UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, ELECTRONIC PRIVACY INFORMATION CENTER, AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, and FREEDOM TO READ FOUNDATION, Plaintiffs, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Civil Action No. 02-CV-2077 (ESH)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In this action, Plaintiffs challenge the government's refusal to disclose aggregate, statistical data concerning implementation of controversial new surveillance powers authorized by Congress in the wake of the terrorist attacks of September 11, 2001. These new powers raise potentially serious implications for constitutionally protected rights and, accordingly, there is widespread public concern about their scope and implementation.

Plaintiffs filed this litigation after defendant Department of Justice ("DOJ") failed to respond expeditiously to a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The request sought records related to Defendant's implementation of the USA PATRIOT Act ("Patriot Act" or "Act"), Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001), legislation that dramatically expanded the government's authority to engage in intrusive surveillance of people living in the United States. The records sought are critical to the public's ability to evaluate the import of the new surveillance powers, to determine whether the government is using the new powers appropriately, to determine whether the new powers should be renewed before they sunset in 2005, and to determine whether the public should support further expansion of the government's surveillance authority.

While the DOJ has now released a number of records in response to Plaintiffs' request, it has asserted that certain responsive records are exempt from disclosure. Defendant moved for summary judgment by motions filed on January 24 and March 7. Plaintiffs now oppose Defendant's motion for summary judgment and cross-move for summary judgment on the ground that Defendant has failed to meet its burden under the FOIA to withhold the disputed records.

FACTUAL AND PROCEDURAL BACKGROUND

The Patriot Act expands the government's surveillance authority in a number of ways, principally through amendments to the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801 *et seq*. Section 206 of the Patriot Act, for example, amends FISA to allow "roving" electronic surveillance. The provision essentially allows the FBI to monitor any communications device used by a surveillance target, even if it cannot specify in advance which devices the target will use. Section 214 of the Act allows "pen register" and "trap and trace" devices to be used against Americans who are not suspected of criminal activity or of association with a foreign power. Section 215 of the Act allows the FBI to require any person or entity to produce "any tangible thing," so long as the request is related to an ongoing foreign-intelligence investigation. Here, again, the FBI need not show any individualized suspicion that the target is engaged in criminal activity or associated with a foreign power. Section 213 amends the Federal Rules of Criminal Procedure to allow "sneak-and-peek" searches – that is, secret searches. Notice can be delayed until long after a search has been executed. In sum, the Patriot Act's surveillance provisions effect a dramatic expansion in the government's ability clandestinely to monitor people living in the United States, including citizens who are not suspected of contravening any law or of acting on behalf of a foreign power.[1]

Congress has made repeated efforts – though only partially successful ones – to oversee the DOJ's implementation of the Patriot Act. For example, various congressional committees have conducted briefings and hearings on the issue. *See* FBI Oversight in the 107th Congress by the Senate Judiciary Committee: FISA Implementation Failures, An Interim Report by Senators Patrick Leahy, Charles Grassley & Arlen Specter (February 2003) (hereinafter, "Feb. 2003

[1] Plaintiffs described the Patriot Act's surveillance provisions at greater length in their Motion for Preliminary Injunction filed in this case on November 13, 2002.

Leahy Report"), at 9-10.[2] In addition, various congressional committees have submitted to the DOJ both written and oral requests for information. *See id*. Particularly relevant to this litigation, the House Judiciary Committee asked the DOJ in June 2002 to respond in writing to fifty questions concerning the DOJ's implementation of the Act. Jaffer Decln., Ex. 12.[3] The House Judiciary Committee posed a number of "follow-up" questions in subsequent letters and the Senate Judiciary Committee posed an additional 43 questions in letters of its own. *See* Feb. 2003 Leahy Report, at 10.

The DOJ has refused to cooperate fully with these congressional oversight efforts. Of the 93 questions posed by the Senate Judiciary Committee, 37 remain unanswered. *See id.* While the DOJ eventually answered the 50 questions posed by the House Judiciary Committee's June 2002 letter, it declared many of the answers classified and insisted that they be provided not to the House Judiciary Committee but rather to the House Intelligence Committee, which had not sought the information and did not plan to oversee the implementation of the Act.[4] Moreover, the DOJ furnished these classified answers ("Classified Answers") only after the Chairman of the House Judiciary Committee threatened to subpoena the Attorney General in order to obtain the requested information.[5]

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[2] The Feb. 2003 Leahy Report is available online at http://www.fas.org/irp/congress/2003_rpt/fisa.pdf.

[3] References herein to the Jaffer Declaration refer to the Declaration of Jameel Jaffer submitted in connection with Plaintiff's Motion for Preliminary Injunction filed in this litigation on November 13, 2002.

[4] *See* Adam Clymer, *Justice Dept. Balks at Effort to Study Antiterror Powers*, New York Times (August 15, 2002) (noting Senate Judiciary Chairman Patrick J. Leahy's observation that "I have never known an administration that is more difficult to get information from.").

[5] *See* Audrey Hudson, *Ashcroft threatened with Hill subpoena*, Washington Times (Aug. 21, 2002) (noting Chairman Sensenbrenner's comment that he would "start blowing a fuse" if the DOJ did not provide answers by Labor Day). Chairman Sensenbrenner was ultimately provided at least some of the information that the DOJ earlier provided to the Intelligence

The Feb. 2003 Leahy Report cited above – a bipartisan report issued by senior members of the Senate Judiciary Committee – expressed deep frustration with the DOJ's refusal to submit to congressional oversight:

> [W]e are disappointed with the non-responsiveness of the DOJ and FBI. Although the FBI and the DOJ have sometimes cooperated with our oversight efforts, often, legitimate requests went unanswered or the DOJ answers were delayed for so long or were so incomplete that they were of minimal use in the oversight efforts of this Committee. The difficulty in obtaining responses from DOJ prompted Senator Specter to ask the Attorney General directly, "how do we communicate with you and are you really too busy to respond?"

