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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

ELECTRONIC FRONTIER FOUNDATION, Plaintiff, v. OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE and UNITED STATES DEPARTMENT OF JUSTICE, Defendants.	Nos. 08-2997 JSW & 08-1023 JSW **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION AND REQUEST THAT RECONSIDERATION BE GRANTED WITHOUT FURTHER BRIEFING** Date: [No Hearing – Local Rule 7-9(d)] Time: Courtroom:

INTRODUCTION

On September 24, 2009, the Court entered an order denying defendants' motion for summary judgment and granting plaintiff's cross-motion for summary judgment in this Freedom of Information Act ("FOIA") case. Dkt. No. 90. Defendants Office of the Director of National Intelligence ("ODNI") and the Department of Justice ("DOJ") respectfully request leave to file a motion for reconsideration of the Court's order because the Court failed to consider several of defendants' arguments, as set forth below.

ARGUMENT

THE COURT SHOULD RECONSIDER ITS ORDER OF SEPTEMBER 24, 2009.

A party moving for reconsideration must specifically demonstrate: (1) the existence of a material difference in fact or law that was not known at the time of the order, despite the exercise of reasonable diligence; or (2) the emergence of new material facts or a change of law occurring after the time of the order; or (3) a manifest failure by the Court to consider material facts or dispositive legal arguments already presented to the Court. Local Rule 7-9(a) and (b).[1] See also School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993) ("Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law."). The moving party may not reargue any written or oral argument previously asserted to the Court. Local Rule 7-9(c). Because in this case the Court failed to consider several arguments made by defendants in their motion for summary judgment, it should grant defendants' Motion for Reconsideration.

I. The Court Failed to Consider Inter-Agency and Intra-Agency Communications Not Exchanged with Congress.

First, the Court failed to reach the Government's claims of privilege over responsive documents that were not exchanged between ODNI and DOJ officials and congressional staff or representatives of telecommunications companies. While the Court correctly noted that the "bulk" of the documents at issue consists of confidential email messages concerning Foreign Intelligence Surveillance Act ("FISA") reform legislation exchanged between ODNI or DOJ officials and congressional staff (Dkt. No. 90 at 7), a significant number of the documents at issue were not exchanged with Congress but remained within the Executive Branch. See ODNI Revised Vaughn Index (Dkt. No. 63) Group 5 (internal ODNI emails and memos discussing meetings with Congress); Office of Information and Privacy ("OIP") Updated Vaughn Index (Dkt. No. 65) Groups 1-3, 4 (last entry), and 9; Office of Legal Counsel ("OLC") Revised

[1] A party may seek leave to file a motion for reconsideration under Local Rule 7-9 before the entry of final judgment. Local Rule 7-9(a). The Court has not entered final judgment in this case.

Vaughn Index (Dkt. No. 64-2) Groups 1, 4, 9, 10, 12, 15, 16, 21, 24, 26, 37, 44, 49, 53-55, 57, 75-79, 81-82, 85, 87, 98-104, 112, 114-115; National Security Division ("NSD") Revised Vaughn Index (Dkt. No. 66-2) Part 1 Groups 2-3,[2] 6, Part 2 Group 3; Kovakas decl. at ¶¶ 9, 12, 13, 17, 18, 19, 20. These documents were responsive to plaintiff's FOIA requests because of the breadth of those requests: plaintiff requested all records concerning communications between ODNI or DOJ officials and congressional staff, or representatives of telecommunications companies, concerning amendments to FISA. This is a much broader request than one that seeks only communications between ODNI or DOJ officials and congressional staff, or representatives of telecommunications companies, concerning amendments to FISA.[3] Thus, for example, email exchanges between agency officials, in which they discuss a communication with a congressional staffer concerning amendments to FISA, were responsive to the request and were included within defendants' Exemption 5 claim.

Indeed, the parties both acknowledged in their briefs that the withheld documents at issue include email communications that Executive Branch officials exchanged with each other concerning amendments to FISA. See, e.g., Plaintiff's Opposition to Defendants' Consolidated Motion for Summary Judgment and Cross-Motion for Summary Judgment (Dkt. No. 43) at 14 ("While the defendants have shown that some of the records at issue in this case qualify as 'inter-agency or intra-agency memoranda' [citing defendants' Vaughn indices], the government has failed to show that a great deal of withheld material meets this standard."); Defendants' Consolidated Motion for Summary Judgment ("Defendants' Opening Brief") (Dkt. No. 29) at 7 ("DOJ and ODNI staff also exchanged email with each other and with other Executive Branch staff in preparation for, or in order to deliberate on, these inter-Branch communications."), 14

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[2] Some documents that were exchanged with congressional staff were inadvertently included in Group 2 of NSD's Vaughn index, which contains emails between NSD, other Executive Branch offices, and the White House. We are submitting herewith a second revised Vaughn index for NSD correcting these miscategorizations. See Declaration of Susan L. Kim and NSD Second Revised Vaughn Index, filed herewith.

