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

PLAINTIFF'S REPLY IN SUPPORT OF THE CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Electronic Privacy Information Center ("EPIC") respectfully submits the following Reply in support of the Cross-motion for Summary Judgment. In this case the Defendant United States Department of Justice National Security Division ("NSD") has withheld non-exempt portions of the semiannual reports to Congress. The agency conceded in the opposition that it improperly withheld statistical information and other non-exempt materials, which it has now released to EPIC. But the NSD continues to withhold portions of the semiannual reports, and an attachment to Document 68, that could not plausibly meet the standard for proper classification. The NSD has also failed to show that the summaries of Foreign Intelligence Surveillance Court ("FISC") legal opinions in the semiannual reports meet the threshold requirement of Exemption 7 or the standard for Exemption 7(E).

ARGUMENT

The NSD has acknowledged in its opposition that significant material that was marked "classified" in the initial document production was not, in fact, properly classified. As a result, the NSD has released additional portions of the semiannual reports to EPIC. Yet the DOJ still argues that none of the other redacted portions of the semiannual reports or of Document 68 contain segregable, non-exempt material. The NSD's argument is not supported by the record and is based on an improperly narrow view of the agency's burden to satisfy Exemptions 1 and 7(E). The use of pen register orders to conduct surveillance pursuant to law enforcement and national security investigations is a matter of public record, explained in countless federal and state court opinions, legal publications, Congressional reports, and other articles. As these investigatory methods are not secret, the NSD does not have a plausible claim that the disclosure of the FISC legal interpretations in the semiannual reports and Westlaw case printouts in Document 68 would cause harm to national security.

First, contrary to the DOJ's claims, Def.'s Opp'n 2, 5-6, the NSD has not satisfied the substantive or procedural criteria of Executive Order 13,526, as is required to withhold material under Exemption 1. The lack of adequate classification markings and lack of specificity underscores the core flaw with the agency's review: the NSD declarations do not adequately explain why the release of summaries of legal opinions regarding interpretations of publicly available statutes and cases would "be expected to cause identifiable or describable damage to national security" in the manner required by the Executive Order. Exec. Order 13,526 § 1.4. It is neither logical nor plausible that a summary of a legal opinion addressing the legality of a widely known intelligence gathering technique – such as the collection of mobile phone location data – can ever be properly classified. And the few conclusory paragraphs offered in the public declarations submitted by the agency are not sufficient to justify such a conclusion.

Second, the NSD has not satisfied either the threshold test needed to assert an Exemption 7 claim or the more specific requirements of Exemption 7(E). The agency has not argued that congressional oversight reports are law enforcement records, and the withheld portions of the semiannual reports were drawn from FISC opinions, not documents compiled for law enforcement purposes. The agency has also failed to carry its burden under Exemption 7(E) because the agency's explanation of the risk circumvention that would be caused by releasing the withheld portions is entirely circular.

I. The NSD Has Not Met Its Burden to Show That The Material Withheld Is Properly Classified As Required Under FOIA Exemption 1

The NSD concedes in its opposition that the agency improperly withheld non-exempt statistical material from the semiannual reports. Def's Opp'n (ECF No. 27) at 10. This directly contradicts the statements submitted by NSD, Second Declaration of Mark A. Bradley (ECF 22-3) at ¶ 13, and undercuts the reliability of the government's factual assertions regarding other withheld materials. *See id.* at ¶ 10 ("The withheld portions of these reports fall into three categories . . . . All of these are classified at the SECRET or TOP SECRET levels . . . ."). Given these previous errors and the conclusory nature of the statements in the declarations, the Court should approach the agency's broad and categorical classification claims with skepticism. Further, publicly available materials, including published court opinions, contained detailed discussions of pen register intelligence gathering techniques. The NSD has not explained how the release of summaries of FISC opinions concerning widely known techniques could have any measurable impact on national security.

