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 MOTION FOR SUMMARY JUDGMENT

Defendant, the United States Department of Justice, respectfully moves this Court to enter summary judgment in this action for defendant pursuant to Federal Rule of Civil Procedure 56 and for the reasons set forth in the accompanying Memorandum of Points and Authorities.

Dated April 8, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Branch Director

CAROLINE J. ANDERSON
Trial Attorney
U.S. Department of Justice, Civil Division
20 Massachusetts Ave. NW. Room 7220
Washington, D.C. 20530
(202) 305-8645
Caroline.J.Anderson@usdoj.gov

Counsel for Defendant

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MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Trial Attorney
U.S. Department of Justice, Civil Division
20 Massachusetts Ave. NW. Room 7220
Washington, D.C. 20530
(202) 305-8645
Caroline.J.Anderson@usdoj.gov

Counsel for Defendant

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PRELIMINARY STATEMENT

Plaintiff Electronic Privacy Information Center ("EPIC") challenges, in part, the response of defendant, the United States Department of Justice ("the Department") to plaintiff's request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Plaintiff's FOIA request sought three categories of documents relating to defendant's reports and submissions to Congressional committees that concern the approval and use of pen register and trap-and-trace ("PR/TT") devices under the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. §§ 1841-1846.

Since this Court denied plaintiff's request for a preliminary injunction, and following a reasonable and thorough search for responsive records, defendant processed and produced hundreds of pages to plaintiff. Those included considerable information relating to a now-discontinued program approved by the Foreign Intelligence Surveillance Court ("FISC") under which the Government was authorized to use PR/TT devices to collect internet metadata in bulk. That information was declassified by the Government last year. Defendant also produced to plaintiff the relevant portions of the Government's semiannual reports to Congress ("SARs") concerning the use of FISA PR/TT devices. Consistent with FOIA's exemptions, however, the Government withheld classified information, information specifically protected by statute, and information that would reveal sensitive law enforcement techniques, procedures, and guidelines. On October 31, 2014, defendant moved for summary judgment and on November 21, 2014, plaintiff cross-moved for summary judgment. On February 4, 2016, the Court denied the cross motions for summary judgment without prejudice and ordered defendant to file a supplemental *Vaughn* Index, declarations, and unredacted versions of all the documents that remain at issue. On March 18, 2016, defendant submitted all of the aforementioned documents for *in camera* review.

Defendant has released as much of the responsive records to plaintiff as it can without revealing FOIA-exempt information. Because the Government's response to plaintiff's FOIA request fully complies with that statute and as discussed below, the Court should grant defendant's Motion for Summary Judgment.

BACKGROUND

1. Pen Register / Trap-and-Trace Authority under the Foreign Intelligence Surveillance Act

Congress enacted FISA to authorize and regulate certain governmental surveillance of communications and other activities for purposes of gathering foreign intelligence. Congress also created the Foreign Intelligence Surveillance Court ("FISC"), an Article III court of eleven appointed U.S. district judges with authority to consider applications and grant orders authorizing electronic surveillance and other forms of intelligence-gathering by the Government. 50 U.S.C. § 1803(a); *see In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 486 (F.I.S.C. 2007).

FISA includes a provision authorizing the FISC, upon application by the Government, to issue an order "approving the installation and use of a pen register or trap and trace device," *see* 50 U.S.C. § 1841(2); 18 U.S.C. § 3127(3), (4), to obtain information relevant to authorized Federal Bureau of Investigation ("FBI") national security investigations. 50 U.S.C. § 1842(a)(1), (b)(2).

