**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Plaintiffs,

v.

FEDERAL BUREAU OF INVESTIGATION, *et al.*,

Defendants.

11 Civ. 7562 (WHP)

ECF Case

# MEMORANDUM OF LAW IN SUPPORT OF THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

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## PRELIMINARY STATEMENT

Defendants Federal Bureau of Investigation ("FBI") and United States Department of Justice ("DOJ") (together, the "Government"), by their attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submit this memorandum of law in support of their motion for summary judgment.

Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (collectively, "ACLU") brought this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The ACLU seeks records related to Section 215 of the USA PATRIOT Act, 50 U.S.C. § 1861(a)(1) ("Section 215"). The Court previously granted the Government's motion for partial summary judgment in this case and a related case brought by the New York Times. *See New York Times Co. v. DOJ*, 872 F. Supp. 2d 309 (S.D.N.Y. 2012). Subsequently, the parties filed motions intended to resolve the ACLU's claims regarding the remainder of the documents responsive to the ACLU's FOIA request.

However, in June 2013, as the parties were in the process of completing briefing on their motions for summary judgment, and following a series of unauthorized disclosures about intelligence-gathering activities conducted by the National Security Agency ("NSA"), the Government acknowledged the existence of, and certain details relating to, a counter-terrorism program designed to identify and exploit terrorist communications occurring within the United States. Under this program, which is conducted pursuant to Section 215 and orders of the Foreign Intelligence Surveillance Court ("FISC"), the NSA obtains and may review bulk telephony metadata—business records created by telecommunications service providers that include such information as the telephone numbers placing and receiving calls, and the time and

duration of those calls, but not their content. The Court recently upheld the lawfulness of this program in *ACLU v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013) (appeal docketed) .

Following the unauthorized disclosures, and after an interagency review process, the Director of National Intelligence ("DNI") made a series of discretionary decisions to acknowledge and declassify certain information concerning telephony metadata collection and other counter-terrorism activities, and, as a consequence, the Government has released to the public more than 2400 pages of declassified documents. Among those are over 1,000 pages produced to the ACLU. Nonetheless, many operational details related to specific applications of the intelligence sources and methods used by the United States to carry out its authority under Section 215 remain classified today. That is because exposure of those highly sensitive intelligence sources and methods to the United States' adversaries would risk serious, or in some cases, exceptionally grave damage to national security. As a result, the Government has continued to withhold certain information responsive to ACLU's FOIA request.

The ACLU has informed the Government that it now challenges only a certain category of withheld information responsive to its FOIA request. Specifically, the ACLU has narrowed its challenge to "fully withheld opinions or orders of the Foreign Intelligence Surveillance Court that relate to bulk collection of any information (i.e., not just telephony metadata)." Email, dated February 7, 2014, from Patrick Toomey, Esq., to Assistant U.S. Attorneys John Clopper and Emily Daughtry (attached as Exhibit A to the Declaration of Assistant U.S. Attorney John Clopper, dated April 4, 2014 ("Clopper Decl.")). As set forth below, and in the supporting declarations submitted in support of the Government's motion, the documents remaining at issue contain intelligence sources, methods, and activities and are currently and properly classified. As such, they are exempt from disclosure under FOIA Exemptions 1 and 3. In addition, with the

exception of one FISC opinion that is described in detail, any information about the remaining withheld documents - including the number of documents withheld - is itself classified and exempt from disclosure as well. The Court should therefore grant the Government summary judgment.

## FACTUAL BACKGROUND

### A. Section 215 of the USA PATRIOT Act

Section 215 – originally enacted on October 26, 2001 as part of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) – amended the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq*. ("FISA"). Section 215 authorizes the FISC, an Article III court composed of 11 appointed U.S. district judges, *see* 50 U.S.C. § 1803, to issue an order for the "production of any tangible things (including books, records, papers, documents, and other items) for an investigation [1] to obtain foreign intelligence information not concerning a United States person or [2] to protect against international terrorism." 50 U.S.C. § 1861(a)(1). The investigation must be authorized and conducted under guidelines approved by the Attorney General under Executive Order ("E.O.") 12333 (or a successor thereto), *id.* § 1861(a)(2)(A), (b)(2)(A), and the Government's application must include, among other things, a statement of facts showing that there are "reasonable grounds to believe that the tangible things sought are relevant" to the investigation in question, *id.* § 1861(b)(2)(A).

