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13
14 **UNITED STATES DISTRICT COURT**
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
16 **SAN FRANCISCO DIVISION**

17 ELECTRONIC FRONTIER FOUNDATION,)
18 Plaintiff,)
19 v.)
20 OFFICE OF THE DIRECTOR OF NATIONAL)
21 INTELLIGENCE and DEPARTMENT OF)
22 JUSTICE,)
23 Defendants.)
24)
25)
26)

NOS. 08-1023 JSW & 08-2997 JSW
**REPLY TO OPPOSITION TO CROSS
MOTION FOR SUMMARY JUDGMENT**

Date: TBD
Time: 9:00 a.m.
Courtroom: 2, 17th Floor

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SUMMARY OF ARGUMENT

The Court should grant summary judgment in EFF's favor because the defendant agencies have not demonstrated that all withheld documents are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B). First, the government has improperly withheld records under Exemption 5. As an initial matter, the government cannot show that all withheld records satisfy the "inter-agency or intra-agency" threshold, a prerequisite for any Exemption 5 privilege. 5 U.S.C. 552(f)(1), 5 U.S.C. § 551(1)(A); *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001). Furthermore, the government continues to argue for an unprecedented interpretation of the presidential communications privilege to withhold material beyond communications authored or solicited and received by the President's "immediate advisers or their staff members." *Judicial Watch v. Dep't of Justice*, 365 F.3d 1108 (D.C. Cir. 2004); *Ctr. for Biological Diversity v. Office of Management and Budget*, No. 07-4997 MHP, 2008 U.S. Dist. LEXIS 98387, 2008 WL 5129417, at *12 (N.D. Cal. Dec. 4, 2008). Moreover, the government has invoked the deliberative process privilege to withhold records that are neither predecisional nor deliberative. *United States v. Rozet*, 183 F.R.D. 662, 666 (N.D. Cal. 1998); *see also, e.g., Elec. Privacy Info. Ctr. v. Dep't of Justice*, 511 F. Supp. 2d 56, 71 (D.D.C. 2007). The government has also failed to show that agency records withheld pursuant to the common interest privilege or the attorney work product doctrine are subject to those privileges. *United States v. Bergonzi*, 216 F.R.D. 487, 495 (N.D. Cal. 2003); *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1090 (9th Cir. 2007).

Second, the government has improperly invoked Exemption 6 to hide the identities of lobbyists. The efforts of paid lobbyists to influence the government is a matter of great public interest that outweighs any minimal privacy interest that lobbyists might have in their activities. *See* Michael Isikoff and Mark Hosenball, *Case Dismissed?: The Secret Lobbying Campaign Your Phone Company Doesn't Want You to Know About*, NEWSWEEK, updated Sept. 26, 2007; 2 U.S.C. § 1601.

1 Finally, the government has not provided sufficiently detailed information to demonstrate
2 that all non-exempt material has been segregated from exempt information. *Church of Scientology*
3 *v. Dep't of Army*, 611 F.2d 738, 744 (9th Cir. 1980). Due to the substantial questions raised about
4 the impropriety of the agencies' withholdings, the Court should deny the government's
5 consolidated motion for summary judgment and grant EFF's cross motion for summary judgment.
6 If the Court has any doubt as to the impropriety of the agencies' exemption claims, it should
7 conduct an *in camera* inspection of the withheld records. *Church of Scientology*, 611 F.2d at 743.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking the disclosure of records held by defendants Office of the Director of National Intelligence (“ODNI”) and Department of Justice (“DOJ”) concerning the efforts of the agencies and telecommunications carriers to push for changes to U.S. foreign intelligence surveillance law, especially to ensure that the carriers received legal immunity for their role in the government’s unlawful surveillance of millions of Americans. The defendants have moved for summary judgment, asking the Court to sustain their decision to withhold a substantial portion of the requested material in part or whole. Because the agencies have failed to meet their burden, the Court should deny the government’s consolidated motion for summary judgment and grant the plaintiff’s cross motion for summary judgment. If the Court has any question about the impropriety of the defendant’s withholdings, the Electronic Frontier Foundation (“EFF”) respectfully requests that the Court review all disputed material *in camera*, and order the defendants to immediately disclose all improperly withheld records.

II. STATEMENT OF ADDITIONAL FACTS

On his first full day in office, President Obama issued a memorandum to the heads of all executive branch departments and agencies concerning FOIA. Memorandum for Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009). The memorandum provided, in pertinent part, that “[a]ll agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles enshrined in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.” *Id.* President Obama also directed the Attorney General “to issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the Federal Register.” *Id.* While the parties’ cross motions for summary judgment were pending in this case, the Attorney General issued the new FOIA guidelines in a memorandum to the heads of executive departments and

1 agencies. Memorandum for Heads of Executive Departments and Agencies (March 19, 2009),
2 <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>.

3 On March 23, 2009, the Court stayed these proceedings pending review of the Attorney
4 General's guidelines. Order (08-1023 Dkt. 77; 08-2997 Dkt. 60). On May 12, 2009, after applying
5 the new guidelines to the material withheld by the government, the defendants emailed EFF a small
6 number of additional records identified for "discretionary release," and filed revised *Vaughn*
7 declarations and indices reflecting the disclosures. (08-1023 Dkts. 79-83; 08-2997 Dkts. 62-66). As
8 discussed in greater detail below, the release of these records has little effect on the issues before
9 the Court, as the government continues to withhold the vast majority of the disputed material.

10 **III. ARGUMENT**

11 **A. EFF is Entitled to Summary Judgment Because the Government Has 12 Improperly Withheld Agency Records**

13 As described in detail below, the defendants have failed to satisfy their burden of proving
14 that they have released all non-exempt material in response to EFF's FOIA requests. As a result,
15 the Court should deny the government's consolidated motion for summary judgment and grant
16 EFF's cross motion for summary judgment, requiring ODNI and DOJ to release all material they
17 have improperly withheld under the FOIA.

