

# EXHIBIT 1

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 10

11 **IN THE UNITED STATES DISTRICT COURT**  
 12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
 13 **SAN FRANCISCO DIVISION**

14 ELECTRONIC FRONTIER FOUNDATION,	)	Case No. 10-CV-04892-DMR
	)	
15 Plaintiff,	)	
	)	SECOND DECLARATION OF
16 vs.	)	KRISTIN L. ELLIS
	)	
17 DEPARTMENT OF JUSTICE,	)	U.S. DEPARTMENT OF JUSTICE,
18 FEDERAL BUREAU OF INVESTIGATION,	)	CRIMINAL DIVISION
AND DRUG ENFORCEMENT	)	
19 ADMINISTRATION,	)	
	)	
20 Defendants.	)	

21  
 22 I, Kristin L. Ellis, declare the following to be a true and correct statement of facts:

23 1. I am a Deputy Chief/Trial Attorney in the Freedom of Information Act/Privacy Act  
 24 (FOIA/PA) Unit of the U.S. Department of Justice (DOJ), Criminal Division (CRM), where I have  
 25 worked since May 2010. Due to my current position, I am aware of the practices and procedures  
 26 generally employed by CRM's FOIA/PA Unit in responding to requests for information under the  
 27  
 28

1 FOIA and/or Privacy Act. My duties include providing litigation support and assistance to AUSAs  
2 and DOJ Civil Division (CIV) Trial Attorneys who represent DOJ in lawsuits filed in Federal court  
3 under the FOIA and/or Privacy Act stemming from requests for CRM records. In carrying out my  
4 duties, I review processing files compiled by CRM's FOIA/PA Unit in responding to information  
5 requests to determine whether searches for records were properly conducted and whether decisions  
6 to withhold or release CRM records were in accordance with the FOIA, the Privacy Act, and DOJ  
7 regulations at 28 C.F.R. §§ 16.1 *et seq.* and §§ 16.40 *et seq.* If searches are incomplete and/or  
8 records have not been processed, I ensure that searches are completed and either process or oversee  
9 the processing of responsive records by FOIA/PA Unit staff members. I regularly consult with the  
10 FOIA/PA Unit Chief and staff members of the Unit about the processing of requests. I also consult  
11 with officials and employees in CRM sections where responsive records are located, and with  
12 officials and employees in other DOJ components and/or Federal agencies that have equities in  
13 responsive records.  
14  
15

16 2. I have been employed as an attorney by the Federal Government since February  
17 1998. From February 1998 until May 2010, I was employed by the U.S. Office of Special Counsel  
18 (OSC), where my duties included, *inter alia*, enforcing the FOIA's sanction provision, which  
19 provides for disciplining agency officials who arbitrarily and capriciously withhold information  
20 requested under the FOIA, see 5 U.S.C. § 1216(a)(3) and 5 U.S.C. § 552(a)(4)(F) (from February  
21 1998 to May 2007), and serving as the principal legal advisor to OSC's FOIA Office and Chief  
22 FOIA Officer and working with Assistant U.S. Attorneys (AUSAs)/CIV Trial Attorneys to defend  
23 OSC's interests in FOIA litigation (from May 2007 to May 2010).  
24

25 3. I have been licensed by the State Bar of Michigan since 1997.

26 4. I am familiar with the particular processing of plaintiff's FOIA request in this case.  
27 Among other things, I coordinated and oversaw the Division's search for responsive information; I  
28

1 compiled and inventoried potentially responsive information located by Division employees; I  
2 reviewed potentially responsive information, sorted out non-responsive and duplicate records,  
3 referred records to their originating agencies, and made recommendations about applicable  
4 exemptions; I conferred and consulted with other Department offices and Federal agencies about  
5 the disposition of potentially responsive information located by CRM; and I prepared responses to  
6 plaintiff.  
7

8 5. The statements that follow are made on the basis of my review of CRM's official  
9 files and records, my own personal knowledge, and information I acquired in performing my  
10 official duties.  
11

#### 12 PLAINTIFF'S REQUEST FOR RECORDS

13 6. Plaintiff submitted a FOIA request dated September 28, 2010, to CRM via  
14 facsimile. CRM received the request on September 29, 2010. A true and correct copy of the  
15 request is attached as Exhibit 1.  
16