A. The NSD Has Improperly Withheld Summaries of FISC Opinions That Include Significant Interpretations of the FISA

The NSD argues that it withheld only three types of information under Exemption 1, Def.'s Opp'n at 3, but the agency redacted "Summaries of Significant Legal Interpretations" by

the FISC in the semiannual reports. *See* Pl's Cross Mot. Summ. J. (ECF No. 25-1) at 21 (listing three examples). The agency has not satisfied its burden to show that these legal summaries are properly classified at the Secret or Top Secret level under Executive Order 13,526. In fact, evidence on the record and in publicly available court opinions and government reports reveals a great deal about the use of pen registers to gather phone data. Given this evidence, it is not plausible that the marginal effect of the disclosure of FISC's interpretation of the same legal issues that are being publicly discussed could "reasonably" be "expected to cause exceptionally grave damage to national security," as required for the Top Secret classification level, or "serious damage to national security," as required for the Secret classification level under Executive Order 13,526 §1.2. *See Judicial Watch, Inc. v. DOD*, 857 F. Supp. 2d 44, 62 (D.D.C. 2012), *aff'd*, 715 F.3d 937 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 900 (2014) (holding that the applicable test under Exemption 1 is whether "the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility" (quoting *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982)).

It is clear from the record that the NSD has not provided the type of specific details necessary to satisfy its burden of reasonableness, logic, and plausibility. Based on the unredacted information in the reprocessed semiannual reports, the NSD has withheld summaries of FISC opinions that were issued during the following periods:

- January 1, 2005, through June 30, 2005. *See* 3d Bradley Decl., Ex. ("Reprocessed Reports"), pt. 2 (ECF No. 27-4) at 15-16.
- July 1, 2005, through December 31, 2005. *See* Reprocessed Reports, pt. 2 at 79-81.
- January 1, 2006, through June 30, 2006. *See* Reprocessed Reports, pt. 2 at 48.

It is also clear from an unclassified paragraph released in the reprocessed reports – which had been improperly redacted by the DOJ in the initial version – that the NSD sent Congress copies of at least one of these FISC opinions "that included significant construction or interpretation of the provisions of the [FISA] issued during the period from July 1, 2005, through December 31, 2005." Reprocessed Reports, pt. 2 at 81. The *Vaughn* Index and the Declarations of David M. Hardy acknowledge that the FBI requested, and the FISC granted, a number of combined "PR/BR" orders. *See* Third Declaration of David M. Hardy (ECF No. 27-7) ¶¶ 29-30, 48, 52; Second Declaration of David M. Hardy (ECF No. 24-1) ¶¶ 10-12, 23, 30, 34; Second Declaration of Mark A. Bradley (ECF No. 22-3), Ex. A. The FBI's use of combined PR/BR orders in 2005 has already been discussed at length in a public report by the DOJ Inspector General. *See* Office of the Inspector Gen., U.S. Dep't of Justice, *A Review of the Federal Bureau of Investigation's Use of Section 215 Orders for Business Records* 35-37 (2007) (describing the types of records requested in the 141 "combination orders" filed by the FBI in 2005).[1]

Therefore, based on the record and on the DOJ's own publicly available report, it is clear that the FISC issued new and significant orders regarding combined PR-BR applications to collect telecommunications data in 2005. According to the DOJ report, the FISC modified two of these "combination orders" in 2005 after the Office of Intelligence Policy and Review (the predecessor to defendant NSD) "notified the FISA court that federal judges in criminal cases had denied requests . . . ." *Id*. at 39. The FISC also "directed the government to file a supplemental brief on this issue," which the OIPR submitted along with a "summary of the relevant criminal case law . . . ." *Id*. The supplemental brief described in the DOJ report is presumably Document 68 in this case.

[1] *Available at* http://www.justice.gov/oig/special/s0703a/final.pdf.

During the same period in 2005, federal magistrate judges published opinions denying DOJ requests for prospective cell-site location information using a combined or "hybrid" application under the Electronic Communications Privacy Act and the criminal Pen Register statute. *See*, *e.g.*, *In re Pen Register*, 396 F. Supp. 2d 747 (S.D. Tex. 2005); *In re United States*, 402 F. Supp. 2d 597 (D. Md. 2005); *In re United States*, 396 F. Supp. 2d 294 (E.D.N.Y. 2005). The Associate Deputy Attorney General then discussed the prospective collection of cell-site information at a Congressional hearing in 2011. *See The Electronic Communications Privacy Act: Government Perspectives on Protecting Privacy in the Digital Age: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 6-7, 9 (2011) (statement of James A. Baker, Associate Deputy Att'y Gen., U.S. Dep't of Justice) ("In particular, this testimony addresses eight separate issues: the standard for obtaining prospective cell-site information . . .").[2] Therefore, the discussion of legal issues presented by the prospective collection of cell phone location information could not reasonably, logically, or plausibly be expected to cause damage to national security because that method of surveillance is already widely discussed in public by judges, government officials, legal commentators, and the agency itself.

