IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER FOUNDATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 07-0403 (TFH)
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S MOTION FOR *IN CAMERA* REVIEW

Plaintiff Electronic Frontier Foundation ("EFF") initiated this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to obtain disclosure of records concerning actions taken by the Foreign Intelligence Surveillance Court ("FISC") that purportedly authorize surveillance activities within the United States that the Executive Branch had previously asserted could be conducted without such judicial authorization. Defendant Department of Justice ("DOJ") has moved for summary judgment, asserting that all of the material EFF requests is exempt from disclosure in its entirety. Plaintiff opposes the government's motion and cross-moves for *in camera* review of the withheld material.

Background

On December 16, 2005, the *New York Times* reported on its front page that "after the Sept. 11 attacks, President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying." James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, NY Times, Dec. 15, 2005. One

day after the publication of the *Times* article, on December 17, 2005, President Bush confirmed the existence of the warrantless surveillance program. President's Radio Address, December 17, 2005. The President and other Executive Branch officials subsequently referred to the program as the "Terrorist Surveillance Program" (hereinafter "the surveillance program"). Complaint, ¶ 6; Answer, ¶ 6.

Since its disclosure, the Administration's purported legal rationale for the warrantless surveillance program was the focus of great controversy and public debate. Within hours of the publication of the *New York Times* report, Senator Arlen Specter, then-Chairman of the Senate Judiciary Committee, said that the surveillance program was "wrong, clearly and categorically wrong . . . . This will be a matter for oversight by the Judiciary Committee as soon as we can get to it in the new year — a very, very high priority item." *Specter Says Senate to Probe Report U.S. Broke Law on Spying,* Bloomberg.com, Dec. 16, 2005. Other members of the Judiciary Committee, on both sides of the aisle, also questioned the legality of the surveillance program; for instance, "[a] prominent conservative on the committee [Sen. Sam Brownback] said he is troubled by the legal arguments the Bush administration has presented for establishing the National Security Agency program." Douglass K. Daniel, *Specter Seeks AG's Testimony on Spying*, Associated Press, Jan. 8, 2006. "He said he was 'troubled by . . . the grounds that the administration says that they did these on, the legal basis, and I think we need to look at that far more broadly and understand it a great deal.'" *Id.*[1]

[1] The Congressional Research Service ("CRS") issued a memorandum last year assessing the legality of the warrantless surveillance program. Congressional Research Service, *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information*, Jan. 5, 2006 (*available at* http://www.fas.org/sgp/crs/intel/m010506.pdf). CRS noted that "[t]he Administration's views have been the subject of debate," *id*. at 3, and concluded that "the Administration's legal justification . . . does not seem to be as well-grounded [as the Justice Department has suggested]," *id*. at 44.

In a letter to Senate Judiciary Committee Chairman Patrick Leahy and ranking minority member Arlen Specter dated January 17, 2007, the Attorney General revealed that the FISC had recently issued orders relating to the surveillance program. He wrote, *inter alia*,

> I am writing to inform you that on January 10, 2007, a Judge of the Foreign Intelligence Surveillance Court issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization. As a result of these orders, any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to approval of the Foreign Intelligence Surveillance Court.

Defendant's Exhibit A (attached to the Declaration of Matthew G. Olsen ("Olsen Decl.")).

At a press briefing on January 17, 2007, White House Press Secretary Tony Snow discussed the FISC action described in the Attorney General's letter. Mr. Snow said, *inter alia*, that "[t]he FISA Court has published the rules under which such [surveillance] activities may be conducted," that "the Foreign Intelligence Surveillance Court has put together its guidelines and its rules [governing the conduct of such surveillance]," and that the Administration's electronic surveillance activities will "continue[] under the rules that have been laid out by the court." Press Briefing by Tony Snow, Jan. 17, 2007; Complaint, ¶ 8; Answer, ¶ 8.