18 **1. The Defendants Have Improperly Withheld Agency Records Under Exemption 5**

19 The government has failed to show that it withheld all material properly and is entitled to
20 summary judgment.

21 **(a) The Defendants Have Failed to Show That All Records 22 Satisfy the Inter-Agency or Intra-Agency Threshold Required to Claim Any Exemption 5 Privilege**

23 As the government concedes, the "the bulk of the records at issue in this case consists of
24 confidential email messages exchanged between ODNI or DOJ officials and congressional staff in
25 which the parties to the emails discussed, analyzed and negotiated possible amendments to FISA."
26 Defendants' Opposition to Plaintiff's Cross Motion for Summary Judgment and Reply in Support
27 of Defendants' Consolidated Motion for Summary Judgment at 2:16-18 ("Def's. Opp. Pl. Cross
28 Mot. Summ. J.") (08-2997 Dkt. 46). The government asserts that all these communications satisfy

1 the “inter-agency or intra-agency” threshold for Exemption 5 protection, but this argument flies in
2 the face of the FOIA’s plain language and legislative history. *See* Plaintiff’s Opposition to
3 Defendants’ Consolidated Motion for Summary Judgment and Cross Motion for Summary
4 Judgment at 12:8-13:2 (“Pl. Cross Mot. Summ. J.”) (08-2997 Dkt. 43). The FOIA unambiguously
5 defines the term “agency” to include “any executive department, military department, Government
6 corporation, Government controlled corporation, or other establishment in the executive branch of
7 the Government (including the Executive Office of the President), or any independent regulatory
8 agency,” 5 U.S.C. § 552(f)(1), but *not* Congress. 5 U.S.C. § 551(1)(A). Congress is simply not an
9 “agency” for purposes of the “inter-agency or intra-agency” threshold for Exemption 5 protection.

10 Unable to find any support for an “inter-Branch” privilege in the statute itself, the
11 government contends that the records meet the “inter-agency or intra-agency” threshold because
12 they facilitated the agencies’ own deliberative processes, as well as those of Congress, citing *Dep’t*
13 *of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1 (2001). The government
14 glosses over the fact that the Supreme Court held in *Klamath* that communications between an
15 agency and non-agency entity are considered “inter-agency or intra-agency records” only when
16 they “ha[ve] been received by an agency, to assist it in the performance of its *own functions*, from a
17 person acting in a governmentally conferred capacity other than on behalf of another agency—*e.g.*,
18 in a capacity as employee or consultant to the agency, or as employee or officer of another
19 governmental unit (not an agency) that is *authorized or required to provide advice to the agency.*”
20 *Id.* at 9-10 (emphasis added).

21 The D.C. Circuit similarly has found that a document may satisfy the Exemption 5
22 threshold only “when an agency record is submitted by an outside consultant as part of the
23 deliberative process, and it was *solicited by the agency*[.]” *Nat’l Institute of Military Justice v.*
24 *Dep’t of Defense*, 512 F.3d 677, 680 (D.C. Cir. 2008) (emphasis added) (citing *Ryan v. Dep’t of*
25 *Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980)). Furthermore, the communications must have been
26 “created for the purpose of aiding the *agency’s* deliberative process,” not the process of the outside
27 party. *Nat’l Institute of Military Justice*, 512 F.3d at 681 (quoting *Dow Jones & Co. v. Dep’t of*
28 *Justice*, 917 F.2d 571, 575 (D.C. Cir. 1990) (emphasis in *Dow Jones*)).

1 While some of the records withheld by the defendants likely fit these criteria, the
2 government's affidavits are replete with evidence that many of the withheld records were not
3 provided at the request of DOJ or ODNI, and did not further the agencies' own deliberations, but
4 rather those of Congress.¹ Such records simply do not satisfy the "inter-agency or intra-agency"
5 threshold requirement, and are not exempt from disclosure.

6 The government argues that grave harm will result if the Court finds that inter-Branch
7 communications do not satisfy the Exemption 5 threshold. Defs. Opp. Pl. Mot. Summ. J. at 8:19-
8 9:9. These concerns, while discussed at length in the government's affidavits, are baseless. As EFF
9 explained in its opening brief, congressional offices may retain control over a document in an
10 agency's possession by simply manifesting an intent to keep the record confidential at the time of
11 its creation and/or transmission. Pl. Cross Mot. Summ. J. at 14 n. 8. While the government
12 complains that "those participating in the communications believed them to be confidential,"
13 Defendants' Consolidated Motion for Summary Judgment at 12:27-28 ("Defs. Mot. Summ. J.")
14 (08-2997 Dkt. 29), the government's declarations do not assert that any withheld communication

15 ¹ See, e.g., Declaration of Kathleen Turner ¶ 8 (08-2997 Dkt. 30) ("ODNI staff viewed it as our
16 responsibility to *provide* congressional staff with as much information and assistance as possible");
17 Declaration of J. Michael McConnell ¶ 20 ("McConnell Decl.") (08-2997 Dkt. 42) ("As the
18 communications at issue in this case reflect, congressional staff often *actively sought out* the
19 assistance of staff in the Executive Branch in crafting legislative provisions"); Declaration of
20 Melanie Ann Pustay ¶ 56 ("Pustay Decl.") (08-2997 Dkt. 33) (characterizing communications in
21 OIP *Vaughn* Index Groups 5-8 as "reflect[ing] Department officials' *commentary and suggestions*
22 [to congressional staff] on the proposed FISA legislation," and explaining that "[e]-mail chains
23 were created as advice [that] *was sought* regarding congressional bills under discussion and
24 officials *offered* language for inclusion in amendments, *provided* candid opinions on language
25 offered by others . . . or *presented* arguments for language to insert."); Declaration of Charles M.
26 Steele ¶ 20 ("Steele Decl.") (08-2997 Dkt. 35) ("OLC attorneys *conveyed* information, advice and
27 recommendations to members of Congress and congressional staff, *often at their request*," and
28 "OLC attorneys were able to *assist* Members and congressional staff in crafting technical
legislative language"); see also Steele Decl. ¶ 26 (withheld communications "reflect preliminary
assessments by attorneys and other staff about issues as to which *they had been asked* to make
recommendations and provide advice.") & ¶ 28 (documents described in NSD *Vaughn* Index
Groups 2-3 "reflect the [DOJ] officials' advice and discussions created while executing the
Department's responsibility of *offering suggestions and commentary* with respect to the
Administration's position regarding proposed legislation," while documents identified in Groups 1-
2 & 4-6 "reflect Department officials' *commentary and suggestions* on legislation") (all emphasis
added).