17 7. Plaintiff requested:

18 [A]ll agency records created on or after January 1, 2006 (including, but not  
19 limited to, electronic records) discussing, concerning, or reflecting:

- 20 1. any problems, obstacles or limitations that hamper the DOJ's current  
21 ability to conduct surveillance on communications systems or networks  
22 including, but not limited to, encrypted services like Blackberry (RIM),  
social networking sites like Facebook, peer-to-peer messaging services  
like Skype, etc.;
- 23 2. any communications or discussions with the operators of  
24 communications systems or networks (including, but not limited to,  
25 those providing encrypted communications, social networking, and peer-  
26 to-peer messaging services), or with equipment manufacturers and  
vendors, concerning technical difficulties the DOJ has encountered in  
conducting authorized electronic surveillance;
- 27 3. any communications or discussions concerning technical difficulties the  
28 DOJ has encountered in obtaining assistance from non-U.S.-based

operators of communications systems or networks, or with equipment manufacturers and vendors in the conduct of authorized electronic surveillance;

4. any communications or discussions with the operators of communications systems or networks, or with equipment manufacturers and vendors, concerning development and needs related to electronic communications surveillance-enabling technology;
5. any communications or discussions with foreign government representatives or trade groups about trade restrictions or import or export controls related to electronic communications surveillance-enabling technology;
6. any briefings, discussions, or other exchanges between DOJ officials and members of the Senate or House of Representatives concerning implementing a requirement for electronic communications surveillance-enabling technology, including, but not limited to, proposed amendments to the Communications Assistance for Law Enforcement Act (CALEA).

*Id.* at p. 2.

8. Plaintiff also requested that its request be granted expedited treatment, pursuant to 28 C.F.R. § 16.5(d)(1)(ii), which provides that requests “will be taken out of order and given expedited treatment whenever it is determined that they involve ... an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.” *See id.* at pp. 2-3.

9. Plaintiff averred that expedited treatment was warranted because of “the proposed introduction of legislation that would impose new technical requirements on communications providers,” and because, it posited, the information requested “will help the public and Congress fully participate in [the] ongoing debate over whether to increase – or restrict – the investigative authority of the federal government.” Plaintiff quoted from a *New York Times* article, which reported that the Obama administration planned to propose “sweeping new regulations for the Internet ... next year.” *Id.* at p. 3; see also Exhibit 2 (a true and correct copy of the referenced *New York Times* article).

11. In a letter dated October 4, 2010, CRM acknowledged receipt of the request for information and denied plaintiff's request for expedited treatment. CRM explained that it was denying the request for expedited processing because "we do not believe that your request for information about legislation that may or may not be proposed to Congress next year satisfies the criteria for expedited processing." A true and correct copy of this letter is attached as Exhibit 3.

## ADEQUACY OF SEARCH

12. CRM conducted systematic searches for information responsive to plaintiff's request. Searches were initiated on October 6, 2010. Agency personnel in CRM's FOIA/PA Unit familiar with the request and with CRM's various offices initially determined that based on the subject matter of the request, the offices most likely to possess responsive information were:

- 16 a. the Computer Crime and Intellectual Property Section (CCIPS), because of  
17 the technology aspects of the request;
- 18 b. the Office of International Affairs (OIA), because of the portions of the  
19 request concerning communications with foreign governments;
- 20 c. the Office of Policy and Legislation (OPL), because of plaintiff's reference  
21 to possible legislative/regulatory solutions to the "going dark" problem; and
- 22 d. OEO's Electronic Surveillance Unit (ESU), because the request concerns  
23 electronic surveillance issues.

25           13.     The FOIA/PA Unit sent each office identified above a search request that included a  
26     copy of plaintiff's FOIA request.

1           14.     On November 5, 2010, while CRM's search for responsive records was on-going,  
2     the Government was served with plaintiff's lawsuit in this matter. CRM learned about the lawsuit  
3     on November 10, 2010.

4           15.     Even though CRM did not grant plaintiff's request for expedited treatment of its  
5     FOIA request, CRM began treating the request as a priority in November 2010.

