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 RENEWED MOTION FOR SUMMARY JUDGMENT

Plaintiff, Electronic Privacy Information Center ("EPIC"), respectfully renews its motion to this Court to enter summary judgment in favor of EPIC pursuant to Federal Rule of Civil Procedure 56 for the reasons set forth in the accompanying Memorandum of Points and Authorities.

Dated: April 8, 2016

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S RENEWED MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

SUMMARY OF THE ARGUMENT

This case concerns an issue of ongoing national importance: the effective public oversight of government surveillance programs, enabled by the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Congressional oversight committees play a key role in that oversight process, but the Department of Justice ("DOJ") itself has long recognized that the public also has a right to participate. Accordingly, both the Administrative Office of the United States Courts and the DOJ routinely make available to the public reports concerning the use of surveillance authorities. However, until EPIC filed this suit, the DOJ had not made the semiannual Foreign Intelligence Surveillance Act ("FISA") reports publicly available. These reports contain summaries of significant FISA Court ("FISC") decisions and procedures that should be provided to the public under the FOIA; the release of these documents are the subject of this dispute.

The Court found earlier that the DOJ's declarations were "manifestly inadequate" to justify the agency's redactions. The supplemental declarations, prepared by the Federal Bureau of Investigation ("FBI") and the National Security Agency ("NSA"), do not provide the evidence necessary to meet the DOJ's burden in this case. The agency's new filings present contradictory and implausible justifications for withholding—the type of 'moving target' that the Court expressed concern about at the January hearing. Furthermore, the DOJ's supplemental release of certain pages from the Semiannual Reports provides sufficient evidence to support granting EPIC's renewed motion.

The Court should grant EPIC's motion for three reasons. First, the DOJ has conceded that it improperly withheld a great deal of non-exempt material in the first release. Second, there is clear evidence of agency bad faith that undercuts the reliability of the declarations submitted in this case. Third, the Remaining Challenged Withholdings concern surveillance methods already known to the public and information about FISC procedures and processes, the release of which

could not present a realistic risk of harm to the public or risk of circumvention of law.

BACKGROUND[1]

I. As a result of EPIC's FOIA request, the DOJ has produced a great deal of material related to the National Security Division's applications for the use of pen register devices.

EPIC filed suit more than two years ago, seeking disclosure of the DOJ's reports to congressional intelligence committees and related records concerning applications filed with the FISC. Compl. ¶ 18. In the Complaint, EPIC alleged that the DOJ was unlawfully withholding records responsive to EPIC's October 3, 2013, request, in violation of the FOIA. Compl. ¶ 35–39. Following the Court's order denying EPIC's motion for a preliminary injunction, the DOJ produced to EPIC redacted copies of 25 semiannual reports by the Attorney General, as well as 52 other documents responsive to EPIC's FOIA request. Def's Mot., *Vaughn Index*, ECF No. 22-3.[2] EPIC published all of these records on its website, and many of the documents have since been analyzed and discussed by legal scholars and the press.

The parties filed cross motions for summary judgment following the initial production of responsive records. In its cross motion for summary judgment, EPIC argued that the DOJ was improperly withholding significant redacted material, including (1) significant FISC legal interpretations, (2) discussions of FISC jurisdiction and FISA legal procedures, and (3) aggregate statistics about the number of pen register applications filed and U.S. persons targeted. Pl.'s Mot. The DOJ subsequently conceded that the aggregate statistics were not exempt, and released those portions of the reports. Def.'s Combined Opp'n to Pl.'s Cross-Mot. Summ. J. & Reply ("Def.'s

[1] Much of the factual and procedural background of this case was previously outlined in EPIC's Cross Motion and the DOJ's Motion for Summary Judgment. *See* Mem. of Law in Supp. of Pl.'s Combined Opp'n to Def.'s Mot. For Summ. J. & Cross-Mot. for Summ. J. ("Pl.'s Mot."), ECF No. 25-1 at 2–6, ECF No. 25-1; Def.'s Mot. at 2–4, ECF No. 22-1.

[2] It is notable that the DOJ did not even assign a FOI/PA number to EPIC's request until *after* EPIC filed suit. *See* Ex. 1 at 1 ("NSD FOI/PA #14-007").

Opp'n") at 2, ECF No. 27-1. EPIC also challenged the DOJ's withholding of Westlaw printouts. Pl.'s Reply at 7, ECF No. 30.

The Court subsequently held a motion hearing on January 21, 2016 to identify the scope of issues in dispute. The Court then issued a Memorandum Opinion and Order, denying the cross motions without prejudice and ordering the DOJ to "file one or more supplemental declarations and an updated *Vaughn* Index that is tailored to the challenged withholdings in the particular documents currently in dispute," as well as to "submit unredacted versions of all of the documents that remain at issue in order to facilitate the Court's *in camera* review of the materials." Mem. Op. 2, ECF No. 32. The DOJ filed a revised *Vaughn* Index, filed supplemental declarations from the FBI and the NSA, and lodged the unredacted materials on March 18, 2016. *See* Notice of Lodging of Documents for *In Camera* Review, ECF No. 34.