The NSD has also failed to provide any reasonable, logical, or plausible explanation of how the disclosure of summaries outlining the scope of the FISC's jurisdiction and improvements to the FISA process could be reasonably expected to cause exceptional or serious harm to national security. The NSD has redacted one section of the semiannual reports discussing the "Scope of the FISC's Jurisdiction" and two sections discussing "FISA Process Improvements." *See* Pl.'s Cross Mot. Summ. J. at 22. The agency's explanation for this categorical withholding is contained in three brief paragraphs in the Third Bradley Declaration.

[2] *Available at* http://www.judiciary.senate.gov/imo/media/doc/11-4-6%20Baker%20Testimony.pdf.

See 3d Bradley Decl. ¶¶ 8-10. But the explanation offered is simply not plausible in this context. The declaration asserts that the disclosure of "legal analysis, when considered in conjunction with other publicly available information" could be expected to lead to the deduction of "particular intelligence activities or sources or methods, and possibly lead to the use of countermeasures." *Id.* ¶ 9. While this might seem logical or plausible in the abstract, it is not plausible based on the record provided by the agency. The summary redacted on pages 56-60 of Document 126 is clearly labeled "Scope of the FISC's Jurisdiction." *See* Reprocessed Reports, pt. 2 at 57-61. The NSD has not cited to any example, and EPIC is not aware of one, where the scope of a court's jurisdiction could itself be classified. It would not be reasonable to conclude that in this case based on the record before the Court.

Finally, contrary to statements in the NSD's opposition and declarations, EPIC has never argued that the agency should disclose summaries of compliance incidents. The agency's failure to distinguish between the redacted sections of the semiannual reports that discuss compliance incidents with the portions that summarize significant legal interpretations by the FISC underscores the NSD's lack of required specificity and transparency.

B. The NSD Has Improperly Withheld Non-exempt Material Contained in Document 68

The NSD argues in the opposition that the Court should allow the agency to withhold Document 68 in its entirety, even though the record contains publicly available legal opinions printed from Westlaw. Def.'s Opp'n at 4-5. Although courts have generally deferred to agency determinations when evaluating an Exemption 1 claim, the agency's judgment must still meet the test of "reasonableness, logic, and plausibility." *Judicial Watch, Inc.*, 857 F. Supp. 2d at 62. The NSD's argument that the release of Westlaw printouts "could be reasonably expected to cause serious harm to national security," Def.'s Opp'n at 4, is simply not plausible.

All of the Westlaw materials included in Document 68 are already publicly available. Any surveillance methods that are discussed in published opinions – including, for example, the use of pen register orders to collect cell phone location information, *see*, *e.g.*, *In re United States*, 396 F. Supp. 2d 294 (E.D.N.Y. 2005), and the collection of "post-cut-through dialed digits," *In re United States*, 441 F. Supp. 2d 816 (S.D. Tex. 2005) – are by definition no longer "secret." In support of the implausible conclusion that the release of case printouts from Westlaw would risk serious damage to national security, the NSD refers to a single paragraph from the Third Declaration of David M. Hardy. Def.'s Opp'n at 3-4. That paragraph addresses the risks that might be presented by the release of Document 68 in its entirety, but the reasoning cannot be logically applied to the Westlaw printouts. According to the declaration, damage could result from disclosure because (1) it would enable discovery of "the evolution of the FBI's intelligence gathering methods;" (2) it would "reveal still-current, specific targets of the FBI's national security investigations;" and (3) it would reveal "criteria and priorities" in these investigations. 3d Hardy Decl. ¶ 40. But disclosure of the Westlaw printouts could not plausibly cause any of those effects. The Westlaw printouts are decisions issued in other cases, and they are already publicly available. Those decisions could not, by their nature, reveal targets of current FBI investigations. Nor could they plausibly reveal any "evolution" in the FBI's tactics or its "priorities." The NSD has offered no reasonable or logical explanation for how these printouts could be properly classified.