6           16.     On November 12, 2010, I contacted CCIPS, OIA, OPL, and ESU to determine the  
7     status and progress of its searches for responsive records. As a result of my contacts and ensuing  
8     discussions, CRM determined that other CRM offices may have information potentially responsive  
9     to plaintiff's request. Consequently, CRM expanded its search for responsive information. On  
10    November 17, 2010, all Office of Enforcement Operations (OEO)<sup>1</sup> employees were asked to search  
11    for responsive information, and on November 30, 2010, all CRM employees were asked to search  
12    for responsive information. OEO employees were instructed to report if they located any  
13    potentially responsive information by November 26, 2010; all other CRM employees were  
14    instructed to report if they located any potentially responsive information by December 10, 2010.  
15    Both the November 17<sup>th</sup> and 30<sup>th</sup> search requests included copies of plaintiff's FOIA request.

16           17.     Employees were also instructed to report to the FOIA/PA Unit whether they  
17    believed they might have potentially responsive information in electronic form (*i.e.*, in their e-mail  
18    accounts or on their personal network (H:) drives). The FOIA/PA Unit then coordinated with  
19    CRM's Information Technology Management (ITM) office to conduct electronic searches.  
20    CRM's Information Technology Management (ITM) office to conduct electronic searches.

21           18.     For employees reporting that they may possess potentially responsive information in  
22    their e-mail accounts, CRM-ITM conducted a global search of most of those employees' unsecured  
23    e-mail accounts, and provided results to the FOIA/PA Unit on January 6 and 11, 2011. For  
24    employees reporting that they may possess potentially responsive information on their H: drives,  
25    CRM-ITM conducted a global search of most of those employees' unsecured e-mail accounts, and provided results to the FOIA/PA Unit on January 6 and 11, 2011. For  
26    employees reporting that they may possess potentially responsive information on their H: drives,

27           <sup>1</sup> The Office of Enforcement Operations (OEO) is a component within the Criminal Division that houses the  
28    FOIA/PA Unit and ESU, *inter alia*.

1 CRM-ITM searched those employees' H: drives and provided those results to the FOIA/PA Unit  
2 on or about March 3, 2011. CRM-ITM also searched a shared network (S:) used by CRM-CCIPS.  
3 In order to conduct these searches, CRM-ITM restored the last full backup from three servers.

4 Several employees were sufficiently aware of the extent and location of the potentially  
5 responsive information they had in their unsecured e-mail accounts/on their H: drives to conduct  
6 their own electronic searches, which they did. Those employees provided any responsive  
7 information they located to the FOIA/PA Unit between November 2010 and February 2011.  
8

9 Finally, two employees reported that they had potentially responsive information on their  
10 secured e-mail accounts. They searched their own accounts; one employee located responsive  
11 information and provided it to the FOIA/PA Unit on January 10, 2011.  
12

13 19. CRM limited its searches to the period January 1, 2006, to October 16, 2010 (the  
14 date on which we initiated searches). The e-mails and electronic records of the employees  
15 reporting potentially responsive information, as well as CRM-CCIPS's S: drive, were searched  
16 using key word searches.<sup>2</sup> Headers and bodies of e-mails and titles and contents of documents  
17 were searched electronically for certain key words based on plaintiff's request in conjunction with  
18 the term "going dark."

19 20. In the end, CRM located approximately 8,425 pages of potentially responsive  
20 information. However, because we cast such a wide net in searching for information (by asking all  
21 CRM employees to search) and because the terms pertinent to this request commonly appear in  
22 CRM records relating to routine issues involving electronic surveillance and unrelated to problems  
23 conducting such surveillance or to any other topic responsive to plaintiff's FOIA request, much of  
24 the information we located was either duplicative (*i.e.*, several employees had the same documents  
25 or were senders/recipients of the same e-mails) or not responsive.  
26

27 <sup>2</sup> For e-mails, the "TO:" and "FROM:" fields were searched using the names of the employees who responded  
28 that they may have responsive e-mails.



**CRM'S RESPONSES TO PLAINTIFF**

21. After carefully reviewing all of the potentially responsive information located, CRM identified only 59 pages of responsive, non-duplicative information originating from CRM.

