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12 **UNITED STATES DISTRICT COURT**
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
14 **OAKLAND DIVISION**
15

16
17 ELECTRONIC FRONTIER FOUNDATION,) Case No. 4:11-cv-05221-YGR
18)
19 Plaintiff,) **REPLY MEMORANDUM IN FURTHER**
20 v.) **RESPONSE TO THE COURT’S ORDER**
21) **RE: FURTHER SUBMISSION ON**
22 UNITED STATES DEPARTMENT OF) **CROSS-MOTIONS FOR SUMMARY**
23 JUSTICE,) **JUDGMENT**
24)
25 Defendant.)
26)
27)
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PRELIMINARY STATEMENT

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2 In compliance with this Court's Order (ECF No. 49), defendant, the U.S. Department of
3 Justice, publicly filed further specific information describing documents withheld by its National
4 Security Division ("NSD") as exempt from disclosure under the Freedom of Information Act.
5 The Government's filing included a *Vaughn* index that lists the page length of each document,
6 the specific category of each document, and the exemption(s) claimed. *See Vaughn* index,
7 Attachment A to Second Supplemental Bradley Declaration (ECF No. 55-1); *Vaughn v. Rosen*,
8 484 F.2d 820, 823-25 (D.C. Cir. 1973). The *Vaughn* index also lists the dates of the vast
9 majority of withheld documents and date ranges when specific dates cannot be provided without
10 risking the revelation of classified information. *See Vaughn* index. In his supplemental
11 declaration also submitted to the Court (ECF No. 55-1) ("Supp. Bradley Decl."), senior NSD
12 official and original classification authority Mark A. Bradley explains, to the extent possible
13 without compromising the secrecy of the very information to be withheld, the bases for claiming
14 the cited FOIA exemptions and why there are no reasonably segregable portions of the withheld
15 documents that may be released without compromising national security.
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19 Mr. Bradley's supplemental declaration and the accompanying public *Vaughn* index
20 comply with this Court's Order and establish that defendant is entitled to summary judgment as
21 to the withheld documents. The Government's filing also offers as much detail as can be
22 provided publicly, without compromising the very national security interests that the
23 Government and Exemption 1 of the FOIA seek to protect. Plaintiff's various criticisms of the
24 Government's filing are without merit.
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1 **I. The Government’s Vaughn Index and Declaration Meet Ninth Circuit**
2 **Requirements and Establish Defendant’s Entitlement to Summary Judgment.**

3 When federal agencies assert FOIA Exemptions 1 and 3 for national security reasons, the
4 Ninth Circuit has required the Government to “describe the justifications for nondisclosure with
5 reasonably specific detail, demonstrate that the information withheld logically falls within the
6 claimed exemptions, and show that the justifications are not controverted by contrary evidence in
7 the record or by evidence of CIA bad faith.” *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992)
8 (quoted in *Berman v. CIA*, 501 F.3d 1136, 1140 (9th Cir. 2007)). Mr. Bradley’s public
9 declaration meets those standards. The declaration describes the kind of information at issue and
10 the reasons for nondisclosure in specific detail and makes clear that the information withheld
11 logically falls within the national security exemptions. The declaration notes the importance of
12 keeping secret information concerning the manner and means by which the United States
13 acquires tangible things for certain authorized national security investigations. Supp. Bradley
14 Decl. ¶¶ 6, 8-9. The declaration also explains how disclosure of the requested information could
15 compromise that secrecy, and details the significant harm that would result if information
16 concerning these highly sensitive intelligence activities, sources, and methods was released to the
17 public, *i.e.*, the use of countermeasures by adversaries of the United States that “may deprive the
18 United States of critical intelligence.” *Id.* ¶ 10.