The DOJ also released to EPIC reprocessed versions of certain pages in the disputed semiannual reports, documents numbered 124–127 and 129. *See* Ex. 1. The reprocessed pages from all five of the documents at issue contain newly released material that the agency previously withheld. *See* Ex. 2. In several instances, the DOJ has now released portions of pages that it previously withheld and marked as "Top Secret" or "Secret" even though those portions contain no information that could plausibly pose a harm to national security. *See, e.g.*, Ex. 1 at 14–16, 22–23, 33–34, 36, 38, 40, 70–71, 83. The DOJ has also released portions of the pages that it previously withheld even though those portions were marked as "Unclassified." *See, e.g.*, Ex. 1 at 11–12, 14–15, 17–18, 21–22, 29–30, 35, 37–38, 39, 42–43, 58–59, 65–66, 78–79, 82–83. The reprocessed pages also contain redacted portions that had already been released by the agency in unredacted form in the March 2014 production. *Compare* Ex. 1 at 65, *with* Pl's Mot., Ex. 1 at 206, ECF No.

25-2, *and with* Def's Opp'n, Third Decl. of Mark A. Bradley, Ex. at 110,[3] ECF No. 27-4. The DOJ has offered no explanation for these new releases and redactions, and the agency provided no supplemental declaration from NSD justifying the withholdings.

II. The DOJ continues to withhold most of the remaining challenged materials.

In response to this Court's February 4, 2016 Order, the DOJ has released 73 reprocessed pages from 5 of the semiannual reports. *See* Ex. 1. These reprocessed pages are significantly different from both the prior versions initially produced in March 2014 and the reprocessed versions produced by the DOJ in its combined reply and opposition. *See* Ex. 2 (comparing the three different versions produced by DOJ in this case). The DOJ continues to withhold in full the Westlaw case printouts attached to Document 68.[4]

The newly reprocessed pages contain many new markings that are relevant to the Court's consideration. First, some pages have text added to indicate that "redactions are b(1) and outside of the remaining challenged withholdings," *see, e.g.*, Ex. 1 at 11, while other pages have text added to indicate that certain redactions are "within the remaining challenged withholdings," *see, e.g.*, Ex. 1 at 15. Second, some pages have paragraph-specific exemption markings that are labeled "Per FBI" and refer to "b1" "b3" and "b7E" in various combinations. *See, e.g.*, Ex. 1 at 14, 34. And third, most pages now include classification markings for each portion of the document, but there is no indication as to why some portion markings have been struck through while others have not. *See, e.g.*, Ex. 1 at 12. The agency has not submitted a supplemental declaration from NSD, so there is no evidence on the record explaining these new markings and withholdings.

[3] This refers to the page number that the Court's electronic case filing system automatically assigns.

[4] It is not clear from the prior declarations submitted by the DOJ whether the Westlaw printouts attached to Document 68 are the same as the "Westlaw Case Printout" described as document 89 in the original *Vaughn* Index. *See* Def's Mot., Ex. IA at 10, ECF No. 22-3.

The Court ordered the DOJ to provide a "supplemental *Vaughn* Index that identifies which of the redactions relate to the "significant legal interpretations by the FISC, its jurisdiction, or its procedures." Mem. Op. 8. The revised *Vaughn* Index submitted by the DOJ includes a single table with one row for each of the six documents at issue. Revised *Vaughn* Index Addressing The Remaining Challenged Withholdings, ECF No. 35. This Index lists specific "pages" within each of the six documents. *Id*. The Index provides no further detail regarding which redactions relate to the specific topics listed.

Many of the markings in the reprocessed pages are internally inconsistent and contradicted by the record. In fact, several of the reprocessed pages have been marked "outside of the remaining challenged withholdings" even though they include headings related to the remaining challenged withholdings, such as "Other Legal Interpretations Under FISA by the FISC," "Summaries of Significant Legal Interpretations," "FISA Process Improvements," and "Litigation Support." *See, e.g.*, Ex. 1 at 17–19, 35, 59–60, 75. Another reprocessed page that includes a similar heading is marked as "within the remaining challenges" and contains newly released text, but the relevant paragraph continues onto a page that was not produced. Ex. 1 at 35. *See also* Ex. 1 at 75. Other reprocessed pages that are marked as "within the remaining challenges" have footnotes that are marked as "outside the remaining challenges." Ex. 1 at 33, 39. Some of the redactions are also inconsistent with the agency's prior concession that aggregate statistics about the number of FISA applications submitted and FISC orders granted are not properly classified. *see* Ex. 1 at 71.

