

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

_____)	
ELECTRONIC PRIVACY)	
INFORMATION CENTER)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:13-cv-01961-KBJ
)	
UNITED STATES)	
DEPARTMENT OF JUSTICE)	
)	
Defendant.)	
_____)	

**PLAINTIFF’S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE AND
RESPONSE TO DEFENDANT’S STATEMENT OF FACTS NOT IN DISPUTE**

Pursuant to Local Civil Rule 7(h) of the Rules of the United States District Court for the District of Columbia, Plaintiff Electronic Privacy Information Center (“EPIC”) hereby submits the following statement of material facts as to which EPIC contends there is no genuine issue in connection with its cross-motion for partial summary judgment, and EPIC’s response to defendant’s statement of material facts.

1. EPIC agrees that the matters set forth in ¶¶ 1-14 of defendant’s statement of material facts are not in dispute.

2. EPIC does not challenge the withholding of documents by the NSA in this case, and so it agrees that the matters set forth in ¶¶ 15-56 of defendant’s statement of material facts are not in dispute to the extent they refer to the determinations made by David J. Sherman about the documents reviewed by the NSA. However, EPIC submits that the matters set forth in ¶¶ 16, 20, 25, 32, 34, 39, 43, 46, 50, and 55 are not supported by the record to the extent they refer to facts beyond what Mr. Sherman determined in his

declaration.

3. EPIC agrees that the matters set forth in ¶¶ 57-63 of the defendant's statement of material facts are not in dispute, but EPIC submits that the references to "these documents" only refer to the documents discussed in the Declaration of David M. Hardy.

4. EPIC submits that ¶ 64 of defendant's statement of material facts is not supported by the record because the Second Declaration of Mark A. Bradley does not establish that the redacted material in the twenty-five semiannual reports is properly classified.

5. EPIC agrees that the matters set forth in ¶¶ 65-67 of defendant's statement of material facts are not in dispute.

6. EPIC submits that the matters set forth in ¶¶ 68-75 are not "material facts" because the determinations made by Mr. Bradley in paragraph 10 of his declaration are not sufficiently detailed to satisfy the agency's burden of proof in this case; to the extent they are material facts, EPIC disputes them.

7. EPIC agrees that the matters set forth in ¶¶ 77-84 in the defendant's statement of material facts are not in dispute to the extent they refer to the determinations made by Martha M. Lutz about the document reviewed by the CIA.

8. EPIC agrees that the matters set forth in ¶¶ 85-89 in the defendant's statement of material facts are not in dispute.

9. EPIC submits that the matters set forth in ¶¶ 90-91 are in dispute because they are not supported by paragraph 11 of the Second Declaration of Mark A. Bradley.

10. EPIC agrees that the matters set forth in ¶¶ 92-94 of the defendant's

statement of material facts are not in dispute.

11. EPIC agrees that the matters set forth in ¶ 95 of the defendant's statement of material facts are not in dispute, but EPIC submits that "such information" refers only to the information contained in the documents described in the Declaration of David M. Hardy.

12. EPIC does not dispute the withholding of non-exempt material by Mr. Sherman and Ms. Lutz, as described in ¶ 96 of the defendant's statement of material facts, but EPIC submits that neither Mr. Hardy nor Mr. Bradley have established that all non-exempt information that could reasonably be disclosed has been disclosed.

13. EPIC submits that ¶ 97 of defendant's statement constitutes a legal conclusion, which EPIC disputes.

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

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

16. In 2013, the Government declassified an April 1, 2011 Memorandum sent from the NSA to the Senate Select Committee on Intelligence regarding the agency's

collection of cell site location information pursuant to the FISA. *See* Press Release, James R. Clapper, Director of National Intelligence, *DNI Clapper Declassifies Additional Intelligence Community Documents Regarding Collection Under Section 501 of the Foreign Intelligence Surveillance Act* (Oct. 28, 2013), <http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/954-dni-clapper-declassifies-additional-intelligence-community-documents-regarding-collection-under-section-501-of-the-foreign-intelligence-surveillance-act>.

17. The NSA Memorandum acknowledges that it has obtained “geolocation information” from cell phone call records and is considering using that information to gather intelligence. *See* Memorandum from Office of the General Counsel (Intelligence Law), Nat’l Sec. Agency, to the Senate Select Committee on Intelligence (Apr. 1, 2011), *available at* http://www.dni.gov/files/documents/501/NSA%20CSLI%20Gottzman%20Response_SealedFINAL.pdf.

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

intelligence.

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

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

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

22. The semiannual reports partially released by the NSD contain aggregate statistical information about the number of pen register applications filed and the number of U.S. persons targeted. *See* 50 U.S.C. § 1846(b).

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

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

25. Document number 68 contains “a discussion on the legal standards, citing particular case law, highlighting the legislative history as well as articulating policy considerations” related to an application for FISA surveillance. Second Declaration of David M. Hardy ¶ 12.

Dated: November 21, 2014

Respectfully submitted,

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/s/ Alan Jay Butler

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