The revelation of FISC orders and rules relating to the surveillance program generated an immediate request from Congress for public disclosure. In a letter to FISC Presiding Judge Colleen Kollar-Kotelly dated January 17, 2007, Sens. Leahy and Specter referenced the letter they received from the Attorney General and wrote:

> On behalf of the Senate Judiciary Committee, we ask that you provide the Committee with copies of the [FISC] orders and opinions. We also request that you make the Court's decision public to the extent possible.
>
> These are matters of significant interest to the Judiciary Committee and the Congress and to the American people, as well. We all have an interest in ensuring

> that the government is performing surveillance necessary to prevent acts of terrorism and that it is doing so in ways that protect the basic rights of all Americans, including the right to privacy.

Plaintiff's Exhibit A (attached hereto). Judge Kollar-Kotelly responded that same day and indicated that she had "no objection" to the Judiciary Committee's request:

> I am writing in response to your request that I provide the Committee on the Judiciary with "copies of the orders and opinions" issued in the matter referenced in Attorney General Alberto R. Gonzales' letter to you, dated January 17, 2007. As the presiding judge of the Foreign Intelligence Surveillance Court (FISC), I have no objection to this material being made available to the Committee. However, the Court's practice is to refer any requests for classified information to the Department of Justice. In this instance, the documents that are responsive to your request contain classified information and, therefore, I would ask you to discuss the matter with the Attorney General or his representatives. If the Executive and Legislative Branches reach agreement for access to this material, the Court will, of course, cooperate with the agreement.

Plaintiff's Exhibit B (attached hereto).

By letter sent by facsimile to defendant DOJ's Office of Intelligence Policy and Review ("OIPR") on January 23, 2007, plaintiff requested under the FOIA the following records:

> copies of all Foreign Intelligence Surveillance Court ("FISC") orders referenced by the Attorney General in his letter to Sens. Leahy and Specter, and all FISC rules and guidelines associated with such orders and/or referenced by Mr. Snow in the January 17 press briefing.

Defendant's Exhibit B (attached to Olsen Decl.), at 2. Plaintiff also requested that processing of its request be expedited pursuant to the applicable DOJ regulation, 28 CFR § 16.5(d). By letter to plaintiff dated January 26, 2007, defendant DOJ acknowledged that it received plaintiff's FOIA request on January 23, 2007. Defendant's Exhibit C (attached to Olsen Decl.). Upon defendant DOJ's failure to respond to the request within the statutorily mandated time period, 5 U.S.C. § 552 (a)(6)(A), plaintiff initiated this action on February 27, 2007. The agency denied plaintiff's request by letter dated March 9, 2007, asserting that "two documents that are responsive to [the] request" had been located and that "these documents have been withheld in

their entirety pursuant to Exemptions 1, 5, 6, and 7(C) of the FOIA." Defendant's Exhibit D (attached to Olsen Decl.), at 1.

Plaintiff is not alone in its unsuccessful efforts to obtain disclosure of information concerning the FISC actions relating to the surveillance program. The Senate Judiciary Committee's attempts to obtain the FISC material from the Department of Justice have also been unavailing. On May 21, 2007, Sens. Leahy and Specter wrote to the Attorney General to reiterate the Committee's longstanding requests for various documents, including "the January 2007 FISC orders to which you refer in your January 17, 2007 letter to us and all other opinions or orders of the FISA court with respect to this surveillance." Plaintiff's Exhibit C (attached hereto) at 3. The Senators noted the Administration's unwillingness to respond to the Committee's requests:

> This Committee has made no fewer than eight formal requests over the past 18 months — to the White House, the Attorney General, or other Department of Justice officials seeking documents and information related to this surveillance program. These requests have sought the Executive Branch legal analysis of this program and documents reflecting its authorization by the President. You have rebuffed all requests for documents and your answers to our questions have been wholly inadequate and, at times, misleading.

Id. at 1. They further noted that the Committee currently is considering legislation relating to surveillance activities, and that the requested information is "critical" to the legislative process:

> [T]he Administration has offered a legislative proposal that it contends seeks to "modernize" the Foreign Intelligence Surveillance Act (FISA). As you know, the Judiciary Committee has historically overseen changes to FISA and it is this Committee's responsibility to review the Administration's proposal with great care. The draft legislation would make dramatic and far-reaching changes to a critical national security authority. Before we can even begin to consider any such legislative proposal, we must be given appropriate access to the information necessary to carry out our oversight and legislative duties.
>
> . . . You testified in January that the warrantless wiretapping program had been terminated and that henceforth surveillance would be conducted pursuant to authorization from the FISA Court. To consider any changes to FISA, it is critical

> that this Committee understand how the Department and the FISA Court have interpreted FISA and the perceived flaws that led the Administration to operate a warrantless surveillance program outside of FISA's provisions for over five years.