C. The NSD Has Failed to Satisfy the Procedural or Substantive Requirements of Executive Order 13,526

The NSD has failed to satisfy both the procedural and substantive requirements of Executive Order 13,526, and the lack of specificity in the agency's discussion of classified material raises genuine issues as to the sufficiency of the Exemption 1 claim. Contrary to the

agency's assertion, Def.'s Opp'n at 8, EPIC has not argued that failure to satisfy the procedural requirements of the Executive Order means that none of the information contained in the documents is classified. Rather, as the D.C. Circuit recently found, an agency must satisfy "the Executive Order's substantive and procedural criteria" to meet its burden under Exemption 1. *Judicial Watch, Inc. v. DOD*, 715 F.3d 937, 941 (D.C. Cir. 2013) (citing *Lesar v. DOJ*, 636 F.2d 472, 481 (D.C. Cir. 1980)). The use of proper markings is also necessary to ensure that the agency has satisfied the necessary substantive criteria under the Executive Order. The NSD has failed to meet those substantive criteria in this case because it has not established a logical or plausible connection between disclosure of the withheld material in the semiannual reports and the applicable harm under the Executive Order.

Even after the NSD reprocessed the semiannual reports and released some unclassified portions and some of the classification markings, the agency has still not satisfied the procedural requirements of the Executive Order. First, Mr. Bradley's declaration states that the material withheld under Exemption 1 "are properly classified pursuant to subparagraphs (c) and (g) of Section 1.4 of Executive Order 13526 . . . ." 3d Bradley Decl. ¶ 10. But none of the semiannual reports provided to EPIC indicate that they contain material classified pursuant to §1.4(g). *See* Reprocessed Reports (ECF Nos. 27-3, 27-4, 27-5). Without such a mark, there is no way for EPIC or the Court to "effectively and efficiently to evaluate the factual nature of disputed information" in this case. *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973).

Second, the NSD has improperly withheld some of the classification portion markings from the semi-annual reports. To properly classify a document, an agency must indicate "one of the three classification levels defined in section 1.2 of this order." Exec. Order 13,526 § 1.6(a)(1). Even in the re-processed reports provided to EPIC, the agency continues to improperly

withhold classification portion markings. *See e.g.*, Bradley Decl., Ex. 2 at 79. By withholding these markings, the NSD makes it impossible for this Court to apply the proper standard to review the agency's Exemption 1 claims.

Further, the NSD has not provided the specific information necessary to show that it has satisfied the substantive requirements of the Executive Order. Specifically, the agency has not offered any explanation regarding the disparate classification levels applied to information about the FISC's legal interpretations. For example, the Third Hardy Declaration notes that Document 68 is classified "SECRET" while two of the semiannual reports are classified "TOP SECRET." 3d Hardy Decl. ¶ 42 n.8. Similarly one portion of the semiannual reports labeled "Other Legal Interpretations under FISA by the FISC" is marked "Top Secret," *see* Reprocessed Reports, pt. 2 at 15-16, whereas other sections labeled "Summary of Significant Legal Interpretations" are marked as Secret, *see id*. at 48, 80. The NSD has not provided any specific analysis of the reason for applying these different classification levels. Instead, the agency has lumped the two standards together in a conclusory sentence in the declaration that does not plausibly articulate why either "serious damage" or "extremely grave damage" could be expected to result from disclosure of these materials. *See* 3d Bradley Decl. ¶10.

II. The NSD Has Not Satisfied the Threshold Exemption 7 Requirement or the Specific Requirements of 7(E)

The NSD has failed to carry its burden of establishing that the records sought by EPIC were properly withheld under FOIA Exemption 7(E). *See* 5 U.S.C. § 552(a)(4)(B) (stating that "the burden is on the agency to sustain its action"). First, the NSD has not explained how portions of its congressional oversight reports qualify as records "compiled for law enforcement purposes" under the Exemption 7 threshold requirement. Second, the government has not shown that the disclosure of withheld portions summarizing FISC opinions would risk circumvention of

the law.

A. Summaries of FISC Opinions Submitted in the Congressional Oversight Reports Were Not Compiled for Law Enforcement Purposes

The NSD argues that all of the information withheld pursuant to Exemption 7(E) in the semiannual reports and Document 68 was "compiled for law enforcement purposes." Def.'s Opp'n at 13-14. But this argument ignores both the record and the applicable legal standard. The NSD has not cited any case that supports its conclusion that summaries of legal opinions, which were submitted to Congress as part of an oversight process, meet the threshold requirement of Exemption 7.