Some of the redactions in the reprocessed pages are not addressed in the supplemental declarations. Some pages indicate that the redactions "are b(1) and outside" of the challenged withholdings. *See, e.g.* Ex. 1 at 11. Other pages have redacted portions that are clearly included in the remaining challenged withholdings, but nevertheless these redacted portions have not been

addressed in the supplemental declarations. *See, e.g.*, Ex. 1 at 17–19, 35, 59–60, 75. The DOJ has not offered any explanation as to why these redactions are not discussed in the supplemental declarations.

III. Pen register devices are not secret, and their use to conduct government surveillance has been the subject of extensive discussion by government agencies, private litigants, judges, and members of the press.

The use of pen register devices by the governments, companies, and private individuals to monitor telephone and other communications signals has been a matter of public record for more than 40 years. *See, e.g.*, *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 166 (1977); Maj. William N. Early, *Interception of Communications by Air Force Agents*, 10 A.F. L. Rev. 8, 18 (1968); Robert G. Whalen, *To Tap or Not To Tap: the Debate Renewed*, N.Y. Times, Dec. 12, 1948, at 205. And while the devices were originally developed to monitor outgoing numbers dialed by telephones, *N.Y. Tel. Co.*, 434 U.S. at 166, the techniques have subsequently been adapted to computer and Internet communications as well, *see* U.S. Dep't of Justice, *Report from the Field: The USA PATRIOT Act at Work* 24–25 (2004). The ability of government law enforcement and intelligence agencies to obtain "dialing, routing, addressing, or signaling information" regarding telephone, Internet, and other communications is directly addressed in the statute. 18 U.S.C. § 3127(3) (defining the term "pen register"). This technique is not a secret; it is a matter of public record, subject to an explicit legal definition that courts have interpreted in many cases.

More recently, judges have discussed potential uses of pen registers in lengthy published opinions. *See* Marcus M. Baldwin, Note, *Dirty Digit: The Collection of Post-Cut-Through Dialed Digits Under the Pen/Trap Statute*, 74 Brooklyn L. Rev. 1109 (2009) (summarizing six cases that addressed the question of whether the government could obtain so-called "post-cut-through dialed digits" pursuant to a pen/trap order); M. Wesley Clark, *Cell Phones as Tracking Devices*, 41 Val. U. L. Rev. 1413 (2007) (summarizing 22 cases that addressed applications for pen register orders to

obtain cell phone location data). *See, e.g.*, *In re United States*, 441 F. Supp. 2d 816 (S.D. Tex. 2006) (concerning a pen register application to obtain "post-cut-through dialed digits"); *In re United States*, 407 F. Supp. 2d 132 (D.D.C. 2005) (concerning a pen register application to obtain cell phone location data).

IV. Congress has recognized that significant legal interpretations by the FISC should be made public.

Congress passed the USA FREEDOM Act, Pub. L. 114-23, 129 Stat. 268, on June 2, 2015, and it was signed into law by the President on the same day. Presidential Statement on Congressional Passage of the USA FREEDOM Act, 2015 Daily Comp. Pres. Doc 412 (June 2, 2015). The law provides for the "declassification of significant decisions, orders, and opinions" of the FISC. Sec. 402, 129 Stat. 218, *codified at* 50 U.S.C. § 1872. The law now provides that the Director of National Intelligence, in consultation with the Attorney General, "make publicly available to the greatest extent practicable" every "decision, order, or opinion" of the FISC that "includes a significant construction or interpretation of any provision of law." 50 U.S.C. § 1872(a). This law makes clear that Congress has evaluated the possible risks associated with making FISC opinions publicly available, and has found that the public interests in disclosure outweigh the potential harms.

ARGUMENT

The FOIA "is premised on the notion that an informed citizenry is 'vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.'" *Shapiro v. FBI*, --- F. Supp. 3d ---, No. 13-555, 2016 WL 287051 at *1 (D.D.C. Jan. 22, 2016) (quoting *NLRB v. Robins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). "In enacting FOIA, Congress struck the balance it thought right—generally favoring disclosure, subject only to a handful of specified exemptions—and did so across the

length and breadth of the Federal Government." *Milner v. Dep't of the Navy*, 562 U.S. 562, 571 n.5 (2011).

The FOIA provides that every government agency shall "upon any request which (i) reasonably describes such records and (ii) is made in accordance with published rules . . . make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). As a result, the FOIA "mandates that an agency disclose records upon request, unless they fall within one of nine exemptions," which are "'explicitly made exclusive' and must be 'narrowly construed.'" *Shapiro*, 2016 WL 287051 at *1 (quoting *Milner*, 562 U.S. at 565).