Id. at 2.

ARGUMENT

In opposing the government's motion for summary judgment, plaintiff does not dispute that *some* portion of the responsive records is likely to be properly exempt from disclosure under the FOIA exemptions upon which DOJ relies. Plaintiff submits, however, that the material may not properly be withheld in its *entirety*. As we show, defendant has not even attempted to comply with the FOIA's fundamental requirement to conduct a "segregability" analysis, and the circumstances surrounding the withheld material strongly suggest that segregable portions of the disputed FISC material can, in fact, be disclosed without harm to national security or other cognizable interests. As such, plaintiff respectfully requests that the Court conduct an *in camera* review of the withheld material to identify those portions that must be disclosed.

I. The Court Should Apply the FOIA Consistently with its Core Purpose of Government Disclosure and Informed Public Debate

The Freedom of Information Act is grounded in the "fundamental principle of public access to Government documents," *John Doe Agency v. John Doe Corp*., 493 U.S. 146, 151 (1989), and in the American public's right to know "what their Government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (citation and internal quotation marks omitted). The basic purpose of the statute is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214, 242 (1978). Accordingly, the drafters of the FOIA intended "that the courts interpret this legislation broadly, as a disclosure statute and not as an excuse to withhold

information from the public." 112 Cong. Rec. 13654 (June 20, 1966) (statement of then-Rep. Donald Rumsfeld).

The FOIA directs government agencies to disclose certain types of records upon request. *See* 5 U.S.C. § 552(a)(3). The statute contains nine exemptions from its broad mandate of disclosure, *see* 5 U.S.C. § 552(b), "'[b]ut these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.' Accordingly, these exemptions 'must be narrowly construed.'" *John Doe Agency*, 493 U.S. at 152 (quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976)).

In a FOIA case, "[t]he government is entitled to summary judgment if no material facts are in dispute and if it demonstrates either that withheld or redacted documents are not required to be disclosed under § 552(a) or are exempt from disclosure under § 552(b)." *Billington v. U.S. Dep't of Justice*, 233 F.3d 581, 583-84 (D.C. Cir. 2000). "Very importantly, 'the burden is on the agency to sustain its action.'" *Founding Church of Scientology of Wash., D.C., Inc. v. NSA*, 610 F.2d 824, 830 (D.C. Cir. 1979) (quoting 5 U.S.C. § 552(a)(4)(B)). Consequently, when the government contends that documents are exempt from disclosure, "[t]he government bears the burden of proving that the withheld information falls within the exemptions it invokes," *Ctr. for Nat. Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 925 (D.C. Cir. 2003), "even when the underlying facts are viewed in the light most favorable to the requester." *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1350 (D.C. Cir. 1983).

As the Senate Judiciary Committee has noted in its efforts to obtain the FISC material at issue here, an understanding of how the "the FISA Court ha[s] interpreted FISA" is critical to the public debate on the surveillance program and proposed changes to the statute. Plaintiff's Exhibit C at 2. Indeed, the public oversight mechanism provided by the FOIA is central to open and

democratic debate on critical policy issues such as this. As the Supreme Court has observed, the Act is "a means for citizens to know 'what the Government is up to.' This phrase should not be dismissed as a convenient formalism. *It defines a structural necessity in a real democracy*." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-172 (2004) (emphasis added; citation omitted). In its *de novo* review of the agency's withholding decision, 5 U.S.C. § 552(a)(4)(B), the Court should seek to vindicate the Act's core purpose of facilitating informed democratic debate on critical issues of public policy.[2]

II. DOJ has Failed to Comply with the FOIA's Segregability Requirement

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b). The D.C. Circuit has made clear that "[t]he 'segregability' requirement applies to all documents and all exemptions in the FOIA." *Ctr. for Auto Safety v. EPA*, 731 F.2d 16, 21 (D.C. Cir. 1984); *see also Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992). This comports with the policy of disclosure and prevents the withholding of entire documents, *see Billington*, 233 F.3d at 586, unless the agency can demonstrate that the non-exempt portions of a document are "inextricably intertwined with exempt portions." *Trans-Pacific Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1027 (D.C. Cir. 1999) (quoting *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1976)).