In 2013, the Government declassified the existence of now-discontinued, FISC-authorized bulk collection of Internet metadata pursuant to the FISA PR/TT provisions. As the Director of National Intelligence has stated, the Government at one time acquired bulk Internet metadata under orders issued by the FISC pursuant to FISA's pen register/trap-and-trace provision. *See* Statement of the Director of National Intelligence, *available at* http://icontherecord.tumblr.com/post/67419963949/dni-clapper-declassifies-additional-

intelligence (last visited March 29, 2016). The data authorized for collection included certain dialing, routing, addressing, and signaling information such as "to" and "from" lines in an e-mail, and the date and time an e-mail was sent, but not the content of an e-mail or the "subject" line. *Id.* This program of bulk Internet metadata collection was terminated in 2011. *Id.*

2. Factual Background

By letter dated October 3, 2013, and received on October 18 following the lapse in federal government appropriations at the beginning of Fiscal Year 2014, plaintiff submitted a FOIA request to NSD. *See* First Declaration of Mark A. Bradley (ECF No. 9-1) ("First Bradley Decl.") ¶ 2. The letter stated:

> EPIC seeks all records related to the Attorney General's required semiannual reports between 2001 and the present under 50 U.S.C. § 1846.
> 1. All reports made to the Permanent Select Committee on Intelligence in the House of Representatives and the Select Committee on Intelligence in the Senate, detailing the total number of orders for pen registers or trap and trace devices granted or denied, and detailing the total number of pen registers or trap and trace devices installed pursuant to 50 U.S.C. § 1843.
> 2. All information provided to the aforementioned committees concerning all uses of pen registers and trap and trace devices.
> 3. All records used in preparation of the above materials, including statistical data.

See EPIC Request, Ex. A to Pl. Mot. for Prelim. Inj. (ECF No. 3-2); Compl. (ECF No. 1) ¶ 18; Answer (ECF No. 12) ¶ 18. By letter dated October 29, 2013, NSD acknowledged receipt of the request. First Bradley Decl. ¶ 3. And by a subsequent letter dated November 5, 2013, NSD granted plaintiff's requests for expedited processing and waiver of processing fees. *Id.* In conversation with previous counsel for this case, on January 7, 2014, counsel for plaintiff agreed to exclude from its request internal Department of Justice emails and drafts of documents for which a final version is processed, although plaintiff declined to narrow its request in other respects at that time.

Plaintiff moved for a preliminary injunction (ECF No. 3). Following a hearing, this Court denied that Motion (ECF Nos. 14, 15), and the parties subsequently agreed on a schedule for

processing and production of documents responsive to plaintiff's FOIA request (ECF Nos. 16, 17). Defendant produced hundreds of pages to plaintiff.

The parties also agreed to further narrow the scope of issues in dispute. In particular, in its February 4, 2016 Opinion and Order, the Court identified those documents containing withholdings that remain in dispute: "(1) the four Westlaw case printouts attached to Document 68, and (2) those portions of the 25 semiannual reports to Congress (Documents 115-139) that consist of summaries of FISC legal opinions, descriptions of the scope of the FISC's jurisdiction, and discussions of FISA process improvements (collectively, the 'Remaining Challenged Withholdings')." *EPIC v. U.S. Dep't of Justice*, Civil No. 13-01961, 2016 WL 447426, *3 (D.D.C. Feb. 4, 2016). The Court directed defendant to provide to the Court "(1) a supplemental *Vaughn* Index that identifies which of the redactions relate to the 'significant legal interpretations by the FISC, its jurisdiction, or its procedures' (Bradly Decl. ¶ 8), and (2) one or more declarations tailored to the government's reasons for making those redactions," as well as "the submission of unredacted copies of the semiannual reports." *Id.* at *4. The documents containing the remaining challenged withholdings are confined to six records: the Westlaw printouts attached to Document 68, and information withheld from pages within five different SARs reports contained in Documents 124, 125, 126, 127, and 129. *See* Revised *Vaughn* Index Addressing the Remaining Challenged Withholdings (ECF No. 35). Defendant provided the aforementioned documents to the Court on March 18, 2016. *See* Notice of Lodging of Documents for *In Camera* Review with the Classified Information Security Officer (ECF No. 34). Defendant now moves for summary judgment with respect to all of plaintiff's claims. While defendant focuses its discussion in this memorandum on the remaining challenged withholdings that the Court

identified, it incorporates by reference all prior briefing.[1]

ARGUMENT

I. STATUTORY STANDARDS

A. The Freedom of Information Act

FOIA's "basic purpose" reflects a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (citation and internal quotation marks omitted). "Congress recognized, however, that public disclosure is not always in the public interest." *CIA v. Sims*, 471 U.S. 159, 166–67 (1985). Accordingly, in passing FOIA, "Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.'" *John Doe Agency*, 493 U.S. at 152 (quoting H.R. Rep. No. 89-1497, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423). As the D.C. Circuit has recognized, "FOIA represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 925 (D.C. Cir. 2003) (citing *John Doe Agency*, 493 U.S. at 152).

