

1 AARON MACKEY (SBN 286647)
amackey@eff.org
2 ADAM D. SCHWARTZ (SBN 309491)
adam@eff.org
3 ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
4 San Francisco, CA 94109
Telephone: (415) 436-9333
5 Facsimile: (415) 436-9993

6 Attorneys for Plaintiff
ELECTRONIC FRONTIER FOUNDATION
7

8
9 **UNITED STATES DISTRICT COURT**
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN FRANCISCO DIVISION**

12
13 ELECTRONIC FRONTIER FOUNDATION,) Case No. 15-cv-03186-MEJ
14 Plaintiff,) **SUPPLEMENTAL BRIEF**
15 v.)
16 DEPARTMENT OF JUSTICE,) Hon. Maria-Elena James
17 Defendant.)
18)
19)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

- INTRODUCTION 1
- I. The Court Should Grant EFF’s Motion for Summary Judgment, Rather than Hold it in Abeyance, Because DOJ Failed to Meet Its Burden Under FOIA. 1
- II. The *EPIC* Decision Supports Summary Judgment For EFF. 4
 - A. The *EPIC* Rulings on Exemption 7 Support Summary Judgment for EFF..... 4
 - 1. The *EPIC* Court Properly Held That the Government Must Support its Exemption Assertions with Specific Detail. 4
 - 2. The *EPIC* Court Properly Rejected the Government’s Assertions Under Exemption 7(D) Concerning Confidential Sources. 5
 - 3. The *EPIC* Court Properly Rejected the Government’s Assertions Under Exemption 7(E) Concerning Circumvention Risks. 6
 - B. The *EPIC* Rulings on Exemption 5 Have No Impact On This Case..... 8
 - C. Many Issues and Documents in This Case Are Not Before the *EPIC* Court. 10
- III. *Animal League Defense Fund* Does Not Impact this Case. 10
- CONCLUSION..... 11

TABLE OF AUTHORITIES

Cases

Animal Legal Defense Fund v. FDA,
2016 WL 4578362 (9th Cir. Sept. 2, 2016) 1, 10, 11

Blackwell v. FBI,
646 F.3d 37 (D.C. Cir. 2011) 8

Cause of Action v. FTC,
961 F. Supp. 2d 142 (D.D.C. 2013) 5

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 1, 11

Defenders of Wildlife v. U.S. Border Patrol,
623 F. Supp. 2d 83 (D.D.C. 2009) 5

DOJ v. Reporters Comm.,
489 U.S. 749 (1989) 1

EPIC v. DEA,
2016 WL 3557007 (D.D.C. June 24, 2016) *passim*

Feshback v. SEC,
5 F. Supp. 2d 774 (N.D. Cal. 1997) 1

Hamdan v. DOJ,
797 F.3d 759 (9th Cir. 2015) 4, 8

Judicial Watch, Inc. v. FDA,
449 F.3d 141 (D.C. Cir. 2006) 5

Light v. DOJ,
968 F. Supp. 2d 11 (D.D.C. 2013) 8

Maricopa Audubon Society v. U.S. Forest Service,
108 F.3d 1089 (9th Cir. 1997) 9

Mead Data Central, Inc. v. U.S. Dept. of Air Force,
566 F.2d 242 (D.C. Cir. 1977) 5

Military Audit Project v. Casey,
656 F. 2d 724 (D.C. Cir. 1981) 5

Morley v. CIA,
508 F.3d 1108 (D.C. Cir. 2007) 5

NLRB v. Sears,
421 U.S. 132, 151 (1975) 9

PHE, Inc. v. DOJ,
983 F.2d 248 (D.C. Cir. 1993) 8

1 *Pons v. Customs Service,*
 2 1998 U.S. Lexis 6084 (D.D.C. 1998) 8
 3 *Rosenfeld v. DOJ,*
 4 904 F. Supp. 2d 988 (N.D. Cal. 2012) 2
 5 *SafeCard Services v. SEC,*
 6 926 F.2d 1197 (D.C. Cir. 1991) 5
 7 *Voinche v. F.B.I.,*
 8 46 F. Supp. 2d 26 (D.D.C. 1999) 6
 9 **Statutes**
 10 5 U.S.C. § 552 *passim*
 11 **Rules**
 12 Fed. R. Civ. P. Rule 56(c) 11
 13 **Other Authorities**
 14 *Drug Agents Use Vast Phone Trove, Eclipsing N.S.A. 's,* New York Times
 15 (September 1, 2013) 7
 16 *Everything We Learned From Edward Snowden in 2013,* National Journal
 17 (December 31, 2013) 7
 18 *U.S. Drug Agency Partners with AT&T for Access to “Vast Database” of Call Records,*
 19 The Guardian (September 2, 2013) 7
 20
 21
 22
 23
 24
 25
 26
 27
 28