I. STANDARD OF REVIEW

Summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine issue of material fact is one that would change the outcome of the litigation." *EPIC v. DHS*, 999 F. Supp. 2d 24, 28 (D.D.C. 2013) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "FOIA cases typically and appropriately are decided on motions for summary judgment." *AquAlliance v. U.S. Bureau of Reclamation*, --- F. Supp. 3d ---, No. 14-cv-1018, 2015 WL 5998949 at *3 (D.D.C. Oct. 14, 2015). A district court reviewing a motion for summary judgment in a FOIA case "conducts a *de novo* review of the record, and the responding federal agency bears the burden of proving that it has complied with its obligations under the FOIA." *Id*.; *see also* 5 U.S.C. § 552(a)(4)(B); *ACLU v. CIA*, 710 F.3d 422, 427 (D.C. Cir. 2013).

The court must "analyze all underlying facts and inferences in the light most favorable to the FOIA requester," and therefore "summary judgment for an agency is only appropriate after the agency proves that it has 'fully discharged its [FOIA] obligations.'" *AquAlliance*, 2015 WL 5998949, at *3. In some cases, the agency may carry its burden by submitting affidavits that

describe "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 evidence of agency bad faith." *Id*.

Where a defendant agency fails "to establish" that it "properly withheld documents under" an exemption, the plaintiff is entitled to summary judgment. *EPIC v. CBP*, --- F. Supp. 3d ---, No. 14-1217, 2016 WL 632179 (D.D.C. Feb. 17, 2016). *See, e.g.*, *DOJ v. Tax Analysts*, 492 U.S. 136, 142 (1989); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980); *Shapiro*, 2016 WL 287051 at *14; *AquAlliance*, 2015 WL 5998949 at *8.

II. EPIC IS ENTITLED TO PARTIAL SUMMARY JUDGMENT

This case now returns to the Court on renewed motions for summary judgment following the DOJ's production of reprocessed pages, submission of a supplemental materials, and lodging of documents for *in camera* review. Given the record before the Court, EPIC is entitled to partial summary judgment for three reasons: (1) the DOJ has conceded that certain redacted portions of the documents the agency initially released are not properly exempt and that certain redacted portions of the reprocessed pages are not properly exempt; (2) the DOJ has not provided evidence to show that the remaining disputed material is exempt; and (3) many of the DOJ's representations are contradicted by the record, which is evidence of bad faith.

A. The DOJ has conceded that the agency previously redacted a great deal of non-exempt material in the semiannual reports.

The DOJ has implicitly conceded that much of the material withheld at various points in this litigation was not exempt from disclosure under the FOIA. To the extent that the agency has released portions of records that it previously withheld or is withholding portions of records that it previously released, the Court must find that the agency violated the FOIA by improperly withholding responsive records. *See Shapiro*, 2016 WL 287051 at *14.

The DOJ has released new material on 37 of the reprocessed pages from the semiannual reports. *See* Ex. 1 at 11–18, 21–23, 29–31, 33–38, 40, 43–44, 50, 58–59, 65–71, 74, 78–83. The newly released material includes portions of 18 pages that discuss the remaining challenged withholdings. *See* Ex. 1 at 14–17, 22–23, 33–35, 38, 40, 50, 59, 70–71, 74, 82–83. By releasing these materials now, the agency necessarily concedes that they are not exempt from release and that their prior withholding was improper.

The DOJ has also previously released material that it is now purporting to withhold as exempt in the reprocessed pages. *Compare* Ex. 1 at 65, *with* Pl's Mot., Ex. 1 at 206, *and with* Def.'s Opp'n, Third Declaration of Mark A. Bradley, Ex. at 110,[5] ECF No. 27-4. The DOJ's attempt to redact material that the agency itself previously released is the most jarring and disturbing example of the government's contradictory and obfuscatory behavior in this case, and it bears close consideration by the Court. The redacted paragraph, which is included on page 65 of EPIC's first exhibit to this motion, was previously marked as top secret even though it contains no information that could plausibly be properly classified. Here is the redacted paragraph, in its entirety, as previously disclosed by the DOJ in March 2014 and December 2014:

> This report is submitted pursuant to Sections 108(a), 306, 406, and 502 of the Foreign Intelligence Surveillance Act of 1978 (FISA or the Act), as amended, 50 U.S.C. §§ 1801-1811, 1821-1829,1841-1846, 1861-1862. It includes information concerning electronic surveillance, physical searches, pen register/trap and trace surveillance, and requests for access to certain business records for foreign intelligence purposes conducted under the Act by the Federal Bureau of Investigation (FBI), the National Security Agency (NSA), and/or the Central Intelligence Agency (CIA) during the period July 1, 2006, through December 31, 2006.1 Consistent with the Department of Justice's efforts to keep the Congress fully informed about its FISA activities in a manner consistent with

[5] This refers to the page number that the Court's electronic case filing system automatically assigns.