[3] Nor were plaintiff's FOIA requests limited to discussions about immunizing telecommunications companies for their alleged role in alleged government surveillance activities, but rather extended to communications concerning any and all amendment to FISA.

("Many of the records requested by plaintiff are quintessentially pre-decisional and deliberative because they consist of communications within the Executive Branch, or between high-level Executive Branch officials in policy-oriented positions and Members of Congress or their staffs, concerning proposed, hotly debated FISA amendments."), 15 ("ODNI withheld pursuant to the deliberative process privilege memorandums for the record that were created by ODNI staff when they returned from meetings or briefings with Congress."). The parties focused on the documents that were shared with Congress in briefing Exemption 5's inter-agency or intra-agency requirement, but that was because those documents, which constitute the bulk – but not all – of the withheld documents, present a harder question when it comes to meeting Exemption 5's threshold requirement.

The Court simply did not address the issue of whether the documents that remained within the Executive Branch were properly withheld. The Court's ruling that communications that were shared with government officials outside the Executive Branch did not meet Exemption 5's inter-agency or intra-agency requirement clearly does not apply to documents that were exchanged among officials within the same agency, or among officials in different agencies, or among agency officials and White House staff. The Court determined, however, that it did not need to reach any of defendants' arguments on the applicability of the deliberative process privilege, the presidential communications privilege, the common interest privilege, or the attorney work product doctrine, having found that defendants failed to establish the threshold requirement.

It also does not appear that the Court gave any serious consideration to the documents that were exchanged between agency officials and the White House, but rather lumped them together with the congressional communications. As we explained in our opening summary judgment brief, "under well established case law," Exemption 5 applies to documents prepared by an agency and sent to the President or his advisers and their staffs, even though the President is not an "agency" for purposes of FOIA. Berman v. CIA, 378 F. Supp. 2d 1209, 1219 (E.D. Cal. 2005) (citing EPA v. Mink, 410 U.S. 73, 85 (1973)), aff'd on other grounds, 501 F.3d 1136 (9th Cir. 2007); see also Judicial Watch, Inc. v. Dep't of Energy ("DOE"), 412 F.3d 125, 130-31

(D.C. Cir. 2005) (holding that agency documents shared with or received from presidential advisory body, which did not qualify as an "agency" under FOIA, were "intra-agency" for purposes of the Exemption 5 threshold); Democratic National Committee v. DOJ, 539 F. Supp. 2d 363, 367-68 (D.D.C. 2008) (holding that emails exchanged between officials in the White House and DOJ were properly excluded under FOIA's Exemption 5). "Congress exempted the President from the definition of an 'agency' under FOIA because it wanted to protect the President from the burdens and intrusions of FOIA, not because it sought to deny the President the protections afforded by the exemptions for information communicated to the President but retained in an agency file." Berman, 378 F. Supp. 2d at 1220.

We respectfully submit that the Court failed to consider whether communications that were not shared with individuals outside the Executive Branch, although reflecting communications between ODNI or DOJ officials and congressional staff or telecommunications companies, were protected from disclosure under FOIA's Exemption 5.

II. The Court Failed to Address Meaningfully Defendants' Common Interest Argument.

Second, the Court did not address in any meaningful way defendants' argument that communications between ODNI or DOJ officials and representatives of the telecommunications companies concerning amendments to FISA satisfy the inter-agency or intra-agency threshold requirement because these parties were communicating about common interests they shared as co-defendants in litigation. See Defendants' Opening Brief at 23-26, citing Hunton & Williams, LLP v. DOJ, 2008 WL 906783 at * 5 (E.D. Va. Mar. 31, 2008) (holding that if documents exchanged between DOJ and non-government entity satisfy the requirements of the common interest privilege, that is sufficient to create an inter-agency or intra-agency relationship for purposes of FOIA's Exemption 5); Defendants' Opposition to Plaintiff's Cross-Motion for Summary Judgment and Reply in Support of Defendants' Consolidated Motion for Summary Judgment ("Defendants' Reply Brief") (Dkt. No. 46) at 10 n. 2, 21-24. The Court's conclusion that these communications are not protected from disclosure under Exemption 5 because the telecommunications companies communicated with the Government to advance their own interests, relying on Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 11

(2001), misses the Government's common interest argument, to which Klamath does not speak. In Klamath, the parties did not enter into a common interest agreement,[4] but they did here (see Defendants' Opening Brief at 25, citing Nichols decl. at ¶ 22), and it is that common interest understanding that makes their communications "inter-agency or intra-agency" for purposes of Exemption 5.