Introduction

1
2 Because Defendant the U.S. Department of Justice (DOJ) has repeatedly failed to meet its
3 burden of proving the applicability of any FOIA exemptions to the disputed records, EFF
4 respectfully asks this Court to grant its motion for summary judgment at this time, rather than hold
5 it in abeyance.¹ The Hemisphere surveillance program is growing by billions of telephone records
6 *every day*. See ECF 23 at 2. The time has come for DOJ to comply with its duty under FOIA to
7 disclose the disputed Hemisphere records and thereby inform the American public “what their
8 government is up to.” *DOJ v. Reporters Comm.*, 489 U.S. 749, 773 (1989).

9
10 *EPIC v. DEA*, 2016 WL 3557007 (D.D.C. June 24, 2016), confirms that DOJ failed to
11 prove the applicability of FOIA Exemption 7 and provides no bar to this Court ordering disclosure
12 of the disputed records.

13 *Animal Legal Defense Fund v. FDA*, 2016 WL 4578362 (9th Cir. Sept. 2, 2016), has no
14 impact on this case.

I. The Court Should Grant EFF’s Motion for Summary Judgment, Rather than Hold it in Abeyance, Because DOJ Failed to Meet Its Burden Under FOIA.

15
16
17 EFF opposes holding its pending motion for summary judgment in abeyance because DOJ
18 consistently failed to meet its burden to demonstrate that its withholdings are proper under FOIA.
19 The Court asked for the parties’ perspectives on holding EFF’s motion in abeyance “to give the
20 Government time to submit additional evidence where it may have inadequately supported an
21 asserted exemption.” ECF 40 at 2.

22
23 Under FOIA, the government bears the burden of proving the propriety of its withholdings,
24 so when a requester such as EFF moves for summary judgment, it prevails simply by showing that
25 the government failed to meet its burden. *Feshback v. SEC*, 5 F. Supp. 2d 774, 779 (N.D. Cal.
26 1997) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

27
28 ¹ EFF submits this supplemental brief to answer questions posed by this Court. See ECF 40.

1 EFF has demonstrated DOJ's failure to meet its burden, entitling EFF to summary judgment
2 as a matter of law. DOJ already had ample opportunities in this litigation to establish its record and
3 meet its burden. DOJ has filed four briefs and five declarations thus far. *See* ECF 19-21; ECF 25-
4 26; ECF 34-35; ECF 37; ECF 43. Pursuant to this Court's recent order, DOJ will soon file two
5 more briefs. EFF's motion for summary judgment and its pleadings in support of it prove that
6 DOJ's withholdings under the claimed FOIA exemptions are insufficient as matter of law. *See* ECF
7 Nos. 23-23-1; ECF 30; ECF 36; ECF 38. Thus, on the existing record, the Court should enter
8 summary judgment for EFF.
9

10 Holding EFF's motion in abeyance to allow DOJ to submit additional evidence would lead
11 to further and unnecessary delay that will unduly burden this Court and unnecessarily prolong this
12 FOIA litigation. If the Court allows DOJ to submit additional evidence, it will likely file at least
13 one new declaration and a brief to argue why the new evidence satisfies its burden to withhold the
14 disputed records. EFF will then need to file a new brief to respond to whatever new evidence and
15 arguments DOJ raises.
16

17 When agencies are given additional opportunities to meet their burden under FOIA, the
18 litigation often devolves into years-long efforts to provide as little additional information as
19 possible until the agency nudges its proof across the line. One prominent FOIA case in this Court,
20 *Rosenfeld v. DOJ*, took nearly three decades, and a series of additional requests and suits,² before
21 the agency finally produced all responsive records and demonstrated its burden to withhold exempt
22 records. *See Rosenfeld v. DOJ*, 904 F. Supp. 2d 988, 992-93 (N.D. Cal. 2012). Thus, EFF renews
23 its motion for summary judgment in its favor, and opposes holding its motion in abeyance for DOJ
24 to submit additional evidence.
25

26 Should the Court have continuing questions about the propriety of DOJ's withholdings,
27

28 ² *See Rosenfeld v. DOJ*, C-85-1709-MHP, C-85-2275-MHP, C-07-3240-EMC.