The Department of Justice "has mixed law enforcement and administrative functions" and the Oversight Section of NSD serves primarily administrative functions, so the defendant's conclusion that these records were compiled for law enforcement purposes must be "scrutinize[d] with some skepticism." *Pub. Empls. for Envtl. Responsibility v. U.S. Section, Int'l Boundary and Water Comm'n*, 740 F.3d 195, 203 (D.C. Cir. 2014) [hereinafter *PEER*]. The Defendant argues that the Oversight Section is an agency "specializing in law enforcement" simply because the Section is a part of the DOJ. Def.'s Opp'n at 14. But the case the agency cites – *Center for National Security Studies v. Department of Justice*, 331 F.3d 918, 926 (D.C. Cir. 2003) – involved records held by the FBI and other law enforcement subcomponents of the DOJ. EPIC does not dispute that those subcomponents serve law enforcement. *See Campbell v. DOJ*, 164 F.3d 20, 32 (D.C. Cir. 1998). But prior decisions regarding records created by those subcomponents of DOJ do not answer the question of whether the Oversight Section of NSD is entitled to deference when it claims that the congressional oversight reports were created for law enforcement purposes. The D.C. Circuit has stressed that the proper focus is on "whether the document in question was compiled for law enforcement purposes." *PEER*, 740 F.3d at 203. The

report itself was clearly created for oversight purposes, and was not created in connection with any specific investigation or law enforcement goal.

The NSD does not appear to contest that the report itself was not compiled for law enforcement purposes, but rather argues that the information summarized in the report was compiled for law enforcement purposes and that the summaries therefore meet the threshold test under *FBI v. Abramson*, 456 U.S. 615 (1982). Def.'s Opp'n at 14. The DOJ's reliance on *Abramson* fails for two reasons.

First, *Abramson* applies only if the earlier record was compiled for law enforcement purposes. *Dow Jones & Co. v. DOJ*, 724 F. Supp. 985, 989 (D.D.C. 1989) *aff'd sub nom*. *Dow Jones & Co. v. DOJ*, 917 F.2d 571 (D.C. Cir. 1990). In *Abramson*, the plaintiff sought documents describing FBI investigations of public figures, which contained information taken from FBI investigatory files. 456 U.S. at 620. There was no dispute that the FBI investigatory files were compiled for law enforcement purposes. *Id.* at 623. In this case, the DOJ is withholding summaries of court opinions and legal interpretations. Court opinions are compiled for the purpose of adjudicating a legal question, not for "law enforcement purposes." *See Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1272 (2011) (Alito, J., concurring) ("[L]aw enforcement includes . . . the investigation and prosecution of offenses . . . and proactive steps designed to prevent criminal activity and maintain security.").

Second, the NSD's broad reading of the holding in *Abramson* is not consistent with the Court's recent decision in *Milner*. The Court in *Milner* rejected the "High 2" exemption that was previously recognized in the D.C. Circuit, holding that FOIA "exemptions must be given a narrow compass" and should not be stretched beyond the boundaries of the statutory text. 131 S. Ct. at 1260 ("We would ill-serve Congress's purpose by construing Exemption 2 to reauthorize

the expansive withholding that Congress wanted to halt. Our reading instead gives the exemption the 'narrower reach' Congress intended through the simple device of confining the provision's meaning to its words.") (internal citations omitted). In this case, the text of the FOIA clearly states that Exemption 7 applies to *records*, not information, compiled for law enforcement purposes. *See Abramson*, 456 U.S. at 632 (Blackmun, J., dissenting) ("I cannot escape the conclusion that the Court has simply substituted the word 'information' for the word 'records' in Exemption 7(C). Yet we have recognized that '[the FOIA] deals with agency records' not information in the abstract.") (internal citations omitted).

