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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ELECTRONIC FRONTIER FOUNDATION, Plaintiff, v. DEPARTMENT OF JUSTICE Defendant.	Case No. 3:10-cv-04892-RS **PLAINTIFF'S REPLY IN SUPPORT OF RENEWED CROSS-MOTION FOR SUMMARY JUDGMENT** Date: April 25, 2013 Time: 2:30 p.m. Place: Ctrm. 3, 17th Floor Judge: Hon. Richard Seeborg

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INTRODUCTION

Through this Freedom of Information Act (FOIA) suit, EFF seeks records related to the government's attempts to expand the Communications Assistance for Law Enforcement Act (CALEA) to require all communications providers—including Skype, Facebook, BlackBerry, and Google—to build backdoors into their systems. Whether the government should be allowed to mandate technological designs to enable wiretapping, what the government's proposed legislative responses are, and how the government is going about lobbying Congress and the Federal Communications Commission (FCC) to change the law continue to be matters of public concern. *See, e.g.*, Ryan Gallagher, "FBI Pursuing Real-Time Gmail Spying Powers as "Top Priority" for 2013," *Slate.com* (March 26, 2013) (discussing FBI General Counsel Andrew Weissmann's recent presentation to the ABA on the FBI's efforts to address the "going dark" problem);[1] Declan McCullagh, "Apple's iMessage Encryption Trips up Feds' Surveillance," *CNet.com* (April 4, 2013).[2] However, despite these facts and despite two and a half years of litigation and four years since EFF filed its first FOIA request, the government still refuses to provide basic information to the public on these issues. The records EFF seeks will help to fill in the gaps in the public's knowledge and will enable Americans to engage in informed debate with their government over the propriety of any CALEA expansion.

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[1] http://www.slate.com/blogs/future_tense/2013/03/26/andrew_weissmann_fbi_wants_real_time_gmail_dropbox_spying_power.html/. Overview and webcast of Weissman's presentation available at http://www.c-spanvideo.org/program/311627-1.

[2] http://news.cnet.com/8301-13578_3-57577887-38/apples-imessage-encryption-trips-up-feds-surveillance/. Additional relevant articles from last year include: Declan McCullagh, "FBI: We need Wiretap-Ready Web Sites – Now," *CNet* (May 4, 2012), http://news.cnet.com/8301-1009_3-57428067-83/fbi-we-need-wiretap-ready-web-sites-now/; Glenn Greenwald, "Surveillance State Democracy," *Salon.com* (May 6, 2012) http://www.salon.com/2012/05/06/surveillance_state_democracy/; Josh Peterson, "Cyber-Intelligence Bill Sponsor Silent on FBI Push to Wiretap Social Networks," *The Daily Caller*, (May 13, 2012) http://dailycaller.com/2012/05/13/cyber-intelligence-bill-sponsor-silent-on-fbi-push-to-wiretap-social-networks/; Ryan Gallagher, "The Problem With the FBI's Plan To 'Wiretap' Online Communications," *Slate* (May 8, 2012) http://www.slate.com/blogs/future_tense/2012/05/08/communications_assistance_law_enforcement_act_fbi_hopes_to_wiretap_online_communications_.html; Sara Yin, "Report: FBI Wants to Wiretap Facebook, Twitter, Google," *PC Magazine* (May 5, 2012) http://securitywatch.pcmag.com/none/297521-report-fbi-wants-to-wiretap-facebook-twitter-google.

Defendant's Reply fails to offer anything new to support its withholdings—including its specious "outside the scope" claims. Even though EFF highlighted in its Renewed Cross-Motion specific records that were improperly withheld, Defendant's Reply fails to address these records.

Because Defendant has failed to meet its burden, the Court should deny its Motion for Summary Judgment and grant EFF's Renewed Cross-Motion. If the Court has any question about the propriety of Defendant's withholdings, EFF respectfully requests that the Court review disputed material *in camera* and order Defendant to immediately disclose all improperly withheld records.

I. ARGUMENT

A. Defendant is Improperly Narrowing the Scope of Plaintiff's Request to Circumvent its FOIA Obligations

Once again, Defendant goes to great lengths in its Reply to parse Plaintiff's FOIA request as narrowly as possible to avoid releasing information responsive to Plaintiff's request.[3] It does this in direct contradiction to this Court's order directing it to re-review materials previously withheld as non-responsive, employing the presumption that "information located on the same page, or in close proximity to undisputedly responsive material is likely to qualify as information that in 'any sense sheds light on, amplifies, or enlarges upon' the plainly responsive material, and that it should therefore be produced, absent an applicable exemption." (Order at 4-5.) Defendant has tried this very tactic, not just in this case but also in other cases in the past, to no avail. *See, e.g.*, *Rosenfeld v. DOJ*, 2010 U.S. Dist. LEXIS 90445 (N.D. Cal. Aug. 31, 2010) (ordering re-processing of files the Bureau claimed were non-responsive and noting, "[t]he FBI's current position, one favoring non-disclosure over disclosure, goes against the dictates of the FOIA. The FOIA favors disclosure."); *Dunaway v. Webster*, 519 F. Supp. 1059 (N.D. Cal. 1981); *Islamic Shura Council of S. Cal. v. FBI*, 779 F. Supp. 2d 1114 (C.D. Cal. 2011); *Powell v. DOJ*, 584 F. Supp. 1508, 1530 (N.D. Cal. 1984). Defendant should not be allowed to prevail on its narrow reading of Plaintiff's requests in this case either.