1 then EFF alternatively suggests that this Court should order DOJ to produce the disputed
2 documents for review *in camera*, as opposed to allowing DOJ to submit additional evidence. This
3 has been EFF’s position throughout briefing. *See* ECF 23 at 23-24; ECF 30 at 15; ECF 36 at 4;
4 ECF 38 at 7-8. Conducting *in camera* review will allow the Court to determine whether any of the
5 claimed exemptions are applicable and whether DOJ has adequately segregated exempt material
6 from what it should otherwise disclose under FOIA.
7

8 The Drug Enforcement Agency’s (DEA) inconsistent application of FOIA’s exemptions to
9 the same records at issue in both this case and *EPIC* demonstrates the superiority of *in camera*
10 review over further DOJ submissions. According to the government’s new “exemption comparison
11 chart,” the DEA used vastly different justifications for withholding the 161 pages common to both
12 cases. *See* ECF 43-2. DEA did not cite Exemption 7(A) on any of the identical 161 pages it
13 withheld from *EPIC*. *Id.* Yet DEA applied Exemption 7(A) to 151 of the common pages sought by
14 EFF. *Id.* Moreover, although DEA cited 7(D) in both cases to withhold 13 pages of common
15 records, it cited Exemption 7(D) on 107 additional pages in EFF’s case but not in *EPIC*’s. *Id.* The
16 DEA has failed to provide any explanation for the agency’s incoherent application of the
17 exemptions to the exact same documents sought by EFF and *EPIC*. This Court’s review would be
18 helpful to independently check the agency’s withholding decisions, as the only entity to actually
19 review the documents – DEA – has claimed FOIA exemptions inconsistently in two cases seeking
20 the same documents.³
21
22

23 Additionally, *in camera* review will lead to a quicker resolution of this case, compared to a
24 third round of supplemental briefing should the Court hold EFF’s motion in abeyance. New
25 briefing and evidence from DOJ is unlikely to yield additional insight into the propriety of its
26

27 ³ The government’s new Declaration and *Vaughn* Index address Exemptions 6, 7(C), and 7(F).
28 ECF 43 at ¶ 20(c); ECF 43-3. To be clear, EFF does not contest any of the withholdings under
these Exemptions. ECF 23 (EFF Mot.) at 1, n. 1.

1 withholdings, meaning the Court may ultimately have to review documents *in camera* anyway.⁴

2 **II. The *EPIC* Decision Supports Summary Judgment For EFF.**

3 The *EPIC* decision’s rulings on Exemption 7 support summary judgment here for EFF. On
4 the other hand, its rulings on Exemption 5 have no impact here. Notably, there are many issues and
5 documents in this case that are not disputed in *EPIC*.⁵

6 **A. The *EPIC* Rulings on Exemption 7 Support Summary Judgment for EFF.**

7 In three ways, the *EPIC* opinion’s rulings on Exemption 7 support summary judgment for
8 EFF. First, the *EPIC* court properly held that the government must support its exemption assertions
9 with specific detail. Second, the *EPIC* court properly rejected the government’s assertion under
10 Exemption 7(D) that disclosure of certain records would expose a confidential source. Third, the
11 *EPIC* court properly rejected the government’s assertion under Exemption 7(E) that disclosure of
12 certain records would create a risk of circumvention of law.⁶

13 **1. The *EPIC* Court Properly Held That the Government Must Support its
14 Exemption Assertions with Specific Detail.**

15 As EFF has shown, a government agency must support its FOIA withholdings with specific
16

17
18 ⁴ Although the court in *EPIC* gave the government the option to (1) supplement the record to
19 correct its failure of proof or (2) produce the documents for *in camera* review, conservation of this
20 Court’s scarce resources counsels against this approach. This is particularly true here because EFF
21 demonstrated that the nature of the DOJ’s withholdings – redacting nearly entire pages of released
22 records and withholding many others in full – do not permit the Court to determine whether DOJ
23 conducted a good-faith effort to segregate and release non-exempt material. *See Hamdan v. DOJ*,
24 797 F.3d 759, 781 (9th Cir. 2015).