Feb. 2003 Leahy Report, at 10. With respect to the Judiciary Committees' written questions in particular, the report noted:

> Unfortunately, the [DOJ] refused to respond to . . . many of these legitimate questions. Indeed, it was only after [House Judiciary Committee] Chairman Sensenbrenner publicly stated that he would subpoena the material that the Department provided any response at all to many of the questions posed, and to date some questions remain unanswered. . . . In addition, the DOJ attempted to respond to some of these requests by providing information not to the Judiciary Committees, which had made the request, but to the Intelligence Committees. Such attempts at forum shopping by the Executive Branch are not a productive means of facilitating legitimate oversight.

Id. at 10.[6] The report concluded:

> In . . . these instances, and in others, the DOJ and FBI have made exercise of our oversight responsibilities difficult. It is our sincere hope that the FBI and DOJ will reconsider their approach to congressional oversight in the future. The Congress and the American people deserve to know what their government is doing.

Id. at 11 (footnote omitted).

Committee. *See* Dan Eggen, *Justice Made Limited Use of New Powers, Panel Told*, Washington Post (Oct. 18, 2002).

[6] The report also noted that the DOJ "repeatedly refused" to provide members of the Senate Judiciary Committee with a recent decision of the Foreign Intelligence Surveillance Court, even though "the opinion, which was highly critical of aspects of the FBI's past performance on FISA warrants, was not classified and bore directly upon the meaning of provisions in the [Patriot Act] authored by Members of the Judiciary Committee." Feb. 2003 Leahy Report, at 10.

The public is entitled to know how the DOJ is using the vast surveillance powers that the Patriot Act authorizes. The Feb. 2003 Leahy Report noted that past FBI abuses have come to light only after "extended periods when the public and the Congress did not diligently monitor the FBI's activities." *Id*. at 5 (emphasis added). It emphasized that statutory reporting requirements, which are very limited, "are no substitute . . . for the watchful eye of the public." *Id*. at 13. It stated, "[p]ublic scrutiny and debate regarding the actions of government agencies as powerful as the DOJ and FBI are critical to explaining actions to the citizens to whom these agencies are ultimately accountable." *Id*. at 5. Like the senior members of the Senate Judiciary Committee, Plaintiffs believe that public scrutiny is essential to ensuring that the DOJ does not again engage in the kinds of abuses that undermined our democracy in the past. *See generally* Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Final Report, S. Rep. No. 755, 94th Cong., 2d Sess., Book II (1976) (hereinafter, "Church Committee Report").

Plaintiffs filed their FOIA request in August 2002. *See* Jaffer Decln., Ex. 1. The request sought aggregate, statistical data and other policy-level information that, if disclosed, would allow the public to evaluate the new powers conferred by the Patriot Act and the manner in which the government has used them. The request did *not* seek the release of records pertaining to particular terrorism or criminal investigations. Nor did it seek the release of other information that could plausibly jeopardize national security or any other government interest. Essentially, the request sought three categories of records. First, it sought all records prepared or collected by the DOJ in connection with the Classified Answers. *See id.* at 1-2. As discussed below, Plaintiffs believe that these answers were improperly classified. Second, it sought policy directives and other guidance issued by the DOJ regarding the use of certain Patriot Act

surveillance authorities. *See id*. at 2. Finally, it sought records containing aggregate, statistical information indicating the DOJ's reliance on the Act's surveillance provisions. *See id*. at 2-4. By letter dated September 3, 2002, Defendant agreed to provide expedited processing of Plaintiffs' request. *See* Jaffer Decln., Ex. 3.

On October 16, approximately two months after the filing of Plaintiffs' FOIA request, Defendant informed Plaintiffs that it had not yet completed searching for responsive records. *See* Jaffer Decln. ¶ 9. Plaintiffs initiated this action on October 24. Following the commencement of this action, Plaintiffs again attempted to secure from Defendant a schedule for the processing of their request. *Id*. ¶¶ 12-20. Defendant refused to commit to such a schedule, however, and on November 13 Plaintiffs filed a Motion for Preliminary Injunction requesting this Court to require Defendant to process their request by a date certain. At a hearing before this Court on November 26, Plaintiffs withdrew their Motion when Defendant agreed to process their request by January 15, 2003. Defendant in fact requested three separate extensions and did not complete the processing of Plaintiffs' request until March 3.[7]

MATTERS REMAINING IN ISSUE

Defendant has identified 391 pages as responsive to Plaintiffs' request. The universe of responsive documents is limited because Plaintiffs sought only those records necessary to the public's ability to understand the import of new surveillance provisions. From the outset, Plaintiffs have made clear that they do not seek records pertaining to particular criminal or

[7] Plaintiffs consented to the first extension because Defendant cited "pressing workload concerns of the attorneys and staff . . . working on this case." Plaintiffs consented to the second extension because Defendant stated that it had located approximately 500 pages of additional responsive records that could not be processed in the time period to which Defendant had earlier committed. (After Plaintiffs consented to the extension, Defendant determined that only 79 of the 500 pages were responsive.) Plaintiffs reluctantly consented to the third extension because they concluded that opposing it would cause more delay than was sought by the motion.

foreign intelligence investigations, whether completed or ongoing. Nor do Plaintiffs seek the kind of general information that, if disclosed, could plausibly undermine the effectiveness of new surveillance tools. Thus, Plaintiffs do not contest, for example, the government's reliance on Exemption 1 to protect records that indicate the extent to which individual FBI offices have relied on particular surveillance tools. Plaintiffs seek only aggregate, statistical data and other policy-level information that would help the public understand how new surveillance powers are being used.

Plaintiffs have made every reasonable effort to narrow the scope of this litigation. As detailed below, they have completely removed from dispute all materials withheld under Exemptions 2, 6, and 7. They have also removed from dispute substantial portions of the material withheld under Exemptions 1 and 5. Plaintiffs challenge the withholding only of those records that are critical to the public's ability to understand the import of new surveillance authorities.