Although CRM was involved in discussions about addressing the "going dark" problem, most of the information about operational difficulties encountered by law enforcement in conducting lawful electronic surveillance originated from other agencies responsible for conducting such surveillance.

22. CRM also located approximately 499 pages of potentially responsive information originating from, or of primary interest to other Federal agencies, and consistent with DOJ regulation, referred those records to the originating agencies for processing and a direct response to plaintiff. *See* 28 C.F.R. § 16.4(c). CRM's referrals are discussed further in the subsection below titled "REFERRALS."

23. CRM started responding to plaintiff on an interim basis on April 1, 2011.

24. In a letter dated April 1, 2011, CRM notified plaintiff that we had completed reviewing approximately 1,100 pages for our first interim response; had located two pages containing responsive information originating from CRM that we were withholding in full under FOIA Exemption 7(E); and had referred approximately 15 pages to the DEA, 15 pages to the FBI, and 109 pages to OIP. A true and accurate copy of CRM's letter is attached as Exhibit 4.

25. In a letter dated April 28, 2011, CRM notified plaintiff that we had completed reviewing approximately 2,300 pages for our second interim response; had located seven pages containing responsive information originating from CRM that we were withholding in full under FOIA Exemptions 5, 6, 7(C), and 7(E); and had referred approximately 42 pages to the FBI, one page to the DEA, 17 pages to OIP, two pages to the Department of State, three pages to EOUSA,

1 two pages to NSD, three pages to NCIS, and two pages to SOCOM. A true and accurate copy of  
2 CRM's letter is attached as Exhibit 5.

3 26. In a letter dated June 1, 2011, CRM notified plaintiff that we had completed  
4 reviewing approximately 3,200 pages for our third interim response; had located 19 pages  
5 containing responsive information originating from CRM and that we were releasing one page in  
6 full and withholding one page in part and 17 pages in full under FOIA Exemptions 5 and 7(E); and  
7 had referred one page to the FBI, two pages to the DEA, approximately 75 pages to OIP, and one  
8 page to USMS. CRM produced the two pages of material to plaintiff on a CD enclosed with the  
9 June 1, 2011, letter. A true and accurate copy of CRM's letter is attached as Exhibit 6.  
10

11 27. In a letter dated June 20, 2011, CRM notified plaintiff that we had completed  
12 reviewing approximately 1,825 pages for our fourth interim response; had located approximately  
13 24 pages containing responsive information originating from CRM that we were withholding full  
14 under FOIA Exemptions 5 and 7(E); had referred approximately 64 pages to the FBI, one page to  
15 the DEA, approximately 140 pages to OIP, one page to NSD, and six pages to ATF; and were  
16 consulting with other DOJ components about the disposition of several records in which CRM  
17 shared equities. CRM also clarified its third interim response to plaintiff, noting that in addition to  
18 the exemptions cited in our June 1, 2011, letter to justify our withholdings, we were also relying on  
19 FOIA Exemptions 6, 7(A), 7(C), 7(D), and 7(F). A true and accurate copy of CRM's letter is  
20 attached as Exhibit 7.  
21

22 28. When CRM issued the fourth interim response, we had completed initial review of  
23 all potentially responsive located during our searches (8,425 pages). At that time, the only  
24 outstanding response due from CRM concerned the disposition of the records that were the subjects  
25 of our consultation requests to other DOJ components.  
26  
27  
28

1           29. CRM completed its response to plaintiff on August 1, 2011. In our final response  
2 letter on August 1<sup>st</sup>, we notified plaintiff that we received responses to the consultation requests  
3 referenced in our June 28, 2011, letter and as a result, were releasing five (5) pages in part and  
4 withholding one (1) page in full, based on FOIA Exemptions 5, 6, 7(C), and 7(E). We further  
5 explained that in our April 28, 2011, letter, we advised plaintiff of a referral to the Department of  
6 State, but that upon further review and discussion with the Department of State, concluded that the  
7 document actually originated with an office serviced for FOIA purposes by OIP. Consequently, we  
8 referred those pages, as well as eight additional pages we identified as originating from one of  
9 OIP's client offices, to OIP for processing and a direct response to plaintiff. A true and accurate  
10 copy of CRM's letter is attached as Exhibit 8.  
11