[3] *Compare* 2013 Def. Reply at 3-9 with 2012 Def. Reply (Dkt. No. 51) at 2-5.

Defendant's approach is contrary to the broad mandate in the FOIA, which states, "each agency, upon any request for records which reasonably describes such records . . . shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). It is also contrary to case law consistently stating that agencies are required "to construe a FOIA request liberally." *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995); *LaCedra v. Executive Office for U.S. Attorneys*, 317 F.3d 345, 348 (D.C. Cir. 2003); *Wilderness Soc. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 1, 20 (D.D.C. 2004). As noted in Plaintiff's Renewed Cross-Motion and this Court's order, this means agencies are "obliged to release any information, subject to the specified exemptions, which relates to the subject of the request or which *in any sense sheds light on, amplifies, or enlarges upon* that material which is found in the same documents." *Dunaway*, 519 F. Supp. at 1083 (emphasis added).

Defendant does not rebut the claim that the material it continues to withhold would shed light on, amplify, or enlarge upon material found in the otherwise responsive documents. Instead, Defendant merely argues its interpretation of Plaintiff's FOIA request was "reasonable." (Def. Reply at 3.) Yet, according to *Dunaway*, an agency may withhold material found in otherwise responsive documents "only if that material is *clearly and without any doubt unrelated* to the subject of the request." *Id.* at 1083 (emphasis added). Therefore, if the withheld material is related to the subject of Plaintiff's FOIA request and would shed light on otherwise responsive records, a narrow interpretation of Plaintiff's request that excludes such material cannot be "reasonable."[4] The out-of-circuit and unpublished cases Defendant cites do not hold to the contrary.

Plaintiff's request was not limited, as Defendant asserts, to information on "specific or technical problems" that hamper the components' abilities to conduct surveillance but broadly included communications and discussions within and outside the components on these problems and their potential solutions. Responsive material should include discussions on how best to

[4] This is true, whether DEA chooses to treat each of its slide presentations as a single responsive record or treats every slide within a presentation as a "self-contained" individual responsive record. (*See* Def. Reply at 7.)

address these problems—whether by technical means, legislative proposals, or internal policy changes.

Defendant has now had more than enough time to review and re-review the records it claims are not responsive and assert any exemptions it might have determined apply to those records. It chose not to do so, even after the Court expressly invited it to over six months ago. Defendant should not be given any more bites at the apple; the material withheld as outside the scope or not responsive should be released.

B. Defendant Still Fails to Meet Its Burden Under Exemption 4

Defendant continues to withhold records "voluntarily provided" to it by several unnamed communications companies concerning "internal operations, technical and product capabilities, and compliance plans," (Third Myrick Decl. ¶ 8,) and from the RAND Corporation. (Fourth Hardy Decl. ¶¶ 10-11.) As noted in EFF's Renewed Cross-Motion, Defendant is not entitled to withhold records under Exemption 4 because it has failed to show this material is confidential commercial or financial information obtained from private parties by the government. 5 U.S.C. § 552(b)(4). Further, the sections of Defendant's declarations supporting its Exemption 4 claims were not based on personal knowledge and included hearsay and non-specific, conclusory, and speculative justifications for withholding under Exemption 4. (Renewed Cross-Mot. at 11-14); *Feshbach v. SEC*, 5 F. Supp. 2d 774, 780 (N.D. Cal. 1997) ("Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment."). Defendant offers nothing new in its Reply. As Defendant has fallen short of satisfying its burden under Exemption 4, the records should be released.

Whether records are entitled to Exemption 4 protection is a fact-based inquiry. *See Watkins v. US Customs & Border Protection*, 643 F.3d 1189, 1196 (9th Cir. 2011) (noting courts must have "an adequate factual basis for [their] ruling"). To support such a claim, an agency must either submit declarations from the companies whose information it seeks to protect or show that the agency declarant has expertise in the commercial area. (Renewed Cross-Mot. at 12 (citing *GC Micro Corp v. Def. Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994); *Watkins*, 643 F.3d at 1196; *Lion Raisins v. Dep't of Agric.*, 354 F.3d 1072, 1080 (9th Cir. 2004)).) Where courts have

upheld Exemption 4 claims based solely on statements from agency declarants, those courts have been clear to review the declarants' credentials. For example, in *Lion Raisins*, the court noted the declarant was employed for eight years as a "Senior Compliance Officer," and, in that time, had become "very familiar' with raisin marketing and was in "almost daily contact" with raisin graders and supervisors. *Id.* at 1080. The Ninth Circuit held that this experience lent "considerable weight to his testimony." *Id.* However, the court also noted that his conclusions were "supported by detailed and specific descriptions of each category of information included . . . and the ways in which each category of information could be turned to Lion's competitive advantage. *Id.*

Defendant seeks to meet these requirements by providing affidavits from agency declarants with no demonstrated expertise in either the government contracting or telecommunications services markets. These declarants lack personal knowledge of the relative competitive issues facing these industries and so submit second-hand, unsubstantiated statements to support Defendant's argument that the withheld information constitutes confidential commercial or financial information warranting Exemption 4 protection. Defendant then argues that the court should accept and rely on these second-hand statements because hearsay is allowed in FOIA cases. (Def. Reply at 11-12.)