1 was so sensitive as to be labeled confidential at the time it was sent, and therefore not subject to
2 treatment as an “agency record” covered by FOIA.²

3 Furthermore, the defendants fail to provide any persuasive reason why their
4 communications with representatives of telecommunications carriers should be considered “inter-
5 agency or intra-agency” records for purposes of Exemption 5. In arguing that the communications
6 satisfy the Exemption 5 threshold because the agencies and carriers have a common interest in
7 ongoing litigation, *see* Defs. Opp. Pl. Cross Mot. Summ. J. at 10 n.2, the government misses the
8 mark. As EFF explained in its opening brief, communications between an agency and an outside
9 party may not qualify for Exemption 5 protection where the outside party communicates with the
10 agency “with [its] own . . . interests in mind,” rather than to serve the *agency’s* interests. *Klamath*,
11 532 U.S. at 11. Here, the carriers communicated with the government to ensure Congress passed
12 legislation that would give the carriers immunity from legal liability. Their efforts were intended to
13 further their own interests, not the internal deliberative process of ODNI or DOJ. As such, the
14 carriers’ communications with the agencies also fail to meet the threshold for Exemption 5
15 protection.³ Even if they did meet the threshold, the common interest privilege is inapplicable here
16 to protect these communications from disclosure under Exemption 5, as described in further detail
17

18 ² Indeed, the threshold “agency records” analysis under the FOIA protects against the type of harm
19 to the legislative process that the government seeks to assert here. Any congressional record
20 deemed to be confidential at the time of its creation and exchange would typically not be treated as
21 an “agency record” subject to FOIA. *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1979), *vacated in part*
22 *on other grounds*, 607 F.2d 367 (D.C. Cir. 1979) (per curiam); *Holy Spirit Ass’n for the Unification*
23 *of World Christianity v. CIA*, 636 F.2d 838 (D.C. Cir. 1980), *vacated in part on other grounds*, 455
U.S. 997 (1982); *Paisley v. CIA*, 712 F.2d 686 (D.C. Cir. 1983) *vacated in part on other grounds*,
724 F.2d 201 (D.C. Cir. 1984) (per curiam); *United We Stand America, Inc. v. IRS*, 359 F.3d 595
(D.C. Cir. 2004). Here, however, the agencies have never contended that the disputed documents
are not “agency records.”

24 ³ This case is easily distinguishable from *Hunton & Williams, LLP v. Dep’t of Justice*, No. 06-477,
25 U.S. Dist. LEXIS 26015, 2008 WL 906783 (E.D. Va. March 31, 2008). As explained in Section
26 1(d) below, the common interest privilege does not apply to the lobbying records at issue in this
27 litigation. Moreover, assuming *arguendo* that the government and carriers have a common interest
28 agreement with respect to ongoing litigation against the carriers, *Hunton* does not support the
contention that the agreement extends to communications between the parties for other purposes.
Such communications do not meet the “inter-agency or intra-agency” threshold.

1 *infra* in Section 1(d).

2 Finally, the government repeats its argument that the doctrine of constitutional avoidance
3 requires the Court to conclude that the withheld documents satisfy the Exemption 5 threshold.
4 Defs. Opp. Pl. Cross Mot. Summ. J. at 9:10-10:-13. The plain language of the FOIA leaves no
5 doubt as to its meaning, however, so there is no basis for the Court to invoke the doctrine. *See*
6 *Citizens for Responsibility and Ethics in Washington v. Dep't of Homeland Security*, 592 F. Supp.
7 2d 127, 131 (D.D.C. 2009) (“in the absence of statutory ambiguity the constitutional avoidance
8 doctrine has no place[.]”) The case law clearly provides that the canon may be applied only to
9 resolve uncertainty in statutory language, not to read an exception into a law that has no foundation
10 in the text or legislative history. *See Klamath*, 532 U.S. at 15-16 (refusing to read an “Indian trust”
11 exemption into the FOIA because “there is simply no support for the exemption in the statutory
12 text, which we have elsewhere insisted be read strictly in order to serve FOIA’s mandate of broad
13 disclosure”). As much as the government may wish the FOIA included an exemption for
14 communications between agencies and Congress—or believe that such a provision would be
15 appropriate—no such privilege exists. *Dow Jones*, 917 F.2d at 1010 n.2 (rejecting government’s
16 claim that Exemption 5 includes a government-wide, inter-Branch privilege).

17 **(b) The Defendants Have Failed to Show that Records Have**
18 **Been Properly Withheld Pursuant to the Presidential**
Communications Privilege

19 The government continues to press its aggressive interpretation of the presidential
20 communications privilege to cover even communications that have no direct connection to any
21 White House official, despite the fact that no court has ever authorized such an expansive
22 invocation of the privilege.⁴ The defendants fail to provide a compelling reason why the Court
23

24 ⁴ The agencies claim the privilege has been asserted most frequently to shield communications
25 among Executive agency officials, congressional staffers, and occasionally representatives of
26 telecommunications carriers where the communications have no nexus to the White House
27 whatsoever. *See, e.g.*, revised ODNI *Vaughn* Index Groups 2-3, 6; revised OIP *Vaughn* Index
28 Groups 2-7 & 9; revised OLC *Vaughn* Index Groups 1, 7-8, 11, 13-14, 17-20, 22-23, 25, 29, 31-33,
35-44, 47-49, 51, 53-59, 61-73, 75-79, 81-87, 88-93, 97, 105-111; revised NSD *Vaughn* Index Part
1, Groups 1, 4-7 & Part 2, Groups 4, 6.

