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

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The government's new filings finally acknowledge what is at stake in this FOIA suit—the public's right to know the breadth of the government's authority to collect Americans' information in bulk, beyond the NSA's phone-records program. At bottom, Plaintiffs seek to understand the meaning of a public law, as it has been interpreted in judicial opinions and orders. In other words, Plaintiffs seek to vindicate one of FOIA's core purposes: exposing the law of the land to public understanding. The government responds to that straightforward request with continued obfuscation and with its most extreme claim of secrecy yet in this longstanding litigation. It claims, for the first time, that it cannot even confirm or deny whether any opinions or orders concerning bulk collection outside of the phone-records program exist, arguing that doing so would disclose classified sources or methods. But the government cannot explain what source or method would be revealed by a simple confirmation that the FISC has indeed addressed the bulk collection of Americans' sensitive information, aside from phone records.

The government also claims that disclosing the FISC's interpretations of Section 215 would reveal classified facts. But that is not so. The primary information Plaintiffs seek would reveal only that certain types of records constitute "tangible things" under Section 215, and that those records, when collected in bulk, are "relevant" within the meaning of Section 215. As explained at length below, neither of those legal conclusions would reveal any classified facts, and thus the government must disclose the bulk collection programs addressed in the FISC opinions and orders at issue.

Finally, with respect to the FISC opinions and orders that the government has in fact acknowledged, the government claims that it cannot disclose a single additional fact without endangering national security. That was not true when the government said it earlier in this litigation—as it hid non-sensitive proof of repeated compliance violations—and it is not true

now. The government has taken such an extreme and categorical position with respect to the fully withheld legal opinions that one can readily identify additional information that can and should be disclosed under FOIA.

ARGUMENT

I. Neither the existence of other bulk collection programs nor the legal basis for such programs may be withheld under FOIA.

For the first time, the government asserts a "Glomar" response to justify its withholding of the Additional FISC Orders. *See* Gov't Opp. 5–6; *see also* Pl. Br. 8 (explaining subcategories of Additional FISC Orders). But the government's Glomar response is unlawful.

A. The fact that there are other bulk collection programs may not be withheld under Exemption 1 or 3.

The government's Glomar response does not meet its burden of demonstrating that "the fact of the existence or nonexistence of agency records falls within a FOIA exemption." *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). A Glomar response is permitted only "when confirming or denying the existence of records would itself 'cause harm cognizable under a[] FOIA exception.'" *Roth v. DOJ*, 642 F.3d 1161, 1178 (D.C. Cir. 2011) (quoting *Wolf*, 473 F.3d at 374)). Here, the government asserts that it can "neither confirm nor deny whether any of the [Additional FISC Orders] identified as responsive to the plaintiffs' FOIA request relate to" the bulk collection of records other than call records. Suppl. Hudson Decl. ¶ 6. But the government's claim that it is withholding "sources or methods" here is far too general to be sustained.

The extraordinary breadth of the government's argument bears emphasis: the government does not claim only that it may classify the existence of *particular* bulk collection programs, but also that it may classify the existence of *any unspecified* bulk collection program under Section 215 whatsoever. But if the government were compelled to produce a Vaughn index that distinguished between (1) opinions related to the NSA's phone-records program, and

(2) those related to all other bulk collection programs, it is impossible to understand what "source or method" would thereby be revealed. That index would not reveal which types of records were sought, what fraction of those unknown records were collected, which entities received production orders, or which agency sought the records. In short, it would reveal merely that the government has sought to use Section 215 to collect a large number of records other than phone records.

Even if the Court accepted that the "bulk" collection of phone records constituted a unique "source or method," the government has not even attempted to defend the notion that the bulk collection of *anything in general* under Section 215 constitutes a "source or method"—nor could it. Courts require the government to establish that particular information constitutes a "source or method" by demonstrating that disclosure of that information would inform the public and adversaries about an agency's "*specific* capabilities, sources, and methods," *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 840 (D.C. Cir. 2001) (emphasis added); *see also Hayden v. NSA/Cent. Sec. Serv.*, 608 F.2d 1381, 1390 (D.C. Cir. 1979). But there is nothing specific about a "source or method" that by its own terms would encompass the high-volume collection of "any tangible things" at all. 50 U.S.C. § 1861(a)(1).