I. Office of Information and Privacy

The Office of Information and Privacy ("OIP") relies on Exemption 5 to justify the withholding of limited portions of twenty-six pages. *See* OIP/OIPR Memorandum in Support of Summary Judgment, p.18; Second Pustay Decln. ¶ 12. As discussed in more detail below, Plaintiffs challenge the withholding of these records insofar as they include statistical or other factual material that can reasonably be segregated from material that is deliberative and predecisional.[8]

[8] By letter dated January 15, OIP stated that it had located 166 pages responsive to Plaintiffs' request. *See* Second Pustay Decln., Ex. A. 108 pages were released without excision, and 52 were released with excisions made pursuant to Exemptions 5, 6, and 7. The remaining 6 pages were referred to OIPR for review. Plaintiffs informed Defendant by letter dated January 17 that they would not challenge OIP's invocation of Exemptions 6 or 7, but that they intended

II. Office of Intelligence Policy and Review

The Office of Intelligence Policy and Review ("OIPR") relies on Exemption 1 to justify the withholding of two documents in their entirety. *See* OIP/OIPR Memorandum in Support of Summary Judgment, p.12; Baker Decln. ¶ 13. As discussed in more detail below, Plaintiffs challenge the withholding of this material insofar as it includes statistical information indicating the extent to which the government has relied on particular surveillance tools. OIPR relies on Exemption 5 to justify the withholding of six documents in their entirety and portions of eighteen additional documents. *See* OIP/OIPR Memorandum in Support of Summary Judgment, p.17; Baker Decln. ¶ 24. As discussed in more detail below, Plaintiffs challenge the withholding of these records insofar as they include statistical or other factual material that can reasonably be segregated from material that is deliberative and predecisional.[9]

III. Federal Bureau of Investigation

The FBI relies on Exemption 1 to justify the withholding of portions of fourteen pages. *See* FBI Memorandum in Support of Summary Judgment, p.5. As discussed in more detail below, Plaintiffs challenge the withholding of this material insofar as it includes statistical

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to challenge OIP's reliance on Exemption 5 and the adequacy of OIP's search. *See* Baker Decln., Ex. 4. Having now had an opportunity to review the Second Declaration of Melanie Ann Pustay, Plaintiffs now withdraw their challenge to the adequacy of OIP's search.

[9] By letter dated January 15, OIPR stated that it had located 34 documents (totaling 68 pages) in response to Plaintiffs' request. *See* Baker Decln., Ex. 1. Of the 34 documents, two were forwarded to OIP and the FBI for review and direct response to Plaintiffs; two were released in their entirety, 22 were released with excisions made pursuant to Exemptions 5 and 6, and eight were withheld in their entirety. *See id.* Of the eight documents withheld in their entirety, two (documents #12 and #34, according to the OIPR's numbering) were withheld on the basis of Exemption 1 and six were withheld on the basis of Exemptions 5 and/or 6. *See id.* Plaintiffs informed Defendant by letter dated January 17 that they would not challenge OIPR's invocation of Exemption 6, but that they intended to challenge OIPR's reliance on Exemptions 1 and 5 and the adequacy of OIPR's search. *See* Baker Decln., Ex. 4. Having now had an opportunity to review the Declaration of James A. Baker, Plaintiffs now withdraw their challenge to the adequacy of OIPR's search.

information indicating the extent to which the government has relied on particular surveillance tools. The FBI relies on Exemption 5 to justify the withholding of fifty pages in their entirety and portions of an additional ten pages. *See* FBI Memorandum in Support of Summary Judgment, pp.12, 15. As discussed in more detail below, Plaintiffs challenge the withholding of these records insofar as they include statistical or other factual material that can reasonably be segregated from material that is deliberative and predecisional.[10]

ARGUMENT

The animating principle behind the FOIA is to safeguard the American public's right to know "what their Government is up to." *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). The central purpose of the statute is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 242 (1978). Accordingly, the drafters of the FOIA intended "that the courts interpret this legislation broadly, as a disclosure statute and not as an excuse to withhold information from the public." Cong. Rec. 13654 (June 20, 1966) (statement of then-Rep. Donald Rumsfeld). The Supreme Court has stated that "[o]fficial

[10] The FBI has released 117 pages in their entirety or with excisions made in reliance on Exemptions 1, 2, 5, and 7. It has withheld 50 pages in their entirety. Plaintiffs informed Defendant by letter dated March 4 that they would not challenge the adequacy of the FBI's search and that they would not challenge most of the excisions. *See* FBI Memorandum in Support of Summary Judgment, Ex. A. However, Plaintiffs informed the FBI that they would challenge the invocation of Exemption 1 in pp. 1-5, 30, and 77-78 of Exhibit I and pp. 38-43 of Exhibit II; Exemption 5 in pp. 30-79 of Exhibit I and pp. 36-37 of Exhibit II; and Exemption 2 in pp. 30-79 of Exhibit I and pp. 54-57 and 71-74 of Exhibit II. *See id.* (References to the FBI Exhibits herein are references to the Exhibits to the Second Revised Declaration of Christine Kiefer.) Having now had an opportunity to review the Revised Second Declaration of Christine Kiefer, Plaintiffs now withdraw their challenge to the FBI's reliance on Exemption 2.

information that sheds light on an agency's performance of its statutory duties falls squarely within [the] statutory purpose." *Reporters Committee for Freedom of the Press*, 489 U.S. at 773.

The FOIA's right of access is particularly important in times of crisis, when an informed electorate is essential to ensuring that the government responds effectively and constitutionally to the most serious challenges. Thus, this Court recently wrote:

> Difficult times such as these have always tested our fidelity to the core democratic values of openness, government accountability, and the rule of law. The Court fully understands that the first priority of the executive branch in a time of crisis is to ensure the physical security of its citizens. By the same token, the first priority of the judicial branch must be to ensure that our Government always operates within the statutory and constitutional constraints which distinguish democracy from dictatorship.

Center for National Security Studies v. United States Department of Justice, 215 F.Supp.2d 94, 96, *order stayed during pendency of appeal*, 217 F.Supp.2d 58 (D.D.C. 2002).