Information contained in the records received in response to a Section 215 order "concerning any United States person may be used and disclosed by [the Government] without the consent of [that] person only in accordance with . . . minimization procedures," adopted by the Attorney General and enumerated in the Government's application, that "minimize the retention, and prohibit the dissemination, of nonpublicly available information concerning

unconsenting United States persons consistent with the need . . . to obtain, produce, and disseminate foreign intelligence information." *Id.* § 1861(b)(2)(B), (g)(2)(A), (h). The FISC must find these requirements have been met before it issues the requested order, which must direct that the minimization procedures set forth in the application be followed. *Id.* § 1861(c)(1).

As initially enacted, Section 215 was set to expire on December 31, 2005. *See* USA PATRIOT Act § 224. Congress subsequently reauthorized Section 215 for limited periods of time on several occasions. *See* 50 U.S.C. § 1861 note. On May 26, 2011, Congress reauthorized Section 215 until June 1, 2015. *See* PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, 125 Stat. 216 (2011).

Under the telephony metadata collection program acknowledged by the DNI, since May 2006 the FBI has obtained orders from the FISC under Section 215 directing certain telecommunications service providers to produce to the NSA, on a daily basis, electronic copies of "call detail records" containing "telephony metadata," created by the recipient providers for calls to, from, or within the United States. *See ACLU v. Clapper,* 959 F. Supp.2d at 733-35. The NSA has then stored and queried the metadata for counter-terrorism purposes. Under the FISC's orders, the NSA's authority to continue the program expires after approximately 90 days and must be renewed. The FISC first authorized the program in May 2006, and since then has renewed the program over 35 times, under orders issued by at least 15 different FISC judges, most recently on March 28, 2014. *See* Joint Statement by Attorney General Eric Holder and Director of National Intelligence James Clapper on the Declassification of Renewal of Collection Under Section 215 of the USA PATRIOT Act (50 U.S.C. Sec. 1861) ("March 28 Joint Statement"), available at http://icontherecord.tumblr.com/ (last visited April 4, 2014).

The President has recently announced certain changes to the telephony metadata collection program, and Congress is considering further changes. In January 2014, the President announced that he was "ordering a transition" that will "end" the "bulk metadata program as it currently exists." Remarks by the President on Review of Signals Intelligence, http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence (last visited April 4, 2014). The President announced two immediate changes to the program: (1) limiting query results to identify only those phone calls within two hops of the terrorist-associated seed, and (2) requiring a judicial finding by the FISC that the reasonable, articulable suspicion standard was satisfied as to each seed being used to generate queries. Pursuant to and consistent with the President's direction, the DOJ asked the FISC to modify the orders under which the telephony metadata program is conducted, and on February 5, 2014, the FISC granted the Government's motion to implement those two changes to the metadata program. *See* http://www.uscourts.gov/uscourts/courts/fisc/br14-01-order.pdf (2/5/14 FISC Order) (last visited April 4, 2014).

In addition, on March 27, 2014, the President announced that, after considering the options presented to him by the U.S. intelligence community and the Attorney General, he had decided to seek legislation altering the bulk telephony metadata program under Section 215. Statement by the President on the Section 215 Bulk Metadata Program, http://www.whitehouse.gov/the-press-office/2014/03/27/statement-president-section-215-bulk-metadata-program (3/27 President Statement) (last visited April 4, 2014). Instead of the Government collecting telephony metadata and maintaining a database, the President called for legislation providing that telephony metadata should remain in the hands of telecommunications companies for the same length of time the data is retained by telecommunications companies

today. Under the proposal, the Government could obtain results from queries of that data pursuant to orders from the FISC directing the companies to identify contacts of seed identifiers. As the President indicated, the Government sought and obtained from the FISC a 90-day reauthorization of the existing Section 215 program, with the two modifications approved by the FISC in February. *See* March 28 AG-DNI Joint Statement.

**B. The ACLU's FOIA Request**

On May 31, 2011, the ACLU submitted a FOIA request to certain components of DOJ—the National Security Division ("NSD"), the Office of Information Policy ("OIP"), the Office of Legal Counsel ("OLC"), and the FBI—seeking "any and all records concerning the Government's interpretation or use of Section 215 . . ." ACLU Complaint ("Compl.") ¶¶ 22, 29-37. On August 22, 2011, NSD released three documents in response to the ACLU requests and stated that it was withholding additional documents in full. Hudson Decl. ¶ 11.

