

**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 STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE DISPUTE**

Pursuant to LCvR 7(h), defendant, the United States Department of Justice submits this Statement of Material Facts as to Which There is No Genuine Dispute.¹

1. By letter dated October 3, 2013, and received on October 18, plaintiff submitted a FOIA request to the Department of Justice, National Security Division (“NSD”). *See* First Declaration of Mark A. Bradley (“Bradley Decl.”) (ECF No. 9-1) ¶ 2.

2. Plaintiff’s FOIA request 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.

¹ This Statement of Facts as to Which There is No Genuine Dispute focuses on the “Remaining Challenged Withholdings” as identified in the Court’s February 4, 2016 Order. *See EPIC v. U.S. Dep’t of Justice*, Civil No. 13-01961, 2016 WL 447426, *6 (D.D.C. Feb. 4, 2016). Defendant incorporates by reference all previous Statements of Fact as to Which There is No Genuine Dispute.

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.

3. By letter dated October 29, 2013, NSD acknowledged receipt of the request. First Bradley Decl. ¶ 3.

4. By a subsequent letter dated November 5, 2013, NSD granted plaintiff's requests for expedited processing and waiver of processing fees. *Id.*

5. In 2013, the Government declassified the existence of now-discontinued, FISC-authorized bulk collection of Internet metadata pursuant to the FISA PR/TT provisions. 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).

6. 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. *Id.*

7. 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.* 8.

8. This program of bulk Internet metadata collection was terminated in 2011. *Id.*

9. The parties agreed to further narrow the scope of issues in dispute. As described in the Court's February 4, 2016 Order, see *EPIC v. U.S. Dep't of Justice*, Civil No. 13-01961, 2016 WL 447426 (D.D.C. Feb. 4, 2016), the only exemptions asserted which remain in dispute are "(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')." *Id.* at 3.

10. NSD searched for records responsive to plaintiff's FOIA request in NSD's Office of Intelligence, Oversight Section. Bradley Decl. ¶ 6.

11. Because of the Oversight Section's unique role as the NSD component in charge of preparing and submitting these productions to Congress, any NSD records responsive to the request would be found in that section. *Id.*

12. The Oversight Section maintains a working file for each semiannual report and Congressional production. *Id.*

13. Those working files contain, among other records, tracking reports used to compile the statistical information for the semiannual reports. *Id.*

14. As part of the search for records responsive to plaintiff's FOIA request, an Oversight Section staff member went through each of the working folders for the reports and productions submitted during the time span of the request, and he provided NSD FOIA with all records related to PR/TT devices, including any information provided to the House and Senate Intelligence Committees concerning those devices and any records used in preparation of those materials. *Id.*

15. The Government has withheld classified information from the remaining challenged withholdings concerning significant legal interpretations of the FISC on behalf of the NSA and pursuant to FOIA Exemption 1. *See* Second Declaration of David J. Sherman ¶ 7.

16. David J. Sherman is an original classification authority. *Id.* ¶ 8.

17. Release of the withheld information concerning significant legal interpretations of the FISC and PR/TT contained within the semiannual reports to Congress (“SARs”) could be reasonably expected to cause exceptionally grave damage to national security and it is properly classified TOP SECRET. *Id.* ¶ 8. The justification for its withholding pursuant to Exemption 1 is contained in the Second Sherman Declaration.

18. The Government has withheld classified information on behalf of the FBI and pursuant to FOIA Exemption 1. *See* Fourth Declaration of David M. Hardy ¶ 12 (“Fourth Hardy Decl.”).

19. David M. Hardy is an original classification authority. *Id.* ¶ 10.

20. Defendant withheld information describing specific FBI intelligence activities or methods that are still used by the FBI today in gathering intelligence information. *Id.* ¶ 31²-33.

21. Mr. Hardy has determined that the release of the withheld information from the SARs and Westlaw printouts attached to Document 68, which concern significant legal interpretations by the FISC, holdings of the FISC, discussions of the scope of the FISC’s jurisdiction, and specific classified surveillance techniques, could be reasonably expected to cause serious and/or exceptionally grave damage to the national security, and accordingly has been classified at the SECRET and TOP SECRET levels. The justification for its withholding pursuant to Exemption 1 is contained in the Fourth Hardy Declaration. *Id.*

² Paragraph 31 of Mr. Hardy’s declaration contains classified information so it has been redacted from the public version of that declaration filed via the Court’s ECF system. A full, unredacted, classified copy of the declaration is being lodged with a Department of Justice Classified Information Security Officer for *ex parte* submission to and *in camera* review by the Court. *See* Notice of Lodging of Documents for *In Camera* Review with the Classified Information Security Officer (ECF No. 34).

22. The information redacted on behalf of the NSA from documents responsive to plaintiff's FOIA request relate to a function (signals intelligence) and the activities of the NSA. *See* Second Sherman Decl. ¶ 13.

23. Pursuant to Exemption 3, the NSA invokes Section 6 of the National Security Act of 1959 as justification to withhold information concerning its activities. *Id.* The justification is contained within the Sherman Declaration.

24. Pursuant to Exemption 3, the NSA and FBI invoke Section 102A(i)(1) of the National Security Act of 1947, as amended, as justification to withhold information pertaining to intelligence sources and methods. *See Id.* ¶ 15; Fourth Hardy Decl. ¶ 15. The justification is contained within the Sherman and Hardy Declarations.

25. Pursuant to Exemption 3, the NSA invokes 18 U.S.C. § 798 as justification for withholding communications intelligence activities of the United States. Sherman Decl. ¶ 14. The justification is contained within the Second Sherman Declaration.

26. Pursuant to Exemption 7(E), the FBI has withheld information concerning techniques and procedures utilized by the FBI in conducting national security investigations. Fourth Hardy Decl. ¶ 22. The justification is contained within the Fourth Hardy Declaration.

27. Mr. Sherman and Mr. Hardy have attested that 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.

Dated April 8, 2016

Respectfully submitted,

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/s/ Caroline J. Anderson

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