

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

ELECTRONIC PRIVACY INFORMATION CENTER,)	
)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.
)	13-cv-1961 KBJ
DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
)	

DEFENDANT'S RESPONSE TO THE COURT'S ORDER OF NOVEMBER 7, 2017

Defendant United States Department of Justice respectfully submits this response to the Court's Order and Memorandum Opinion, dated November 7, 2017, *see* ECF Nos. 46-47 (hereinafter "Order" and "Mem. Op.", respectively), in this Freedom of Information Act ("FOIA") case.¹

On November 7, 2017, the Court granted in part and denied in part Defendant's motion for summary judgment. *See* Mem. Op. at 36-37. In doing so, the Court noted that "DOJ's general success in establishing that the disputed information can be withheld comes with a caveat," Mem. Op. at 4, which is that the "Court's in camera review" of the documents at issue "revealed certain inconsistencies in the redactions that the government must address." *Id.* at 35. The Court identified three categories of inconsistencies and ordered Defendant "to submit one or more supplemental declarations" addressing these inconsistencies. Mem. Op. at 5. This filing, along with the Fifth

¹ In its November 7 order, the Court ordered that the Defendant's response be filed on or before December 9, 2017. *See* Order at 1. Defendant subsequently moved for an extension of that deadline to December 21, *see* Defendant's Unopposed Motion for an Extension of Time for Defendant to File Its Submissions in Response to the Court's Order of November 7, 2017, ECF No. 49, which the Court granted in a Minute Order, dated December 7, 2017.

Declaration of David M. Hardy (hereinafter “Hardy Decl.”) (attached hereto as Exhibit 1), addresses these three categories of inconsistencies.²

1. Category One: Documents 124 and Document 127

The first category comprises certain pages within two documents (pages 53-54 and 56 of Document 124 and page 69 of Document 127) that the Court reviewed *in camera* and *ex parte*. The Court explained in its Memorandum Opinion that “the government appears to have mistakenly labeled [these] material[s] as *not* being within the Remaining Challenges” previously identified in this case whereas these materials “appear[] to fall within the categories of information that are still in dispute.” *Id.* at 35-36. The Court then ordered Defendant to “either explain why the Court’s reading is incorrect or submit a supplemental declaration that provides an explanation for why the information is exempt from disclosure.” *Id.* at 36.

First, with regard to Document 124, there are two sections of that document at issue here. One section is labeled “K,” is entitled “FISA Process Improvements,” and encompasses all or portions of pages 56 to 57. Defendant has determined that, upon further review, this section does contain information within the remaining challenges and has thus processed that section pursuant to its obligations under FOIA. Defendant has determined that no information within section K of Document 124 is exempt from disclosure and is thus disclosing that section without any redactions. *See Excerpt from Document 124* (attached hereto as Exhibit 2).

The other section is labeled “G,” is entitled “Other Legal Interpretations under FISA by the FISC,” and encompasses all or portions of pages 53 to 54. Upon further review, Defendant has determined that this section does come within the remaining challenges but that the two paragraphs

² Because the Court also set a separate briefing schedule for summary judgment motions, *see Order at 1*, this filing does not purport to be a motion for summary judgment. Nevertheless, Defendant submits that, in light of the disclosures attached to this filing and the Fifth Hardy Declaration, summary judgment for Defendant is appropriate.

that comprise this section must be withheld in full pursuant to Exemptions 1, 3, and 7E of FOIA. *See* Hardy Decl. ¶ 6. As Mr. Hardy explains, the withheld information “relates to a specific FISA application and provides information about the nature of the contents of that specific application.” *Id.* ¶ 7. Mr. Hardy reviewed the withheld information and determined that it is properly classified at the Top Secret level, involves sources and methods of intelligence gathering, and would, if released, “allow for criminals to circumvent” those critical sources and methods. *Id.* He also determined that no information within those two paragraphs could be “properly segregated from the whole and released in part without risking [the] harms protected by . . . Exemptions” 1, 3, and 7E. *Id.* ¶ 6.

Second, with regard to Document 127, the section at issue here is Section L, is entitled “FISA Process Improvements,” and encompasses all or portions of pages 69 to 71. Defendant has determined that, upon further review, certain material within this section is within the remaining challenges and has thus processed that section pursuant to its obligations under FOIA. *See id.* ¶ 12. In processing that section, Defendant has disclosed all but the final paragraph of this section without any redactions. *See id.*; *see also* Excerpt from Document 127 (attached hereto as Exhibit 3).