The government's argument is particularly problematic because the statute permits the government to obtain information other than phone records under Section 215, *see* 50 U.S.C. § 1861(a)(3), and because the government has publicly claimed the legal authority to collect records in bulk, *see* Pl. Br. 14–15. The bare fact that the FISC has ruled on an application to collect information other than phone records in "bulk" says nothing about specific sources or

methods—but it would contribute significantly to the public debate around Section 215.[1]

B. The legal basis for other types of bulk collection may not be withheld under Exemption 1 or 3.

The legal basis for the government's other bulk collection programs must also be released. In particular, the government is not entitled to withhold at least two basic features of any FISC order addressing bulk collection under Section 215: the FISC's explanation or conclusion that (1) certain records are "tangible things" within the meaning of Section 215; and (2) such records are "relevant" within the meaning of Section 215 when collected in bulk. *See* Pl. Br. 14–15. Whether explained in formal legal opinions or simply set forth in the text of FISC orders, these conclusions are themselves legal interpretations of Section 215 and must be segregated. *See N.Y. Times Co. v. DOJ*, Nos. 13-422 (L), 13-445 (Con), 2014 WL 1569514, at *13 (2d Cir. Apr. 21, 2014) (rehearing pending).

A court's conclusion that the government may collect a particular kind of record under a particular legal authority is not classifiable, at least where the government's interest in that type of record is already known. What the government calls a classified *fact* is only the court's legal *conclusion* that Congress authorized the government to collect a particular type of record under Section 215. This is an interpretation of what the law allows—one that can plainly be segregated and must be disclosed. For example, the "fact" that the government has the authority to intercept email under FISA's definition of "electronic surveillance," 50 U.S.C. § 1801—and the fact that it does so, in general—cannot be classified. Yet the government argues that equivalent information

[1] Additionally, the high level of generality the government applies to "sources or methods" renders illogical and implausible its claim of possible harm. Suppl. Hudson Decl. ¶ 13; *see* Gov't Opp. 6. Because it is a public fact that the government engages in bulk collection under Section 215, there is no plausible argument that confirming the existence of "other" bulk collection programs would provide any information that would damage national security. *See, e.g.*, *Judicial Watch, Inc. v. United States Secret Serv.*, 579 F. Supp. 2d 182, 186 (D.D.C. 2008) (rejecting agency's Glomar response because its claim of harm "does not hold water").

about the meaning and use of Section 215 can be withheld here. If anything, this claim is more offensive to the public interests at the core of FOIA. That the government is using Section 215 to collect records belonging to thousands of Americans—most of them entirely innocent—does not entitle it to *greater* secrecy than where its collection is narrow and targeted.

Relatedly, the mere fact that the government can collect certain kinds of records in "bulk" under Section 215 does not constitute a "source or method." That the government may be permitted to collect a large volume of records under a single Section 215 order is no more classifiable than the fact that it has the authority to collect "small" batches of relevant records under Section 215—or that it could collect a large volume of records using many Section 215 orders. Indeed, the government points to no authority supporting the idea that the sheer size of a production order constitutes a "source or method." This notion is especially misplaced if, as the government claims, "bulk" collection does not imply the collection of the entire universe of potential records. For instance, the government has insisted that bulk collection of telephony metadata does not mean that every single American's phone records are being collected. *See, e.g.*, Br. of Appellees at 6–7, *ACLU v. Clapper*, No. 14-42 (2d Cir. Apr. 10, 2014) (ECF No. 87).

The government's argument that it may withhold legal analysis related to other bulk collection programs is particularly perplexing because it has publicly claimed that its legal authority to collect records in bulk under Section 215 is *not* limited to phone records. Indeed, the government has indicated that under its (and the FISC's) interpretation of Section 215, the government may engage in the bulk collection of tangible things that are "highly standardized and inter-connected [in] nature" or that are "easily susceptible of analysis in large datasets to bring unknown connections between and among individuals to light." Def. Mem. of Law at 21, *ACLU v. Clapper*, No. 13 Civ. 3994 (S.D.N.Y. Oct. 1, 2013) (ECF No. 61). At the same time,

the government has specifically denied that under its interpretation of Section 215, it could engage in the bulk collection of "medical records[] or library-borrower records." *Id.* Plaintiffs simply seek to know which categories of records the FISC has concluded *do* meet this standard.