1 should not follow *Judicial Watch v. Dep't of Justice*, 365 F.3d 1108 (D.C. Cir. 2004) , which they
2 sought to dismiss in their opening brief as a narrow holding that was “wrongly decided.” Defs.
3 Mot. Summ. J. at 21:22-24:23. The government now claims that *Judicial Watch* is distinguishable
4 because the agency records in that case “were related to the preparation of pardon
5 recommendations, but never transmitted to the President or his immediate White House advisors,”
6 and so “had a much more tenuous nexus to presidential decisionmaking and deliberations.” Defs.
7 Opp. Pl. Cross Mot. Summ. J. at 17:1-4. Here, the defendants invoke the presidential
8 communications privilege primarily to withhold documents that likewise have never been
9 transmitted to the President or his immediate White House advisors, which is precisely what
10 *Judicial Watch* rejected. 365 F.3d at 1123.⁵

11 With respect to the relatively few records the government claims have some connection to a
12 White House official,⁶ the defendants still have not satisfied their obligation to identify the advisors
13 and the responsibilities they exercise.⁷ Judge Patel recently determined that a *Vaughn* submission
14

15 ⁵ The government does not dispute EFF’s contention that the presidential communications privilege
16 may be properly invoked to shield only communications from disclosure, not draft legislation,
17 handwritten notes or other documents as described in revised ODNI *Vaughn* Index Group 2-3 & 6;
18 revised OIP Index Groups 4-8; revised OLC *Vaughn* Index Group 78; and revised NSD *Vaughn*
19 Index Part 1, Groups 1, 6 & 7. Pl. Cross Mot. Summ. J. at 18:15-19:1. (Indeed, OLC disclosed the
20 calendar entries listed at revised OLC *Vaughn* Index Groups 88 & 98-104 in its May 12, 2009
21 discretionary release. *See* Supplemental Declaration of Marcia Hofmann Ex. A (“Supp. Hofmann
22 Decl.”).) The government responds that these are “all records that do not have a White House
author or recipient listed on the Vaughn indices[.]” Defs. Opp. to Cross Pl. Mot. Summ. J. at 19 n.7.
The fact that these documents concededly have no nexus to the White House only underscores the
inapplicability of the presidential communications privilege to shield such material from
disclosure.

23 ⁶ *See, e.g.*, revised ODNI *Vaughn* Index Groups 2 & 6; revised OIP *Vaughn* Index Groups 1, 8, 10;
24 revised OLC *Vaughn* Index Groups 2-3, 6, 10, 12, 15-16, 21, 24, 26, 60, 94-96 & 113; and revised
NSD *Vaughn* Index Part 1, Group 2 & Part 2, Group 5.

25 ⁷ DOJ recently chose to release the names of a handful of high-level White House officials who
26 were parties to several communications listed in revised NSD *Vaughn* Index Part 2, Group 5, and
27 revised OIP *Vaughn* Index 10. *See* Supp. Hofmann Decl. Exs. B & C. However, NSD released
28 these names in only five of the 32 records in revised NSD *Vaughn* Index Part 2, Group 5, and
continues to withhold the names of all White House officials in the other records. Supp. Hofmann
Decl. Ex. B. Similarly, OIP has released names of two White House officials in three email

1 sufficient to justify the invocation of the presidential communications privilege must include
2 “individuals’ specific capacities or other indicators of proximity to the President or his key
3 advisors.” *Ctr. for Biological Diversity v. Office of Management and Budget*, No. 07-4997 MHP,
4 2008 U.S. Dist. LEXIS 98387, 2008 WL 5129417, at *12 (N.D. Cal. Dec. 4, 2008). The
5 government attempts to distinguish *Ctr. for Biological Diversity* by claiming that OMB’s *Vaughn*
6 submission in that case did not clearly establish whether the presidential advisors for whom the
7 presidential communications privilege was invoked “qualified as immediate White House advisors
8 with broad and significant responsibility for investigating and formulating the advice to be given to
9 the President.” Defs. Opp. to Pl. Mot. Summ. J. at 19:7-9. Yet Daniel Meyer’s affidavit suffers
10 from the same deficiency. Declaration of Daniel P. Meyer (“Meyer Decl.”) (08-2997 Dkt. 39).
11 Specifically, Mr. Meyer states:

12 I have been informed that *some* of the withheld documents were particularly close to
13 the President’s legislative deliberations and decisionmaking in that they were
14 authored by, or solicited and received by, the President’s White House staff,
15 *including* representatives from the White House Office of the Chief of Staff, the
16 White House Counsel’s Office, the White House Office of Legislative Affairs, and
17 the White House Office of Communications, as well as staff at the Office of the
18 Vice President.

19 Meyer Decl. ¶ 22 (emphasis added). By the government’s own admission, only *some* of the
20 communications withheld pursuant to the presidential communications privilege were authored or
21 solicited and received by White House officials. Moreover, Mr. Meyer notes that these staff
22 members *included* representatives of the White House Office of the Chief of Staff, the White
23 House Counsel’s Office, the White House Office of Legislative Affairs, the White House Office of
24 Communications, and the Office of the Vice President, but leaves open the possibility that some
25 individuals may have represented more distant offices within the White House.

26 As *Ctr. for Biological Diversity* makes clear, it is the government’s burden to show that the
27 presidential communications privilege has been invoked *only* to protect communications authored
28 or solicited and received by the President’s “immediate advisers or their staff members.” 2008 WL
29 _____
30 messages (totaling five pages), but continues to withhold White House names in all the records
described in revised OIP *Vaughn* Index Group 1. Supp. Hofmann Decl. Ex. C.

1 5129417, at *12 (citing *In re Sealed Case*, 121 F.3d 121 F.3d 729, 752 (D.C. Cir. 1997)). While
2 some of the White House officials here may be sufficiently close to the President to invoke the
3 privilege, Mr. Meyer's declaration does not satisfy the government's burden, and in fact gives the
4 Court further reason to question whether the presidential communications privilege has been
5 improperly asserted to prevent disclosure of some material.⁸

6 **(c) The Government Has Failed to Show that Records Have**
7 **Been Properly Withheld Pursuant to the Deliberative**
8 **Process Privilege**

9 As EFF explained in detail in its opening brief, the government's *Vaughn* affidavits and
10 document indices, including the declarations filed by the government, are deficient and fail to
11 justify summary judgment in the defendants' favor pursuant to the deliberative process.