> the national security, this report contains information beyond that required by the statutory provisions set forth above. In addition to submitting this semi-annual report, the Intelligence Community and the Department provide information to the Congress concerning significant intelligence activities conducted under FISA in a manner consistent with the National Security Act.

The paragraph consists almost entirely of boilerplate statements that could be predicted by the context and general information about the nature of the semiannual reports. Any claim that this paragraph contains properly classified information, let alone information classified as "TOP SECRET," should be rejected outright. Furthermore, the Court should conduct a searching review of the agency's other classification claims given the overbroad assertion of classification authority in these reprocessed pages. The DOJ has provided no justification for this redaction, and its presence in the documents calls into question the veracity of all the government's statements thus far.

B. The DOJ cannot show that the remaining disputed material is exempt under (b)(1), (b)(3), or (b)(7)(E).

Although the DOJ has conceded that a significant amount of material in the remaining challenged withholdings is not exempt from release under the FOIA, the agency now argues, for the first time, that certain portions of the reprocessed pages are exempt from disclosure under sections (b)(1), (b)(3), and (b)(7)(E). The agency claims that nearly all of the remaining challenged withholdings are exempt under (b)(1), that many of the remaining challenged withholdings are also exempt under (b)(3) and (b)(7)(E), but that a few of the remaining challenged withholdings are exempt only under (b)(3) and (b)(7)(E) or only under (b)(1) and (b)(3).[6] The DOJ's remaining challenged withholdings are unlawful because the agency has not shown that these materials are subject to the claimed exemptions.

[6] *See, e.g.*, Ex. 1 at 34, 71, 83.

1. The DOJ's Exemption 1 claims are implausible and contradicted by evidence the record.

In order to support an Exemption 1 claim, an agency must make a "plausible assertion that information is properly classified." *Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007). In most cases, courts defer to agency declarations that describe potential national security threats, but that "deference is not equivalent to acquiescence." *Campbell v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998). An agency declaration can be deemed insufficient to support an Exemption 1 claim if it lacks "detail and specificity," if there is evidence of "bad faith," or if the declaration fails to "account for contrary record evidence." *Id*. When "information contained in agency affidavits is contradicted by other evidence in the record" then "there is evidence of bad faith." *Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 393 (D.C. Cir. 1987).

The DOJ's supplemental declarations submitted by the FOIA officials from the FBI and the NSA, both agencies that did not create and do not control the records at issue in this case, cannot support the agency's claimed exemptions. As EPIC explained in the prior cross motion and reply, the release of summaries of significant legal interpretations of the FISC, discussions of the FISC jurisdiction, and discussions of FISA procedures could not "reasonably be expected" to cause "serious" or "exceptionally grave" damage to national security. *See* Pl's Mot. at 21–22; Pl's Reply at 3–7.

The DOJ's argument rests on a faulty premise: that these summaries must be withheld because they would reveal sources and methods of intelligence gathering. But although a pen register is a "method" of intelligence gathering, it is also discussed widely in opinions, commentaries, and reports. *See, e.g.*, M. Wesley Clark, *Cell Phones as Tracking Devices*, 41 Val. U. L. Rev. 1413 (2007); *In re United States*, 441 F. Supp. 2d 816 (S.D. Tex. 2006); U.S. Dep't of Justice, *Report from the Field: The USA PATRIOT Act at Work* 24–25 (2004). This particular

"method" is even defined and discussed in the U.S. Code. 18 U.S.C. § 3127(3). In addition, the particular interpretation of the FISA pen register provision by the FISC is not itself a "source" or "method" of intelligence gathering, but a legal judgment that Congress has determined the public has a right to access. 50 U.S.C. § 1872(a).

The DOJ's argument that publicly available Westlaw printouts are also exempt from disclosure reveals the absurdity of the agency's position. While it may be true, as the FBI representative claims, that the Westlaw printouts concern "the FBI's intelligence methods and activities," Classified Fourth Decl. of David M. Hardy ("Fourth Hardy Decl.") ¶ 27, ECF No. 35-1, that is equally true of the publicly available versions of those cases. In fact, the DOJ has already released portions of records that quote a publicly available pen register opinion in such a way that it is easily identifiable. *See* Ex. 3 at 53–54 (discussing an "Opinion" that analyzed "Senator Leahy's final remarks about the PATRIOT Act" and quoting a portion of the opinion that found the Senator "had been instrumental in passing the CALEA 'reasonably available technology' limitation"); *see also In re United States*, 441 F. Supp. 2d 816 (S.D. Tex 2006) (addressing a DOJ application to obtain post-cut through dialed digits under the pen register provision).[7] The strained efforts to withhold this material, which is already available to the public, show bad faith on the part of the agency.