25 ⁵ This Court instructed the parties to address “the impact of the *EPIC* case . . . on this action,”
26 including “(a) whether there is any issue or document in this case that is not before the *EPIC* court
27 and thus may be resolved in this case without affecting the *EPIC* case; [and] (b) the extent to which
28 the *EPIC* court’s rulings on Exemption 7(E) have any effect on this Court’s decision given the
different standards applied by the Ninth Circuit and D.C. Circuit as to risk of circumvention of the
law” *See* ECF 40 at 2.

⁶ The government’s conduct in the *EPIC* case also supports summary judgment for EFF. In its new
“exemption comparison chart,” the government concedes that as to the 161 common documents in
the *EPIC* case and this one, it asserted Exemption 7(A) over 151 pages in this case but never in the
EPIC case. *See* ECF 43-2. EFF has already shown that Exemption 7(A) does not apply here. *See*
ECF 30 at 6-8. The government’s decision not to assert Exemption 7(A) over the same documents
in the *EPIC* case further shows the exemption does not apply.

1 detail and not mere conclusory allegations. *See* ECF 23 at 6; ECF 30 at 7, 9, 11.

2 The *EPIC* court agreed:

3 *Vaughn* and subsequent case law requires the government to provide
4 “a relatively detailed justification, specifically identifying the reasons
5 why a particular exemption is relevant and correlating those claims
6 with the particular part of a withheld document to which they apply.”
7 *Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 251
8 (D.C. Cir. 1977) (citing *Vaughn*, 484 F.2d at 825). Although there is
9 no strict format required for a *Vaughn* index, an agency must “disclose
10 as much information as possible without thwarting the exemption’s
11 purpose.” *Defenders of Wildlife*, 623 F. Supp. 2d 83, 88 (D.D.C.
12 2009). Withholding information under conclusory, generalized, or
13 sweeping allegations of exemptions is not acceptable. *See, e.g. Morley*
14 *v. CIA*, 508 F.3d 1108, 1115 (D.C. Cir. 2007); *Judicial Watch, Inc. v.*
15 *FDA*, 449 F.3d 141, 147 (D.C. Cir. 2006).

16 *EPIC v. DEA*, 2016 WL 3557007, *4 (D.D.C. 2016). *See also id.* at *3 (“Agency affidavits and
17 declarations must be ‘relatively detailed and non-conclusory’”), quoting *SafeCard Services v. SEC*,
18 926 F.2d 1197, 1200 (D.C. Cir. 1991); and *id.* at *3 (a court “may grant summary judgment solely
19 on the basis of information provided by the department or agency in affidavits or declarations that
20 describe the documents and justifications for nondisclosure with ‘reasonably specific detail’”),
21 quoting *Cause of Action v. FTC*, 961 F. Supp. 2d 142, 153 (D.D.C. 2013), quoting *Military Audit*
22 *Project v. Casey*, 656 F. 2d 724, 738 (D.C. Cir. 1981).

23 **2. The *EPIC* Court Properly Rejected the Government’s Assertions Under**
24 **Exemption 7(D) Concerning Confidential Sources.**

25 EFF has shown, just as the *EPIC* court held, that DOJ failed to meet its burden of proving
26 either an express or an implied assurance of confidentiality. *See* ECF 23 at 14-16; ECF 30 at 8-9.
27 FOIA Exemption 7(D) allows an agency to withhold information that “could reasonably be
28 expected to disclose the identity of a confidential source” Here, as in *EPIC*, DOJ argues that
private-sector companies that participated in Hemisphere are confidential sources.