FOIA mandates disclosure of agency records unless the requested information falls within one of nine enumerated exemptions. *See* 5 U.S.C. § 552(b). A court only has jurisdiction

[1] Defendant understands, for example, that the adequacy of its search is not in dispute and was not challenged in plaintiff's first Cross-Motion for Summary Judgment. *See generally*, Pl.'s Cross Mot. for Summ. J. (ECF No. 25). Nevertheless, in an abundance of caution, defendant incorporates by reference the arguments contained within its first motion for summary judgment regarding the adequacy of its search, *see* Def.'s Mot. for Summ. J. (ECF No. 22) at 29-31, and all other arguments therein, and in defendant's combined Opposition to plaintiff's Cross Motion for Summary Judgment, Reply in Support of its Motion for Summary Judgment (ECF No. 27), and first Statement of Material Facts as to Which There Is No Genuine Dispute (ECF No. 22).

to compel an agency to disclose "improperly withheld" agency records, *i.e.*, records that do not fall within an exemption. *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 384 (1980); *see also* 5 U.S.C. § 552(a)(4)(B) (providing the district court with jurisdiction only "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant"); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) ("Under 5 U.S.C. § 552(a)(4)(B)[,] federal jurisdiction is dependent upon a showing that an agency has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.'"). FOIA's statutory exemptions "are intended to have meaningful reach and application," *John Doe Agency*, 493 U.S. at 152.

Most FOIA actions are resolved on summary judgment. *Reliant Energy Power Generation, Inc. v. FERC*, 520 F. Supp. 2d 194, 200 (D.D.C. 2007). The government bears the burden of proving that any withheld information falls within the exemptions it invokes. *See* 5 U.S.C. § 552(a)(4)(B); *King v. U.S. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987). A court may grant summary judgment to the government based entirely on the basis of information set forth in agency affidavits or declarations which "describe the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).

B. Special Considerations in National Security Cases

Defendant has invoked Exemption 1 as one basis for withholding certain information and records. Information withheld on the basis of Exemption 1 "implicat[es] national security, a uniquely executive purview." *Ctr. for Nat'l Sec. Studies,*331 F.3d at 926–27. While courts

review de novo an agency's withholding of information pursuant to a FOIA request, "de novo review in FOIA cases is not everywhere alike." *Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987). Although de novo review calls for "an objective, independent judicial determination," courts nonetheless defer to an agency's determination in the national security context, acknowledging that "the executive ha[s] unique insights into what adverse [e]ffects might occur as a result of public disclosure of a particular classified record." *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978) (citation and internal quotation marks omitted). Courts have specifically recognized the "propriety of deference to the executive in the context of FOIA claims which implicate national security." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927 (citing *Dep't of Navy v. Egan,* 484 U.S. 518, 529 (1988)).

Accordingly, courts have "consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927; *see Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) ("Today we reaffirm our deferential posture in FOIA cases regarding the 'uniquely executive purview' of national security."). "[I]n the national security context," therefore, "the reviewing court must give 'substantial weight'" to agency declarations. *ACLU v. U.S. Dep't of Justice*, 265 F. Supp. 2d 20, 27 (D.D.C. 2003) (quoting *King*, 830 F.2d at 217); *see Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) (stating that because "courts have little expertise in either international diplomacy or counterintelligence operations, we are in no position to dismiss the CIA's facially reasonable concerns" about the harm that disclosure could cause to national security); *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) (holding that the district court erred in "perform[ing] its own calculus as to whether or not harm to the national security or to intelligence sources and methods would result from disclosure"). In according such deference,

"a reviewing court must take into account that any affidavit or other agency statement of threatened harm to national security will always be speculative to some extent, in the sense that it describes a potential future harm." *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (citation and internal quotation marks omitted).