I. Disclosure of the withheld records is in the public interest

Plaintiffs seek the disclosure of records that describe, in the most general terms, the DOJ's reliance on new surveillance powers. These records are of pressing concern to the public for a number of reasons.

First, they would help the public understand the government's policies in an area of critical importance. *See* H.R. Rep. No. 89-1497 (1966) (submitted to accompany the proposed FOIA) ("A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. A danger signal to our democratic society in the United States is the fact that such a political truism needs repeating."). While it is widely understood that FISA allows the government to conduct intrusive surveillance of people who are not suspected of any crime, it is impossible to determine from FISA's language alone how extensively the government has relied on the statute. It is impossible to

determine, for example, how extensively the government has relied on FISA in order to intercept the telephone or electronic communications of United States citizens, or how often it has subjected a person to surveillance solely because of his or her engagement in activity protected by the First Amendment. Without disclosure of the records sought by Plaintiffs, Americans will simply not know how the government has exercised unprecedented surveillance authority.

Second, disclosure of the records sought would help the public determine whether the new surveillance powers should be permanent. Many of the Patriot Act's surveillance provisions sunset in 2005. *See* Patriot Act, § 224. The public cannot assess whether these powers should be renewed without knowing how the powers have been used and what effect they have had on individual rights. *See* Feb. 2003 Leahy Report, at 7 ("[V]igilant oversight" is required in order to determine whether "the FBI needed the increased powers in the first place" and whether the FBI is "effectively and properly using these new powers").

Third, disclosure of the records sought would help the public determine whether the government should be given even more extensive surveillance powers. The Senate Judiciary Committee members' February 2003 report noted that "shortly after the [Patriot] Act had been signed by the President on October 26, 2001, DOJ began to press the Congress for additional changes to relax FISA requirements." Feb. 2003 Leahy Report, at 7. One of these proposals would have expanded FISA's definition of "foreign power" to include individual, non-United States persons engaged in international terrorism. *See id*. Other proposals, advanced in draft legislation publicized in February, would make even more sweeping changes, including substantially expanding the FBI's authority to conduct surveillance without prior judicial

approval.[11] The public cannot assess whether these changes are appropriate if it is kept in the dark about the use of existing surveillance powers. Notably, the Feb. 2003 Leahy Report suggests that the Attorney General has *not* made the case for expanded power. In discussing the proposal to expand the definition of "foreign power," the report observed that, according to the Attorney General,

> this proposal was to address the threat posed by a single foreign terrorist without an obvious tie to another person, group, or state overseas. Yet, when asked to "provide this Committee with information about specific cases that support your claim to need such broad new powers," DOJ was silent in its response and named no specific cases showing such a need, nor did it say that it could provide such specificity even in a classified setting. In short, DOJ sought more power but was either unwilling or unable to provide an example as to why.

Feb. 2003 Leahy Report, at 7 (footnote omitted). Plaintiffs believe that the public is entitled to basic information that would allow it to determine whether the Attorney General's pursuit of broader surveillance authority is justified.

Finally, disclosure of the records sought would serve to reassure the public that the FBI has not abused its new surveillance powers. The Church Committee, which documented FBI surveillance before the passage of the FISA in 1978, summarized its findings in this way:

> Too many people have been spied upon by too many government agencies and too much information has been collected. The government has often undertaken the secret surveillance of citizens on the basis of their political beliefs, even if those beliefs posed no threat of violence or illegal acts on behalf of a hostile foreign power. . . . Investigations of groups deemed potentially dangerous – and even of groups associated with potentially dangerous organizations – have continued for decades, despite the fact that those groups did not engage in unlawful activity. Groups and individuals have been harassed and disrupted because of their political views and their lifestyles.

Church Committee Report, at 5. It is only by holding the DOJ accountable to the public that Americans can be assured that such abuse will not recur. *See* Feb. 2003 Leahy Report, at 5

[11] The draft Domestic Security Enhancement Act is available online at http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_1.pdf.

(noting that, historically, FBI abuse of surveillance authorities has occurred "after extended periods when the public and the Congress did not diligently monitor the FBI's activities"). Disclosure of the records sought by Plaintiffs could serve to reassure the public that the FBI has used new surveillance authorities to protect national security and not for illegitimate purposes. Indeed, in granting Plaintiffs' request for expedited processing, Defendant itself acknowledged that Plaintiffs' FOIA request concerns a matter "in which there exist possible questions about the government's integrity which affect public confidence." Jaffer Decln., Ex. 3, p.1.

II. Defendant improperly asserts Exemption 1

Exemption 1 applies to records that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). The government's decision to classify documents withheld in reliance on Exemption 1 is subject to *de novo* review. *See, e.g., Goldberg v. United States Department of State*, 818 F.2d 71, 77 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 904 (1988). The "salient characteristics of *de novo* review in the national security context" are:

> (1) The government has the burden of establishing an exemption; (2) The court must make a *de novo* determination; (3) In doing this, it must first accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record; [and] (4) Whether and how to conduct an *In camera* examination of the documents rests in the sound discretion of the court, in national security cases as in all other cases.

Ray v. Turner, 587 F.2d 1187, 1194 (D.C. Cir. 1978) (internal quotation marks omitted).

While the court is required to accord "substantial weight" to an agency's affidavit concerning the details of the classified status of disputed records, the court must do this "without relinquishing [its] independent responsibility." *Goldberg*, 818 F.2d at 77; *see also Ray. v. Turner*, 587 F.2d at 1194 (noting that FOIA drafters "stressed the need for an objective,

independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security"). Thus, "conclusory and generalized allegations of exemptions" are not acceptable. *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). Further, the agency must demonstrate "a logical connection between the information and the claimed exemption." *Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982); *see also Goldberg,* 818 F.2d at 78*; Abbotts v. Nuclear Regulatory Commission,* 766 F.2d 604, 606 (D.C. Cir 1985)*; Center for National Security Studies*, 215 F.Supp.2d at 102 (in Exemption 7 case, finding that government had "not met its burden of establishing a 'rational link' between the harms alleged and disclosure").