So important is the segregability requirement to FOIA's broad disclosure mandate that trial courts have an affirmative duty to consider the issue of segregability *sua sponte*. *Trans-*

[2] As this Court noted in another FOIA case seeking disclosure of information about the surveillance program, "a meaningful and truly democratic debate on the legality and propriety of the . . . surveillance program cannot be based solely upon information that the Administration voluntarily chooses to disseminate." *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 41 n.9 (D.D.C. 2006) (citation and internal quotation marks omitted).

Pacific Policing Agreement, 177 F.3d at 1028; *see also Billington*, 233 F.3d at 586. In fact, "[i]t is error for a district court to simply approve the withholding of an entire document without entering a finding on segregability, or the lack thereof." *Schiller*, 964 F.2d at 1210 (citations and internal quotation marks omitted); *see also Billington*, 233 F.3d at 586.

In this case, the government has not conducted any segregation analysis, nor made any apparent effort to segregate non-exempt, releasable material from the withheld records. Instead, defendant DOJ hopes the general assertion that the records relate to the surveillance program is sufficient to persuade the Court to assume blanket withholding is appropriate. Importantly, the government's memorandum in support of summary judgment does not address segregability at all, nor does the sole declaration on which it relies. *See* Olsen Decl. Nonetheless, the government has invoked three FOIA exemptions to conceal every word of the material responsive to plaintiff's request.[3]

The government's indiscriminate approach plainly warrants judicial scrutiny. FOIA's segregability requirement obliges an agency to perform a "segregability analysis" that distinguishes exempt from non-exempt material within each document that is responsive to the FOIA request. *See Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973) ("An entire document is not exempt merely because an isolated portion need not be disclosed. Thus, the agency may not sweep a document under a general allegation of exemption, even if that general allegation is correct with regard to part of the information."). Furthermore, even if an agency can show that certain material in a document is exempt but cannot be reasonably segregated from non-exempt information, that agency must also "describe what proportion of the information is non-exempt

[3] In its letter to plaintiff dated March 9, 2007, defendant DOJ asserted that the responsive material was being withheld pursuant to Exemptions 1, 3, 6 and 7(C). Defendant's Exhibit D at 1. The agency appears to have abandoned its reliance on Exemption 6 in this litigation.

and how that material is dispersed throughout the document," such that "both litigants and judges will be better positioned to test the validity of the agency's claim that the non-exempt material is not segregable." *Mead Data Cent. Inc.*, 566 F.2d at 261.

The government has not made any effort to comply with these standards. Moreover, the circumstances of this particular case reinforce the conclusion that the government's generalized explanation are wholly inadequate as a basis for finding that no reasonably segregable portions exist.

A. FISA Contemplates Public Disclosure

First, the Foreign Intelligence Surveillance Act itself contemplates that the kind of material at issue in this case can be presented and described in "unclassified form." As recently amended, the statute provides, in pertinent part,

> (1) The [Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review] may establish such *rules and procedures*, and take such actions, as are reasonably necessary to administer their responsibilities under this Act.
>
> (2) The *rules and procedures* established under paragraph (1), and any modifications of such rules and procedures, shall be recorded, and shall be transmitted to the following:
>
> (A) All of the judges on the [Foreign Intelligence Surveillance Court].
> (B) All of the judges on the [Foreign Intelligence Surveillance Court of Review].
> (C) The Chief Justice of the United States.
> (D) The Committee on the Judiciary of the Senate.
> (E) The Select Committee on Intelligence of the Senate.
> (F) The Committee on the Judiciary of the House of Representatives.
> (G) The Permanent Select Committee on Intelligence of the House of Representatives.
>
> (3) The transmissions required by paragraph (2) *shall be submitted in unclassified form*, but may include a classified annex.