19 Plaintiff implies (without support) that these legitimate concerns do not apply
20 because, it claims, it has “made clear it does not seek disclosure of *specific* information
21 concerning sources or methods” but only “*generalized* information.” Plaintiff’s
22 Response Memorandum (ECF No. 55) (“Pl. Response”) at 3. But the documents subject
23 to summary judgment and responsive to plaintiff’s FOIA request include such specific
24 information, or include other information that would tend to reveal such specific
25 information, or include other information that would tend to reveal such specific
26 information, or include other information that would tend to reveal such specific
27 information, or include other information that would tend to reveal such specific
28 information, or include other information that would tend to reveal such specific

1 information. Supp. Bradley Decl. ¶¶ 6, 9. And as Mr. Bradley also testified, no
2 information in the documents can be segregated and released without revealing classified
3 information that is properly exempt from disclosure under FOIA. *Id.* ¶¶ 8-11.¹

4 Indeed, as plaintiff all but points out, to the extent such “generalized” information can be
5 made public, it has been: the government has published general information concerning the use
6 of Section 215. Pl. Response at 3. Such statistics have been provided to plaintiff in response to
7 plaintiff’s FOIA request, and therefore are no longer at issue in this litigation. What remains
8 does not consist of such general (or properly releasable) information. Moreover, plaintiff now
9 seeks documents containing “significant” legal interpretations of the government’s Section 215
10 authority; revealing information about “when” and “how often” the government has employed
11 that authority in a manner that was related to such a “significant legal interpretation” would
12 disclose additional, and damaging, information. *See* Supp. Bradley Decl. ¶ 11 (explaining why
13 legal reasoning cannot be segregated and released “particularly when viewed in the context of
14 this FOIA request,” and that revealing such information “would tend to reveal the intelligence
15 capabilities and particular activities far beyond the general notion that the Government may be
16 using Section 215 to collect information”).²

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21 ¹ Moreover, plaintiff ignores the fact that this Court ordered the Government to provide certain
22 information, *or* to explain why further “information cannot be provided on the public record.”
23 Order, ECF No. 49 at 3. As discussed in Mr. Bradley’s supplemental declaration and in this
24 memorandum, that is what the Government did.

25 ² Similarly, plaintiff criticizes the Government for allegedly failing to explain why it has
26 revealed the dates of only some of the withheld FISC materials. It bears noting that this
27 Court did not order the Government to provide such dates as part of the supplemental
28 filing, and that the Government has provided dates for the vast majority of withheld
documents. *See* Order (ECF No. 49); *Vaughn* index. In any event, Mr. Bradley explains
that “providing further information” than defendant has done “concerning the dates of
withheld [FISC] records that contain significant legal interpretation or analysis of Section
215 would tend to reveal non-public information about when the government was or was
not using those authorities.” Supp. Bradley Decl. ¶ 12. Mr. Bradley notes that, when

1 Plaintiff also asserts that the Government violated the Court's Order because the
2 articulation of harm that would result from releasing the documents is stated once by Mr.
3 Bradley in his declaration, rather than repeated for each document in the index. Pl. Response at
4 3 n.4. Plaintiff's argument elevates form over substance to no end; as Mr. Bradley testified,
5 "[t]he articulation that I am able to provide publicly for the Exemption 1 withholding of each
6 withheld document is the same in substance." Supp. Bradley Decl. ¶ 5; *see id.* ¶ 6 (same as to
7 Exemption 3).
8