The *EPIC* court held that the DEA failed to meet its burden of proving an express assurance
of confidentiality based on a factual record nearly identical to the one here. The DEA rested on a

1 declaration stating: “[a]ccording to the DEA personnel who are familiar with Hemisphere, the
2 companies provide information to law enforcement with the express expectation that both the
3 source and the information will be afforded confidentiality.” *See* 2016 WL 3557007, *10, quoting
4 Myrick Decl. at 41. Here, DOJ rests on the same statement from the same declarant. *See* ECF 21
5 (Myrick Decl. of 2/18/16) at ¶ 54. Based on this record, the *EPIC* court held: “the government has
6 failed to meet its burden of showing that an explicit assurance of confidentiality was given to the
7 private companies involved with Hemisphere. *See e.g., Voinche v. F.B.I.*, 46 F. Supp. 2d 26, 34
8 (D.D.C. 1999) (‘To properly invoke Exemption 7(D), however, the [government] must present
9 more than the conclusory statement of an agent that is not familiar with the informant.’).” *See* 2016
10 WL 3557007, *10.

12 Likewise, the *EPIC* court held that the DEA failed to meet its burden of proving an implied
13 assurance of confidentiality, and again the factual record there was nearly identical to the one here.
14 The DEA rested on a declaration stating: “confidentiality can be inferred because providing the
15 information can lead to retaliation against the companies.” *See* 2016 WL 3557007, *11, quoting
16 Myrick Decl. at p. 41. Here, DOJ rests on an identical declaration. *See* ECF 21 (Myrick Decl. of
17 2/18/16) at par. 54. Based on this record, the *EPIC* court held: “The Court agrees with *EPIC* that
18 the DEA has failed to provide the necessary details to support a finding that confidentiality was
19 implied to private companies assisting with the operation of Hemisphere. The DEA cites no
20 authority for the proposition that potential retaliation against a private company is sufficient to
21 justify a finding of implied confidentiality.” *See* 2016 WL 3557007, *11.

24 **3. The *EPIC* Court Properly Rejected the Government’s Assertions Under
25 Exemption 7(E) Concerning Circumvention Risks.**

26 The *EPIC* court rejected the same government assertions under Exemption 7(E) that EFF
27 proved are insufficient under FOIA. *See* ECF 23 at 17-19; ECF 30 at 10-11. FOIA Exemption 7(E)
28 allows an agency to withhold information that “would disclose techniques and procedures for law

1 enforcement investigations or prosecutions, or would disclose guidelines for law enforcement
2 investigations or prosecutions if such disclosure could reasonably be expected to risk
3 circumvention of the law.” The government on this basis withholds two sets of information in both
4 this case and the *EPIC* case: the names of companies that assist Hemisphere, and the names of
5 police agencies with access to it.

6
7 The *EPIC* court rejected DEA’s assertion of Exemption 7(E) over company names,
8 reasoning:

9 As a general matter, the government’s use of telephone interception
10 and data collection for law enforcement purposes is known to the
11 public. *See e.g., Everything We Learned From Edward Snowden in*
12 *2013*, National Journal, December 31, 2013 (noting, among other
13 things, that Verizon provided daily information on domestic and
14 international telephone calls to the National Security Agency). More
15 specifically, the cooperation of major telecommunication companies
with Hemisphere has been widely reported by various news outlets, as
indicated by the Complaint in this case. *See Compl. (citing Drug*
Agents Use Vast Phone Trove, Eclipsing N.S.A.’s, New York Times,
September 1, 2013).

16 *See* 2016 WL 3557007, *12. Here, EFF relies on similar proof, including the same *New York Times*
17 article, to show that the public is well aware of telephone surveillance in general and Hemisphere
18 in particular. *See* ECF 23 at 1-4, 17-18; ECF 30 at 10. The *EPIC* court further explained:

19 The DEA has failed to logically demonstrate how release of the private
20 corporation’s names would assist drug traffickers seeking to evade law
21 enforcement. For example, according to one of the media reports cited
22 in *EPIC*’s Complaint, the AT&T database “includes every phone call
23 which passes through the carrier’s infrastructure, not just those made
24 by AT&T customers.” *U.S. Drug Agency Partners with AT&T for*
Access to “Vast Database” of Call Records, The Guardian, September
25 2, 2013. The logical inference from this report is that a drug trafficking
organization cannot avoid use of any one telephone carrier in order to
evade the DEA’s prosecution efforts through Hemisphere.

26 *See* 2016 WL 3557007, *13. *See also id.* (“Publicly available information about such
27 telecommunication companies’ facility locations is as available now as it would be were the DEA
28 to disclose the identities of the companies assisting with Hemisphere.”).

