

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

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

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

**DEFENDANT’S RESPONSE TO PLAINTIFF’S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE DISPUTE**

Pursuant to LCvR 7(h) and paragraph 5(d) of this Court’s Appendix to its Standing Order and Guidelines for Civil Cases, defendant, the United States Department of Justice, submits this Response to plaintiff’s Statement of Material Facts as to Which There is No Genuine Dispute.

Defendant’s Responses to Plaintiff’s Statement of Facts

1. On October 3, 2013, EPIC transmitted, via certified mail, a FOIA request to National Security Division (“NSD”) of the Department of Justice (“DOJ”). Compl.

¶16, ECF No. 1.

DEFENDANT’S RESPONSE:

Undisputed.

2. EPIC’s FOIA Request sought three categories of agency records:

(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.”

Compl. at ¶18.

DEFENDANT’S RESPONSE:

Undisputed.

3. In the FOIA Request, EPIC sought “news media” fee status, expedited processing, and a fee waiver. Compl. ¶¶ 19–21.

DEFENDANT’S RESPONSE:

Undisputed.

4. The NSD acknowledged receipt of EPIC’s FOIA Request in a letter dated October 29, 2013. First Bradley Decl. ¶ 3.

DEFENDANT’S RESPONSE:

Undisputed.

5. EPIC received a second letter from the NSD, dated November 5, 2013, granting EPIC’s request for expedited processing based on “a particular urgency to inform the public about an actual or alleged federal government activity” and EPIC’s fee waiver request. *Id.*

DEFENDANT’S RESPONSE:

Undisputed, but not material.

6. On December 9, 2013, EPIC initiated this litigation after the NSD failed to make a determination or produce responsive records within the statutory deadline. Compl. ¶ 29.

DEFENDANT’S RESPONSE:

This paragraph contains a conclusion of law that is disputed.

7. Following the Court's February 11, 2014, Order, the DOJ produced to EPIC redacted copies of 25 semiannual reports by the Attorney General ("First Production"), as well as 52 other documents responsive to EPIC's FOIA request. Def.'s Mot., *Vaughn Index*, ECF No. 22-3.

DEFENDANT'S RESPONSE:

Undisputed.

8. After the DOJ completed the initial production of responsive records, the parties filed cross motions for summary judgment according to the briefing schedule adopted in the Court's August 18, 2014, Minute Order.

DEFENDANT'S RESPONSE:

Undisputed.

9. EPIC filed a Cross Motion for Summary Judgment on November 21, 2014, arguing 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 FISA applications filed and U.S. persons targeted. 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.

DEFENDANT'S RESPONSE:

Undisputed.

10. The DOJ subsequently conceded that aggregate statistics had been improperly withheld in the first production of the semiannual reports and provided a reprocessed version of the reports. Def.'s Mem. Opp'n, Ex. I, ECF Nos. 27-2, 27-3, 27-4, 27-5.

DEFENDANT'S RESPONSE:

Undisputed to the extent Plaintiff refers only to aggregate annual statistics concerning PR/TT surveillance that were redacted in error and subsequently released upon re-review. Disputed to the extent Plaintiff refers to aggregate statistics concerning Business Records surveillance, which fall outside of Plaintiff's FOIA request. *See* Def.'s Opp'n to Pl.'s Renewed Mot. for Summ. J. at 8 n.2.

11. On February 4, 2016, the Court issued a Memorandum Opinion and Order, denying the parties' cross motions for summary judgment 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.

DEFENDANT'S RESPONSE:

Undisputed.

12. On March 18, 2016, the DOJ filed a revised *Vaughn* Index, filed supplemental declarations of FBI and NSA FOIA officials, and lodged unredacted copies of certain records with the court. Def.'s Notice of Lodging of Documents for *In Camera* Review with the Classified Information Security Officer, ECF No. 34; Revised *Vaughn* Index Addressing the Remaining Challenged Withholdings, ECF No. 35.

DEFENDANT'S RESPONSE:

Undisputed.

13. On March 18, 2016, the DOJ also released to EPIC reprocessed versions of certain pages in the disputed semiannual reports ("Third Production"), including portions of documents numbered 124–127 and 129. *See* Ex. 1.

DEFENDANT’S RESPONSE:

Undisputed.

14. In the Third Production, the DOJ released portions of the semiannual reports that the agency previously withheld as exempt and claimed were properly classified. *See* Ex. 2.

DEFENDANT’S RESPONSE:

Undisputed to the extent Plaintiff is suggesting that Defendant voluntarily released additional information.

15. In the Third Production, the DOJ released portions of the semiannual reports 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.

DEFENDANT’S RESPONSE:

Defendant disputes Plaintiff’s characterization of the relationship between its withholdings determinations and the markings that appeared on the documents in question. Officials with original classification authority reviewed all of the documents over which Exemption 1 was asserted and determined that they are properly classified under Executive Order 13,526 regardless of prior markings. Fourth Hardy Decl. ¶ 10; Second Sherman Decl. ¶ 8.¹

16. In the Third Production, the DOJ released portions of the semiannual reports that it previously withheld even though those portions were marked as “Secret” and “Top Secret.” *See, e.g.*, Ex. 1 at 14–16, 22–23, 33–34, 36, 38, 40, 70–71, 83.