50 U.S.C. § 1803(f) (*as amended by* Pub. L. 109-177, 120 Stat. 192 (March 9, 2006)) (emphases added).

There is no question that the material withheld in this case includes such "rules and procedures." As noted, White House spokesman Tony Snow announced on January 17 that "[t]he FISA Court has published the rules under which such [surveillance] activities may be conducted," that "the Foreign Intelligence Surveillance Court has put together its guidelines and its rules [governing the conduct of such surveillance]," and that the Administration's electronic surveillance activities will "continue[] under the rules that have been laid out by the court." Press Briefing by Tony Snow, Jan. 17, 2007; Complaint, ¶ 8; Answer, ¶ 8. The government's declarant, Mr. Olsen, states that "[t]he material withheld . . . consists of orders signed by the FISC and procedures that regulate the acquisition, retention and dissemination of information about United States persons, including persons who are not the targets of FISA collection." Olsen Decl., ¶ 11. It is thus clear that at least some of the material at issue here is precisely the type of material that can – and indeed must – be made available in "unclassified form."

B. Material Generated by the FISA Judicial Process has been Disclosed

Second, despite the government's suggestion that *every* bit of material emanating from the FISA judicial process is "routinely classified," Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment at 13, such material has, in fact, been publicly disclosed when, as in this case, the judicial deliberations touched upon significant issues of public concern. Thus, in the first (and to date, only) proceeding before the Foreign Intelligence Surveillance Court of Review, the court's opinion was released with only minor redactions. *In re Sealed Case No. 02-001*, 310 F.3d 717, 720 n.3 (F.I.S.C.R. 2002) ("The bracketed information is classified and has been redacted from the public version of the

opinion.").[4] Likewise, defendant DOJ released a public version of its brief in that proceeding, Plaintiff's Exhibit E (attached hereto), further demonstrating that discussion of matters arising under FISA are indeed susceptible to "reasonable segregation" and public disclosure.

The government's brief in *In re Sealed Case No. 02-001* discussed in detail – *and quoted* – the FISC order and opinion that were under review by the appellate court. *See*, *e.g.*, *id.* at 17-22. Indeed, the FISC opinion of May 17, 2002, is itself publicly available. Plaintiff's Exhibit F (attached hereto). It is thus clear that, notwithstanding the government's suggestion of a need for *total* secrecy, there is a strong precedent for public disclosure of the type of material at issue here, subject to appropriate and limited redaction.

C. FISC's Presiding Judge does not Object to Disclosure

Finally, this case presents an unusual circumstance in which the presiding judge of the Foreign Intelligence Surveillance Court – which produced the disputed material – has clearly and unequivocally indicated that she has "no objection" to the request of the Senate Judiciary Committee that the material be made available to the Committee and "public to the extent possible." Plaintiff's Exhibits A & B. It is likely that Judge Kollar-Kotelly's lack of objection stems from the fact that the requested material, like the earlier FISC and FISCR material made public, primarily addresses *legal issues*, as opposed to *operational details.* Indeed, Sens. Leahy and Specter, in their recent letter to the Attorney General "emphasize[d] that [they] are seeking the legal justifications and analysis underlying these matters and not the specific operational details or information obtained by the surveillance." Plaintiff's Exhibit C at 3.

[4] To enable the Court to see that only a small amount of information was redacted from the Court of Review's opinion, plaintiff is filing herewith, as Plaintiff's Exhibit D, the slip opinion released by the court.

Plaintiff does not dispute that the government has met its burden of demonstrating that the documents contain *some* exempt material. That showing, however, is not enough to meet the segregability standard set forth by the D.C. Circuit: "the focus in the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Mead Data Cent. Inc.*, 566 F.2d at 260. As the D.C. Circuit has long recognized, "unless the segregability provision of the FOIA is to be nothing more than a precatory precept, agencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts." *Id.* at 261. The fact that the requested documents concern a matter of national security does not insulate the government from FOIA's segregability command.