9 In stark contrast to the generalized and unsupported claims of harm that the Court of
10 Appeals found insufficient to support a claimed national security exemption in *Weiner v. FBI*,
11 943 F.2d 972, 982 (9th Cir. 1991), the public declaration of Mr. Bradley in this case details the
12 harm to intelligence gathering activities that could reasonably be expected to result from release
13 of the withheld documents. *Cf. Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987) (declaration
14 "need not specify its objections [to disclosure] in such detail as to compromise the secrecy of the
15 information") (citation omitted). The National Security Division's judgment with respect to the
16 sensitivity of the documents in question, and the harm that could reasonably be expected to result
17 from their release, falls squarely within the area of agency expertise to which this Court must
18 grant substantial deference. *See Hunt*, 981 F.2d at 1119.
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23 combined with information available to enemies of the United States, such information
24 could be used to determine when the Government has used its Section 215 authority "and
25 correlate the use . . . to certain events that may be . . . known to adversaries of the United
26 States." *Id.* In light of that, and the contents of the *Vaughn* index, it is obvious why
27 defendant was able to provide dates for some FISC materials, but not others: the FISC
28 documents noted by plaintiff (Pl. Response at 4) for which defendant provided dates are
materials such as briefings and statutorily-required filings of standard minimization
procedures that do not directly relate to or coincide with particular applications to the
FISC for use of Section 215 authority.

1 Moreover, it is important to note that defendant's submission is not limited to its public
2 affidavits nor, in a case involving protection of extremely sensitive national security information,
3 is the Government limited to relying only on what it can say publicly. Plaintiff is thus wrong
4 when it implies without foundation that the Government has failed to produce "a properly
5 detailed *Vaughn* Index" because the Government seeks to shirk a "considerable burden." Pl.
6 Response at 2 (citation omitted). Plaintiff ignores the point of the supplemental filing and the
7 fact that defendant has provided a lengthy and detailed classified *Vaughn* index accompanied by
8 a detailed, classified declaration. The Court directed defendant to make its supplemental filing
9 because the Court was "not satisfied that the public record has been made as complete as
10 possible." Order, ECF No. 49 at 2. With its detailed, public *Vaughn* index, the Government has
11 made the public record as complete as possible. See Supplemental Bradley Declaration ¶¶ 5, 7,
12 8-13 (explaining why further detailed information cannot be provided publicly without risking
13 disclosure of properly classified information).
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16 Defendant's public filings establish that it is entitled to summary judgment as a
17 matter of law. To the extent the Court agrees with plaintiff that further detail is required,
18 however, the Court may find such detail in the government's classified submission. *E.g.*,
19 *Mobley v. Department of Justice*, 870 F. Supp. 2d 61, 69 (D.D.C. 2012); *Amnesty Int'l v.*
20 *CIA*, 728 F. Supp. 2d 479, 507-08 (S.D.N.Y. 2010). Indeed, when classified national
21 security information is at issue, "in camera review of affidavits, followed if necessary by
22 further judicial inquiry, will be the norm." *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir.
23 2003) (quoting *McGehee v. Casey*, 718 F.2d 1137, 1149 (D.C. Cir. 1983)). See *Pollard*
24 *v. FBI*, 705 F.2d 1151, 1153-54 (9th Cir. 1983) (approving of *in camera* consideration of
25 classified affidavit in FOIA case); *Hayden v. NSA*, 608 F.2d 1381, 1385 (D.C. Cir. 1979)
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1 (in a FOIA case where “public itemization and detailed justification would compromise
2 legitimate secrecy interests,” it is “appropriate to receive affidavits in camera rather than
3 in public.”). *See also* Supp. Bradley Decl. ¶ 7.

4 **II. The Government Has Established That No Portions of the NSD**
5 **Documents Withheld in Full Can Be Segregated From Exempt Material**
6 **and Released.**

7 In compliance with the Court’s Order, in his supplemental public declaration Mr.
8 Bradley explained, in as much detail as possible on the public record, why there are no
9 portions of the withheld records that can be segregated from exempt (*i.e.*, classified and
10 properly withheld pursuant to statute) material and released. Supp. Bradley Decl. ¶¶ 8-
11 13. To the extent NSD found releasable, responsive material, it was released and is no
12 longer at issue in this litigation. Plaintiff’s criticisms of the Government’s segregability
13 determination amount to sophistry.