In sum, the fact that the government has relied on Section 215—as opposed to its many other legal authorities—to collect certain categories of records in bulk cannot be withheld. Two examples make this point more concrete. If the FISC has authorized the government to collect financial records in bulk, disclosure of that authority would not reveal any classifiable information. The government's interest in financial records—and even various kinds of financial records—is already well known and officially acknowledged. *See* Pl. Br. 14–15. Thus, the government has no legitimate interest in withholding the mere fact that it collects some financial records in bulk under Section 215. That disclosure would not reveal the individual entities receiving such orders. It would not reveal the targets of the government's investigations. It would not reveal the percentage of such records that the government is now collecting, or has collected in the past. It would not reveal which agency or agencies collect those records. And it would not reveal how the government analyzes financial records. In fact, in virtually every respect, it would reveal *less* than the government has disclosed about the NSA's phone-records program—which, government officials now admit, should have been disclosed to the public all along. *See* Pl. Br. 5.

The same would hold true if the FISC has addressed the bulk collection of location data under Section 215. The government has officially acknowledged its interest in this data, and has even acknowledged that it conducted a geolocation pilot program under Section 215. *See* Declassified NSA Letter (Suppl. Sims Decl., Ex. 1). Disclosure of the FISC's legal analysis

related to the bulk collection of this information would, again, reveal no sensitive operational details.[2]

II. *In camera* review is necessary because the record leaves no doubt that the government has improperly withheld information in this case.

The government repeatedly insists that the Court should defer to its declarations, *see, e.g.*, Gov't Opp. 3, 9, 15—but the record in this case mandates a searching review of the documents at issue. The government's submissions, past and present, leave no doubt that the government has repeatedly withheld information subject to release under FOIA. Together, the examples below show that the government has forfeited any claim to deference it might once have had. Even in the national-security context, courts do not "relinquish[] their independent responsibility" to review an agency's withholdings. *Goldberg v. United States Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987). Consequently, the Court can and should perform its own review.

A. The government's past submissions make deference unwarranted here.

Plaintiffs have already provided substantial evidence that the government's earlier submissions to the Court were legally untenable, factually misleading, or both. Pl. Br. 23–25. The government's attempts to defend those withholdings only provide additional evidence of its exaggerations and misrepresentations.

In the earlier stages of this case, the government failed to segregate information that could have been disclosed without revealing any classified information about still-secret programs. Instead, the government withheld in full numerous records related to Section 215 that were not entitled to exemption—including records showing serious compliance violations. *See*

[2] Indeed, across these examples, any claim of harm is undercut by the administration's support of legislation that would end bulk collection altogether. *See Hearing on the USA FREEDOM Act Before the S. Select Comm. on Intel.*, 113th Cong. (June 5, 2014) (testimony of Deputy Attorney-General James Cole). If such legal authority is unnecessary in the first place, it is difficult to fathom how describing it to the public could endanger the nation's security.

Pl. Br. 24. It is now easy to see this in black and white: as an example, the plaintiff in a parallel FOIA action has illustrated the redactions that the government *could* have applied in order to release non-exempt information to the public, even before the NSA's phone-records program was acknowledged. *Compare* Third Decl. of Mark Rumold, Ex. A, *Elec. Frontier Found. v. DOJ*, No. 11-cv-05221-YGR (N.D. Cal. May 16, 2014) (ECF No. 81-1) (applying hypothetical redactions to FISC order regarding compliance violation), *with id.*, Ex. B (current declassified version of the same document) (both attached hereto as Suppl. Sims Decl. Exs. 2-A, 2-B). Contrary to the repeated assertions of government declarants, the segregation and release of such information would not have exposed sensitive operational details, nor would it have produced only "fragmented" sentences or phrases "devoid of any meaning." Declaration of Diane M. Janosek ¶ 42, Feb. 8, 2013 (ECF No. 97). Indeed, the district court in the parallel suit has determined that the government improperly withheld documents in their entirety "when a disclosure of reasonably segregable portions of those documents would have been required." Order at 2, *Elec. Frontier Found. v. DOJ*, No. 11-cv-05221-YGR (N.D. Cal. June 13, 2014) (ECF No. 85) (Suppl. Sims Decl., Ex. 8). On that basis, the court has ordered *in camera* review.