The other cases that the DOJ cites are factually distinguishable and fail to support the agency's position. In *Lesar v. Department of Justice*, the plaintiff sought DOJ reports summarizing an inquiry into whether the FBI's investigation of Dr. Martin Luther King, Jr. was illegal. 636 F.2d 472 (D.C. Cir. 1980). Those records were part of an investigation and thus clearly compiled for a law enforcement purpose. *Id.* at 487 ("Indeed, one of the specific purposes for which the Task Force was created was that of ascertaining whether the FBI's activities regarding Dr. King were improper or illegal."). So *Lesar* is not relevant to this case. The other case that the DOJ cites, *Assassination Archives & Research Center, Inc. v. Central Intelligence Agency*, 903 F. Supp. 131 (D.D.C. 1995), is similarly unavailing. In that case the information withheld included summaries of "information gathered regarding criminal investigations" including "the names and information received from third parties who were interviewed." *Id.* at 133. Clearly such investigatory summaries and evidentiary materials were compiled for law enforcement purposes. But the withheld portions of the semiannual reports in this case are not summaries of investigatory notes or files, they are summaries of legal opinions issued by a federal court, the FISC. The NSD does not cite any case that supports the proposition that

judicial opinions are compiled for law enforcement purposes.

B. The NSD Has Not Shown That Release of the Summaries of FISC Opinions Could Risk Circumvention of the Law

The NSD's Exemption 7(E) claim fails as a matter of law. The agency states incorrectly that "it is axiomatic that law enforcement 'techniques or procedures' are categorically protected from disclosure; the government need not show that harm would result from disclosure to invoke Exemption 7(E)." Def.'s Opp'n at 15. This is exactly backwards and contrary to recent opinions by the D.C. Circuit. Furthermore, the agency's declaration only provides a conclusory and circular explanation of how disclosure of these documents would risk circumvention of the law. The DOJ has withheld summaries of FISC legal opinions from the semiannual reports, and has not offered any explanation for how those legal summaries would risk circumvention of the law.

In order to sustain an Exemption 7(E) claim, the agency must "demonstrate logically how the release of the requested information might create a risk of circumvention of the law." *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011) (quoting *Mayer Brown LLP v. IRS*, 563 F.3d 1190, 1194 (D.C. Cir. 2009)). This is true even when the Exemption is invoked to withhold techniques or procedures. *C.f. PEER*, 740 F.3d at 70 n.4 (noting that the Second Circuit has disagreed with the D.C. Circuit's interpretation of the statute). In order to satisfy this standard, the agency must establish that disclosing the particular techniques or procedures at issue would risk "revealing investigatory techniques that are not widely known to the general public with at least some specificity." *Hussain v. DHS*, 674 F. Supp. 2d 260, 271 (D.D.C. 2009) (internal quotations omitted).

Here the NSD's reasoning is entirely circular and falls well short of satisfying the Exemption 7(E) requirements. *See* 3d Bradley Decl. ¶ 12 (disclosing "law enforcement techniques . . . would risk circumvention of the law because it could reasonably be expected to permit subjects of FBI national security investigations to circumvent the law enforcement techniques . . . .").

Furthermore, the withheld portions of the semiannual reports in this case are summaries of court opinions based on public laws and other published cases. The use of pen registers has already been widely discussed by judges, DOJ officials, legislators, and the public. Because the NSD has not specifically identified a risk stemming from disclosure of these redacted portions of the semiannual reports, the agency has not satisfied its burden under Exemption 7(E).

III. The NSD Has Failed to Release All Reasonably Segregable, Non-exempt Portions of the Semiannual Reports and Document 68

The NSD argues that it has adequately segregated all non-exempt material from the documents at issue, citing to the conclusory paragraphs in the declarations of Mr. Bradley and Mr. Hardy. Def.'s Opp'n at 17. But as EPIC has explained in detail, the agency continues to withhold summaries of FISC legal opinions in the semiannual reports and Westlaw case printouts in Document 68, which do not plausibly fall within Exemptions 1 or 7(E). These portions are clearly segregable because they are listed under separate headings from the "compliance incidents" that the agency refers to in its declarations. EPIC has not argued that this Court should order the NSD to release these summaries of compliance incidents, or any other material that the agency has withheld under Exemptions 1, 3, and 7(E). EPIC only seeks release of certain discrete portions of the documents that summarize significant legal decisions by the FISC and other courts. These portions are not subject to Exemption 1 or Exemption 7(E).

CONCLUSION

For the foregoing reasons, the Court should grant EPIC's Cross-Motion for Summary Judgment in part.

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Respectfully submitted,

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