III. *In Camera* Review of the Withheld Material is Necessary for the Court to Conduct a Meaningful *De Novo* Review of DOJ's Actions

Plaintiff respectfully requests that the Court conduct an *in camera* review of the withheld records. In reviewing the validity of an agency's exemption claims, the Court "may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld." 5 U.S.C. § 552(a)(4)(B). The decision whether to undertake *in camera* review is left to the trial court's discretion. *Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 996 (D.C. Cir. 1998). "*In camera* review is particularly appropriate when the documents withheld are brief and limited in number." *Maynard v. CIA*, 986 F.2d 547, 558 (1st Cir. 1993) (citations omitted); *see also Donovan v. FBI*, 806 F.2d 55, 59 (2d Cir. 1986) ("*in camera* inspection has been found to be appropriate when only a small number of documents are to be examined") (citation omitted).[5]

[5] There is some confusion as to the number of documents at issue here. In its March 9, 2007, response to EFF's request, defendant DOJ stated unequivocally that it had "located two

Summary judgment without *in camera* review is appropriate only where the government's affidavits "provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith." *Ctr. for Auto Safety*, 731 F.2d at 22; *see also Allen v. CIA*, 636 F.2d 1287, 1291 (D.C. Cir. 1980), *overruled on other grounds*, *Founding Church of Scientology of Wash. D.C., Inc. v. Smith*, 721 F.2d 828, 830 (D.C. Cir. 1983). "While in camera examination need not be automatic, in many situations it will plainly be necessary and appropriate." *Ray*, 587 F.2d at 1191 (quoting the Conference Report on the 1974 FOIA Amendments, S. Rep. No. 93-1200 at 2 (1974), as reprinted in 1974 U.S.C.C.A.N. 6285, 6287) (internal quotation marks omitted). In this case, as discussed above, the government's failure to even consider the segregability issue should leave the Court profoundly concerned that the government has withheld information to an unjustified extent. In light of the clear failure of the agency to comply with the Act's segregability requirements, and of the strong public interest in the material at issue, the Court should exercise its discretion to review *in camera* the withheld documents.

A. *In Camera* Review Can Compensate for Plaintiff's Information Disadvantage

As the D.C. Circuit has explained, Congress intended that "the *de novo* review mandated by the Freedom of Information Act be extremely thorough so as to insure that agencies do not impermissibly expand by unreviewed interpretations the particular types of matters Congress has exempted from disclosure." *Allen*, 636 F.2d at 1297 (citation and internal quotation marks

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documents that are responsive to [the] request." Defendant's Exhibit D. The agency now asserts that it "intended to indicate that it had located two documents or categories of documents that were responsive to EFF's request," and that any clarification of the matter "cannot be further discussed in an unclassified setting." Olsen Decl., ¶ 9. In any event, DOJ has at no time asserted that there are a large number of responsive documents.

omitted). Even in the context of matters classified for national security reasons the courts are empowered to conduct an in camera review in order to satisfy their obligation to conduct a *de novo* review. *See Ray*, 587 F.2d at 1201- 15 (Wright, J. concurring) (discussing the legislative history of the 1974 amendments to the FOIA). Thus, not even national security claims of the sort relied upon here can require courts to "relinquish[] their independent responsibility" to undertake a thorough *de novo* evaluation of the government's exemption claims, reviewing documents *in camera* if necessary. *Goldberg v. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987).

Thorough judicial review of the government's exemption claims is particularly appropriate in light of the requester's informational disadvantage, peculiar to the context of FOIA litigation:

> [I]t is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure. . . . In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information . . . .

Vaughn, 484 F.2d at 823; *see also Jones v. FBI*, 41 F.3d 238, 242 (6th Cir. 1994) ("[T]he plaintiff is handicapped in this endeavor by the fact that only the agency truly knows the content of the withheld material. Except in cases in which the court takes the entire set of responsive documents *in camera*, even the court does not know." (citations omitted)). "In an effort to compensate" for this disadvantage on the part of FOIA requesters, "the trial court, as the trier of fact, may and often does examine the document *in camera* to determine whether the Government has properly characterized the information as exempt." *Vaughn*, 484 F.2d at 825.