The government strains to argue that its prior blanket withholdings were made in "good faith" because it was under the misimpression that the FISC's rules prevented their disclosure. *See* Gov't Opp. 19 & n.3. Yet the FISC's rules contain no such restriction, as the government now admits. *See id.* But even more importantly, the government's claim to error is not credible. The government began releasing FISC orders—on its own initiative—when it declassified a Primary Order for the first time on July 31, 2013. *See* Office of the Dir. of Nat'l Intel., DNI Clapper Declassifies and Releases Telephone Metadata Collection Documents (July 31, 2013), http://1.usa.gov/1ud7vjq. That was six weeks *before* the FISC opinion that the government now

points to as having "clarified" the law. Gov't Opp. 19. It appears from the record that the government simply declassified the Primary Order when it served its purposes, as it could have done all along. But even if the government secretly inquired with the FISC to obtain permission, it could and should have made that same inquiry when it processed Plaintiffs' FOIA request. Instead, it treated the FISC rules as a pretext for withholding information—including legal analysis unrelated to bulk collection—from the public. *See* Pl. Br. 24–25.

B. The Court must conduct an *in camera* review because, even now, the government continues to withhold information that is obviously and indisputably segregable.

The government's pattern of overbroad withholding continues. While it has released a number of responsive documents concerning the collection of phone records, that is not a license to withhold the rest. The withholding of each document must be justified on its own terms.

Significantly, the government has *already* disclosed some of the information that it tells the Court it cannot release here. The government claims that "no further information about the nature or substance of the Additional FISC Orders can be provided without revealing classified information," including "the dates of these orders." Hudson Decl. ¶ 52. Yet that categorical claim cannot possibly be true. Documents already released by the government contain the docket numbers, dates, and even the excerpted text of additional FISC orders related to bulk collection under Section 215—orders that the government has not produced to Plaintiffs. For example:

- Docket No. BR 09-09, Primary Order, July 9, 2009: This FISC order is identified, described, and/or quoted at length on pages 1, 3, and 5–6 of the government's "End-to-End Report" (Suppl. Sims Decl., Ex. 3). It is also identified in Paragraph 3 of a later Primary Order, No. BR 09-13, Sept. 3, 2009 (Suppl. Sims Decl., Ex. 4).
- Docket No. BR 09-15, Primary Order, Oct. 30, 2009: This FISC order is identified, described, and/or quoted at length on pages 2, 4 & n.2, and 6 of the FISC's Supplemental Opinion, dated Nov. 5, 2009 (Suppl. Sims Decl., Ex. 5).
- Docket No. BR 09-19, Primary Order, Dec. 16, 2009: This FISC order is identified in Paragraph 3 of a later Primary Order, No. BR 10-10, Feb. 26, 2010 (Suppl. Sims Decl.,

Ex. 6). It is also identified and described in Paragraph 1 of the government's Joint Motion for Enlargement of Time, No. BR 09-19, Jan. 8, 2010 (Suppl. Sims Decl., Ex. 7).

The government's failure to segregate and disclose these orders, or even identify them on its Vaughn index, is inexplicable, given that these documents are repeatedly quoted or described in detail in *other* records released by the government. If ever there was proof that segregation is possible, it is now before the Court.

There is more. Especially baffling is the government's refusal to identify the withheld FISC orders relating to the NSA's phone-records program. The government has given a "no-number, no-list" response with respect to these documents, *see* Pl. Br. 18 n.7, yet many details of them have already been officially acknowledged. Among other things, the government has acknowledged that the NSA's phone-records program was first approved by the FISC on May 24, 2006, *see* Order at 4, *In re Production of Tangible Things From [Redacted]*, No. BR 08-13 (FISC Mar. 2, 2009), http://1.usa.gov/1nCeim1, and it has released numerous subsequent Primary Orders with their dates unredacted. The government has provided no plausible reason as to why it cannot disclose or identify at least one Secondary Order from each of *those* dates.[3] The government could surely devise some calibrated way of releasing additional information—by, for example, releasing a subset of these documents, or describing them more fully on its Vaughn index. Because the government is unwilling, Plaintiffs ask the Court to do so after reviewing the withheld documents *in camera*.

CONCLUSION

For these reasons, Plaintiffs' motion should be granted and the government's denied.

[3] In fact, the timing of at least four Secondary Orders is described in a document recently declassified by the government. *See* Suppl. Sims Decl., Ex. 7 at 2 (identifying Secondary Orders served on or about July 9, 2009; Sept. 3, 2009; Oct. 30, 2009; and Dec. 30, 2009).

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Respectfully submitted,

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