The ACLU filed its complaint in this action on October 26, 2011. Compl. ¶¶ 38-44. The parties subsequently moved for partial summary judgment relating to one document, and the Court upheld the Government's withholding of that document in its decision in *New York Times v. DOJ,* 872 F. Supp. 2d 309 (S.D.N.Y. 2012). [1] After the ACLU narrowed its request by stipulation, the Government finalized its response to the ACLU's FOIA request and released

[1] In *New York Times*, the Court upheld the Government's decision to withhold from the New York Times and the ACLU a classified report to Congress from the Attorney General and the DNI relating to the bulk telephony metadata collection program authorized by Section 215 of the USA PATRIOT Act, 50 U.S.C. § 1861(a)(1). *See New York* Times, 872 F. Supp. 2d at 312. That report was the only document sought by the New York Times, but was just one of the documents responsive to the ACLU's FOIA request. *Id.* at 313. As discussed *infra*, the Government has since declassified the report in part. It was released to the public in redacted form on July 31, 2013. *See* DNI Clapper Declassifies and Releases Telephone Metadata Collection Documents, dated July 31, 2013, available at http://icontherecord.tumblr.com/tagged/declassified/page/2 (last visited April 4, 2014).

additional documents. On March 15, 2012, OIP informed the ACLU it had located sixteen documents responsive to ACLU's FOIA request. Of those sixteen documents, twelve were released in full, and four were withheld in full. Also on March 15, 2012, OLC informed the ACLU that it had identified and was withholding in full two documents. On March 15, 2012, April 15, 2012, and May 15, 2012, the FBI released responsive material to the ACLU. On August 20, 2012, the FBI made a final supplemental release. Hudson Decl. ¶ 14.

The posture of this action changed markedly in the summer and fall of 2013. On June 6, 2013, newspapers published articles and documents received from a former NSA contractor. Hudson Decl. ¶ 17. This "unprecedented unauthorized disclosure of TOP SECRET documents touched on some of the U.S. Government's most sensitive national security programs, including highly classified and on-going signals intelligence collection programs." *Id.* These unauthorized disclosures included previously-classified information regarding Section 215. *Id.* ¶ 21. In response, the DNI declassified certain information regarding the collection of telephony metadata pursuant to Section 215. *Id.* ¶ 23. The Government informed the Court of the DNI's action, and the parties asked the Court to hold their cross-motions for summary judgment in abeyance while the Government determined what impact the change in classification would have on the records at issue in this FOIA case. Letter to the Court from Assistant U.S. Attorneys John Clopper and Emily Daughtry, dated June 7, 2013, at 1-2 (Dkt. No. 62).

On June 20, 2013, the President directed the DNI to continue to review whether further information could be declassified regarding, *inter alia*, activities authorized under Section 215. Hudson Decl. ¶ 24. Since that time, at presidential direction and under guidance by the DNI, the U.S. Government has "engaged in a large-scale, multi-agency review process" to "determine what further information concerning programs under Section 215 and other surveillance

programs could be declassified and released consistent with the national security for the purpose of restoring public confidence and better explaining the legal rationale and protections surrounding the programs." *Id.* ¶ 25. The parties thereafter withdrew their motions for summary judgment and the Government reprocessed documents responsive to ACLU's FOIA request as part of this broader review. *Id.* ¶ 29; Order, dated August 16, 2013, at 1 (Dkt. No. 71).

As a result of this transparency initiative, the DNI exercised his discretion under Executive Order 13526 to declassify and publicly release a number of documents pertaining to telephony metadata collection under Section 215, including over 1,000 pages responsive to ACLU's FOIA request as well as additional documents outside the scope of that request. *Id.* ¶ 27; *see also* "Office of the DNI: IC On the Record," available at icontherecord.tumblr.com (last visited April 4, 2014).

At the conclusion of the reprocessing of responsive documents, the ACLU informed the Government of the extent to which it intended to challenge the Government's continued withholding of certain information as classified or otherwise exempt from disclosure, and, on January 31, 2014, the parties wrote the Court jointly proposing a briefly schedule. *See* Letter to the Court from Assistant U.S. Attorneys John D. Clopper and Emily Daughtry, dated January 31, 2014, at 2 (Dkt. No. 81). On February 6, 2014, the ACLU informed the Government that it had decided to further narrow its challenge to "fully withheld opinions or orders of the Foreign Intelligence Surveillance Court that relate to bulk collection of any information (i.e., not just telephony metadata)." Email from Patrick Toomey, Esq., dated February 7, 2014 (Clopper Decl., Exh. A). By order dated March 11, 2014, the Court adopted the parties' proposed briefing schedule.