Yet, the cases cited by Defendant to support its arguments are inapposite. (*See* Def. Reply at 12 (citing *Lion Raisins; Gerstein v. DOJ,* No. C-03-04893 RMW, 2005 U.S. Dist. LEXIS 41276, at *13-14 (N.D. Cal. Sept. 30, 2005); and *Barnard v. DHS*, 598 F. Supp. 2d 1, 19 (D.D.C. 2009)).) As noted above, the affiant in *Lion Raisins*—unlike Mr. Hardy or Ms. Myrick—had specific knowledge about the relevant markets and issues and could assess whether the information withheld properly constituted confidential trade secrets or commercial or financial information. The two other cases cited by Defendant—*Gerstein* and *Barnard*—did not involve confidential, non-government, market-based information subject to Exemption 4 claims. Instead, the information at issue came from the government and was classified or law enforcement-related and protectable by Exemptions 1 or 7. For those types of information, the agency declarants' knowledge in the subject matter and reference to other government employees' statements was sufficient to support the withholdings. Even in *Bowen v. U.S. Food & Drug Admin.*, 925 F.2d 1225

(9th Cir. Cal. 1991), the court noted the declarant "described in detail which documents were being withheld under [Exemption 4] and why" and that the plaintiff's "requests involved trade secret information regarding the manufacturing formulas and processes, as well as quality control and internal security measures, of private business entities." *Id.* at 1227-28 (internal citations omitted). This is far more detail than Defendant provides in its own declarations.

In the absence of declarations from the companies at issue or from government declarants with demonstrated personal knowledge in the subject matter, and for all the other reasons stated in Plaintiff's Renewed Cross-Motion, Defendant has not carried its burden under Exemption 4. Thus, the records should be released.

C. Defendant Still Fails to Meet Its Burden Under Exemption 5

1. Defendant Concedes that Factual and Non-Deliberative Material Has Been Withheld Under the Deliberative Process Privilege

EFF demonstrated in its Renewed Cross-Motion that Defendant improperly withheld factual material under the deliberative process privilege of Exemption 5. (Renewed Cross-Mot. at 19-20.) In reply, Defendant concedes this point, arguing it is justified in withholding factual material under Exemption 5 because it often claimed this Exemption coextensively with Exemption 7(E). (Def. Reply at 16.) Defendant cannot use its reliance on 7(E) to bootstrap its claims under Exemption 5; it must prove the material is properly withheld under *each* exemption. It has failed to do so here. Thus, to the extent that this Court determines Defendant's withholdings under Exemption 7(E) to be misplaced, (*see infra* at 15-18), the deliberative process privilege is similarly unavailable to withhold the "factual information" otherwise withheld under Exemption 7(E).

Even in the absence of Exemption 7(E) claims, Defendant appears to have withheld purely factual material. In particular, the FBI's withholding in full of an "internal staff summary" note, (*see* Fourth Hardy Decl. ¶ 14), and the DEA's withholding of a "two-page bulletin," (*see* Third Myrick Decl. ¶ 11), were improper. Both contain factual information concerning, respectively, a meeting between "OCA, OTD, a DOJ staff attorney, and a staff employee of the Senate Judiciary Committee," and a "particular intercept issue." (Fourth Hardy Decl. ¶ 14; Third Myrick Decl.

¶ 11.) Similarly, FBI Document EFF/Lynch 329-331 contains "discussion paper articles"[5] on topics such as "Going Dark" and the "Degradation of Domestic Electronic Surveillance Capability." To the extent that these "discussion paper articles" still contain "definitions," that is precisely the type of non-deliberative, factual material that may not be withheld under the deliberative process privilege. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Further, while the "thoughts and opinions" of the authors may be withheld, any factual descriptions may not be withheld under the deliberative process privilege. *See id*. (deliberative process privilege applies "only to the 'opinion' or 'recommendatory' portion of [a document], not to factual information which is contained in the document").

2. The "Consultant Corollary" Does Not Protect Records Shared with Communications Providers and Non-DOJ Law Enforcement

Defendant argues that materials shared with non-agency third parties including telecommunications providers and non-federal law enforcement agencies are still "inter- or intra-agency communications" because the entities with which these records were shared were acting as consultants. (Def. Reply at 21-22 (citing *Dept. of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001)).) This argument fails; because those entities communicated with the government with "their own, albeit entirely legitimate, interest in mind," *Klamath*, 532 U.S. at 12, they were not acting as consultants, and records shared with them are not entitled to Exemption 5 protection.

In *Klamath*, the Department of the Interior attempted to withhold records shared between the Bureau of Indian Affairs and an Indian tribe, arguing these communications were analogous to agency communications with a hired consultant. *Id.* at 11-12. However, the Court noted that a consultant advising an agency "does not represent an interest of its own, or the interest of any other client." *Id.* at 11. Instead, "[i]ts only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do." *Id*. Because, the tribes represented their own interests, their communications with the

[5] FBI claims that it "mislabeled" these pages as "definitions on topics" in its original *Vaughn* submission. (Fourth Hardy Decl. ¶16.)

government did not meet the consultant corollary test and could not be withheld under Exemption 5. *Id*. at 12.