B. The Court has Broad Discretion to Conduct *In Camera* Review and the Public Interest in the Material Warrants its Exercise

The D.C. Circuit has encouraged *in camera* review of FOIA documents in a variety of circumstances. The Circuit has long held *in camera* review to be appropriate where "agency affidavits are insufficiently detailed to permit meaningful review of exemption claims" or "evidence of agency bad faith is before the court." *Lam Lek Chong v. U.S. Drug Enforcement Admin.*, 929 F.2d 729, 735 (D.C. Cir. 1991); *see also, e.g., Allen*, 636 F.2d at 1298. At the same time, the Court has made clear that these are not the only circumstances under which *in camera* review is justified. *See, e.g., Spirko*, 147 F.3d at 996 ("[i]n camera inspection does not depend on a finding or even tentative finding of bad faith" (quoting *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978)) (internal quotation marks omitted)). On the contrary, as the court of appeals has repeatedly emphasized, trial courts have broad discretion over whether to conduct *in camera* review. *See, e.g., Carter v. Dep't of Commerce*, 830 F.2d 388, 392 (D.C. Cir. 1987); *Ctr. for Auto Safety*, 731 F.2d at 20; *see also Spirko*, 147 F.3d at 996 ("With such broad discretion vested in the district court, this court has yet to identify particular circumstances under which *in camera* inspection would be inappropriate . . . ." (emphasis in original)). "The ultimate criterion is simply this: Whether the district judge believes that *in camera* inspection is needed in order to make a responsible *de novo* determination on the claims of exemption." *Spirko*, 147 F.3d at 996 (quoting *Ray*, 587 F.2d at 1195) (internal quotation marks omitted); *see also Carter*, 830 F.2d at 392; *Ctr. for Auto Safety*, 731 F.2d at 21.

This case clearly warrants *in camera* review, as there is a "greater call for *in camera* inspection" in "cases that involve a strong public interest in disclosure." *Allen*, 636 F.2d at 1299; *see also Jones*, 41 F.3d at 243. As the D.C. Circuit has explained:

> When citizens request information to ascertain whether a particular agency is properly serving its public function, the agency often deems it in its best interest to stifle or inhibit the probes. It is in these instances that the judiciary plays an important role in reviewing the agency's withholding of information. But since it is in these instances that the representations of the agency are most likely to be protective and perhaps less than accurate, the need for *in camera* inspection is greater.

Allen, 636 F.2d at 1299.

The public interest in the contents of the withheld documents is exceptionally high. The FOIA request at issue seeks records related to the Administration's belated resort to the FISC for approval of an extremely controversial surveillance program that intercepts the communications of Americans. The subject of this request – government spying on communications – has serious implications for the constitutionally protected rights of speech and privacy and the statutory regime that regulates electronic surveillance within the United States.

The legality and propriety of the surveillance program has been the subject of sustained, intense public concern. As noted, it took less than a day after its first public disclosure for Sen. Arlen Specter, then-Chairman of the Senate Judiciary Committee, to pledge that the Senate would hold hearings to investigate the NSA's warrantless surveillance. *Specter Says Senate to Probe Report U.S. Broke Law on Spying,* Bloomberg.com, Dec. 16, 2005. Within just a few days of the revelation of the surveillance program, dozens of news stories appeared across the country. [6]

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[6] *See*, *e.g.*, James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, New York Times, Dec. 16, 2005, at A1; Maura Reynolds and Greg Miller, *Congress Wants Answers About Spying on U.S. Citizens*, Pittsburgh Post-Gazette, Dec. 16, 2005; Steven Thomma, *Spying Could Create Backlash on Congress; Public Reaction Hinges on Identity of Targets*, San Jose Mercury News, Dec. 16, 2005; Christine Hauser, *Bush Declines to Discuss Report on Eavesdropping*, New York Times, Dec. 16, 2005; Katherine Shrader, *Lawmakers Say Reported Spy Program Shocking, Call For Investigations*, San Diego Union Tribune, Dec. 16, 2005; Caren Bohan and Thomas Ferraro, *Bush Defends Eavesdropping and Patriot Act*, ABC News, Dec. 17, 2005; Dan Eggen and Charles Lane, *On Hill, Anger and Calls for Hearing Greet News of*

Since then, concern by Congress, the media and the public has continued unabated. As Sens. Leahy and Specter have noted in their repeated efforts to obtain access to the material at issue here, the FISC's actions of January 2007 do not resolve the controversy surrounding the surveillance program, but merely add new issues to the public debate:

> [T]he Administration has offered a legislative proposal that it contends seeks to "modernize" the Foreign Intelligence Surveillance Act (FISA). . . . The draft legislation would make dramatic and far-reaching changes to a critical national security authority. Before we can even begin to consider any such legislative proposal, we must be given appropriate access to the information necessary to carry out our oversight and legislative duties.
>
> . . . You testified in January that the warrantless wiretapping program had been terminated and that henceforth surveillance would be conducted pursuant to authorization from the FISA Court. To consider any changes to FISA, it is critical that this Committee understand how the Department and the FISA Court have interpreted FISA and the perceived flaws that led the Administration to operate a warrantless surveillance program outside of FISA's provisions for over five years.