### C. Responsive Records Remaining at Issue and Applicable FOIA Exemptions

Based on the ACLU's narrowed challenge to "fully withheld opinions or orders of the Foreign Intelligence Surveillance Court that relate to bulk collection of any information (i.e., not just telephony metadata)," the following documents remain at issue:

- **August 2008 FISC Opinion**: One FISC opinion, dated August 20, 2008, Docket No. 08-07 (August 2008 FISC Opinion") totaling six pages. This FISC opinion is No. 50 in the Government's *Vaughn* Index. In addition, two non-identical duplicates of this FISC opinion were contained in two productions to Congress pursuant to 50 U.S.C. § 1871(c)(1). The versions of this opinion produced to Congress are Nos. 13A and 82A in the Government's *Vaughn* Index. This opinion has been withheld in full pursuant to Exemptions 1 and 3.

- **Additional FISC Orders**: An unspecified number of FISC Orders ("Additional FISC Orders"), issued on various dates during the range of dates applicable to the ACLU's FOIA request (*i.e.*, March 9, 2006 to June 30, 2011), including certain FISC Orders, dated October 31, 2006, that were produced to Congress pursuant to 50 U.S.C. § 1871(c)(1). These FISC orders are listed in the Government's Vaughn Index at Nos. 77B, 77C, 79, 81J, and 125 *et seq*. The precise number of FISC Orders that have been withheld in full pursuant to Exemptions 1 and 3, as well as descriptions of these records, have been provided to the Court in a classified *Vaughn* Index, which is attached to the Classified Hudson Declaration. Because this information is itself classified, the Government has provided it to the Court *ex parte* and *in camera*.

While the DNI has declassified considerable information pertaining to Section 215, operational details as to specific applications of the sources and methods used by the United States pursuant to Section 215 remain classified. Hudson Decl. ¶ 28. As described below and in the public and classified Declarations of Jennifer Hudson, the Government has withheld documents and information pursuant to FOIA Exemptions 1 and 3.[2] Accordingly, the DOJ now seeks summary judgment concerning its withholding of exempt records under the FOIA.

[2] In support of this motion, the Government is submitting an unclassified declaration from Jennifer L. Hudson, Director, Information Management Division, Office of the Chief Information Officer, Office of the Director of National Intelligence ("Hudson Decl."), and a

## ARGUMENT

### I. Governing FOIA Standards

As the Court noted in its *New York Times* decision, FOIA represents a balance struck by Congress "'between the right of the public to know and the need of the Government to keep information in confidence.'" *New York Times*, 872 F. Supp. 2d at 314 (quoting H.R. Rep. No. 89-1497, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (same). Thus, while FOIA requires disclosure under certain circumstances, the statute recognizes "that public disclosure is not always in the public interest," *Baldrige v. Shapiro*, 455 U.S. 345, 352 (1982), and mandates that records need not be disclosed if "the documents fall within [the statute's] enumerated exemptions," *New York Times,* 872 F. Supp. 2d at 314 (quoting *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001)).

Most FOIA actions are resolved through summary judgment. *See, e.g.*, *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). Summary judgment is warranted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In a FOIA case, "[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." *Carney* at

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classified declaration from Ms. Hudson ("Classified Hudson Decl."). Because the classified declaration contains information that cannot be disclosed on the public record, the Government is providing it for the Court's review *ex parte* and *in camera*.

812 (footnote omitted). In that regard, the agency's declarations in support of its determinations are "accorded a presumption of good faith." *Id*. (quotation marks omitted).[3]

Moreover, courts must accord "substantial weight" to agencies' affidavits regarding national security. *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009); *accord ACLU v. DOJ*, 681 F.3d 61, 69 (2d Cir. 2012); *Diamond v. FBI*, 707 F.2d 75, 79 (2d Cir. 1983); *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). In FOIA cases involving matters of national security, "the court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions; to do so would violate the principle of affording substantial weight to the expert opinion of the agency." *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980); *see also ACLU*, 681 F.3d at 70-71 ("Recognizing the relative competencies of the executive and the judiciary, we believe that it is bad law and bad policy to second-guess the predictive judgments made by the government's intelligence agencies regarding whether disclosure of the [withheld information] would pose a threat to national security.") (quoting *Wilner*, 592 F.3d at 76) (internal quotation marks omitted)); *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 927 (D.C. Cir. 2003) (courts have "consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review"); *Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) ("courts have little expertise in either international diplomacy or counterintelligence operations"); *accord Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009); *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990). Rather, "an agency's justification

[3] Because the ACLU has not challenged the adequacy of the Government's searches for responsive documents, the Government does not address the searches' adequacy in this memorandum. Further, because agency affidavits alone will support a grant of summary judgment in a FOIA case, consistent with the general practice in this Circuit, the Government has not submitted a Local Rule 56.1 statement. *See, e.g., New York Times*, 872 F. Supp. 2d at 314; *see also Ferguson v. FBI*, 89 Civ. 5071 (RPP), 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995) (noting "the general rule in this Circuit"), *aff 'd*, 83 F.3d 41 (2d Cir. 1996).

for invoking a FOIA exemption is sufficient if it appears logical or plausible.'" *New York Times*, 872 F. Supp. 2d at 315 (quoting *Wilner*, 592 F.3d at 73); *accord ACLU*, 681 F.3d at 69; *Wolf*, 473 F.3d at 374-75.