With regard to the final paragraph of this section, Defendant has released the first two sentences as segregable from the remainder and has explained why the remaining text must be withheld. *See* Hardy Decl. ¶¶ 13-16. Specifically, as Mr. Hardy explains, the remainder of this paragraph “describes the inner workings of the classified FISA application process and is associated with the use of a specific intelligence source/method, which is used by the government to obtain valuable information on national security targets.” *Id.* ¶ 14. Relying on Exemptions 1, 3, and 7E of FOIA, Mr. Hardy explains that the information must be withheld because it is classified at the Secret level and disclosing it “would reveal critical information about classified sources and methods” and would “compromise the confidentiality” of the “classified application process” and “risk adversely affecting its effectiveness.” *Id.* ¶¶ 15-16.

2. Category Two: Document 126

The second category involves footnote 16 on page 57 of Document 126. The Court observed that Defendant had labeled that footnote as “outside the Remaining Challenges even though the footnote pertains to text that the government admits is within the Remaining Challenges.” Mem. Op. at 36. In light of this inconsistency, the Court ordered Defendant to “explain this discrepancy in its supplemental submission, and if the government agrees that the material is within the Remaining Challenges, it must provide a declaration that addresses the text of the footnote and why it is exempt from disclosure.” *Id.*

Defendant confirms that the “footnote should have been identified as within the Remaining Challenges in the same manner as the text accompanying the footnote” and it “regrets this oversight.” Hardy Decl. ¶ 9. As Mr. Hardy explains, the text accompanying this footnote was withheld pursuant to FOIA Exemptions 1, 3, and 7E of FOIA, for the reasons set forth in the Classified Fourth Hardy Declaration. *See id.* ¶ 10 (citing ECF No. 35-1, Classified Fourth Hardy Declaration ¶¶ 34, 38). In unclassified terms, the text accompanying footnote 16 is classified at the Secret level, involves intelligence gathering sources and methods, and, if revealed, “would allow for criminals to circumvent intelligence gathering sources and methods critical to the FBI’s ability to detect and disrupt criminal activities.” *Id.* And, given that the withheld “information in footnote 16 directly relates to and references the exempt text,” the “justification for withholding the text” “extends to footnote 16.” *Id.*

Accordingly, footnote 16 must be withheld from disclosure pursuant to FOIA Exemptions 1, 3, and 7E. *See* Excerpt from Document 126 (attached hereto as Exhibit 4).

3. Category Three: Document 127

The third and final category involves page 59 of Document 127. The Court observed that “there is a notation” on that page that “material is ‘within the remaining challenged withholdings,’ even though no redactions appear on the page” and thus the Court ordered that Defendant be “required to explain the notation that is made on this page.” Mem. Op. at 36. Defendant has reviewed the relevant excerpt from Document 127 and can confirm that, at the time Defendant lodged documents with the Court for its *in camera* and *ex parte* review, *see* Notice of Lodging of Documents for *In Camera* Review With the Classified Information Security Officer, ECF No. 34, Defendant was withholding the information within Section F of Document 127 (which contained page 59) pursuant to FOIA Exemptions 1, 3, and 7E and so the pages the Court reviewed should have reflected that fact. This issue is of no moment, however, because Defendant disclosed to Plaintiff on July 6, 2016, Section F of Document 127 entitled “Post-Cut-Through Digits,” which encompasses all or a portion of pages 58-61, without any redactions. *See* Letter to Alan Butler from Kevin Tiernan (attached hereto as Exhibit 5, with July 6, 2016 production of Excerpt of Document 126); *see also* Excerpt from Document 127 (attached hereto as Exhibit 3). Accordingly, the final category of inconsistencies raised by the Court in its November 7 order has been mooted by the production to Plaintiff of an unredacted version of page 59 of Document 127.³

Based on the foregoing, Defendant respectfully submits that it has complied with this Court’s November 7 Order.

³ Based on recent communications between Plaintiff and Defendant, it would appear that the parties disagree as to the reason why Defendant decided to reprocess Section F of Document 127 in the summer of 2016. The Court need not resolve that dispute now, however, because the answer to that question does not alter the fact that Plaintiff sought the release of this information under FOIA, and it has been disclosed to Plaintiff without any redactions. Thus, there is no longer a dispute on the merits on that point. If why the Defendant reprocessed Section F of Document 127 has relevance at all, then it is to the issue of attorney’s fees and should await resolution in that phase of the case.

Dated: December 21, 2017

Respectfully submitted,

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