Following *Klamath*, there is a presumption that documents shared between a federal agency and an outside party are not protected under Exemption 5, unless the agency hires the outside party as a consultant. *See, e.g.*, *Ctr. for Biological Diversity v. Office of the U.S. Trade Rep.,* 450 Fed. Appx. 605, 608 (9th Cir. 2011) ("This fact alone suggests they do not meet Exemption 5's threshold requirement."); *Flathead Joint Bd. of Control v. United States DOI*, 309 F. Supp. 2d 1217, 1224 (D. Mont. 2004) (citing *Dow Jones & Co., Inc. v. DOJ*, 286 U.S. App. D.C. 349, 917 F.2d 571, 574 (D.C. Cir. 1990)) (same). Defendant has not shown that it hired the third parties with which it shared the records at issue. As such, this Court should presume those documents are not entitled to Exemption 5 protection.

Defendant has also not presented any facts about its relationship with these third parties that would overcome this presumption. *See Ctr. for Biological Diversity,* 450 Fed. Appx. at 609 (citing *Klamath*, 532 U.S. at 14 and noting "[t]he relevant factual inquiry . . . is the nature of the relationships between the government agency and the third party or parties."). And in fact, the Northern District has already held that records shared between federal agencies and communications providers under similar circumstances are not protected by the consultant corollary. *See EFF v. Office of the Dir. of Nat'l Intelligence*, No. 08-01023, 2009 U.S. Dist. LEXIS 88116 (N.D. Cal. Sept. 24, 2009) (holding that documents shared with telecommunications providers "are not protected from disclosure because the companies communicated with the government agencies 'with their own … interests in mind,' rather than the agency's interests." *Id.* *16).[6]

The same is true in this case. The history of the enactment and expansion of CALEA is replete with evidence that communications providers are often at odds with the federal government on the specific issue of CALEA compliance. For example, in a March 1998 Department of Justice

[6] As noted by the Ninth Circuit on appeal, "the Solicitor General chose not to appeal the Exemption 5 ruling as it pertained to . . . those documents in which the telecommunications firms were involved in the exchange." *EFF v. ODNI*, 595 F.3d 949, 962 (9th Cir. 2010).

Office of Inspector General (OIG) report on the implementation of CALEA, the OIG reported that providers disagreed with law enforcement "over what capabilities must be provided to meet CALEA requirements and over reimbursement eligibility" and refused to modify their systems to be CALEA compliant. *See*, DOJ OIG, *Implementation of the Communications Assistance for Law Enforcement Act by the FBI*, Audit Report 98-13, (March 1998).[7] A similar 2006 report noted continuing disagreements between law enforcement agencies and carriers over costs and problems associated with implementing CALEA wiretaps. DOJ OIG, *The Implementation of the Communications Assistance for Law Enforcement Act*, Audit Report 06-13, 28-38, 66, 56-60, (March 2006) (describing costs the telecommunications companies charge for wiretaps).[8]

Communications companies and their trade associations have also regularly opposed DOJ efforts to expand CALEA in court cases and in proceedings before the Federal Communications Commission (FCC). *See, e.g.*, *Comments of CTIA—The Wireless Association on U.S. DOJ Petition for Expedited Rulemaking* (RM-I1376) (July 25, 2007) (opposing DOJ request to FCC to require carriers to provide detailed information about packets flowing through a carrier's packet communications network);[9] *see also* Final Brief for Petitioners, *Am. Council on Education v. FCC*, 451 F.3d 226 (D.C. Cir. March 20, 2006) 2005 U.S. D.C. Cir. Briefs 1404 (filed by Center for Democracy & Technology, EFF, and several communications providers, trade associations, and technology companies opposing proposed expansion of CALEA). And DOJ has opposed petitions filed by providers to minimize their obligations under CALEA. *See In re. CALEA and Broadband Access and Services*, FCC ET Docket No. 04-295 (Jan. 19, 2006) (Opp'n of DOJ to Pet. for Reconsideration Filed By U.S. Telecom Ass'n).[10]

Telecommunications providers' interests continue to be in conflict with the government's. As *CNet* reported in an article on the FBI's continued efforts to expand CALEA, the trade

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[7] *Available at* http://www.justice.gov/oig/reports/FBI/a9813.htm.

[8] *Available at* http://www.justice.gov/oig/reports/FBI/a0613/final.pdf.

[9] *Available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519560535.

[10] *Available at* http://apps.fcc.gov/ecfs/document/view?id=6518311450. (In this document, the FBI, DEA and DOJ Criminal Division filed an opposition to the U.S. Telecom Association's petition to the FCC to push out the date of mandated CALEA compliance.)

association TechAmerica, which represents communications, internet and cloud services providers and "includes representatives from HP, eBay, IBM, Qualcomm, and other tech companies on its board of directors, has been lobbying against a CALEA expansion." McCullagh, "FBI: We Need Wiretap-Ready Web Sites—Now," *CNet* (May 4, 2012).[11] Given the breadth of evidence to show that communications providers communicate with the federal government with their own interests in mind and the fact that the Northern District has already addressed this exact question in an earlier case, these records are not protected by the consultant corollary to Exemption 5 and must be released.

