

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

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

**PLAINTIFF’S STATEMENT OF MATERIAL FACTS FOR
WHICH THERE IS NO GENUINE DISPUTE**

Pursuant to Local Civil Rule 7(h) and Rule 4(d) of this Court’s Standing Order, Plaintiff Electronic Privacy Information Center (“EPIC”) hereby submits the following statement of material facts as to which EPIC contends there is no genuine dispute.¹

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.

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

¹ This Statement of Material Facts relates to the Renewed Motion for Summary Judgment as to the “Remaining Challenged Withholdings” as identified in the Court’s February 2, 2016, Order. Plaintiff also incorporates by reference all previous Statements of Material Fact from the prior cross motions.

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.

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

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

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.*

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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 110,² ECF No. 27-4.

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

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.

20. In the Third Production, the DOJ has excluded pages that contain material

² This refers to the page number that the Court’s electronic case filing system automatically assigns.

within the remaining challenged withholdings. *See, e.g.*, Ex. 1 at 35, 75.

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. 35.

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

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.

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

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.

26. 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.

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

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).

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

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).

Dated: April 8, 2016

Respectfully submitted,

MARC ROTENBERG
EPIC President

/s/ Alan Jay Butler

ALAN JAY BUTLER
Senior Counsel
Electronic Privacy Information Center
1718 Connecticut Ave., NW
Suite 200
Washington, DC 20009

Counsel for Plaintiff