Neither OIPR nor the FBI has met its burden with respect to the challenged withholdings.

a. OIPR

OIPR has invoked Exemption 1 to justify the withholding of two documents. The first is a three-page undated document that contains classified answers to the House Judiciary Committee's June 2002 oversight letter. The second is a seven-page excerpt from the Attorney General's semi-annual reports to Congress on FISA. *See* Baker Decln., Ex. 2, pp. 7, 9.

The Declaration of James A. Baker, which OIPR proffers in support of its withholdings, simply fails to meet the burden imposed by the FOIA. Indeed, the Baker Declaration acknowledges that the information contained in the withheld documents consists almost entirely of aggregate, statistical information indicating the frequency with which the FBI has relied on particular surveillance authorities. *See* Baker Decln. ¶¶ 15, 16. The documents do not identify particular surveillance targets – past, present, or future – or discuss particular foreign-intelligence or criminal investigations. Nor do they indicate how heavily the FBI plans to rely on particular

surveillance authorities in the future. (Presumably, the FBI's decision to rely on a particular surveillance tool in any given investigation is based on the nature of the investigation, and not on the extent to which the FBI has relied on that surveillance tool previously.) Rather, the documents provide information *in the most general possible terms* indicating the extent to which the FBI relied on particular surveillance tools *in the past*. It is implausible that the public disclosure of the withheld documents could jeopardize national security. While OIPR invokes national security to justify the withholding, there is no "logical connection between the information and the claimed exemption." *Salisbury*, 690 F.2d at 970.

Defendant's assertion of Exemption 1 in this case is founded on Executive Order 12958, which allows the classification of information that concerns "intelligence activities (including special activities), intelligence sources or methods, or cryptology." Exec. Order No. 12958, Sec. 1.5(c). The government's use of FISA surveillance authorities, however, goes far beyond intelligence gathering. The Attorney General recently argued before both the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review that the Patriot Act allows the government to rely on the electronic surveillance and physical search provisions of FISA not only in foreign-intelligence investigations but even in investigations whose primary purpose is ordinary law enforcement. *See generally In re Sealed Case*, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev., 2002); *In re All Matters Submitted to the Foreign Intelligence Surveillance Court* (Foreign Int. Surv. Ct., 2002). Indeed, a document produced by Defendant in response to the FOIA request at issue here specifically advises the FBI that these FISA tools can be used in investigations whose primary purpose is law enforcement. *See* Memorandum of Attorney General John Ashcroft to Director, FBI (March 6, 2002) (attached hereto as Exhibit 1), at 2 ("The USA Patriot Act allows FISA to be used for 'a significant purpose,' rather than the

primary purpose, of obtaining foreign intelligence information. Thus it allows FISA to be used primarily for a law enforcement purpose . . . ."). It is also clear that FISA's "pen register" and "business records" provisions are used in criminal investigations; after the Patriot Act, the FBI can invoke these provisions in any investigation – including any criminal investigation – related to international terrorism. *See* 50 U.S.C. §§ 1842, 1861. In fact, as noted above, the FBI may now invoke the pen-register and business-records provisions even against people who are suspected neither of criminal activity nor of acting on behalf of a foreign power. (The FBI could, for example, order a library to identify every patron who had borrowed a particular book, or order an internet service provider to identify every person who had visited a particular website.) Given the sweeping changes to FISA effected by the Patriot Act, Plaintiffs submit that the government cannot reasonably claim that an investigation is intelligence-related simply because the investigation happens to be conducted under FISA.

Historically, the public has had access to thorough information about the government's use of surveillance in law enforcement investigations. *See, e.g.,* 18 U.S.C. § 2519(2) (requiring the Attorney General to report, among numerous other things, the number of wiretap orders applied for and the number obtained; the number of extensions applied for and the number obtained; the period of interceptions authorized by each order; the predicate offense specified in each order; the identity of the applying investigative or law enforcement officer; and the nature of the facilities from which or the place where communications were to be intercepted). Notably, the information reported under section 2519 included – and still includes – statistics concerning surveillance in law enforcement investigations related to national security. Until the Patriot Act, surveillance in such investigations was uniformly conducted under Title III, and the government accounted for such surveillance in its section 2519 reports. Defendant should not be

permitted to withhold information about the use of surveillance in criminal investigations – information to which the public has had access for at least 35 years – simply by conducting the surveillance under FISA rather than Title III.

In asserting that the public does not have a right to know how new surveillance powers have been used, OIPR points to FISA's limited reporting requirements, which require the Attorney General to disclose certain statistics but make no mention of the kinds of statistics that OIPR seeks to withhold in this case. *See* Baker Decln. ¶¶ 18-19. FISA's reporting requirements, however, do not limit the information that can be disclosed to the public. FISA ensures a degree of FBI accountability through two kinds of reporting mechanisms. First, it requires the Attorney General annually to submit a report to the Administrative Office of the United States Court and to Congress, indicating with respect to the preceding calendar year (a) the total number of applications made for orders and extensions of orders approving electronic surveillance, and (b) the total number of such orders and extensions either granted, modified, or denied. *See* 50 U.S.C. § 1807. Second, FISA requires the FBI to, on a semiannual basis, "fully inform" the House and Senate Intelligence Committees concerning the use of each of FISA's main surveillance authorities, and provide to both the Intelligence and Judiciary Committees certain additional statistics concerning the use of those authorities. *See* 50 U.S.C. §§ 1808, 1826, 1846, 1862. Contrary to OIPR's assertion, neither of the reporting requirements creates an outside limit on public disclosure about FBI surveillance. Nowhere in the statute is there language suggesting that the reporting requirements are intended to *foreclose* the public from obtaining information. Unsurprisingly, the Feb. 2003 Leahy Report discussed above specifically emphasized that FISA's reporting provisions create a floor, not a ceiling, on public disclosure concerning the government's use of FISA:

> We are . . . conscious of the extraordinary power FISA confers on the Executive branch. FISA contains safeguards, including judicial review by the FISA Court and certain limited reporting requirements to congressional intelligence committees, to ensure that this power is not abused. Such safeguards are no substitute, however, for the watchful eye of the public and the Judiciary Committees, which have broader oversight responsibilities for DOJ and the FBI.