This is no less true for records shared with non-federal law enforcement agencies. Defendant argues that records provided to third party state and local law enforcement agencies at a meeting of the Law Enforcement Executive Forum (LEEF) are nevertheless agency records because the "FBI solicited the views of these outsiders to offer input on the development of the Bureau's electronic surveillance policy" and that "the robust exchange of information and ideas within the law enforcement community is essential to developing strong, effective programs." (Def. Reply at 21; Fourth Hardy Decl. ¶15.) However, the fact that the FBI believes these meetings promote a robust exchange of information does not make the third parties with whom the information has been exchanged consultants of the Bureau. If so, any time an agency had a fruitful meeting with any group for any reason it could claim the communications were protected by the consultant corollary to Exemption 5. Further, the FBI's description of LEEF and of the relationship between the Bureau and non-federal law enforcement contrasts with the DOJ Inspector General's analysis of the same program. In the DOJ OIG's 2006 report on CALEA implementation, the OIG noted that "State and local law enforcement officials stated that they feel unsupported by the FBI on electronic surveillance issues." *See* DOJ, OIG, *The Implementation of the Communications Assistance for Law Enforcement Act*, Audit Report 06-13, xv, 67 (March 2006). According to the

[11] http://news.cnet.com/8301-1009_3-57428067-83/fbi-we-need-wiretap-ready-web-sites-now/; TechAmerica, "Board of Directors," http://www.techamerica.org/about/board-of-directors/. *See also*, Declan McCullagh, "'Dark' Motive: FBI Seeks Signs of Carrier Roadblocks to Surveillance," *CNet.com* (Nov. 5, 2012) http://news.cnet.com/8301-13578_3-57545353-38/dark-motive-fbi-seeks-signs-of-carrier-roadblocks-to-surveillance/.

report, third party law enforcement told OIG "that forums have become one-sided with the FBI simply presenting information, instead of an exchange of ideas between the FBI and law enforcement officials." *Id.*

State and local law enforcement are often at odds with the federal government on other legal and policy matters as well. For example, in the last couple years there has been extensive disagreement between local police departments and the federal government over enforcement of the federal Secure Communities program, which requires state and local law enforcement to use their criminal systems to enforce federal immigration laws. *See*, *e.g.*, Michael Hennessey, "Secure Communities Destroys Public Trust," *SF Chronicle* (May 1, 2011) (Hennessey was San Francisco's Sheriff for 30 years);[12] "Sheriff Mark Curran: Why He Changed His Mind About Secure Communities," *PBS Frontline* (Oct. 18, 2011) (Curran is the Republican sheriff of Lake County, IL).[13] Similarly, state, local and federal law enforcement agencies are often not aligned on the legality and prosecution of marijuana possession and sales. *See*, *e.g.*, Mark Eddy, "Medical Marijuana: Review and Analysis of Federal and State Policies," 18 *Congressional Research Service* (April 2, 2010) (noting that as of 2010, 14 states had "removed state-level criminal penalties for the cultivation, possession, and use of medical marijuana," despite the fact that medical marijuana patients, their caregivers, and other marijuana providers could still be arrested by federal law enforcement agents and could be prosecuted under federal law.[14]

State and local law enforcement agencies also compete with each other for limited DOJ funds to support community policing and other efforts. *See, e.g.*, DOJ, Bureau of Justice Assistance funding program;[15] DOJ Community Oriented Policing Services (COPS);[16] DOJ, *FY 2011 Budget Request*: *Assist State, Local And Tribal Law Enforcement* (2011).[17] Although these examples may only be tangentially related to CALEA expansion, they show that outside law enforcement

[12] *Available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/05/01/INB81J8OCL.DTL.

[13] *Available at* http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/sheriff-mark-curran-why-he-changed-his-mind-about-secure-communities/.

[14] *Available at* https://www.fas.org/sgp/crs/misc/RL33211.pdf.

[15] https://www.bja.gov/funding.aspx.

[16] http://www.cops.usdoj.gov/Default.asp?Item=46.

[17] *Available at* www.justice.gov/jmd/2011factsheets/pdf/law-enforcement.pdf.

agencies are regularly "self-advocates at the expense of others seeking benefits inadequate to satisfy everyone," *Klamath*, 532 U.S. at 12, and reinforces the presumption that they are not consultants.

The examples above show that the third parties with whom Defendant shared records do not meet the consultant corollary test under *Klamath* and Exemption 5. Therefore any records shared with them are no longer inter- or intra-agency records and must be released.

3. The FBI Continues to Improperly Withhold Documents Labeled as 'Drafts' Under the Deliberative Process Privilege

Plaintiff's Renewed Cross-Motion noted various instances in which the FBI withheld documents under the deliberative process privilege without providing any more description of the document, other than to label it a "draft." (Renewed Cross-Mot. at 19.) EFF would readily withdraw challenges to "draft" documents where FBI can identify a final document to which the draft contributed, however, because of the sheer quantity of records withheld as "drafts," (Second Hardy Decl. ¶ 45 (noting over 1,800 pages of "drafts" had been withheld)), EFF is unable to meaningfully distinguish between documents that were legitimately predecisional and deliberative "drafts" and those for which the "draft" label was simply conveniently attached. *See Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982) ("The designation of the documents here as 'drafts' does not end the inquiry."). Because FBI has failed to satisfy its burden to withhold this information, and absent more specific descriptions of the withheld material and the deliberative process to which the material contributed, the documents must be released. *See Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1094 (9th Cir. 1997) (holding the agency must "identify a specific decision to which the document is predecisional" to be properly withheld under the deliberative process privilege).