The DOJ's exemption 1 claims should be rejected not only because the agency fails to make a "plausible assertion" of a risk of harm from disclosure, but also because the contradictory statements made by the agency on the record are evidence of bad faith. *See Carter*, 830 F.3d at 393; *Detroit Free Press v. DOJ*, 174 F. Supp. 2d 597, 601 (E.D. Mich. 2001) (finding that

[7] This is the only decision, according to a Westlaw search, that includes the same language quoted in the NSD's Verified Memorandum of Law (Document #88).

contradictory statements by the agency "call[ed] into question the veracity of the FBI's justification for withholding); *Caton v. Norton*, No. CIV.04-CV-439-JD, 2005 WL 1009544, at *4 (D.N.H. May 2, 2005) (finding that a plaintiff could "overcome the presumption" of validity of the agency declaration based on the "apparent implausibility" of the explanation). The agency has repeatedly contradicted its own statements and the evidence on the record in this case, and the latest round of supplemental filings have only exacerbated this problem.

The DOJ has made false and contradictory statements regarding the withholding of responsive records and its claimed exemptions. This is evidence of bad faith and should be taken into account as the Court reviews the documents *in camera*. First, the DOJ has released a substantial amount of new material that the agency previously argued, and claimed in sworn declarations, was properly classified and exempt from disclosure. *See* Ex. 1 at 11–18, 21–23, 29–31, 33–38, 40, 43–44, 50, 58–59, 65–71, 74, 78–83. Some of the newly released material was clearly marked as unclassified. *See* Ex. 1 at 11–12, 14–15, 17–18, 21–22, 29–30, 35, 37–38, 39, 42–43, 58–59, 65–66, 78–79, 82–83. Second, the DOJ has redacted material throughout the reprocessed pages that it claims is exempt under (b)(1) even though the portion markings clearly indicate that those paragraphs no longer contain classified material. *See, e.g.*, Ex. 1 at 12 (some portion markings are struck through while others are not). Third, the DOJ has improperly excluded material that is clearly within the remaining challenged withholdings. *See, e.g.*, Ex. 1 at 17–19, 35, 59–60, 75. Fourth, the DOJ has inexplicably revived an argument that the agency conceded in the prior cross motions: that aggregate statistics about the number of FISA applications submitted to and granted by the FISC can be properly classified, *see* Ex. 1 at 71, even though those statistics are already publicly available based on other reports, *see* EPIC, *Foreign Intelligence*

Surveillance Act Court Orders 1979–2014 (2015).[8]

None of the DOJ's contradictions and false statements are justifiable, and the NSD has not proffered any explanation for its inconsistent claims and improper withholdings. The agency has also submitted the reprocessed pages out of order in such a way as to frustrate this Court's ability to compare them with prior releases. *See* Ex. 2. The Court should recognize that the agency's self-contradictory positions and shifting arguments are the direct cause of a substantial and unnecessary duplication of efforts and an improper withholding of responsive records in this case. Such behavior is clear evidence of bad faith and calls into question the veracity of the agency's statements to the Court.

2. The DOJ cannot satisfy the requirements of Exemption 3.

For the first time in this litigation, the DOJ now claims that Exemption 3 provides a basis to withhold certain portions of the reprocessed semiannual reports. Not only is this claim legally insufficient, but the introduction at this late hour reveals the agency's bad faith in processing EPIC's request. The claim is a frivolous and tactical attempt to take advantage of EPIC's good faith effort to narrow the scope of issues in dispute by waiving prior challenges to Exemption 3 claims related to NSA, CIA, and FBI documents.

The DOJ has not submitted any declaration from the NSD, the agency that created and controls the records at issue, to justify the Exemption 3 claim. Instead, the agency has submitted a supplemental declaration from the FBI Record/Information Dissemination Section Chief David M. Hardy. Fourth Hardy Decl. The Exemption 3 claim, according to Mr. Hardy's declaration, relates to the National Security Act of 1947, 50 U.S.C. § 3024(i)(1). Fourth Hardy Decl. ¶ 15. However, the records at issue were not created by the FBI and they are not controlled by the FBI,

[8] https://epic.org/privacy/wiretap/stats/fisa_stats.html.

these are NSD records. The D.C. Circuit has never held that such records, created and controlled by a non-IC agency, can be properly withheld pursuant to the National Security Act.

FOIA Exemption 3 applies to records that are "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). In order to establish that a record is exempt under the provision, an agency must show that the "withheld material" is included in "the statute's coverage." *DiBacco v. U.S. Army*, 795 F.3d 178, 197 (D.C. Cir. 2015). Courts have acknowledged that the National Security Act is "a valid Exemption 3 statute." *Id*. An agency's Exemption 3 claim is therefore satisfied if the records at issue fall within the purview of the National Security Act.