II. THE GOVERNMENT IS ENTITLED TO SUMMARY JUDGMENT

Because defendant has complied with its obligations under the FOIA, it is entitled to summary judgment on plaintiff's claims. The majority of the Second Declaration of David Sherman ("Second Sherman Decl.") and Fourth Declaration of David Hardy ("Fourth Hardy Decl.") contains classified information that has been redacted from the public version of those documents filed via the Court's ECF system. Unredacted, classified copies of the declarations were lodged with a Department of Justice Classified Information Security Officer for *ex parte* submission to and *in camera* review by the Court on March 18, 2016. *See* ECF No. 34.

In camera, *ex parte* review of classified declarations in FOIA cases is common and appropriate where a more detailed public explanation cannot be provided without revealing the very information that is sought to be protected. *See, e.g.*, *Krikorian v. Dep't of State*, 984 F.2d 461, 464-65 (D.C. Cir. 1993); *Maynard v. CIA*, 986 F.2d 547, 557 (1st Cir. 1993); *Hayden v. NSA/Cent. Sec. Serv.*, 608 F.2d 1381, 1385 (D.C. Cir. 1979).

A. The Government Properly Withheld Classified Information Pursuant to FOIA Exemption 1.

Exemption 1 protects from disclosure records that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). The current Executive Order, E.O. 13,526, governs the classification of national security information.

An agency establishes that it has properly withheld information under Exemption 1 if it demonstrates that it has met the classification requirements of E.O. 13,526. Section 1.1 of the Executive Order sets forth four requirements for the classification of national security information: (1) an original classification authority classifies the information; (2) the U.S. Government owns, produces, or controls the information; (3) the information is within one of eight protected categories listed in section 1.4 of the Order; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in a specified level of damage to the national security, and the original classification authority is able to identify or describe the damages. E.O. 13,526 § 1.1(a). As noted, the Court must accord "substantial weight" to agency affidavits concerning classified information, *King*, 830 F.2d at 217, and must defer to the expertise of agencies involved in national security and foreign policy, particularly to those agencies' articulations and predictive judgments of potential harm to national security, *see Larson*, 565 F.3d at 865; *Frugone*, 169 F.3d at 775; *Fitzgibbon*, 911 F.2d at 766. Indeed, "little proof or explanation is required beyond a plausible assertion that information is properly classified." *Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007).

Defendant, in consultation with the NSA and FBI, has properly withheld classified information pursuant to FOIA Exemption 1.

1. The Government has Properly Withheld Classified NSA Information Pursuant to Exemption 1.

The Government has properly withheld classified information on behalf of the NSA and pursuant to FOIA Exemption 1 from within Document 129, page 51. *See* Second Sherman Decl. ¶ 7. This information is contained within the SARs 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. *See* First Decl. of Bradley ¶ 2. The reports discuss, *inter alia*, all PR/TT surveillances conducted under FISA from July 1, 2000 to December 21, 2012. Bradley Decl. ¶ 9.

Specifically, the material withheld by the NSA is "responsive to the first category of this Court's order in that the material concerns a significant legal interpretation of the Foreign Intelligence Surveillance Court." Second Sherman Decl. ¶ 7.

As David J. Sherman, a senior NSA official and original classification authority, explains, release of this information concerning significant legal interpretations of the FISC could be reasonably expected to cause exceptionally grave damage to national security and it is properly classified as Top Secret. Second Sherman Decl. ¶ 8; 5 U.S.C. § 552(b)(1). Official confirmation of general information about the Government's use of its PR/TT authority under FISA does not eliminate the risk to national security of compelling further disclosures of details about particular uses of that authority. *E.g.*, *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1086, 1090 (9th Cir. 2010) (official acknowledgment of existence of CIA extraordinary rendition program did not preclude details of program remaining state secrets if details' disclosure would risk harm to national security). Additional detail describing the damage that could reasonably be expected to occur if the withheld information were disclosed is contained within the classified portions of the Second Sherman Declaration. Because both the substantive and procedural requirements of E.O. 13,526 have been met, Second Sherman Decl. ¶ 8, this information is properly classified, and is exempt from disclosure under FOIA. 5 U.S.C. § 552(b)(1).