Plaintiff's Exhibit C at 2.

It is clear that the strong public interest in the subject of EFF's FOIA request weighs heavily in favor of *in camera* review of the withheld documents. The need for such review is bolstered by the government's failure to address the critical issue of segregability. "It is error for a district court to simply approve the withholding of an entire document without entering a

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Stateside Surveillance, Washington Post, Dec. 17, 2005, at A1; Jennifer Loven, *Bush Defends Secret Spying in U.S.*, San Francisco Chronicle, Dec. 17, 2005; Barton Gellman and Dafna Linzer, *Pushing the Limits of Wartime Powers*, Washington Post, Dec. 18, 2005, at A1; John Diamond, *NSA's Surveillance of Citizens Echoes 1970s Controversy*, USA Today, Dec. 18, 2005; James Kuhnhenn, *Bush Defends Spying in U.S.*, San Jose Mercury News, Dec. 18, 2005; Fred Barbash and Peter Baker, *Gonzales Defends Eavesdropping Program*, Washington Post, Dec. 19, 2005; Todd J. Gillman, *Bush Assails Disclosure of Domestic Spying Program*, San Jose Mercury News, Dec. 19, 2005; David Stout, *Bush Says U.S. Spy Program is Legal and Essential*, New York Times, Dec. 19, 2005; James Gerstenzang, *Bush Vows to Continue Domestic Surveillance*, L.A. Times, Dec. 19, 2005; Terence Hunt, *Bush Says NSA Surveillance Necessary, Legal*, Washington Post, Dec. 19, 2005; George E. Condon, *Bush Says Spying Is Needed To Guard US*, San Diego Union Tribune, Dec. 20, 2005; Jeff Zeleny, *No 'Unchecked Power' In Domestic Spy Furor*, Chicago Tribune, Dec. 20, 2005.

finding on segregability, or the lack thereof," *Powell v. U.S. Bureau of Prisons*, 927 F.2d 1239, 1242 n.4 (D.C. Cir. 1991) (internal quotation and citation omitted); *see Schiller*, 964 F.2d at 1209 (remanding case because NLRB had failed to "correlate[] the claimed exemptions to particular passages in the [exempt] memos"). Here, the government does not even assert that there are no "reasonably segregable" portions of the withheld material, and the Court thus cannot make the necessary finding.

"A judge has discretion to order *in camera* inspection on the basis of an uneasiness, on a doubt that he wants satisfied before he takes responsibility for a *de novo* determination." *Spirko*, 147 F.3d at 996 (quoting *Ray*, 587 F.2d at 1195) (internal quotation marks omitted). Plaintiff submits that substantial doubt exists here, and urges the Court to review the withheld material *in camera*.

Conclusion

For the foregoing reasons, defendant's motion for summary judgment should be denied and plaintiff's motion for *in camera* review should be granted.

Respectfully submitted,

/s/David L. Sobel
DAVID L. SOBEL
D.C. Bar No. 360418

MARCIA HOFMANN
D.C. Bar. No. 484136

Electronic Frontier Foundation
1875 Connecticut Avenue, N.W.
Suite 650
Washington, DC 20009
(202) 797-9009

Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER FOUNDATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 07-0403 (TFH)
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

As required by Local Rule 7.1(h), plaintiff Electronic Frontier Foundation responds to defendant's statement of material facts as to which there is no genuine issue and concurs that there is no genuine issue with respect to the material facts identified therein.

Respectfully submitted,

/s/David L. Sobel
DAVID L. SOBEL
D.C. Bar No. 360418

MARCIA HOFMANN
D.C. Bar. No. 484136

Electronic Frontier Foundation
1875 Connecticut Avenue, N.W.
Suite 650
Washington, DC 20009
(202) 797-9009

Counsel for Plaintiff