15 First, plaintiff argues, without citation to any legal authority, that there must be
16 something segregable when a document is large. Pl. Response at 4. Plaintiff also asserts
17 without explanation that a segregability analysis cannot apply equally to a long document
18 and a shorter one. *Id.* But this is nonsense: Mr. Bradley has testified and explained that
19 there is no segregable, non-exempt information in the documents withheld in full. Supp.
20 Bradley Decl. ¶¶ 8-13. Where, as here, there is no reasonably segregable information on
21 any page of a document, it is of no moment how long the document may be.

24 Plaintiff then blatantly misconstrues Mr. Bradley’s declaration with repeated
25 assertions that the Government is withholding as classified information that is not
26 classified, *i.e.*, that is “innocuous,” “does not fall within Section 1.4 [of E.O. 13526]’s
27 classification categories,” or is “mundane.” Pl. Resp. 5-6. Of course, this is not the
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1 Government's position nor is it what Mr. Bradley stated in his declaration. Rather, Mr.
2 Bradley explained that "*seemingly innocuous*" information, when "juxtaposed with the
3 fact that the document in question contains significant legal analysis of an application of
4 Section 215," or "when combined with other information that might be available to the
5 public . . . can reasonably be expected to reveal . . . classified national security
6 information." Supp. Bradley Decl. ¶¶ 10, 11 (emphasis added). This is simply a
7 recognition of the well-established proposition that "each individual piece of intelligence
8 information, much like a piece of jigsaw puzzle, may aid in piecing together other bits of
9 information even when the individual piece is not of obvious importance itself." *Gardels*
10 *v. CIA*, 689 F.2d 1100, 1106 (D.C. Cir. 1982) (quoting *Halperin v. CIA*, 629 F.2d 144,
11 150 (D.C. Cir. 1980)). Courts commonly refer to this as the "mosaic theory" of
12 intelligence:
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15 It requires little reflection to understand that the business of foreign intelligence
16 gathering in this age of computer technology is more akin to the construction of a
17 mosaic than it is to the management of a cloak and dagger affair. Thousands of
18 bits and pieces of *seemingly innocuous* information can be analyzed and fitted
19 into place to reveal with startling clarity how the unseen whole must operate
20 "The courts, of course, are ill-equipped to become sufficiently steeped in foreign
intelligence matters to serve effectively in the review of secrecy classifications in
that area."

21 *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978) (quoting *United States v. Marchetti*, 466
22 F.2d 1309, 1318 (4th Cir. 1972) (emphasis added); see *McGehee*, 718 F.2d at 1149. This
23 concept, long-recognized by the courts, is the gravamen of Mr. Bradley's segregability
24 discussion – not plaintiff's straw-man of a "justification for the classification of
25 innocuous information." Pl. Response 5.
26

27 The balance of plaintiff's segregability discussion consists of plaintiff's meritless
28 argument that legal analysis cannot be properly classified. As defendant has explained,

1 plaintiff is mistaken and, in any event, “the legal analysis in the withheld documents
 2 cannot reasonably be segregated and released without risking disclosure of the manner
 3 and means by which the United States Government acquires tangible things for certain
 4 authorized investigations pursuant to Section 215.” Supp. Bradley Decl. ¶ 8. *See*
 5 Defendant’s Reply Memorandum in Support of Summary Judgment (ECF No.45) at 4-8;
 6 *N.Y. Times Co. v. Dep’t of Justice*, --- F.Supp.2d ----, 2013 WL 50209, *20 (S.D.N.Y.
 7 January 02, 2013) (stating there is “no reason why legal analysis cannot be classified
 8 pursuant to E.O. 13526 if it pertains to matters that are themselves classified;” also citing
 9 cases that “support the proposition that legal analysis can be withheld as classified
 10 pursuant to Exemption 1”).³

13 **III. The Court Need Not and Should Not Resort to *In Camera* Review of
 14 Hundreds of Pages of Withheld Documents.**