2. The Government has Properly Withheld Classified FBI Information Pursuant to FOIA Exemption 1.

The Government has properly withheld classified information on behalf of the FBI and

pursuant to FOIA Exemption 1, *see* Fourth Hardy Decl. ¶¶ 11-13, from the Westlaw case printouts attached to Document 68, *id.* ¶ 28, as well as from five SARs reports contained within Documents 124, 125, 126, 127 and 129, *see id.* ¶¶ 4, 29, 33, 38, 41, 42. The withheld information includes summaries of significant legal interpretations by the FISC, holdings of the FISC, discussions of the scope of the FISC's jurisdiction, and specific classified surveillance techniques. *Id.*

Pursuant to Exemption 1, defendant withheld information describing specific FBI intelligence activities or methods that are used by the FBI in gathering intelligence information. Fourth Hardy Decl. ¶ 12. As Mr. Hardy explains, release of this information would inform hostile entities of the FBI's intelligence activities and intelligence gathering methods, specific targets of FBI investigations, and reveal the intelligence gathering capabilities of the activities or methods directed at specific targets. *Id.* ¶ 13. Mr. Hardy, an original classification authority, testifies that release of this withheld information could reasonably be expected to cause serious and/or exceptionally grave damage to the national security and the information has accordingly been classified at the "Secret" and "Top Secret" levels. *Id.* ¶ 10. Additional detail describing the damage that could reasonably be expected to occur if the withheld information were disclosed is contained within the classified portions of the Fourth Hardy Declaration. Because both the substantive and procedural requirements of E.O. 13,526 have been met, *id.*, this information is properly classified, and is exempt from disclosure under FOIA. *Id.*; 5 U.S.C. § 552(b)(1). Accordingly, for all of the reasons set forth above and in the accompanying declarations, defendant is entitled to summary judgment on all of its Exemption 1 withholdings.

B. The Government has Properly Withheld Information Pursuant to Multiple Statutes and FOIA Exemption 3.

The Government also properly withheld information pursuant to various applicable statutes and FOIA Exemption 3. Exemption 3 applies to records that are "specifically exempted from disclosure" by other federal statutes "if that statute – establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3).[2] In promulgating FOIA, Congress included Exemption 3 to recognize the existence of collateral statutes that limit the disclosure of information held by the government, and to incorporate such statutes within FOIA's exemptions. *See Baldridge v. Shapiro*, 455 U.S. 345, 352-53 (1982); *Essential Info., Inc. v. U.S. Info. Agency*, 134 F.3d 1165, 1166 (D.C. Cir. 1998). Under Exemption 3, "the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Fitzgibbon*, 911 F.2d at 761-62. The "purpose of Exemption 3 [is] to assure that Congress, not the agency, makes the basic nondisclosure decision." *Ass'n of Retired R.R. Workers,* 830 F.2d at 336.

Here, the Government has invoked Exemption 3, often on the basis of multiple statutes, to protect the same information over which the Government has asserted Exemption 1. As this Circuit has recognized, "agencies may invoke the exemptions independently and courts may uphold agency action under one exemption without considering the applicability of the other." *Larson*, 565 F.3d at 862-63. This Court therefore need not reach the Exemption 3 withholdings if it upholds all of defendant's Exemption 1 withholdings, nor need the Court reach the Exemption 1 withholdings if the Court upholds the Exemption 3 withholdings.

[2] The relevant section of the FOIA statute setting forth Exemption 3 was amended five years ago to specify that statutes "enacted after the date of enactment of the OPEN FOIA Act of 2009" must specifically cite to the appropriate section of FOIA to qualify as withholding statutes pursuant to Exemption 3. *See* 5 U.S.C. § 552(b)(3)(B) (added by OPEN FOIA Act of 2009, Pub. L. No. 111-83, tit. V, § 564, 123 Stat. 2184 (2009)). Here, the statutes invoked by government were enacted well before the date of that amendment.