12  
13                   **ALL REASONABLY SEGREGABLE RECORDS RELEASED**

14           30. The subject matter of this request concerns sensitive law enforcement information.  
15 Indeed, the information that plaintiff seeks would, if disclosed, provide drug cartels, terrorists,  
16 child predators, and other criminals a roadmap of how to thwart lawful electronic surveillance  
17 efforts by law enforcement, and thus avoid detection, by revealing weaknesses and gaps in the  
18 Government's ability to conduct such surveillance. Against this backdrop, CRM conducted an  
19 exacting, line-by-line review of the records located during our wide-reaching search to identify any  
20 non-exempt information that could reasonably be segregated and released without adversely  
21 affecting the Government's legitimate law enforcement interests. While limited, CRM achieved  
22 this in the disclosures it made to plaintiff in May and August 2011. Beyond the information  
23 segregated and released to plaintiff, CRM concluded that there was no additional non-exempt,  
24 responsive information that could be reasonably segregated and released to plaintiff without  
25 (a) creating a significant risk of circumvention of efforts by law enforcement to conduct lawful  
26  
27  
28

1 electronic surveillance; (b) intruding on the privacy interests of individuals; and/or (c) revealing  
2 privileged deliberative materials or attorney work products. To the extent that there are some non-  
3 exempt words or phrases interspersed with withheld information, CRM concluded that it was not  
4 reasonable to segregate and release it because agencies are not required to segregate and release  
5 what would amount to meaningless information.  
6

7 31. After segregating all of the non-exempt information that we reasonably could, CRM  
8 withheld the remaining responsive information pursuant to FOIA Exemptions 5, 6, 7(A), 7(C),  
9 7(D), 7(E), and 7(F).  
10

### 11 CRM'S JUSTIFICATION FOR WITHHOLDING RECORDS

12 32. CRM has prepared a *Vaughn* Index describing the information being withheld and  
13 the exemptions we have applied, in accordance with *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir.  
14 1973). Our bases for applying particular exemptions to withhold the information described in our  
15 *Vaughn* Index are explained below. My Declaration, in conjunction with CRM's *Vaughn* Index  
16 together provide CRM's justifications for withholding information.  
17

### 18 EXEMPTION 7 – THRESHOLD

19 33. Exemption 7 protects "records or information compiled for law enforcement  
20 purposes," provided that the information otherwise falls within one of the six categories listed in  
21 the exemption. Thus, to qualify for protection under Exemption 7, the withheld information must  
22 first satisfy this threshold requirement.  
23

24 34. As a preliminary matter, the Criminal Division of the Department of Justice  
25 develops, enforces, and supervises the application of all federal criminal laws except those  
26 specifically assigned to other divisions. The Division and the 94 U.S. Attorneys have  
27 responsibility for overseeing criminal matters under more than 900 statutes, as well as certain civil  
28

35. Moreover, the specific information withheld from e-mails and documents pursuant to Exemption 7 in this case was compiled for law enforcement purposes. It reflects problems with and limitations on conducting lawful electronic surveillance during criminal investigations. The e-mails and documents were either created during criminal investigations in furtherance of those investigations, *see e.g.*, CRM-000003, CRM-000050 to CRM-000052, and CRM-000055 to CRM-000059, or were re-compilations of information originally compiled during criminal investigations, *see e.g.*, CRM-000015 to CRM-000019, CRM-000028, CRM-000029, CRM-000042 to CRM-000043, CRM-000060, and CRM-000061 (consisting of examples of the “going dark” problem encountered by law enforcement for use in the process of proposing remedial legislation). Subsequent re-compilations of information originally compiled for law enforcement purposes do not affect the law enforcement character of the information. *Federal Bureau of Investigation v. Abramson*, 456 U.S. 615, 631-32 (1982). Consequently, CRM concluded that the records withheld pursuant to one or more subparts of Exemption 7 were compiled for law enforcement purposes.

**EXEMPTION 7(E)**

21           36.       Exemption 7(E) protects information compiled for law enforcement purposes that,  
22 if released, “would disclose techniques and procedures for law enforcement investigations or  
23 prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if  
24 such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C.  
25 § 552(b)(7)(E).