12 The government contends that all materials withheld pursuant to the deliberative process
13 privilege are predecisional "because they relate to, and preceded, the President's final action on
14 FISA reform—that is, the President's decision to sign the Foreign Intelligence Surveillance of 1978
15 Amendments Act of 2008 in July 2008[,]" Defs. Opp. Pl. Cross Mot. Summ. J. at 12:7-9. But this
16 position is thoroughly undercut by the fact that ODNI recently released a number of records
17 previously withheld in full under the deliberative process privilege that are unquestionably final
18 records used in the agency's dealings with the public.⁹ Some of the documents released by ODNI
19 that are freely available include a "fact sheet" (compare *FISA Legislation Necessary to Keep Our*
20 *Nation Safe* at Supp. Hofmann Decl. Ex. D, as released by ODNI, and Supp. Hofmann Decl. Ex. E,
21 available at [http://www.usdoj.gov/archive/ll/docs/fisa-legislation-necessary-to-keep-our-nation-](http://www.usdoj.gov/archive/ll/docs/fisa-legislation-necessary-to-keep-our-nation-safe.pdf)
22 [safe.pdf](http://www.usdoj.gov/archive/ll/docs/fisa-legislation-necessary-to-keep-our-nation-safe.pdf)); a joint statement by DOJ and ODNI regarding a House FISA proposal (compare Supp.
23 Hofmann Decl. Ex. D, as released by ODNI, and Supp. Hofmann Decl. Ex. F, available at

24 ⁸ The government correctly notes that EFF has decided not to challenge the redaction of identifying
25 information about government officials pursuant to Exemption 6. Defs. Opp. Pl. Cross Mot. Summ.
26 J. at 17 n.6. This does not diminish the government's obligation to describe White House officials'
27 duties in sufficient detail to justify all withholdings under the presidential communications
28 privilege, however.

⁹ Each of these records was also apparently withheld pursuant to the presidential communications
privilege. See revised ODNI *Vaughn* Index Group 2.

1 <http://www.usdoj.gov/archive/ll/docs/din-doj-statement031108.pdf>); three copies of a *New York*
2 *Times* op-ed by former Director of National Intelligence Mike McConnell (compare Supp.
3 Hofmann Decl. Ex. D, as released by ODNI, and Supp. Hofmann Decl. Ex. G, available at
4 <http://www.nytimes.com/2007/12/10/opinion/10mccconnell.html>); a second op-ed by McConnell
5 published in the *Washington Post* (compare Supp. Hofmann Decl. Ex. D, as released by ODNI, and
6 Supp. Hofmann Decl. Ex. H, available at [http://www.washingtonpost.com/wp-
8 dyn/content/article/2008/02/14/AR2008021403103.html](http://www.washingtonpost.com/wp-
7 dyn/content/article/2008/02/14/AR2008021403103.html)); a statement of Administration policy on
9 a House bill (compare Supp. Hofmann Decl. Ex. D, as released by ODNI, and Supp. Hofmann
10 Decl. Ex. I, available at <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr3773sap-r.pdf>);
11 and a transcript of an interview with McConnell on CNN’s “Late Edition” (compare Supp.
12 Hofmann Decl. Ex. D, as released by ODNI, and Supp. Hofmann Decl. Ex. J, available at
<http://www.usdoj.gov/archive/ll/docs/in-case-you-missed-it022508.pdf>).

13 Despite the clear and obvious post-decisional character of these newly released records, the
14 government’s *Vaughn* submission asserted unequivocally that these documents were properly
15 exempt from disclosure under Exemption 5. *See* Declaration of John F. Hackett ¶¶ 30-31 (08-2997
16 Dkt. 31). Indeed, the government seems to continue to take the position that these documents were
17 legitimately withheld, but have been merely been released at the discretion of ODNI. *See* Not.
18 Filing at 1:21-27 (08-1023 Dkt. 79; 08-2997 Dkt. 62). Such withholdings—the nature of which the
19 Court can now assess in light of ODNI’s recent discretionary release—are clearly unjustifiable.

20 Even if a record is predecisional at the time it is created, it “can lose that status if it is
21 adopted, formally or informally, as the agency position on an issue or is used by the agency in its
22 dealings with the public.” *United States v. Rozet*, 183 F.R.D. 662, 666 (N.D. Cal. 1998) (citing
23 *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Nat’l Council of*
24 *La Raza v. Dep’t of Justice*, 411 F.3d 350, 356-67 (2d Cir. 2005) (same); *see also NLRB v. Sears,*
25 *Roebuck & Co.*, 421 U.S. 132, 161 (1975) (Exemption 5 does not apply to any intra-agency record
26 that an agency has chosen to expressly adopt or incorporate by reference into a final opinion). This
27 is unquestionably the case with documents reflecting the government’s positions in its dealings
28 with the public such as press releases, statements of administration and agency policy, op-eds

1 published in major national newspapers, and transcripts of television talk shows. The government's
2 recent (and belated) disclosure of some of this material provides the Court with a unique window
3 into the agencies' untenable deliberative process claims.

4 Finally, the government repeats its argument that all material withheld under the
5 deliberative process privilege is, in fact, deliberative, and therefore exempt from disclosure. Def.
6 Opp. Pl. Cross Mot. Summ. J. at 13:8-14:7. The government points to two categories of documents
7 as examples of material properly withheld as deliberative: talking points and emails summarizing
8 conversations with congressional staffers. As EFF explained in its opening brief, talking points are
9 often found to be improperly withheld under Exemption 5, particularly where they have been used
10 to prepare government officials to answer questions from the public and media. *Elec. Privacy Info.*
11 *Ctr. v. Dep't of Justice*, 511 F. Supp. 2d 56, 71 (D.D.C. 2007); *N.Y. Times Co. v. Dep't of Defense*,
12 499 F. Supp. 2d 501, 514-515 (S.D.N.Y. 2007); see also *Judicial Watch, Inc. v. Dep't of Energy*,
13 310 F. Supp. 2d 271, 327 (D.D.C. 2004), *affirmed in part and reversed in part on other grounds*,
14 412 F.3d 125 (D.C. Cir. 2005); *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 265-
15 266 (D.D.C. 2004). The talking points at issue were created to provide agency officials information
16 sufficient to communicate factual information and final agency positions regarding the FISA
17 amendments and the RESTORE Act to Congress, the media, and the public. See Pustay Decl. ¶ 61;
18 Steele Decl. ¶ 30. There is no indication that the withheld documents were drafts or otherwise
19 reflected agency deliberations, as was the case in all the opinions cited by the government in
20 support of its withholdings here.¹⁰