Courts apply a two-pronged inquiry when evaluating an agency's invocation of Exemption 3. *See Sims*, 471 U.S. at 167-68. First, the court must determine whether the statute identified by the agency qualifies as an exempting statute under Exemption 3. Second, the court should consider whether the withheld material falls within the scope of the exempting statute. *See id.* As the D.C. Circuit has recognized, "Exemption 3 presents considerations distinct and apart from the other eight exemptions." *Ass'n of Retired R.R. Workers*, 830 F.2d at 336. "[I]ts applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Id.* (quoting *Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978)).

1. The Government has Properly Withheld Information Protected by the National Security Act of 1947 and FOIA Exemption 3.

The Government has invoked Exemption 3 over all of the remaining challenged withholdings. First, the FBI and NSA have each invoked Section 102A(i)(1) of the National Security Act of 1947, as amended, as justification to withhold information pertaining to intelligence sources and methods contained in Documents 68, 124, 125, 126, 127, and 129. *See* Second Sherman Decl. ¶ 15; Fourth Hardy Decl. ¶ 15; Revised *Vaughn* Index. That provision states that the Director of National Intelligence "shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1), [3] and qualifies as a withholding statute under FOIA Exemption 3, *see, e.g.*, *ACLU v. U.S. Dep't of Defense*, 628 F.3d 612, 619 (D.C.

[3] While the text of the statute speaks of the "Director of National Intelligence" – or, prior to 2004, of the Director of Central Intelligence, *see* 50 U.S.C. § 3025(c)(3) – the Government has long taken the position that any member of the intelligence community, including the NSA and FBI, may assert the National Security Act to protect intelligence sources and methods, and courts have regularly upheld other agencies' assertions of that Act in support of Exemption 3 withholdings. *See, e.g.*, *Larson,* 565 F.3d at 868–69 (National Security Agency); *Krikorian,* 984 F.2d at 465–66 (Department of State); *Schoenman v. FBI*, 763 F. Supp. 2d 173, 193 n.12 (D.D.C. 2011) (Department of Justice on behalf of FBI).

Cir. 2011). The Supreme Court has recognized the "wide-ranging authority" provided by the National Security Act, entrusting intelligence agencies to "weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." *Sims*, 471 U.S. at 180. Indeed, rather than place any limit on the scope of the National Security Act, "Congress simply and pointedly protected all sources of intelligence that provide, or are engaged to provide, information the Agency needs to perform its statutory duties with respect to foreign intelligence." *Id.* at 169-70. For the same reasons, NSA and FBI must invoke the protective shield of the National Security Act to protect their intelligence sources and methods and those of the broader intelligence community. *See* Fourth Hardy Decl. ¶ 17; Second Sherman Decl. ¶ 3. All of this information falls squarely within the scope of the National Security Act.

Notably, the mandate to withhold information pursuant to this statute is broader than the authority to withhold information pursuant to FOIA exemption 1 and Executive Order 13,526. *Cf. Gardels v. CIA*, 689 F.2d 1100, 1107 (D.C. Cir. 1982) (noting that the executive order governing classification of documents was "not designed to incorporate into its coverage the CIA's full statutory power to protect all of its 'intelligence sources and methods'"). This is because, unlike section 1.1(a)(4) of E.O. 13,526, the National Security Act does not require the Government to determine that the disclosure of the information would be expected to result in damage to the national security. *Compare* 50 U.S.C. §§ 3024(i)(1), *with* E.O. 13,526 § 1.1(a)(4); *see also Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 58 n.3 (D.C. Cir. 2003) ("Because we conclude that the Agency easily establishes that the records . . . are exempt from disclosure under Exemption 3, we do not consider the applicability of Exemption 1."). Congress has already made that determination by enacting these statutes. *See Hayden,* 608 F.2d at 1390

("Congress has already, in enacting the statute, decided that disclosure of NSA activities is potentially harmful.").

2. The Government has Properly Withheld Information Protected by Section 6 of the National Security Act or 1959 and FOIA Exemption 3.