15 As defendant has explained, the Government has established with its public
 16 filings that it is entitled to summary judgment. However, should the Court require a
 17 “fuller explanation of the highly significant intelligence sources, methods and activities at
 18 issue and the harm to national security that would result from the disclosure of this
 19

21 ³ In a footnote, plaintiff argues that the Government cannot assert that the FISC rules prohibit
 22 release by the Government of FISC materials without an authorizing Order by the FISC. Pl.
 23 Response 7-8 n.6. Plaintiff is correct that Mr. Bradley discussed that application of the FISC’s
 24 rules and procedures in his Second Supplemental Public Declaration, and it was not raised in
 25 defendant’s earlier memoranda. Suppl. Bradley Decl. ¶ 13. But the FISC procedures present a
 26 *jurisdictional* bar to an order for disclosure of FISC materials under FOIA. *See GTE Sylvania,*
 27 *Inc. v. Consumers Union of U.S.*, 445 U.S. 375, 384, 387 (1980); 5 U.S.C. § 552(a)(4)(B). That
 28 argument therefore cannot be waived. FED. R. CIV. P. 12(h)(3). Nor, as plaintiff implies, has the
 FISC ever held that FISC records are properly disclosable under FOIA; rather, the FISC
 expressed no view on “whatever remedies may be available” in a district court under FOIA. *In*
re Mot. for Release of Court Records, 526 F. Supp. 2d 484, 496 (FISC 2007). Indeed, plaintiff
 cites to no case in which a court has ordered release under FOIA of FISC records, particularly
 those that had not been authorized for release by the FISC itself.

1 information,” the Government urges the Court to view its classified, *ex parte* submission
2 *in camera*. See Supp. Bradley Decl. ¶ 7.

3 Perhaps on the theory that extra time spent by the Court “can’t hurt,” plaintiff
4 suggests the Court conduct *in camera* review of hundreds of pages of withheld
5 documents. Pl. Response 7. But *in camera* document review burdens the resources of
6 the Court, is contrary to judicial economy, and should not be “resorted to as a matter of
7 course, simply on the theory that ‘it can’t hurt.’” *Quiñon v. FBI*, 86 F.3d 1222, 1228
8 (D.C. Cir. 1996)). For that reason, *in camera* inspection of documents withheld under a
9 FOIA exemption should “not be resorted to lightly” and is disfavored where, as here, “the
10 government sustains its burden of proof by way of its testimony or affidavits.” See *Lion*
11 *Raisins v. Dep’t of Agriculture*, 354 F.3d 1072, 1079 (9th Cir. 2004).
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13
14 Moreover, the relevant “testimony or affidavits” includes the Government’s
15 classified submission. Should the Court direct defendant to provide withheld documents
16 for *in camera* review, the Government will, of course, promptly arrange to make the
17 documents in question available consistent with procedures for the handling of classified
18 information. In the interests of judicial economy, however, and consistent with the law
19 of this Circuit, the Government urges the Court to fully consider defendant’s *ex parte*,
20 classified submission before resorting to time-consuming *in camera* review of the
21 withheld documents.⁴
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25 ⁴ Defendant believes its classified, *ex parte* submission will be of great assistance to the Court
26 should the Court require a fuller explanation, and that it further establishes the Government’s
27 entitlement to summary judgment. However, if the Court has further questions after reviewing
28 the classified submission, the Court should direct the Government to supplement that classified
submission before resorting to *in camera* review of withheld documents. *E.g.*, *Campbell v. Dep’t*
of Justice, 164 F.3d 20, 31 (D.C. Cir. 1998) (the preferred course when agency affidavits are
inadequate is to order the agency to submit a new declaration).

1
2 **CONCLUSION**

3 For all the foregoing reasons, as well as those set forth in defendant's memorandum and
4 reply memorandum in support of its motion for summary judgment and its earlier response to the
5 Court's Order, the Court should grant summary judgment for defendant.

6 Dated: May 23, 2013

Respectfully submitted,

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