Feb. 2003 Leahy Report, at 13.[12]

FISA simply does not address the question of which of the reports, or which parts of the reports, should be withheld from the public. Plaintiffs readily acknowledge, of course, that some of the information that the Attorney General is likely to provide to the Intelligence Committees will be highly sensitive and appropriately withheld from public release. For example, the reports might identify current surveillance targets or discuss plans for future investigations. Plaintiffs recognize that, to the extent the semiannual reports include this kind of information, the reports are properly withheld under Exemption 1. It does not follow, however, that *everything* included in the semiannual reports can be withheld. The FOIA requires the disclosure of "[a]ny reasonably segregable portion" of documents containing exempt material. 5 U.S.C. § 552(b). Given that the semi-annual reports must "fully inform" the Intelligence Committees about the use of FISA surveillance authorities, it is a matter of common sense that they will include, in addition to classified information, information that can be – and must be, under the FOIA – released to the public. FISA itself does not make any attempt to draw a line between the one kind of information and the other. That decision is left to the executive branch in the first

[12] A bill recently introduced by Senators Leahy, Grassley, and Specter would raise this floor by requiring the Attorney General annually to issue a public report indicating, among other things, "the aggregate number of United States persons targeted for orders issued under [FISA], including those targeted for – (A) electronic surveillance . . .; (B) physical searches . . .; (C) pen registers . . .; [and] (D) access to records . . . ." S. Res. 436, 108th Cong. (2003). According to its sponsors, the bill would make it easier for Congress and the public to "assess over time whether the government has turned more of its powerful surveillance techniques on its own citizens, as opposed to non-U.S. persons." 149 Cong. Rec. S2704 (daily ed. Feb. 25, 2003) (statement of Sen. Leahy).

instance, and to the courts, which, on a challenge such as the present one, exercise *de novo* review.[13]

If Congress had intended to foreclose public access to FISA statistics other than those included in the Section 1807 annual report, it is difficult to understand why it would not have done so in clear language. In other contexts, Congress has unambiguously indicated its intent that particular information be exempt from disclosure under FOIA. *See, e.g.*, Consolidated Appropriations Resolution, 2003 (H.R. J. Res. 2, 108th Cong., 1st Sess. (enacted)), § 644 (stating that "[n]o funds appropriated under this Act . . . shall be available to take any action based upon any provision of 5 U.S.C. § 552 with respect to records collected or maintained pursuant to 18 U.S.C. §§ 846(b), 923(g)(3) or 923(g)(7)"). Congress could easily have used similar language in FISA or in the Patriot Act, had it intended categorically to exempt from disclosure under FOIA the kinds of statistics that Defendant seeks to withhold here.

OIPR defends its invocation of Exemption 1 by summoning from obscurity a twenty-year-old document in which the ACLU argued that Congress should require the regular public disclosure of additional FISA statistics, including "the number of U.S. persons who have been FISA surveillance targets." Baker Decln. ¶ 20. The Senate Intelligence Committee ultimately rejected the proposal, devoting a short paragraph to it in a 1984 report. *See* S. Rep. 98-660, at 25

[13] Notably, the statistics that the Attorney General is required to report concerning physical searches, pen registers, and business records, *see* 50 U.S.C. §§ 1826, 1846, and 1862, which OIPR argues must be withheld from the public, are almost *identical* to the statistics concerning electronic surveillance that the Attorney General routinely reports publicly, *see id.* § 1807, except that sections 1826, 1846, and 1862 pertain to different surveillance tools. *Compare, e.g., id*. § 1846 (requiring Attorney General to provide to Intelligence and Judiciary Committees a report stating the number of "pen register" and "trap and trace" applications submitted, and the number granted, modified, or denied) *with id*. § 1807 (requiring Attorney General to report total number of electronic surveillance orders submitted, and the number granted, modified, or denied). It is difficult to see why national security would require the statistics identified in sections 1826, 1846, and 1862 to be withheld from the public when the virtually identical statistics identified in section 1807 are routinely published.

(1984). The 1984 report has no application to the present dispute, however, because the FISA that exists now bears virtually no resemblance to the FISA that existed in 1984. For example, FISA as originally enacted did not permit physical searches. The physical search authority was added in 1994. *See* Pub. L. 103-359, Title VIII, § 807(a)(3), Oct. 14, 1994, 108 Stat. 3443. Nor did FISA as originally enacted permit the FBI to install pen registers. That authority was added in 1998. *See* Pub. L. 105-272, Title VI, § 601(2), Oct. 20, 1998, 112 Stat. 2405. Nor, finally, did FISA as originally enacted permit the FBI to order the production of business records. That authority, too, was added in 1998, *see* Pub. L. 105-272, Title VI, § 602, Oct. 20, 1998, 112 Stat. 2411. FISA as it exists today is *vastly* more expansive it was in 1978 or even 1984.

FISA has changed dramatically even in the last two years. As noted above, the Patriot Act expanded the FBI's authority to conduct physical and electronic surveillance under FISA. *See* Patriot Act, § 218. It made it easier for the FBI to obtain pen register orders against people who are not suspected of criminal activity or of acting on behalf of a foreign power. *See id*. § 214. It also repealed the relatively limited business-records provision in favor of a much broader provision that allows the FBI to obtain any "tangible thing" pertaining to anybody at all, so long as the FBI certifies that the request is related to an ongoing foreign-intelligence investigation. *See id.* § 215. In sum, the Patriot Act radically expanded a statute that, even before its recent amendment, was far more expansive than the statute enacted by Congress in 1978.