The National Security Act requires the Director of National Intelligence ("DNI") to "protect from unauthorized disclosure intelligence sources and methods." 50 § 3024(i)(1). The DNI has exercised his authority under the National Security Act by establishing a "framework for oversight of classified information," Intelligence Community Directive 700. *DiBacco*, 795 F.3d at 198. Courts have therefore found that where "material contains 'intelligence sources and methods' within the National Security Act's coverage" and the material is being withheld by a member of the Intelligence Community, Exemption 3 applies. *Id*. at 199. But the NSD is not a member of the Intelligence Community. *See* Dir. of Nat'l Intelligence, *Members of the IC*, http://www.dni.gov/index.php/intelligence-community/members-of-the-ic.

It is a matter of first impression in this Circuit whether a non-IC agency can assert an Exemption 3 claim based on the National Security Act. But the plain text of the statute indicates that such a claim is impermissible. *See DiBacco*, 795 F.3d at 197–200 (addressing the statutory and regulatory structure of the National Security Act). The National Security Act restricts the ability of the DNI, not civilian agencies, to release certain information. The D.C. Circuit has found that the DNI's directive to other Intelligence Community members binds those other

agencies as well. *DiBacco*, 795 F.3d at 198. But it does not follow that the National Security Act restricts agencies outside of the Intelligence Community from releasing records not controlled by Intelligence Community members.

It would be inappropriate and contrary to the statutory text and structure for the NSD, or any other non-IC agency, to assert an Exemption 3 claim based on the National Security Act.

3. The DOJ has not satisfied the Exemption 7 threshold test or established the necessary criteria to satisfy subsection (E).

The DOJ has failed to carry its burden of establishing that the redacted portions of the reprocessed semiannual reports are subject to Exemption 7(E). First, the DOJ has failed to establish that the semiannual reports are records "compiled for law enforcement purposes" under Exemption 7. Second, the government has not shown that the disclosure of the Westlaw printouts or withheld portions of the semiannual reports summarizing FISC opinions, the scope of FISC's jurisdiction, and FISA process improvements would risk circumvention of the law.

a. The semiannual reports are not subject to Exemption 7(E).

An agency invoking Exemption 7(E) must first make a "threshold" showing and demonstrate that the records were "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7); *see FBI v. Abramson*, 456 U.S. 615, 622 (1982). As EPIC previously explained, the semiannual reports—created by the NSD's Oversight Section—were compiled for oversight, not law enforcement, purposes. *See* Pl.'s Mot. at 25–27; Pl.'s Reply at 11–14. The government's supplemental declarations provide no support for a contrary conclusion.

In the FBI's supplemental declaration, Mr. Hardy simply echoes the DOJ's prior conclusory assertion that because "the semi-annual reports to Congress (Documents 124–127, and 129) were drawn from FBI investigative files," the semiannual reports were thus compiled for law enforcement purposes. Fourth Hardy Decl. ¶ 19; see Def.'s Opp'n at 14. But summaries

of significant legal interpretations by the FISC, its jurisdiction, and FISA procedures plainly fall outside the scope of the "law enforcement purposes." *See* Pl.'s Reply at 12–14. The semiannual reports thus do not satisfy the Exemption 7 threshold.

Even if the DOJ established that the semiannual reports were "compiled for law enforcement purposes," the agency would still fall short of establishing that disclosure of the reports would "risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E); Pl.'s Mot. at 27–28. The limited portions of Mr. Hardy's declaration made available to EPIC provide no detail as to the asserted risk posed by the disclosure of the semiannual reports. Fourth Hardy Decl. ¶ 21–23. EPIC renews its argument that the DOJ has failed to establish that disclosure of summaries of legal opinions, legal memos, or statistics would "reasonably be expected to risk circumvention of the law." Pl.'s Mot. at 27–28; Pl.'s Reply at 14–15.

Because the DOJ has failed to establish that the semiannual reports were compiled for law enforcement purposes, and that disclosure would risk circumvention of the law, the agency improperly withheld the semiannual reports under Exemption 7(E).

b. Publicly available Westlaw case printouts can never be properly withheld under Exemption 7(E).

The DOJ's conclusory Exemption 7(E) assertions are similarly inadequate to justify the withholding of the Westlaw case printouts contained in Document 68. These judicial decisions, which are publicly available in a widely used research database, were not "compiled for law enforcement purposes," but were compiled to decide a legal issue. *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."); Pl.'s Reply at 12.