21 ¹⁰ *Judicial Watch v. Dep't of the Army*, 402 F. Supp. 2d 241, 247 (D.D.C. 2005) (approving
22 withholding of *draft* talking points containing "opinions, recommendations, and drafts"); *Anderson*
23 *v. Cornejo*, No. 97-7556, 2001 WL 826878 at *3 (N.D. Ill. July 20, 2001) (permitting partial
24 redaction of talking points prepared to brief an agency official for a meeting with a senator, but
25 only to the extent the materials reflected attorney advice on pending litigation or information "not .
26 . . relevant to the issues involved in the present case"); *Hunt v. U.S. Marine Corp.*, 935 F. Supp. 46,
27 52 (D.D.C. 1996) (point papers exempt from disclosure where they were "prepared in the midst of
28 [an agency's] deliberative process to assist officers in their formulation of a final decision");
Security Financial Life Insurance Co. v. Dep't of the Treasury, 03-102, 2005 U.S. Dist. LEXIS
6641, 2005 WL 839543 at *11 (D.D.C. April 12, 2005) (Q&As and talking points exempt from
disclosure where they were created to "explain and compare alternative tax proposals" to prepare
agency officials to testify before Congress); *Williams v. Dep't of Justice*, 556 F. Supp. 63, 65
(D.D.C. 1982) (factual summaries in internal agency memoranda prepared in contemplation of

1 The Government and the telecommunications carriers had a straightforward, legal,
2 common interest in the matter they were discussing: the enactment of a provision
3 that would potentially end litigation in which it was alleged that telecommunications
4 carriers had assisted the Government in surveillance activities.

5 Defs. Opp. to Pl. Cross Mot. Summ. J. at 21. The government cites no declarations in support of
6 this factual assertion, and the record is devoid of any facts that show what the legal interests of the
7 carriers may be. Moreover, the government does not address or explain its prior assertions that the
8 “United States’ interest is not adequately represented by the parties,” or that the telecoms had
9 opposing interests. Mot. to Intervene by the United States at 6:16-17 and 7:11-13 (*Hepting v.*
10 *AT&T*, Case No. 06-0672-VRW) (Declaration of Marcia Hofmann Ex. 19 (“Hofmann Decl”) (08-
11 2997 Dkt. 44)). Nor does the government address the fact that it is a litigation *opponent* of the
12 telecoms in five cases (which comprise all of the cases effected by Section 803 of the FISAAA), or
13 that its own liability was not at issue in the legislation discussed in the withheld records. Pl. Cross
14 Mot. Summ. J. at 26-27.

15 Neither the common interest privilege nor the attorney work product privilege protects
16 these agency records because the government’s interest in ending the litigation is not a legal
17 interest, but rather a means to an end. The carriers had asserted that they would refuse to cooperate
18 with lawful orders unless they received immunity, and the government lobbied for that immunity in
19 order to help ensure the carriers’ future cooperation. *See* Hofmann Decl. Exs. 10-15; McConnell
20 Decl. ¶ 13.

21 Nevertheless, the government attempts to recharacterize its political and business interest as
22 a legal interest, asserting that the “Government clearly has its own legal interest in the litigation to
23 protect against the disclosure of information related to alleged intelligence relationships and
24 activities.” Defs. Opp. to Pl. Cross Mot. Summ. J. at 24. This argument fails because the asserted
25 interest must be a common one. *United States v. Bergonzi*, 216 F.R.D. 487, 495 (N.D. Cal. 2003).
26 As the government has previously admitted, “the [telecom] parties’ interest may well be in the
27 *disclosure* of state secrets to the extent that doing so might assist them in presenting their claims or
28 defenses fully to vindicate their own private interests.” Hofmann Decl. Ex. 19 at 6:16-17 and 7:11-
13 (emphasis original). Furthermore, the communication and alleged work product at issue must

1 be designed to further the common interest. Dismissing the cases against the telecoms does not
2 protect against the disclosure of information when other cases are ongoing.¹²

3 The government's citation to *Hunton & Williams*, 2008 WL 906783, continues to be
4 unavailing. In *Hunton*, the DOJ and a company entered into a common interest agreement "for the
5 limited purpose of addressing their shared common interests." 2008 WL 906783 at **4-5. The
6 plaintiff sought documents directly pertaining to the litigation, including drafts of court filings and
7 documents discussing "views concerning the effect of any injunction on governmental use of
8 Blackberry devices, the issue of how exceptions for government use could be implemented and
9 whether any injunctive relief would be contrary to the public interest." *Id.* at *4. The court found a
10 common legal interest in limiting the scope of an injunction, using the simple and direct reasoning
11 that "an injunction, by definition, is an equitable legal remedy." *Hunton*, 2008 WL 906783 at *6.

12 The government's citation to *Hunton's* discussion of dismissal is inapposite, as that
13 discussion related to whether the government and the private entity had a common *opponent*. *Id.* at
14 *7. In the following paragraph of the decision, *Hunton* did not find a common interest in dismissal,
15 but merely a "joint interest in preventing or limiting the scope of any injunction." *Id.* Here, by
16 sharp contrast, EFF is not seeking records about ongoing litigation or any pending injunction, but
17 rather lobbying efforts to push through prospective legislation. Pl. Cross Mot. Summ. J. at 24-30.
18 Moreover, the *Hunton* court's order only upheld Exemption 5 with respect to documents in the
19 scope of an agreement that was "limited to the subject of any injunction that would be considered
20 by the court." *Id.* at **6, 10. The decision does not make clear whether a common interest in
21 dismissal was at issue, but to the extent that it was, the court rejected that argument.

22 Finally, the government fails to address the crime-fraud exception to the common interest
23 privilege and work product doctrine. In a footnote, the government asserts that this argument is
24 "meritless," but cites to neither law nor facts. Defs. Opp. Pl. Cross Mot. Summ. J. at 24 n.12. The
25 government does not dispute that the warrantless wiretapping was illegal, preferring to contend that

26 _____
27 ¹² In any event, the government's interest in protecting properly classified information from
28 unauthorized disclosure was never in jeopardy. No secret information has been disclosed in the
NSA MDL so far, and any disclosure pursuant to any future court orders would be, by definition,
authorized disclosure.