4. Both FBI and DEA Continue to Improperly Withhold Records Reflecting Final Agency Positions or Opinions

EFF's Renewed Cross-Motion demonstrated that both the FBI and DEA withheld records that reflect the final positions or opinions of the agency. (Renewed Cross-Mot. at 17-19.) In

particular,[18] EFF noted that FBI and DEA had withheld in their entirety materials used to prepare senior agency officials for testimony before Congress. (*Id*. at 22-23.) In reply, Defendant claims that the deliberative process privilege has not been asserted to withhold "final agency action or decision." (Def. Rep. at 17.)

Exemption 5 is unavailable to withhold materials used to prepare and brief senior policy officials for testimony before Congress because the materials were likely "relied upon or adopted as official positions after their preparation." *Elec. Privacy Info. Ctr. v. DOJ*, 511 F. Supp. 2d 56, 71 (D.D.C. 2007). DEA replies that the content of these talking points was "not revealed in public testimony." (Second Myrick Decl. ¶ 23.) However, this is not the relevant inquiry; instead, it is whether the documents are "candid or personal in nature," "recommendatory," or weigh the "pros and cons of agency adoption" that determines whether the documents are deliberative. *Coastal States*, 617 F.2d at 866. DEA's withheld materials satisfy none of these criteria; instead, the materials were used "as preparatory tools" for policy-level officials to represent the agency's viewpoint. Thus, regardless of whether a specific bit of information was revealed at the hearing, because the briefing materials reflect the positions the agency was *prepared* to take, the information constitutes a final agency position and should be released.

The FBI's withholding of briefing materials is similarly unwarranted. The Bureau withheld testimony "used to prepare the Director for his appearance at a closed session" of the Senate Select Committee on Intelligence. (Fourth Hardy Decl. ¶ 8.) FBI states that disclosure of the testimony would "reveal the privileged, internal deliberative process that the FBI was having concerning the proposed enhancement of intelligence gathering capabilities, techniques, and procedures." (*Id*.) Yet disclosure of that "deliberative process" already occurred through the Director's testimony to the Intelligence Committee. Here, Defendant's concern is not with protection of the FBI's deliberative process, but with disclosure of the information it seeks to withhold. This, however, is not sufficient

[18] The documents selected for discussion by EFF are by no means the only examples of withheld "talking points" and "briefing materials," however. (*See, e.g.*, Renewed Cross Mot. at 17-19 nn. 21-23.)

to carry its burden at summary judgment, and the withholding of the testimony is plainly inappropriate under Exemption 5.

5. CRIM Continues to Improperly Withhold Material Under the Work Product Privilege

EFF's Renewed Cross-Motion showed Defendant failed to provide the requisite information to withhold records under the work product privilege. (Renewed Cross-Mot. at 21-22.) In response, Defendant simply repeats the same generic assertions of privilege made in CRIM's declarations. (*See* Def. Reply at 23-24.) Notably, to withhold information under the work product privilege, "at a minimum, an agency seeking to withhold a document . . . must identify the litigation for which the document was created (either by name or through factual description)[.]" *Church of Scientology Int'l v. DOJ*, 30 F.3d 224, 237 (1st Cir. 1994); (*but see* Def. Reply at 25-26 (noting only that documents withheld under the work product privilege relate to a "particular criminal investigation," a "particular criminal prosecution," and a "particular case [an AUSA] was working on")). Defendant has not provided the bare minimum of information to withhold records under the work product privilege. Therefore, the materials must be released.

D. FBI and DEA Still Fail to Support Their Exemption 7(A) Claims[19]

Defendant has failed to provide any additional information or legal support for DEA and FBI's Exemption 7(A) claims. For all the reasons stated in Plaintiff's Renewed Cross-Motion (Renewed Cross-Mot. at 22-23), Defendant has failed to meet its burden to sustain its withholdings under Exemption 7(A), and the records should be released.

E. FBI Still Fails to Support Its Claims of Implied Confidentiality Under Exemption 7(D) and *DOJ v. Landano*

Defendant presents no new arguments or evidence in its Reply to sustain FBI's implied confidentiality claims. As noted in EFF's Renewed Cross-Motion, the requirement under Exemption 7(D) "is not whether the requested *document* is of the type that the agency usually treats as confidential, but whether the particular *source* spoke with an understanding that the communication would remain confidential." (*See* Renewed Cross-Mot. at 23-24 (citing cases).)

[19] Based on the information provided by DOJ Criminal Division in the Cunningham Declaration, EFF no longer challenges CRIM's 7(A) withholdings.