Applying this deferential standard, the Government's declarations amply demonstrate that it has properly withheld responsive records pursuant to FOIA Exemptions 1 and 3. As set forth in more detail below, the Government is therefore entitled to summary judgment dismissing the remainder of the ACLU's claims.

## II. The Documents Remaining at Issue Have Been Properly Withheld Under FOIA Exemption 1

Exemption 1 provides that FOIA's disclosure mandate does not apply to matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). As noted above, under Exemption 1, courts owe deference to an agency affidavit concerning national security matters. *Wilner*, 592 F.3d at 73. "[L]ittle proof or explanation is required beyond a plausible assertion that information is properly classified." *Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007). Indeed, in national security cases, "'the government's burden is a light one,'" *New York Times*, 872 F. Supp. 2d at 315 (quoting *ACLU v. DOD*, 628 F.3d at 624), and "'an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible,'" *id.* at 315 (quoting *Wilner*, 592 F.3d at 73). *See also Amnesty Int'l v. CIA*, 728 F. Supp. 2d 479, 508 (S.D.N.Y. 2010) (explaining decision to "defer[] to [] executive declarations predicting harm to the national security").

The current standard for classification is set forth in E.O. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009). Section 1.1 of the Executive Order lists four requirements for the classification of

national security information: (1) an "original classification authority" must classify the information; (2) the information must be "owned by, produced by or for, or [] under the control of the United States Government;" (3) the information must fall within one or more of eight protected categories of information listed in section 1.4 of the E.O.; and (4) an original classification authority must "determine[] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and be "able to identify or describe the damage." E.O. 13526 § 1.1(a)(1)-(4).

As discussed below, the withheld classified records satisfy all the criteria for withholding under Exemption 1. First, an original classification authority has classified all of the withheld materials at issue. Hudson Decl. ¶¶ 3, 43, 53; Classified Hudson Decl. Second, the information is "owned by, produced by or for, or under the control of the United States Government." E.O. 13526 § 1.1(a)(2); Hudson Decl. ¶ 43, 53. Third, the withheld classified records contain information falling within three of the categories described in Section 1.4 of E.O. 13526, specifically, § 1.4(c), which allows information to be classified if it pertains to "intelligence activities (including covert action), intelligence sources or methods, or cryptology;" § 1.4(d), which allows information to be classified if it pertains to "foreign relations or foreign activities of the United States, including confidential sources;" and § 1.4(g), which allows information to be classified if it pertains to "vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security." Hudson Decl. ¶¶ 35, 43. Finally, the Government has submitted declarations and *Vaughn* indices in support of this motion, explaining that the unauthorized disclosure of the withheld information, classified at the SECRET or TOP SECRET levels, could be expected to cause serious or exceptionally grave damage to the national security of the United States. Ms. Hudson's declarations establish that

the Government has withheld classified information, including intelligence activities, sources, and methods, that, if disclosed, could be expected to cause serious or exceptionally grave damage to national security. Hudson Decl. ¶¶ 31, 39, 41, 42; Classified Hudson Decl.

### A. Release of the August 2008 FISC Opinion Could Reasonably Be Expected to Harm National Security

The Government has properly withheld the August 2008 FISC Opinion in its entirety because it addresses the NSA's use of a specific intelligence method in the conduct of queries of telephony metadata or call detail records obtained pursuant to the FISC's orders in connection with the telephony metadata collection program. Hudson Decl. ¶ 41. As Ms. Hudson explains, disclosure of this intelligence method could reasonably be expected to cause exceptionally grave damage to the national security because "its release could allow our adversaries to undertake countermeasures that degrade the effectiveness of NSA's querying of the bulk metadata using this intelligence method." *Id.* ¶ 44. Furthermore, "[i]f the effectiveness of the intelligence method has been degraded, NSA would no longer be able to rely on this method," which would, in turn, compromise NSA's ability to analyze bulk telephony metadata. *Id.* A lost or reduced ability to effectively analyze this metadata would hamper the NSA's "identification of previously unknown persons of interest in support of anti-terrorism efforts both within the United States and abroad." *Id.*

As Ms. Hudson explains, the Government cannot provide further public explanation of the classification of this intelligence method without risking disclosure of the very information the Government seeks to protect. *Id.* ¶¶ 44, 49. However, this public explanation of the harm to national security is both logical and plausible, and the Court should defer to the considered judgment of the multiple officials in the U.S. intelligence community that the August 2008 FISC Opinion remains classified in its entirety. *See ACLU v. DOJ*, 681 F. 3d at 69; *CIA v. Sims*, 471

U.S. 159, 179 (1985). The Government has nonetheless provided in its *ex parte* classified declaration further explanation of the exceptionally grave damage to national security that could reasonably be expected to occur should the opinion be released. *See* Classified Hudson Decl.