Not only are the statute's surveillance authorities significantly more diverse and intrusive than they were when the statute was first enacted, but the Attorney General relies on those authorities far more heavily. According to the Attorney General's annual reports submitted under 50 U.S.C. § 1807, the FBI obtained fewer than two hundred FISA surveillance orders in 1979. In calendar 2000, it obtained almost a thousand. *See* Letter of John Ashcroft, Attorney

General, to L. Ralph Mecham, Director, Administrative Office of the United States Courts (April 27, 2001).[14] Indeed, over the last few years, the government has conducted approximately twice as much electronic surveillance under FISA as it has conducted under Title III. *Compare id. with* Report of the Director of the Administrative Office of the United States Courts on Applications for Orders Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications (April 2001).[15] Given the vast differences between FISA as it exists today and FISA as it existed in 1984, and given the dramatic expansion in the Attorney General's reliance on the statute, the Senate Intelligence Committee's determination that routine publication of FISA statistics was unnecessary *in 1984* simply has no bearing on whether such statistics must be disclosed under the FOIA today.

Defendant's reliance on the opinions of the 1984 Senate Intelligence Committee is especially inappropriate given that the *current* Senate Intelligence Committee, in a joint report with its House counterpart, recently recommended that Congress reconsider "the statutes, policies and procedures that govern the national security classification of intelligence information and its protection from unauthorized disclosure." Recommendations of the Final Report of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence Joint Inquiry Into the Terrorist Attacks of September 11, 2001 (Dec. 10, 2002), at 13.[16] The Intelligence Committees noted in particular the concern that the classification process is being used as "a shield to protect agency self-interest." *Id*. The Feb.

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[14] The Attorney General's reports under section 1807 are available online at http://www.usdoj.gov/04foia/readingrooms/2000fisa-ltr.pdf.

[15] The Title III report is available online at http://www.uscourts.gov/wiretap00/contents.html.

[16] The Intelligence Committees' Joint Report is available online at <http://intelligence.senate.gov/recommendations.pdf>.

2003 Leahy Report noted similar concerns. *See* Feb. 2003 Leahy Report, at 35-36. Executive Order 12958 expressly provides that "[i]n no case shall information be classified in order to (1) conceal violations of law, inefficiency, or administrative error; [or] (2) prevent embarrassment to a person, organization, or agency . . . ." Exec. Order 12958, Sec. 1.8(a).[17]

OIPR also defends its reliance on Exemption 1 by noting the government's "successful opposition" to a September 2002 proposal that would have required more thorough public reports on FISA surveillance. Baker Decln. ¶ 21. This argument is unpersuasive for at least two reasons. First, the proposal to which OIPR refers was advanced well before Congress learned the extent to which the FBI had been abusing its authority under FISA. Congress was simply not aware of recent FBI abuses until at least August 20, 2002, when the Foreign Intelligence Surveillance Court published an extraordinary opinion cataloguing FBI errors, misrepresentations, and omissions of material facts in "an alarming number of cases." *In re All Matters Submitted to the Foreign Intelligence Surveillance Court* (Foreign Int. Surv. Ct., 2002),

[17] OIPR's reliance on Exemption 1 is inappropriate for yet another reason. Since the Patriot Act was enacted, there has been considerable public concern about the possibility that the FBI is using new surveillance powers in ways that will stifle legitimate expressive and associational activity protected by the First Amendment. In response to public concern, the government has on numerous occasions made selective representations about the very information it now insists on withholding. *See, e.g.*, David Johnston & Don Van Natta, Jr., *Iraqis in U.S. being monitored*, New York Times (Nov. 17, 2002) (citing statements of "senior government officials" assuring the public that "thousands of Iraqi citizens and Iraqi-Americans" are under surveillance in the United States); Mark Sommer, *Big Brother at the Library*, Buffalo News (Nov. 11, 2002) (quoting FBI spokesperson's statement that Section 215 of the Patriot Act "hasn't been something widely used, if at all"); Peter Maller, *Terrorism measure worries librarians*, Milwaukee Journal Sentinel (July 8, 2002) (quoting FBI spokesperson's statement that "[n]o library searches using [Section 215] of the act have been conducted in Wisconsin"). It is well-settled that the government cannot selectively introduce information into the public domain and then refuse to release essentially the same information to the public. *See, e.g., Founding Church of Scientology of Washington, D.C. v. National Security Agency*, 610 F.2d 824, 831-32 (D.C. Cir. 1979); *Washington Post v. United States Department of Defense*, 766 F.Supp. 1, 9-10 (D.D.C. 1991); *see also Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) ("When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.").

reversed on other grounds, *In re Sealed Case*, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev., 2002). Second, it is simply not true that Defendant's objection to the proposal to strengthen FISA reporting requirements was "successful" in any meaningful sense of the word. As is noted above, Senators Leahy, Grassley, and Specter have recently proposed an amendment that would go significantly further than the proposal that Defendant "successfully" opposed. *See* S.Res. 436, 108th Cong. (2003).

For these reasons, OIPR's assertion of Exemption 1 is improper in this case.

b. FBI

The FBI has invoked Exemption 1 to withhold pages 1-5, 30, and 77-78 of Exhibit I, and pages 38-43 of Exhibit II. *See* FBI Memorandum in Support of Summary Judgment, p.5. Plaintiffs challenge the withholding of these records only insofar as the records indicate the total number of times the FBI has used particular surveillance and investigatory authorities during a specified time period. Plaintiffs do not challenge the withholding of records insofar as they contain more specific information about the use of particular surveillance authorities. As Plaintiffs have explained, the FOIA requires the disclosure of "any reasonably segregable portion" of documents containing exempt material. 5 U.S.C. § 552(b).

The FBI's boilerplate rationale for withholding aggregate, statistical information concerning FISA surveillance is that disclosure would

> (1) reveal the existence, methodology, and specific targets of national security interest; (2) reveal the nature, objective, and requirements, and scope of a specific FBI counterintelligence activity or method; (3) disclose the intelligence-gathering capabilities of the activity or method; and (4) provide an assessment of the intelligence source penetration during a specific period of time.

Revised Second Kiefer Decln., Ex. IV, p.3, 6, 8, 10, etc. Plaintiffs have addressed the insufficiency of this rationale above. The other arguments advanced by the FBI are directed at

justifying the withholding of more specific information whose non-disclosure Plaintiffs do not contest. *See, e.g.*, Revised Second Kiefer Decln., Ex. IV, p.2 (explaining rationale for non-disclosure of FISA file numbers and names of particular FBI field offices that originated FISA investigations).