The Court in *DOJ v. Landano* "rejected the view . . . that a presumption of confidentiality attaches from the mere fact of an FBI investigation," *see Rosenfeld v. DOJ*, 57 F.3d 803, 814 (9th Cir. 1995) (citing *Landano*, 508 U.S. 165 (1993)), and since then courts have found an implied grant of confidentiality only in cases where fears of retaliation are warranted by the nature of the crime (not merely by the FBI's unsupported assertions). *See, e.g.*, *Halpern v. FBI*, 181 F.3d 279, 299-300 (2nd Cir. 1999) (noting conditions in meatpacking industry warranted fears of retaliation); *Mays v. DEA*, 234 F.3d 1324, 1329 (D.C. Cir. 2000) (noting violence and retaliation involved in conspiracy to distribute crack and powder cocaine); *Williams v. FBI*, 69 F.3d 1155, 1159-60 (D.C. Cir. 1995) (inference of confidentiality warranted in crimes of "rebellion or insurrection, seditious conspiracy, and advocating overthrow of the government"); *c.f. Rosenfeld*, 57 F.3d at 814-15 (denying certain documents exempt status under Exemption 7(D) based on lack of evidence of implied confidentiality). FBI has not shown any similar facts that would warrant an inference of confidentiality here.

Because FBI still fails to provide sufficient evidence to support a claim that any "sources" provided information under an implied grant of confidentiality, this information must be released.

F. Defendant Still Fails to Show Material Withheld Under Exemption 7(E) is not Widely Known or that Its Disclosure Would Risk Circumvention of the Law

Despite dedicating several additional pages in its Reply to its Exemption 7(E) claims, Defendant still fails to show that its extensive Exemption 7(E) redactions apply solely to information not widely known to the public and are necessary to prevent a risk of circumvention of law. As such, these records must be released.

Cases in this district hold that Defendants must provide "substantial evidence" that a reasonable risk of circumvention exists. *See*, *e.g.*, *Feshbach*, 5 F. Supp. 2d at 787 (agencies claiming 7(E) exemptions must present "substantial evidence" to survive summary judgment challenges); *Gerstein*, 2005 U.S. Dist. LEXIS 41276 at *41 (N.D. Cal. Sept. 30, 2005) (Court examined totality of the government's evidence, including lack of documentary evidence or credible testimony); *Gordon v. FBI*, 388 F. Supp. 2d 1028 (N.D. Cal. 2005) (Exemption 7(E) allows the government to withhold documents only if it demonstrates a reasonable risk that criminals will use them to circumvent

detection, apprehension or prosecution). Merely positing the possibility of a hypothetical risk of circumvention cannot be sufficient, or else the government could always succeed in justifying any 7(E) withholding, even one where the risk was extremely low.

The government has failed to rebut EFF's arguments that many of the withheld documents are likely to contain techniques that are routine, or that "leap to the mind of the most simpleminded investigator" (*See* Renewed Cross-Mot. at 26-27 (citing cases and examples); Def. Reply at 28-29.) Courts regularly reject broad 7(E) claims where "conclusory affidavits submitted by the defendants fail[] to present sufficient facts to carry their burden of showing that the deletions fell within this exemption." *Dunaway*, 519 F. Supp. at 1082-1083 (finding, after *in camera* review of the records at issue, that "the techniques sought to be protected . . . are in this court's judgment precisely the type of commonly known investigative techniques which this exemption was not meant to reach." *Id.* at 1083). The Court should do no less here.

FBI has used a particularly broad brush to withhold large blocks of text and several pages from presentations titled "Preservation of Lawful Intercepts: Challenges and Potential Solutions" and "FBI Efforts to Preserve Electronic Surveillance (ELSUR) Capabilities" (*See*, *e.g.*, Dkt. 41-5 at Bates pp. EFF/Lynch 76-77, 84, 94-95, 101, 107, 108, 114, 120-125, 129, 131-137, 138-141, 749-54). Some of this material has been shared with outside entities, likely in a public forum, such as the April 2010 presentation to the National District Attorneys Association (*id.* at 85-89), and to the 6th National Community Prosecution Conference (*id.* at 131-137). The FBI has withheld other material under Exemption 7(E) with little or no justification, including an "undated talking points survey titled 'Lawful Enforcement Gaps Survey'" (*id.* at 146-148). This survey was also shared with "other law enforcement agencies." (*Id.*) Other material was redacted in large blocks or in full under 7(E) from other talking points papers, briefing memos, intelligence notes, and intelligence assessments (*see*, *e.g.*, *id.* at 129-30, 142-45, 150-54, 156-61, 163-65, 175 ("talking points summary of what a social networking company is, and what can or can not be obtained with a NSL/Subpoena"), 176-79, 213-16); emails (*see*, *e.g.*, *id.* at 171, 180, 190-91, 196, 197, 203-04, 212); and "user guides" (*see*, *e.g.*, *id.* at 173-74). These pages are merely representative of the FBI's over-reliance on Exemption 7(E), and by no means present the entire universe of material

inappropriately withheld. Much of this material is or appears to be general rather than specific information on technologies and technical issues and thus either involves techniques that are widely known[20] or would not risk circumvention of the law if the material were released.