In addition, there is no segregable portion of the August 2008 FISC Opinion that can be released. FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b)(9). As Ms. Hudson explains, "the specific intelligence method is discussed in every paragraph of this opinion, including in the title." Hudson Decl. ¶ 41. An intensive, line-by-line review of this opinion was performed by multiple Government agencies, which ultimately determined that "[e]ven if the name of the intelligence method was redacted, the method itself could be deduced, given other information that the DNI has declassified pursuant to the President's transparency initiative and the sophistication of our Nation's adversaries and foreign intelligence services." *Id.*

Indeed, although some information regarding this intelligence method is by itself unclassified, in the context of this particular FISC opinion, which addresses the conduct of queries of telephony metadata, the intelligence method remains currently and properly classified. *Id.* ¶ 42. In the context of the ACLU's FOIA request and other public information, any legal analysis in the opinion also cannot be released without revealing classified information about the classified intelligence method that is described and referred to repeatedly throughout the short opinion. *Id.* ¶¶ 45-47. Thus, "the entire opinion is currently and properly classified based on the procedure of classification by compilation." *Id.* ¶ 42; *see* E.O. 13526 § 1.7(e) ("Compilation of items of information that are individually unclassified may be classified if the compiled information reveals an additional association or relationship that: (1) meets the standard of

classification under this order; and (2) is not otherwise revealed in the individual items of information."); *Sims*, 471 U.S. at 178 ("[B]its and pieces of data may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself. . . Thus, what may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." (internal quotations and citations omitted)); *New York Times v. DOJ*, 915 F. Supp. 2d 508, 535 (S.D.N.Y. 2013) (noting that "legal analysis may appropriately be classified") (citing cases).

Accordingly, the result of the multi-agency review is that the August 2008 FISC Opinion remains currently and properly classified in its entirety at the TOP SECRET level and contains no reasonably segregable, non-exempt information. Hudson Decl. ¶¶ 43, 45.

### B. Release of the Additional FISC Orders Could Reasonably Be Expected to Harm National Security

The Government has also withheld in full the an unspecified number of FISC orders, including Document Nos. 77B, 77C, 79, 81J and the multiple FISC orders identified at No. 125 *et seq.* on the Government's *Vaughn* index (the "Additional FISC Orders"). The Government has withheld these orders—which are described more fully in the classified materials submitted to the Court—to protect intelligence activities, sources and methods used by the Government to gather intelligence data. Hudson Decl. ¶¶ 50; Classified Hudson Decl. As explained by Ms. Hudson, the number of Additional FISC Orders withheld in full cannot be provided on the public record, nor can the records be described individually on the public record, because to do so would "reveal classified and statutorily protected information relating to sources and methods of intelligence collection, including, among other things, the identity of telecommunications carriers participating in the bulk telephony metadata program and the timing of their participation." Hudson Decl. ¶ 50.

As Ms. Hudson explains, no further information can be provided on the public record about the Additional FISC Orders, including the number of orders being withheld in full, the dates of the orders, or any information about the nature or substance of the orders. *Id.* ¶ 52. All of this information remains currently and properly classified in accordance with E.O. 13526, and therefore this information is also withheld pursuant to FOIA Exemption 1. *Id.* ¶ 53. As courts have recognized in cases brought under FOIA, agencies may withhold information about responsive documents that would otherwise appear on a *Vaughn* index, if that information is itself exempt from disclosure under FOIA. *See Bassiouni v. CIA*, 392 F.3d 244, 246 (7th Cir. 2004) ("The risk to intelligence sources and methods comes from the details that would appear in a Vaughn index."); *see also ACLU v. CIA*, 710 F.3d 422, 433-34 (D.C. Cir. 2013) (noting in dicta that a "'no number, no list' response" is itself akin to a "radically minimalist" *Vaughn* index and could be invoked with respect to a limited category of documents).