For these reasons, FBI's assertion of Exemption 1 is improper in this case.

III. Defendant improperly asserts Exemption 5

Exemption 5 exempts from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). The Exemption incorporates privileges available to an agency in civil litigation, including the deliberative process privilege, which protects from mandatory disclosure documents that reflect predecisional deliberations. *See National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 149-50 (1975); *EPA v. Mink*, 410 U.S. 73, at 90-91 (1973). Importantly, the privilege protects only those documents that are both predecisional *and* deliberative. *See Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980). Thus, even if a document is predecisional, "the privilege applies only to the 'opinion' or 'recommendatory' portion . . . , *not to factual information* which is contained in the document." *Id.* at 867 (emphasis added); *see also ITT World Communications, Inc. v. FCC*, 699 F.2d 1219, 1236 (D.C. Cir. 1983). Facts in a predecisional document must be segregated and disclosed unless they are "inextricably intertwined" with exempt portions. *Ryan v. Department of Justice*, 617 F.2d 781, 790-91 (D.C. Cir. 1980) (internal quotation marks omitted); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242, 260 (D.C Cir. 1977).

Defendant has not met its burden with respect to the records it has withheld in reliance on Exemption 5.[18] Defendant simply makes no attempt to distinguish factual from deliberative material. Explaining its withholdings under Exemption 5, the FBI states:

> Also included . . . are two pages containing the notes and comments of the FBI's Deputy General Counsel Charles M. Steele . . . . These notes and comments are a collection of *statistics*, thoughts, ideas and proposals, and were prepared by Mr. Steele in order to formulate oral responses to Congressional requests for the FBI's feedback on the Patriot Act and potential future legislation.

FBI Memorandum in Support of Summary Judgment, p. 13 (emphasis added); *see also* Steele Decln. ¶ 9 ("Exemption 5 has also been invoked to protect a two-page document that contains my personal notes and comments . . . regarding how the various Patriot Act provisions have been used, *including certain statistics* . . . ." (emphasis added)).[19] Defendant has not released the referenced statistics, though they are clearly factual information outside the scope of the privilege.

The Second Declaration of Melanie Pustay, which OIP proffers in support of its reliance on Exemption 5, similarly fails to distinguish factual from deliberative material. The withheld

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[18] OIP invokes Exemption 5 with respect to excisions from 26 documents consisting principally of e-mail messages. OIP/OIPR Memorandum in Support of Summary Judgment, p.18; Second Pustay Decln. ¶ 12. OIPR invokes Exemption 5 with respect to 6 documents withheld in their entirety and to excisions in 18 other records. OIP/OIPR Memorandum in Support of Summary Judgment, p.17; Baker Decln. ¶ 24. The FBI invokes Exemption 5 with respect to pp. 30-79 of Exhibit 1 and pp. 36-37 of Exhibit II. FBI Memorandum in Support of Summary Judgment, pp. 12, 15. Plaintiffs do not challenge FBI's reliance on Exemption 5 with respect to pp. 54-57 and 71-74 of Exhibit II. Plaintiffs challenge Defendant's reliance on Exemption 5 only insofar as the withheld records include segregable factual information. Plaintiffs do not, however, challenge the withholding of disaggregated statistical information indicating the use of particular surveillance tools *by individual FBI field offices*.

[19] Disturbingly, the Revised Second Declaration of Christine Kiefer, which describes the same two-page document, makes no mention of statistics. It describes the document as containing "a collection of thoughts, discussions, ideas, proposals and proposed recommendations." Revised Second Kiefer Decln. ¶ 38.

documents are said to discuss the DOJ's response to the House Judiciary Committee's June 2002 oversight letter, and to address in particular:

> which Department components should be tasked with working on particular questions, *what the answers to the questions might consist of*, and what language should be used in the response letter.

Second Pustay Decln. ¶ 12 (emphasis added). Because the DOJ's answers to the House Judiciary Committee consisted in large part of statistical data, Plaintiffs believe that the documents withheld by OIP in reliance on Exemption 5 may include statistical information. Yet Defendant has not segregated this material from the material that is properly protected by the privilege.

Finally, the OIPR, too, fails to segregate factual material. The Declaration of James A. Baker states that the material withheld in reliance on Exemption 5 includes e-mails which discuss:

> Which Department components should be assigned to work on particular questions, *what approach should be taken in responding to the questions*, and what language should be used in the response letter.

Baker Decln. ¶ 24 (emphasis added). Plaintiffs believe that the documents withheld by OIPR may include statistical information. Again, however, Defendant has failed to segregate this material from the material that is actually protected by the privilege.

Defendant offers no reason for its failure to segregate factual information, other than a bare assertion that such factual information is itself deliberative. *See* Steele Decln. ¶ 11; Revised Second Kiefer Decln. ¶ 40. That bare assertion does not sustain Defendant's burden under the

FOIA. *See, e.g., Mead Data Central, Inc.*, 566 F.2d at 260 (claims of non-segregability must be made with the same degree of detail as required for claims of exemption).[20]

The record shows that Defendant has improperly asserted Exemption 5 in this case to withhold segregable, factual information.

CONCLUSION

For the reasons given above, Defendant's motion for summary judgment should be denied and Plaintiff's cross-motion for summary judgment should be granted.

[20] While each of OIP, OIPR and the FBI submit boilerplate language suggesting that requiring them to disclose factual information could make it more difficult for them to fulfill their mandates in the future, *see* Revised Second Pustay Decln. ¶ 13; Baker Decln. ¶ 25; Second Kiefer Decln. ¶ 39, this Court has held that "[i]nformation that must be disclosed pursuant to FOIA becomes no less subject to disclosure simply because an obstinate agency claims that it will no longer do its job if required to make that information public." *Army Times Publishing Co. v. Department of the Air Force*, No. 90-1383 (D.D.C. Feb. 28, 1995).

Respectfully submitted,

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