DEFENDANT’S RESPONSE:

Defendant disputes Plaintiff’s characterization of the relationship between its withholdings determinations and the markings that appeared on the documents in question. Officials with

¹ It should be noted that Exemptions 3 and 7, also asserted by Defendant, do not require that the protected information be classified. *See* 5 U.S.C. § 552(b)(3); (b)(7).

original classification authority reviewed all of the documents and determined that they are properly classified under Executive Order 13,526 regardless of prior markings. Fourth Hardy Decl. ¶ 10; Second Sherman Decl. ¶ 8.

17. In the Third Production, the DOJ redacted portions of the semiannual reports that it previously released as non-exempt. *Compare* Ex. 1 at 65, *with* Pl.’s Mot., Ex. 1 at 206, ECF No. 25-2, *and with* Def’s Opp’n, Third Declaration of Mark A. Bradley, Ex. at 110, ECF No. 27-4.

DEFENDANT’S RESPONSE:

Disputed. Defendant has released information that was redacted in error, including a mistake identified by Plaintiff in its summary judgment filing. *See* Ex. 1 (supplemental release).

18. The DOJ added several new markings to the pages from the semiannual reports in the Third Production. *See* Ex. 1.

DEFENDANT’S RESPONSE:

Undisputed.

19. In the Third Production, the DOJ marked several of the pages as “outside of the remaining challenged withholdings” even though those pages 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.

DEFENDANT’S RESPONSE:

Defendant disputes Plaintiff’s averment that Defendant improperly labeled material contained in the third production. Defendant respectfully refers the Court to the full, unredacted version of the relevant documents lodged with the Court. ECF No. 34.

20. In the Third Production, the DOJ has excluded pages that contain material within the remaining challenged withholdings. *See, e.g.*, Ex. 1 at 35, 75.

DEFENDANT'S RESPONSE:

Disputed. Defendant respectfully refers the Court to the full, unredacted version of the relevant documents lodged with the Court. ECF No. 34.

21. The DOJ's Revised *Vaughn* Index does not identify which redactions relate to the significant legal interpretations by the FISC, its jurisdiction, or its procedures. *See* ECF No.

DEFENDANT'S RESPONSE:

Disputed. The Revised *Vaughn* Index identifies the portions of the produced records that relate to the remaining challenged withholdings. *See* Revised *Vaughn* Index, ECF No. 35; *EPIC v. Dep't of Justice*, No. 13-CV-01961 (KBJ), 2016 WL 447426, at *3 (D.D.C. Feb. 4, 2016).

22. The DOJ did not file a supplemental declaration from the NSD.

DEFENDANT'S RESPONSE:

Undisputed.

23. The DOJ did not offer any explanation for many of the redactions in the Third Production. *See, e.g.*, Ex. 1 at 11, 17–19, 35, 59–60, 75.

DEFENDANT'S RESPONSE:

Disputed. All redactions were addressed in the Fourth Hardy Declaration and Second Sherman Declaration.

24. The DOJ continues to withhold in full the Westlaw case printouts attached to Document 68. *See* Ex. 1.

DEFENDANT'S RESPONSE:

Undisputed.

25. The DOJ has also withheld in full Westlaw printouts identified as Document 89 in the original *Vaughn* Index. Def.'s Mot., Ex. IA at 11, ECF No. 22-3.

DEFENDANT'S RESPONSE:

Undisputed, but not material. This document does not remain within the remaining challenged withholdings identified by the Court. *See EPIC v. Dep't of Justice*, No. 13-CV-01961 (KBJ), 2016 WL 447426, at *3 (D.D.C. Feb. 4, 2016).

26. The use of pen register devices by the government, 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.

DEFENDANT'S RESPONSE:

This paragraph contains conclusions of law that are disputed.

27. The pen register technique is not a secret; it is a matter of public record, and it is defined in federal law.

DEFENDANT'S RESPONSE:

Disputed. *See* Fourth Hardy Declaration ¶¶ 11-44; Second Sherman Declaration ¶¶ 9-11.

28. 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).

DEFENDANT’S RESPONSE:

This paragraph contains conclusions of law which are disputed.

29. Congress passed the USA FREEDOM Act, Pub. L. 114-23, 129 Stat. 268, on June 2, 2015.

DEFENDANT’S RESPONSE:

Undisputed, but not material.

30. The USA FREEDOM Act requires 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).

DEFENDANT’S RESPONSE:

Undisputed, but not material. Defendant respectfully refers the Court to the cited section of the Act for a full and accurate statement of its contents.

Dated May 6, 2016

Respectfully submitted,

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/s/ Caroline J. Anderson

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