶ 3, 7-11; 2d Bradley Decl. ¶¶ 10, 13.

111) Mr. Bradley has personally reviewed all the documents discussed in his declarations, and all were properly marked for classification per the Executive Order. 3d Bradley Decl. ¶¶ 3, 11.

112) Classified information has been redacted from the documents produced to plaintiff, and their overall classification markings have been struck through, *e.g.*, ~~SECRET~~, because the documents as released to plaintiff are not classified. *Id.* ¶ 11.

113) Statistics concerning the number of United States persons targeted for

surveillance in a given semiannual time period were initially redacted from the versions of Documents 126, 136, and 137 released to plaintiff due to administrative error. 3d Bradley Decl. ¶ 5.

114) Defendant has corrected those errors by releasing the statistics in question to plaintiff as well as re-reviewing all of the semiannual reports to ensure there were no other such errors. 3d Bradley Decl. ¶ 5.

115) Certain statistics are included in certain reports, but not others, and some of the responsive semiannual reports include precise statistics whereas others state a statistic was “at least” a certain level, not due to any redactions or other decisions by defendant in processing plaintiff’s FOIA request, but due to the content of the original responsive records. 3d Bradley Dec. ¶¶ 6-7.

116) The information redacted from the reports to Congress was drawn from FBI national security investigative files. 3d Bradley Decl. ¶ 12; 3d Hardy Decl. ¶¶ 31, 32, 49.

117) The information withheld pursuant to Exemption 7(E) from the semiannual reports to Congress produced to plaintiff would reveal law enforcement techniques. 3d Bradley Decl. ¶ 12; 2d Bradley Decl. ¶ 11.

118) Release of any portion of Document 68 would reveal information about intelligence sources, methods, and activities. 3d Hardy Decl. ¶¶ 43-46.

119) Defendant withheld information pertaining to intelligence sources, methods, and activities pursuant to Section 102A(i)(1) of the National Security Act of 1947, as amended, on behalf of the FBI. 1st Hardy Decl. ¶¶ 36-38; 3d Hardy Decl. ¶¶ 43-46.

120) Defendant has reviewed the withheld material and disclosed all non-exempt information that reasonably could be disclosed. *See* 1st Hardy Decl. ¶¶ 52-53, 2d Hardy Decl.

¶¶ 53-54, 3d Hardy Decl. ¶ 55, 2d Bradley Decl. ¶ 13, 3d Bradley Decl. ¶¶ 8-10.

Dated December 11, 2014

Respectfully submitted,

JOYCE R. BRANDA
Acting Assistant Attorney General

RONALD C. MACHEN
United States Attorney

ELIZABETH J. SHAPIRO
Deputy Branch Director

/s/ Steven Y. Bressler
STEVEN Y. BRESSLER
Senior Counsel
U.S. Department of Justice, Civil Division
Ben Franklin Station, P.O. Box 833
Washington, D.C. 20044
(202) 305-0167
Steven.Bressler@usdoj.gov

Counsel for Defendant