The DOJ has also failed to establish how disclosure of a widely available Westlaw case

printouts would "risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). Exemption 7(E) "requires that the [agency] 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) (internal citations omitted). Again, the DOJ has failed to logically connect the disclosure of information "described and discussed" in legal opinions hosted on a publicly accessible research database to a "risk of circumvention of the law." *See* Fourth Hardy Decl. ¶ 22.

The Court should also categorically reject the agency's claim that publicly available court decisions can be withheld under Exemption 7(E). The Westlaw case printouts at issue are already in the public domain, they have "thereby shed their Exemption [7] protection." *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) (*discussed in Ewell v. DOJ*, No. CV 14-495 (RDM), 2016 WL 316777, at *6 (D.D.C. Jan. 26, 2016)). A plaintiff who can establish "that there is a permanent public record of the exact portions" of requested records can defeat any claimed exemption under the public domain doctrine. *Cottone*, 193 F.3d at 554 (quoting *Davis v. DOJ*, 968 F.2d 1276, 1280 (D.C. Cir. 1992)). All the plaintiff needs to do to meet this standard is "point to specific information in the public domain that appears to duplicate that being withheld." *Id*.

Here, there is no dispute that the case printouts originated from Westlaw. *See* Def.'s Opp'n at 5 (asserting the proper classification of "Westlaw printouts"); Fourth Hardy Decl. ¶ 3 (describing Document 68 as containing "Westlaw case printouts"). Similarly, there can be no dispute that information provided by Westlaw is publicly accessible. Because the Westlaw case printouts withheld by the DOJ are *exact* duplicates of cases already made publicly available on Westlaw, those printouts are not exempt from disclosure under the FOIA.

C. The DOJ has failed to release reasonably segregable portions of the remaining challenged withholdings.

Even where an agency has properly invoked a FOIA exemption, it must disclose any

"reasonably segregable portion" of the record requested. 5 U.S.C. § 552(b); *see Stolt-Nielsen Transp. Group Ltd v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008) (quoting *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1116 (D.C. Cir. 2007)); *Oglesby v. United States Dep't of the Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996) ("If a document contains exempt information, the agency must still release 'any reasonably segregable portion' after deletion of the nondisclosable portions."). Thus the FOIA "makes clear that the fact that a responsive document fits within an applicable exemption does not automatically entitle the keeper of such material to withhold the *entire* record." *Charles v. Office of the Armed Forces Med. Exam'r*, 979 F. Supp. 2d 35, 42 (D.D.C. 2013).

Here, the FBI argues that the DOJ properly withheld the "seemingly public" Westlaw case printouts in full because, "when read or viewed within the context of other available documents and information, this material could reasonably be expected to reveal highly sensitive information to sophisticated adversaries." Fourth Hardy Decl. at 23. But the Westlaw printouts are not covered by any of the FOIA's exemptions and therefore they must be released. *Shapiro*, 2016 WL 287051, at *13. But even if portions of those Westlaw printouts were properly exempted, it is implausible that entire legal opinions would be devoid of reasonably segregable material. Thus, even if some of the Westlaw case printouts could fall under a FOIA exemption, the DOJ has improperly withheld reasonably segregable portions of those printouts.

Regarding the semiannual reports, the NSA and the FBI assert that all reasonably segregable material has been released to EPIC. Second Sherman Decl. ¶¶ 16–17; Fourth Hardy Decl. ¶¶ 45–46. The agencies are incorrect. The DOJ has withheld summaries of FISC opinions, FISC jurisdiction, FISA procedures, and aggregate statistics contained in the semiannual reports, which as EPIC has argued, fall outside the FOIA's exemptions. Pl.'s Mot. at 31. Thus, by failing

to produce those portions of the semiannual reports, the NSD has failed to disclose all reasonably segregable material to EPIC.

D. The DOJ has failed to comply with the Court's order.

The Court found in the February 4, 2016, Order that the DOJ's declarations were "manifestly inadequate" to support review of the agency's claimed exemptions. Mem. Op. 7. The Court accordingly found that it required both "a supplemental *Vaughn* Index that identifies which of the redactions relate to the 'significant legal interpretations by the FISC, its jurisdiction, or its procedures'" and "one or more declarations tailored to the government's reasons for making those redactions." Mem. Op. 8. The DOJ has failed to satisfy both of the Court's requirements. The supplemental *Vaughn* Index does not provide detail about which redactions relate to the remaining challenged withholdings. The DOJ also did not submit a supplemental declaration from the DOJ, the agency that actually created and maintains the semiannual reports at issue. Due to the agency's fundamental failure to comply with the Court's Order, the Court should find that EPIC is entitled to summary judgment and remand the request to the agency with an order to release the remaining challenged withholdings.

CONCLUSION

For the foregoing reasons, the Court should grant EPIC's Renewed Motion for Summary Judgment as to the remaining challenged withholdings.

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Respectfully submitted,

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