The NSA relies on Section 6 of the National Security Agency Act of 1959, *codified at* 50 U.S.C. § 3605, which provides that "nothing in this [Act] or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof . . . ." As Mr. Sherman explains, the information withheld on behalf of the NSA from within Document 129, which relates to a significant legal interpretation of the FISC, is protected by Section 6 of the NSA Act because it relates to one of NSA's primary functions and activities (signals intelligence). *See* Second Sherman Decl. ¶ 13. All of this information plainly involves "any function of the [NSA], or . . . information with respect to the activities thereof." 50 U.S.C. § 3605(a). That is sufficient to invoke Exemption 3: "The protection afforded by section 6 is, by its very terms, absolute. If a document is covered by section 6, NSA is entitled to withhold it regardless of the requesting party's needs." *Linder v. NSA*, 94 F.3d 693, 698 (D.C. Cir. 1996); *see id.* at 696 ("[A] specific showing of potential harm to national security is irrelevant to the language of section 6. Congress has already decided that disclosure of NSA activities is potentially harmful.") (citation and alterations omitted); *Hayden,* 608 F.2d at 1390.

3. The Government has Properly Withheld Information Protected by 18 U.S.C. § 798 and FOIA Exemption 3.

NSA has also invoked 18 U.S.C. § 798 as an Exemption 3 statute to justify withholding information in Document 129. Second Sherman Decl. ¶ 7. That criminal statute prohibits a person from knowingly and willfully disclosing to an unauthorized person "any classified

information . . . concerning the communication intelligence activities of the United States . . . or . . . obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes." 18 U.S.C. § 798(a)(3), (4). Section 798 is an Exemption 3 statute. *Larson*, 565 F.3d at 868. As Mr. Sherman explains, release of the withheld information would reveal, *inter alia*, classified information "concerning the communications intelligence activities of the United States." Second Sherman Decl. ¶ 14.

For all of the reasons set forth above and in the accompanying declarations, defendant is entitled to summary judgment on all of its Exemption 3 withholdings.

C. The Government has Properly Withheld Information Concerning Law Enforcement Techniques and Procedures Pursuant to FOIA Exemption 7(E).

The Government also properly withheld information pursuant to FOIA Exemption 7. Exemption 7(E) protects from disclosure information compiled for law enforcement purposes where release of the information "would disclose techniques and procedures for law enforcement investigations or prosecutions," without a requirement that the government establish such disclosure would cause harm, or where it would "disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."[4] 5 U.S.C. § 552(b)(7)(E).

Congress intended that Exemption 7(E) protect from disclosure techniques and procedures used to prevent and protect against crimes as well as techniques and procedures used to investigate crimes after they have been committed. *See, e.g., PHE, Inc. v. U.S. Dep't of*

[4] "To clear that relatively low bar, an agency must demonstrate only that release of a document might increase the risk 'that a law will be violated or that past violators will escape legal consequences.'" *Pub. Emps. for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n*, 740 F.3d 195, 204-205 (D.C. Cir. 2014), *quoting Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009), *& citing Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011).

Justice, 983 F.2d 248, 249-51 (D.C. Cir. 1993) (holding that portions of FBI manual describing patterns of violations, investigative techniques, and sources of information available to investigators were protected by Exemption 7(E)). *See also Milner v. U.S. Dep't of Navy*, 562 U.S. 562, 1272-73 (2011) (Alito, J., concurring) (stating that "[p]articularly in recent years, terrorism prevention and national security measures have been recognized as vital to effective law enforcement efforts in our Nation[;]" also stating that "law enforcement purposes" under FOIA Exemption 7 "involve more than just investigation and prosecution," and that "security measures are critical to effective law enforcement as we know it."). 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). *See Keys v. U.S. Dep't of Homeland Sec.*, 510 F. Supp. 2d 121, 129 (D.D.C. 2007); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F. Supp. 2d 146, 181 (D.D.C. 2004); *Smith v. Bureau of Alcohol, Tobacco & Firearms,* 977 F. Supp. 496, 501 (D.D.C. 1997).