1 The *EPIC* court also rejected the DEA’s assertion of Exemption 7(E) over police agency
2 names. *See* 2016 WL 3557007, *14-15. Doing so, the court rejected the DEA’s argument that
3 “because every law enforcement agency has its own respective focus and sphere of authority,
4 knowing which particular law enforcement agencies have access to Hemisphere would help
5 criminals tailor their activities to avoid apprehension.” *Id.* DOJ unpersuasively rests on the same
6 argument in this case. *See* ECF 23 at 18-19.
7

8 In reaching its Exemption 7(E) holdings, the *EPIC* court distinguished three cases that EFF
9 also distinguished: *PHE, Inc. v. DOJ*, 983 F.2d 248 (D.C. Cir. 1993); *Light v. DOJ*, 968 F. Supp.
10 2d 11 (D.D.C. 2013); and *Pons v. Customs Service*, 1998 U.S. Lexis 6084 (D.D.C. 1998). *Compare*
11 2016 WL 3557007, *12, 14-15; *with* ECF 23 at 18-21; *and* ECF 30 at 10-11.
12

13 The *EPIC* opinion is relevant and persuasive authority, notwithstanding the different
14 Exemption 7(E) standards in the Ninth Circuit and the D.C. Circuit. In the Ninth Circuit, agencies
15 must prove a circumvention risk as to law enforcement *guidelines*, but not as to law enforcement
16 techniques and procedures. *Hamdan*, 797 F.3d at 778. In the D.C. Circuit, agencies must prove a
17 circumvention risk as to *all* of these kinds of law enforcement documents. *Blackwell v. FBI*, 646
18 F.3d 37, 41-42 (D.C. Cir. 2011). Here, the disputed records are guidelines. *See* ECF 36 at 2-3; ECF
19 38 at 3-6. Thus, the division of circuit authority does not diminish the persuasiveness and
20 applicability of the *EPIC* opinion.
21

22 **B. The *EPIC* Rulings on Exemption 5 Have No Impact On This Case.**

23 The *EPIC* decision’s holdings with respect to Exemption 5 are irrelevant here. As EFF
24 demonstrated, DOJ failed to meet its threshold burden to prove the seven records it withholds on
25 this basis were not shared outside the executive branch. *See* ECF 23 at 7-8; ECF 30 at 2-3. EFF
26 also demonstrated that DOJ failed to prove the applicability of the attorney-client privilege, the
27 work-product privilege, or the deliberative process privilege. *See* ECF 23 at 8-11; ECF 30 at 3-6.
28

1 FOIA Exemption 5 applies to “inter-agency or intra-agency” records not available during litigation
2 against an agency.

3 The *EPIC* opinion did not address the threshold issue of whether the documents are inter-
4 or intra-agency records as required by FOIA. Also, it did not address six of the seven records DOJ
5 withholds here under Exemption 5. It only addressed the applicability of the deliberative process
6 privilege to one document (which is document #4 here), and the applicability of the work-product
7 privilege to another document (which is not at issue here). *See* 2016 WL 3557007, *5-9; *see also*
8 Dkt. 43-2 (the DOJ’s new “exemption comparison chart”) at lines 16-27 (identifying the singular
9 document over which the government asserts Exemption 5 in both cases).
10

11 Much of the *EPIC* opinion’s reasoning on deliberative process privilege is contrary to
12 controlling Ninth Circuit precedent. In *Maricopa Audubon Society v. U.S. Forest Service*, 108 F.3d
13 1089, 1094 (9th Cir. 1997), the Ninth Circuit held that a government agency asserting DPP “must
14 identify a specific decision to which the document is predecisional.” Doing so, the Ninth Circuit
15 rejected as “dictum” a footnote in *NLRB v. Sears*, 421 U.S. 132, 151 n. 18 (1975). *See also* ECF 8
16 at 8-9; ECF 30 at 3-4. But the *EPIC* opinion reached the opposite conclusion, relying on the *Sears*
17 footnote. *See* 2016 WL 3557007, *5-6. Also, the *EPIC* opinion unpersuasively concluded that
18 DEA could rest its claim on the bare fact that a lawyer in the DEA’s Chief Counsel Office prepared
19 a memo, including their added comments, for DEA senior management. *Id.* at *7.
20