To the extent possible on the public record, Ms. Hudson has described the damage to national security that could reasonably be expected to occur should any further information regarding the Additional FISC Orders be released. Specifically, "[g]iven the information that has already been declassified and released regarding the U.S. Government's intelligence activities pursuant to Section 215, including several released-in-part FISC Opinions and Orders related to these activities that do not specifically identify the entities that are subject to FISC Orders, disclosing the number and dates of the Additional FISC Orders at issue in this litigation could provide a sophisticated adversary the ability to deduce the number of entities subject to FISC Orders, which in turn would tend to reveal the identity of the entities subject to FISC Orders." Hudson Decl. ¶55. For example, as Ms. Hudson illustrates in her declaration, some of the Additional FISC Orders identify telecommunications carriers who were ordered to produce

call detail records as part of the telephony metadata collection program. Ms. Hudson explains that the Government has declassified and released certain FISC "primary orders" related to the bulk telephony metadata program, which "direct the production of call detail records that contain information about communications between telephone numbers," and explains that releasing the number of corresponding FISC orders directed specifically to the telecommunications carriers subject to these orders would reveal the number of entities subject to the orders. This, in turn, "would tend to reveal the identity of those entities." *Id.* Ms. Hudson has provided a more detailed explanation of the ways in which the release of the Additional FISC Orders would tend to reveal the identities of the entities subject to these orders in her classified, *ex parte* declaration. *See* Classified Hudson Decl.

Disclosing whether particular telecommunications companies assisted with NSA intelligence activities could be expected to cause exceptionally grave damage to national security by, *inter alia*, revealing to foreign adversaries which channels of communication may or may not be secure and, thus, providing a roadmap for avoiding U.S. Government surveillance and finding alternative means to communicate in the course of plotting activity such as terrorist attacks. [4]

[4] Congress also recognized the need to protect the identities of telecommunications carriers alleged to have assisted the United States when Congress enacted provisions of the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436, Title II, § 201 (July 10, 2008), which provided such carriers immunity from civil suit when certain conditions are met. In recommending enactment of the legislation, the Senate Select Committee on Intelligence found that "electronic surveillance for law enforcement and intelligence purposes depends in great part on the cooperation of the private companies that operate the Nation's telecommunications system." S. Rep. 110-209, at 9 (2007) (accompanying S. 2248). The Report expressly stated that, in connection with alleged assistance by telecommunications companies after the attacks of September 11, 2001, "[i]t would be inappropriate to disclose the names of the electronic communication service providers from which assistance was sought" and that the "identities of persons or entities who provide assistance to the intelligence community are properly protected as sources and methods of intelligence." *Id. Accord* 50 U.S.C. § 3024(i) (protecting intelligence sources and methods from disclosure; discussed *infra*).

Hudson Decl. ¶ 55-56. *Accord Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978) (rejecting argument "that admission or denial of the fact of acquisition of [certain] communications ... would not reveal which circuits NSA has targeted" as "naïve").

Finally, Ms. Hudson explains in her declaration that our Nation's adversaries "search constantly for information regarding the intelligence activities of the U.S. Government," collecting "seemingly disparate pieces of information" in order to "create ways to defeat collection activities." Hudson Decl. ¶ 57. Thus, any additional "pieces of information" about the Additional FISC Orders, including "the number of such orders withheld in full, the dates of the orders, and information about the nature and substance of the orders," could be used to assist our adversaries to figure out ways to evade intelligence collection activities. This information is therefore classified as either SECRET or TOP SECRET. *Id.* ¶¶ 53, 57. Additional detail regarding the damage to national security that could reasonably be expected to occur from the release of the Additional FISC Orders is described in Ms. Hudson's classified, *ex parte* declaration. *See* Classified Hudson Decl.

Where, as here, the Government has satisfied the conditions for classification under E.O. 13526, such classified information is exempt from disclosure. *See, e.g., ACLU v. DOJ*, 681 F.3d at 69-71*; New York Times,* 872 F. Supp. 2d at 316; *ACLU v. DOD*, 752 F. Supp. 2d 361, 371 (S.D.N.Y. 2010) (records properly withheld under Exemption 1 where Government demonstrated withheld information logically falls within Exemption 1); *Hogan v. Huff*, 00 Civ. 6753 (VM), 2002 WL 1359722, at *8 (S.D.N.Y. June 21, 2002) (information properly withheld under Exemption 1 where disclosure of the information "would potentially harm the agency by exposing its methods"). As the Government has described the justification for nondisclosure with reasonably specific detail and demonstrated that the information withheld logically and

plausibly falls within Exemption 1, the Court should uphold the Government's withholding of the classified information at issue in this case. *Wilner*, 592 F.3d at 73.