"In assessing whether records are compiled for law enforcement purposes, . . . the focus is on how and under what circumstances the requested files were compiled, and 'whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding.'" *Jefferson v. Dep't of Justice, Office of Prof'l Responsibility*, 284 F.3d 172, 176-77 (D.C. Cir. 2002) (citations omitted). The range of law enforcement purposes falling within the scope of Exemption 7 includes government national security and counterterrorism activities. *See, e.g., Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 926 (D.C. Cir. 2003); *Kidder v. FBI*, 517 F. Supp. 2d 17, 27 (D.D.C. 2007); *accord Milner*, 131 S. Ct. at 1272 (law enforcement purposes within the meaning of Exemption 7 include national security measures). Furthermore, the D.C. Circuit accords special deference to law enforcement agencies like the FBI when they

identify material as having been compiled for law enforcement purposes under Exemption 7. *See Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 32 (D.C. Cir. 1998).

Plaintiff requested only information related to FISA PR/TTs, a tool used by the FBI (a component of defendant which is indisputably a law enforcement agency) to obtain information pursuant to a court order and as part of authorized national security investigations. The withheld portions of the Westlaw printouts attached to Document 68, as well as Documents 124, 125, 126, 127, and 129 from the SARs, plainly meet the threshold requirements for Exemption 7(E) protection. *See* Fourth Hardy Decl. ¶¶ 4, 18-19. As explained below, the Government has properly asserted 5 U.S.C. § 552(b)(7)(E) over exempt law enforcement information.

The FBI has asserted Exemption 7(E) to protect a confidential law enforcement technique and procedures used by the Intelligence Community in national security investigations and law enforcement, and details concerning that technique. *See* Fourth Hardy Decl. ¶¶ 21-22. Although Mr. Hardy discusses the harm that could reasonably be expected to flow from public release of this information, *id.* ¶ 23, such techniques and procedures are categorically protected by the Exemption, without any need for inquiry into the harm that would result from their disclosure. *Fisher v. U.S. Dep't of Justice*, 772 F. Supp. 7, 12 n.9 (D.D.C. 1991). Additional detail concerning the techniques at issue is included in the classified portions of Mr. Hardy's Fourth Declaration. Defendant is entitled to summary judgment on all of its Exemption 7(E) withholdings.

D. Defendant has Released All Non-Exempt, Reasonably Segregable Portions of the Responsive Documents.

FOIA provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). This provision does not require disclosure of records in which

the non-exempt information that remains is meaningless. *See, e.g., Nat'l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 220-21 (D.D.C. 2005) (concluding that no reasonably segregable information exists because "the non-exempt information would produce only incomplete, fragmented, unintelligible sentences composed of isolated, meaningless words."). "The question of segregability is by necessity subjective and context-specific, turning upon the nature of the document in question and the information contained therein. An agency need not, for instance, 'commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content.'" *Schoenman,* 763 F. Supp. 2d. at 202 (quoting *Mead Data v. U.S. Dep't of the Air Force*, 566 F.2d 242, 261 n.55 (D.C. Cir. 1977)).

The Government has reviewed the withheld material and disclosed all non-exempt information that reasonably could be disclosed. *See* Second Sherman Decl. ¶¶ 16-17, Fourth Hardy Decl. ¶¶ 45-46. Accordingly, defendant has produced all "reasonably segregable portion[s]" of the responsive records. 5 U.S.C. § 552(b). *See, e.g., Loving v. U.S. Dep't of Def.*, 496 F. Supp. 2d 101, 110 (D.D.C. 2007) (holding that "government's declaration and supporting material are sufficient to satisfy its burden to show with 'reasonable specificity' why the document cannot be further segregated," where declaration averred that agency had "released to plaintiff all material that could be reasonably segregated") (quoting *Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002)).

CONCLUSION

For all of the foregoing reasons, the Court should grant defendant's Motion for Summary Judgment.

Dated April 8, 2016 Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Branch Director

/s/ Caroline J. Anderson
CAROLINE J. ANDERSON
Trial Attorney
U.S. Department of Justice, Civil Division
20 Massachusetts Ave. NW, Room 7220
Washington, D.C. 20530
(202) 305-8645
Caroline.J.Anderson@usdoj.gov

Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2016, a copy of the foregoing Memorandum in Support of Defendant's Motion for Summary Judgment was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Caroline J. Anderson
Caroline J. Anderson