1 it is “not at issue” in this litigation. *Id.* To the contrary, the illegality is at issue because the
2 government may not claim the common interest privilege to hide illegal activity. *In re Napster, Inc.*
3 *Copyright Litig.*, 479 F.3d 1078, 1090 (9th Cir. 2007). The existence of other litigation on a similar
4 subject does not remove this Court’s jurisdiction to decide whether the crime-fraud exception
5 applies.

6 It is not surprising that the government would not dispute the illegality. The prior
7 administration had admitted that the program violated FISA. Summ. of Evidence at 10 & 42 (MDL
8 06-1791 Dkt. 481) (Hofmann Decl. Ex. 1). Likewise, President Obama has promised “no more
9 illegal wiretapping of American citizens”¹³ and Attorney General Eric Holder has criticized the
10 wiretapping program, lamenting that he “never thought that [he] would see that a president would
11 act in direct defiance of federal law by authorizing warrantless NSA surveillance of American
12 citizens.” Eric H. Holder Jr., *Eric Holder on the Rule of Law, 2008 ACS National Convention*, June
13 12, 2008, video available at <http://acslaw.org/node/6720>.

14 EFF has shown sufficient evidence to support a good faith belief that *in camera* review of
15 the materials may reveal evidence to establish the claim that the crime-fraud exception applies, and
16 the government has offered no evidence to the contrary. *In re Napster*, 479 F.3d at 1090.
17 According, this Court should review *in camera* the agency records withheld on the basis of the
18 common interest privilege and determine whether the claim is well founded.¹⁴

19 **2. The Defendants Improperly Withheld Records Under Exemption 6**

20 The government’s argument in defense of its Exemption 6 withholding relies primarily
21 upon Exemption 3, which it contends is coextensive with its Exemption 6 claims. As noted in
22 EFF’s opening brief, despite not challenging Exemption 3 directly, “EFF continues to challenge the
23 Exemption 5 and 6 withholdings to the extent that records can be disclosed without revealing

24 _____
25 ¹³ Unofficial transcript available at [http://maneyeyes.alphaworks.ibm.com/maneyeyes/datasets/
transcript-of-sen-barack-obamas-rem/versions/1.txt](http://maneyeyes.alphaworks.ibm.com/maneyeyes/datasets/transcript-of-sen-barack-obamas-rem/versions/1.txt) (last visited June 1, 2009).

26 ¹⁴ Finally, even if the Court determines that the defendants have properly invoked Exemption 5 to
27 withhold some material, the agencies have waived any privilege to the extent those records have
28 been shared with congressional staff, White House officials, or other outside parties. Pl. Cross.
Mot. Summ. J. at 30 n.25. The government has not disputed this argument.

1 classified information or the government's intelligence sources and methods." Pl. Cross Mot.
2 Summ. J. at 8 n.5. The identities of the individuals contacting the government would reveal neither
3 classified information nor the government's intelligence sources and methods (no one is
4 contending that the lobbyists are the sources of intelligence information or that lobbying is a
5 method of intelligence gathering).

6 Moreover, the identity of at least some lobbyists who contacted the government on these
7 issues is well known. See Hofmann Decl. Ex. 9 (Michael Isikoff and Mark Hosenball, *Case*
8 *Dismissed?: The Secret Lobbying Campaign Your Phone Company Doesn't Want You to Know*
9 *About*, NEWSWEEK, updated Sept. 26, 2007); see also, e.g., Hofmann Decl. Ex. 22 (Lobbying and
10 Disclosure Act reporting form listing individuals who lobbied, *inter alia*, DOJ and ODNI on the
11 FISA legislation on behalf of AT&T). Nor is the identity of at least some of the companies
12 threatening to reduce cooperation to pressure the government a secret:

13 NEWSWEEK has learned that AT&T and Verizon both conveyed such concerns to
14 the government. According to a knowledgeable industry source (who asked for
15 anonymity when discussing sensitive material), AT&T told intelligence officials
16 that because the temporary eavesdropping law, passed by Congress last summer,
17 had expired, it would no longer help government agencies launch eavesdropping
measures against new targets for fear the company could be exposed to new
lawsuits. Another telephone giant, Verizon, expressed similar "concerns" about
eavesdropping on new targets, although the source said that Verizon did not go so
far as to refuse to comply with new government surveillance requests.

18 Michael Isikoff and Mark Hosenball, *Scare Tactics*, NEWSWEEK, Feb. 27, 2008, available at
19 <http://www.newsweek.com/id/116683> (Supp. Hofmann Decl. Ex. K).

20 Moreover, there is a strong public interest in the disclosure of the identity of the lobbyists at
21 issue in this litigation. As acknowledged by the Lobbying and Disclosure Act of 1995, "responsible
22 representative Government requires public awareness of the efforts of paid lobbyists to influence
23 the public decisionmaking process in both the legislative and executive branches of the Federal
24 Government [and] effective public disclosure of the *identity* and extent of the efforts of paid
25 lobbyists to influence Federal officials in the conduct of Government actions will increase public
26 confidence in the integrity of Government." 2 U.S.C. § 1601 (emphasis added). The government's
27 citations to the declarations of Mr. Hackett and Mr. Colborn, Defs. Opp. Pl. Cross Mot. Summ. J.
28 at 26, do not change the fact that Congress has already decided that there is a public interest in

1 disclosure of the information the defendants seek to hide.

2 Finally, the identities of the FISA lobbyists is important to effectuate the government's
 3 promise to reduce the influence of lobbyists in the new administration. Immediately after taking
 4 office, President Obama issued an executive order entitled "Ethics Commitments by Executive
 5 Branch Personnel," which severely limits the role of former lobbyists in the administration. Exec.
 6 Order No. 13,490, 3 C.F.R. 13490 (Jan. 21, 2009).¹⁵ Knowing the identity of individuals who
 7 lobbied the defendant agencies is vital if the public is to assess, for example, whether anyone
 8 violated the pledge not to "participate in any particular matter involving specific parties that is
 9 directly and substantially related to my former employer or former clients." This is not an idle
 10 concern. For example, Wilmer Cutler Pickering Hale & Dorr is counsel for Verizon in the NSA
 11 MDL, and the Administration has nominated or appointed scores of Wilmer Cutler Pickering Hale
 12 & Dorr attorneys to executive branch positions, including defendant the Department of Justice. *See*
 13 posting of David Lat to Above the Law, *Musical Chairs: The Obama White House Counsel's*
 14 *Office (And ODAG picks, too.)*, ABOVE THE LAW,
 15 http://abovethelaw.com/2009/01/obama_white_house_counsel.php (Jan. 21, 2009) (listing various
 16 appointees and asking "Will anyone be left at WilmerHale after Obama is through with the
 17 place?").