Another distinguishing factor between this case and Klamath is that unlike the Indian Tribes in Klamath, the telecommunications companies were not "seeking a Government benefit at the expense of other applicants." Klamath, 532 U.S. at 12 n. 4. The "dispositive point" in Klamath was the adversarial, as opposed to consultative, character of the communications between the Government and the Tribes – "that the apparent object of the Tribe's communications is a decision by an agency of the Government to support a claim by the Tribe that is necessarily adverse to the interests of competitors." Id. at 14. Here, in contrast, the telecommunications companies were communicating with the Government about the enactment of a mutually beneficial provision that would potentially end litigation against them. See Hunton & Williams, 2008 WL 906783 at * 4-5.

The Court's ruling that the communications between ODNI and/or DOJ officials and representatives of the telecommunications companies failed to meet Exemption 5's threshold requirement because the companies communicated with the Government "'with their own . . . interests in mind,'" Dkt. No. 90 at 8 (citing Klamath, 532 U.S. at 11), would effectively nullify common interest agreements entered into by the Government. Non-governmental parties to litigation with the Government per se communicate with the Government with their own interests in mind. The result of the Court's ruling is to deprive the Government of its "right to prepare for litigation and partner with others to form a joint legal strategy" without having to disclose its legal advice to a FOIA requester. Hunton & Williams, 2008 WL 906783 at * 5. See also Hanson v. United States Agency for Int'l Devel., 372 F.3d 286, 289 (4th Cir. 2004) ("While

[4] While the documents at issue in Klamath included memoranda from the Tribes to the Government addressing claims filed by the Government on behalf of the Tribes in a water rights adjudication, there is no indication in the opinion that the Tribes and the Government entered into a common interest agreement.

FOIA exists to facilitate greater government transparency, the government has as much right to undisclosed legal advice in anticipation of litigation as any private party."); United States v. AT&T, 642 F.2d 1285, 1300 (D.C. Cir. 1980) ("The Government has the same entitlement as any other party to assistance from those sharing common interests, whatever their motives.").

III. The Court Failed to Uphold Defendants' Assertion of Exemption 3, Which Was Uncontested.

Third, the Court failed to consider defendants' assertion of Exemption 3 to withhold the identities of telecommunications companies' employees and agents. The Court acknowledged that defendants claimed that this information was protected by Exemptions 3 and 6, and that EFF no longer challenges defendants' withholding of this information under Exemption 3. Dkt. No. 90 at 3-4, 9 & n. 1. The Court nevertheless seems to have held that this information must be disclosed because the Court rejected defendants' Exemption 6 argument, denied our motion for summary judgment and granted plaintiff's cross-motion for summary judgment, and ordered disclosure of improperly withheld documents.

Defendants properly asserted and supported their claim that disclosure of information as to whether any particular telecommunications carrier has assisted, or may in the future assist, the Government with intelligence activities would reveal intelligence sources and methods and is, therefore, exempt from disclosure pursuant to well-recognized non-disclosure statutes and Exemption 3. Defendants' Opening Brief at 29-31; Defendants' Reply Brief at 24-25. We explained that it was necessary to protect the identities of telecommunications companies and their representatives and agents to protect intelligence sources and methods. Defendants' Opening Brief at 29-31, citing McConnell decl. at ¶¶ 5, 23-27, Steele decl. at ¶¶ 18-19, Hackett decl. at ¶ 42, and Brand decl. at ¶¶ 27-29. The Court should have upheld defendants' Exemption 3 claim as unchallenged by plaintiff. Instead, it failed to address it.

CONCLUSION

For all of these reasons, defendants respectfully request that the Court grant their motion for leave to file a motion for reconsideration of the Court's September 24, 2009 order and request that reconsideration be granted without further briefing.

Dated: Oct. 6, 2009

Respectfully submitted,

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