21 The *EPIC* opinion held the plaintiff had waived its work-product argument. *See* 2016 WL
22 3557007, *7-8. So the remainder of the *EPIC* opinion on this issue is dicta. That opinion is
23 especially unpersuasive in suggesting Hemisphere’s nature shows government officials might
24 reasonably anticipate litigation. *Id.* at *9. In fact, the government kept the program “under the
25 radar” for years, so it could not reasonably anticipate litigation. *See* ECF 30 at 5.
26
27
28

1 **C. Many Issues and Documents in This Case Are Not Before the EPIC Court.**

2 Many documents and issues in this case are not before the *EPIC* court, and thus may be
3 resolved here without affecting that case. Of the 259 pages disputed in this case, 98 pages (38%)
4 are not disputed in the *EPIC* case. *Compare* ECF 43 (Myrick 3rd Decl.), ¶ 12 (identifying 161
5 pages in dispute in both EPIC and EFF’s cases); *with* ECF 23 at 12 (identifying 259 pages withheld
6 from EFF in this case). Moreover, unlike EPIC, EFF seeks several additional categories of
7 information that the government withholds under Exemption 7(E): the cities and states where
8 Hemisphere is located; the internal procedures and guidelines for making Hemisphere requests;
9 details regarding how Hemisphere requests are routed and processed and how resources are
10 organized and deployed; details about how Hemisphere results are delivered to and presented to
11 law enforcement; and technical details about how Hemisphere works and details about the specific
12 capabilities and limitations of Hemisphere. *Compare* ECF 23 at 17-21; *with* 2016 WL 3557007,
13 *12.
14
15

16 Also, the following issues in the *EPIC* case are not before this Court: the adequacy of the
17 government’s search for responsive records, *see* 2016 WL 3557007, *3-4; the absence of a *Vaughn*
18 index, *id.* at *4-5; and information withheld under Exemption 7(E) about how cooperation from
19 third parties is secured, *id.* at *14.
20

21 **III. Animal League Defense Fund Does Not Impact this Case.**

22 The *en banc* Ninth Circuit’s decision in *Animal Legal Defense Fund v. FDA*, ___ F.3d ___,
23 2016 WL 4578362 (Sept. 2, 2016) (“*ALDF*”), does not impact this case. In *ALDF*, the Ninth
24 Circuit held that in FOIA cases, the appropriate appellate standard of review for district court
25 decisions on summary judgment is *de novo*. *ALDF* at *2. The court observed that, “if there are
26 genuine issues of material fact in a FOIA case, the district court should proceed to a bench trial or
27 adversary hearing.” *Id.* It noted that the appellate standard of review following appeals from such
28

1 trials or adversary hearings is bifurcated: the Ninth Circuit reviews findings of fact for clear error
2 and conclusions of law *de novo*. *Id.*

3 *ALDF* has no impact on this case for at least two reasons.

4 First, *ALDF* did not alter the *de novo* standard this Court, and other trial courts, must
5 employ under FOIA to review DOJ's withholdings. 5 U.S.C. § 552(a)(4)(B). Rather, *ALDF*
6 changed the appellate standard of review the Ninth Circuit employs when reviewing a trial court's
7 summary judgment decisions, conforming it to the standard required under Rule 56(c) of the
8 Federal Rules of Civil Procedure. *ALDF*, 2016 WL 4578362, *2. *ALDF*'s change in the appellate
9 standard of review would only impact this case if one or both parties seek review of this Court's
10 summary judgment decisions. It is thus inapplicable to the case at this time.

11
12 Second, this case should be resolved on summary judgment because there are no disputed
13 questions of material fact. *See Celotex*, 477 U.S. at 323. DOJ argues that it met its burden to prove
14 it complied with its obligations under FOIA. EFF argues that DOJ failed to do so. Both parties
15 believe they are entitled to summary judgment as a matter of law. Because there is no factual
16 dispute here, unlike the underlying factual dispute in *ALDF*, that case has no bearing on the
17 pending motions here.
18

19 **Conclusion**

20 EFF respectfully requests that this Court grant EFF's motion for summary judgment, deny
21 DOJ's motion for summary judgment, and order DOJ to provide EFF the disputed records.
22

23 DATED: November 4, 2016

Respectfully submitted,

24 /s/ Adam Schwartz

25 Adam Schwartz

26 Aaron Mackey
27 ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
28 Attorneys for Plaintiff
ELECTRONIC FRONTIER FOUNDATION