18 3. The Government Has Failed to Segregate Exempt Materials From Non- 19 Exempt Material as the FOIA Requires

20 The FOIA explicitly requires that "[a]ny reasonably segregable portion of a record shall be
 21 provided to any person requesting such record after deletion of the portions which are exempt[.]" 5
 22 U.S.C. § 552(b); *see also Church of Scientology v. Dep't of Army*, 611 F.2d 738, 744 (9th Cir.
 23 1980) ("it is error for a district court to simply approve the withholding of an entire document
 24 without entering a finding on segregability, or the lack thereof.") To satisfy its burden, an agency is
 25 "required to provide the court with its *reasons*—as opposed to its simple conclusion—for its
 26 inability to segregate non-exempt portions of the documents, and also to provide the court with a
 27 description of 'what proportion of the information in a document is non-exempt, and how that

28 ¹⁵ Available at http://www.whitehouse.gov/the_press_office/ExecutiveOrder-EthicsCommitments/.

1 material is dispersed throughout the document.” *Lawyers’ Comm. For Civil Rights of San*
2 *Francisco Bay Area v. Dep’t of the Treasury*, No. 07-2590 PJH, 2008 U.S. Dist. LEXIS 87624,
3 2008 WL 448285 at *13 (N.D. Cal. Sept. 30, 2008) (quoting *Mead Data Cent., Inc. v. Dep’t of the*
4 *Air Force*, 556 F.2d 242, 261 (D.C. Cir. 1977) (emphasis in original).

5 In its reply, the government offers sweeping, conclusory statements from the defendants
6 who failed to address segregability in the first instance.¹⁶ As EFF described in detail before, Pl.
7 Cross Mot. Summ. J. at 33-34, such cursory justifications fall far short of the specificity an agency
8 is required to provide. *Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep’t of State*, 818
9 F. Supp. 1291, 1300 (N.D. Cal. 1992) (finding boilerplate, conclusory assertions inadequate to
10 permit the Court to make finding on segregability); *L.A. Times Communs. LLC v. Dep’t of Labor*,
11 483 F. Supp. 2d 975, 986 (C.D. Cal. 2007) (“Agencies may meet this burden by describing through
12 affidavit, *in a non-conclusory manner*, why such information is not reasonably segregable”)
13 (emphasis added). Thus, the government has not satisfied its burden.

14 **B. The Court Should Review the Disputed Records *In Camera***

15 Where, as here, the government fails to provide affidavits sufficient to justify summary
16 judgment in its favor, a court may examine the documents at issue and determine whether the
17 exempted material should be released. 5 U.S.C. § 552(a)(4)(B) (that a court “may examine the
18 content of . . . agency records in camera to determine whether such records or any part thereof shall
19 be withheld.”); *Church of Scientology*, 611 F.2d at 743 (“Though the burden remains at all times
20 on the government to establish exempt status, [i]n camera inspection may supplement an otherwise
21

22
23 ¹⁶ Supplemental Declaration of John F. Hackett ¶ 3 (08-1023 Dkt. 80; 08-2997 Dkt. 63) (“All of the
24 documents were reviewed to determine whether they contained any reasonably segregable, non-
25 exempt information. For documents in categories one, two and four we were able to segregate and
26 release non-exempt information and those documents were released in part to plaintiff. After
27 conducting a review of the remaining documents we determined that they did not contain any
28 reasonably segregable, non-exempt information.”); Supplemental Declaration of Paul P. Colburn
¶ 4 (08-1023 Dkt. 81; 08-2997 Dkt. 64) (“an attorney at OLC reviewed for segregability the five
documents identified in the Office’s Vaughn index (Vaughn nos. 4, 9, 112, 114, 115) that have
been withheld pursuant to FOIA Exemption 5 based solely on the deliberative process privilege,
and determined that no factual or other portions could be segregated for disclosure.”)

1 sketchy set of affidavits,” although “the district court’s prerogative is not a substitute for the
2 government’s burden of proof, and should not be resorted to lightly.”); *Wiener v. FBI*, 943 F.2d
3 972, 979 (9th Cir. 1991) (“in camera review may supplement a *Vaughn* index, but may not replace
4 it.”)

5
6 If the Court has any doubt that EFF is not entitled to summary judgment, an *in camera*
7 inspection of the documents in dispute in this case would be especially appropriate. As described in
8 detail above, the Defendants’ declarations and *Vaughn* indices do not provide explanations of the
9 government’s Exemption 5 and 6 withholdings sufficient to support summary judgment.
10 Furthermore, the withheld material is not so voluminous as to be burdensome for the Court to
11 review. Finally, the Court will best examine the question of whether Exemptions 5 and 6 were
12 properly invoked by reviewing the documents at issue. *People of the State of Calif. v. EPA*, No. 07-
13 2055 (JSW), 2009 WL 273411 at *4 (N.D. Cal. Feb. 4, 2009) (ordering *in camera* review of
14 withheld material where defendant agencies failed to provide sufficiently detailed factual
15 information in support of their exemptions claims). For these reasons, EFF respectfully urges the
16 Court to conduct an *in camera* inspection of the documents at issue in this case.
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2 **IV. CONCLUSION**

3 For the foregoing reasons, the government's consolidated motion for summary judgment
4 should be denied, and EFF's cross motion for summary judgment should be granted. Should the
5 Court have any doubt as to the impropriety of the agencies' withholdings, it should conduct an *in*
6 *camera* inspection of the withheld records.

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8 DATED: June 2, 2009

Respectfully submitted,

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10 /s/ Marcia Hofmann

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