## III. The Documents Remaining At Issue Have Been Properly Withheld Under FOIA Exemption 3

The Government has also properly invoked Exemption 3, which applies to records that are "specifically exempted from disclosure" by other federal statutes "if that statute—establishes particular criteria for withholding or refers to the particular types of material to be withheld." 5 U.S.C. § 552(b)(3); *see generally New York Times*, 872 F. Supp. 2d at 316 (applying Exemption 3). In enacting FOIA, Congress included Exemption 3 to recognize the existence of collateral statutes that limit the disclosure of information held by the Government, and to incorporate such statutes within FOIA's exemptions. *See Baldrige v. Shapiro*, 455 U.S. at 352-53; *Essential Info., Inc. v. U.S. Info. Agency*, 134 F.3d 1165, 1166 (D.C. Cir. 1998). Under Exemption 3, "the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Wilner*, 592 F.3d at 72; *Fitzgibbon*, 911 F.2d at 761-62.

In examining an Exemption 3 claim, a court determines whether the claimed statute is an exemption statute under FOIA and whether the withheld material satisfies the criteria for the exemption statute. *Sims*, 471 U.S. at 167; *ACLU*, 681 F.3d at 72-73; *Wilner*, 592 F.3d at 72. Thus, a court should "not closely scrutinize the contents of the withheld document; instead, [it should] determine only whether there is a relevant statute and whether the document falls within that statute." *New York Times,* 872 F. Supp. 2d at 316 (quoting *Krikorian v. Dep't of State*, 984 F.2d 461, 465 (D.C. Cir. 1993)). Moreover, to support its claim that information may be withheld pursuant to Exemption 3, the Government need not show that there would be any harm to national security from disclosure, only that the withheld information falls within the purview of the exemption statute. *See Larson*, 565 F.3d at 868.

In this case, all of the withheld documents are exempt pursuant to Exemption 3 by virtue of Section 102A(i)(1) of the National Security Act of 1947, as amended by the Intelligence Reform and Terrorism Prevention Act of 2004, 50 U.S.C. § 3024(i)(1) (the "National Security Act"). Hudson Decl. ¶¶ 37-38, 48, 58. It is well settled that the National Security Act is a withholding statute under Exemption 3. *See, e.g., ACLU v. DOJ*, 681 F.3d at 72-73. Section 102A(i)(1) provides that "the Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). As Ms. Hudson explains in her public declaration, these materials are properly withheld under Exemption 3 because their release would reveal intelligence sources and methods. Hudson Decl. ¶¶ 48, 58. And, as Ms. Hudson also explains, the National Security Act protects intelligence sources and methods from unauthorized disclosure. *Id.* ¶¶ 38, 58.

In addition, the August 2008 FISC Opinion is exempt pursuant to Section 6 of the National Security Agency Act, Public Law No. 86-36, which provides that "[n]othing in this Act or any other law shall be construed to require the disclosure of the organization or any function of the National Security Agency, [or] of any information with respect to the activities thereof . . . ." The Second Circuit has held that "the language of Section 6 makes quite clear that it falls within the scope of Exemption 3." *Wilner*, 592 F.3d at 75; *see also Larson*, 565 F.3d at 868; *Students Against Genocide v. Department of State*, 257 F.3d 828 (D.C. Cir. 2001). The courts have held that the protection provided by this statutory privilege is absolute. *See, e.g., Linder v. NSA*, 94 F.3d 693 (D.C. Cir. 1996). Section 6 states unequivocally that, notwithstanding any other law, which of course includes the FOIA, NSA cannot be compelled to disclose any information with respect to its activities. *See Hayden v. NSA*, 608 F.2d 1381, 1389 (D.C. 1979). Further, while the harm from the release of this FISC opinion would be exceptionally grave,

NSA is not required to demonstrate specific harm to national security when invoking this statutory privilege, but only to show that the information relates to its activities. *Id.* at 1390. As noted in Ms. Hudson's declaration, the intelligence method discussed in the August 2008 FISC Opinion pertains to NSA's "activities undertaken to carry out its [signals intelligence] mission." Hudson Decl. ¶ 48. To invoke this privilege, NSA must demonstrate only that the information it seeks to protect falls within the scope of Section 6, which it has done here.

Accordingly, all of the withheld documents are exempt pursuant to Exemption 3 by virtue of Section 102A(i)(1) of the National Security Act, and the August 2008 FISC Opinion is also exempt pursuant to Section 6 of the National Security Agency Act. Hudson Decl. ¶¶ 37-38, 48, 58.

## CONCLUSION

For the foregoing reasons, the Government's motion for summary judgment dismissing the remaining claims in *American Civil Liberties Union v. Federal Bureau of Investigation*, 11 Civ. 7562 (WHP), should be granted.

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Respectfully submitted,

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