DEA and CRIM's productions fare no better. CRIM and DEA argue "release of this information would provide a detailed road map that would permit criminals to evade lawful electronic surveillance[,]" (Second Ellis Decl. ¶ 39; Second Myrick Decl. ¶ 9g), implying that a criminal would be able to piece together bits of information from the responses to these FOIA requests to figure out how to evade government surveillance. However, the court in *Gerstein v. DOJ* rejected a very similar argument presented by the DOJ in its attempts to withhold statistical information on which of its offices used delayed-notice warrants under Patriot Act Section 213. 2005 U.S. Dist. LEXIS 41276. The court found "the notion that criminals will plan illegal activity based on whether a particular USAO has invoked Section 213 to be dubious," and held the DOJ's "conclusory" assertions failed to support its "parade of horribles." *Id.* at *41; *see also Detroit Free Press v. Ashcroft,* 303 F.3d 681, 709-10 (6th Cir. 2002) (rejecting government's "mosaic intelligence" argument and holding such an argument, taken to its logical conclusion, would allow the government to "operate in virtual secrecy in all matters dealing, even remotely, with 'national security'"). One can see, even from the two documents that Plaintiff included as exhibits to the Second Lynch Declaration (Exs. 1, 2), that DEA and CRIM are likely applying Exemption 7(E) to withhold more information than they are entitled to. The components' *Vaughn* submissions describing records withheld in full under Exemption 7(E) and the additional records Plaintiff attached as examples to the Third Lynch Declaration further prove this point. (*See* Third Lynch Decl., Ex. B.)

Defendant's assertions that the techniques and technologies discussed in these records are not widely known do not belie the fact that each component has withheld large blocks of text and whole records under Exemption 7(E) that likely contain material of a general nature. By virtue of the FOIA process, Plaintiff cannot access these records to prove this fact beyond doubt; however, this is why the burden falls on government agency defendants in a FOIA lawsuit to show that all

[20] *See* Renewed Cross-Mot. at 27-29 (citing well-known techniques).

material has been properly withheld. Given the broad brush with which Defendant has painted block 7(E) redactions throughout its production and the likelihood that some if not much of the material includes known techniques and technologies, the Court should find the government has failed to show that release of this information would risk circumvention of the law and order the material withheld under 7(E) released.

G. Defendant Has Failed to Release All Reasonably Segregable Material

Defendant argues that because Plaintiff requested information on problems hampering the government's ability to conduct surveillance, Plaintiff should not be surprised that Defendant has withheld over 3,000 pages of records at issue in this case in part or in full. (Def. Reply at 10.) Yet this is not the test for appropriate segregation under the FOIA. To satisfy an agency's burden, it must "describe what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document." *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force,* 566 F.2d 242, 261 (D.C. Cir. 1977); *see also Nat'l Resources Def. Counsel v. Dep't of Def.*, 388 F. Supp. 2d 1086, 1105 (C.D. Cal. 2005). The components' assertion that they have "provided all 'reasonably segregable' responsive information" (Def. Reply at 9-10, n.8) fails to line up with the government's improper redactions discussed in Plaintiff's Renewed Cross-Motion and above. The government attempts to shift accountability for a failure to comply with FOIA to Plaintiff, which is indicative of the manner in which the government has approached these FOIA requests and this case.

To warrant summary judgment, the government must demonstrate to the Court's satisfaction that every withheld document has had all non-exempt material segregated and released. *See NRDC v. DOD*, 388 F. Supp. 2d 1086, 1096 (C.D. Cal. 2005). "Agencies may meet this burden by describing through affidavit, *in a non-conclusory manner*, why such information is not reasonably segregable." *L.A. Times Commc'ns. LLC v. Dep't of Labor*, 483 F. Supp. 2d 975, 986 (C.D. Cal. 2007) (emphasis added); *see also Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep't of State*, 818 F. Supp. 1291, 1300 (N.D. Cal. 1992) (finding boilerplate, conclusory assertions inadequate to permit the Court to make finding on segregability). Because Defendant has not satisfied that burden, it is not entitled to summary judgment.

H. This Court's *In Camera* Review May Be Necessary To Ensure Defendant Has Released All Non-Exempt, Segregable Information

Given that EFF filed its first FOIA request four years ago, that all the requests have been in litigation for two and a half years, and that the parties already briefed and argued cross motions for summary judgment last year, Defendant should not be given another opportunity to explain its overly broad and improper exemption and "outside the scope" claims. Instead, EFF respectfully asks the Court to order the material released.

However, should the Court require additional evidence before ordering the release of the records at issue, EFF asks the Court to conduct an *in camera* review of the disputed records. A trial court has broad discretion to review records *in camera* to test the government's exemption claims, 5 U.S.C. § 552(a)(4)(B), and *in camera* inspection is particularly appropriate where, as here, "the dispute turns on the contents of the withheld documents, and not the parties' interpretations of those documents." *Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 996 (D.C. Cir. 1998) (internal citations omitted); *see also Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978) (*per curiam*) ("*in camera* inspection does not depend on a finding or even tentative finding of bad faith").

In camera review could be especially appropriate here, where the components have often withheld multi-page documents with only a single sentence supporting the withholding and where Defendant's "outside-the-scope" and "non-responsive" redactions show a tendency to over-redact and withhold responsive, non-exempt records. Therefore, while EFF submits that Defendants have failed to meet their burdens and the records should be disclosed, should this Court have any doubt, EFF suggests that *in camera* inspection of some or all of the records at issue would be appropriate.

II. CONCLUSION

For the foregoing reasons, the government's Renewed Motion for Summary Judgment should be denied, and EFF's Renewed Cross-Motion for Summary Judgment should be granted.

DATED: April 11, 2013

Respectfully submitted,

/s/ Jennifer Lynch

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