37. Although electronic surveillance is a well-known law enforcement technique, the particulars of when and how such surveillance is conducted, and more specifically, of difficulties in conducting electronic surveillance, are not well-known to the public.

38. Plaintiff's request, by its very terms, seeks information that would detail how to evade lawful electronic surveillance by law enforcement. This information necessarily implicates surveillance techniques and guidelines that are not well-known to the public.

39. Here, the responsive information CRM located is replete with Exemption 7(E) material that implicitly or explicitly reveals the parameters of the Department's surveillance techniques and guidelines; details the difficulties, vulnerabilities, and/or technical limitations of conducting such surveillance on specific carriers/service providers or on specific devices; and describes the exploitation of such vulnerabilities or limitations by child predators, drug cartels and traffickers, and other criminal elements. *See* CRM-000001 to CRM-000040, CRM-000042 to CRM-000043, CRM-000047, CRM-000049, and CRM-000053 to CRM-000061. The responsive pages include guidance on how to work around these difficulties. *See* CRM-000001 to CRM-000002, CRM-000004 to CRM-000009, CRM-000013 to CRM-000014, and CRM-000050 to CRM-000052. Consequently, release of this information would provide a detailed road map that would permit criminals to evade lawful electronic surveillance by law enforcement and thwart investigative efforts, thus posing a real and significant threat of circumvention of the law. CRM consequently concluded that this information, which details particulars about the use and limitations of electronic surveillance, implicates law enforcement techniques and guidelines that are not well-known to the public and that, if disclosed, would risk circumvention of the law.

## EXEMPTION 5

40. Exemption 5 protects privileged information – such as deliberative materials and attorney work products – contained in intra- or inter-agency documents. 5 U.S.C. § 552(b)(5).

**Exemption 5's Threshold:**

41. The threshold for applying Exemption 5 requires that the documents withheld be intra- or inter-agency. *See* 5 U.S.C. § 552(b)(5). In applying Exemption 5 to the documents identified in the *Vaughn* Index, CRM first concluded that the documents were created in the Criminal Division and were not exchanged outside the Executive Branch. Specifically, CRM applied the exemption to e-mails and documents created and/or circulated within the Criminal Division (CRM-000015 to CRM-000019, CRM-000028 to CRM-000047, CRM-000049, and CRM-000061); to handwritten notes taken by CRM employees during meetings discussing strategies for addressing the “going dark” problem (CRM-000010 to CRM-000011); to documents created within or modified by the Criminal Division and circulated with other Executive Branch agencies (CRM-000013 to CRM-000014, CRM-000020 to CRM-000027, and CRM-000048); and to e-mails between Criminal Division employees and AUSAs/employees of other Federal agencies such as the ATF, FBI, and DEA (CRM-000003, CRM-000050 to CRM-000054, and CRM-000060).

**Attorney Work Product Privilege:**

42. The attorney work product privilege protects such tangible and intangible items as interviews, memoranda, correspondence, and mental impressions prepared or developed by an attorney in anticipation of litigation, based upon the recognition that proper preparation of a case depends on an attorney’s ability to assemble information, sort relevant from irrelevant facts, and prepare his/her legal theories and strategies without intrusive or needless scrutiny. For purposes of the attorney work product privilege, litigation is anticipated when the Government is investigating specific wrongdoing in an attempt to gather evidence and build a case against the suspected wrongdoer. However, litigation need not come to fruition in order for the privilege to attach. Moreover, the privilege extends to recommendations not to litigate (or prosecute) a case. Finally,



1 for purposes of FOIA, the work product privilege protects factual materials, in addition to an  
2 attorney's legal analysis.

3 43. CRM relied on the attorney work product privilege to justify withholding  
4 information from CRM-000003, CRM-000042 to CRM-000043, and CRM-000052 to CRM-  
5 000054. These e-mails all concerned discussions among Department attorneys in relation to on-  
6 going cases that are either still under investigation or have proceeded to prosecution. CRM thus  
7 concluded that these messages were sent in anticipation and/or furtherance of litigation, and is  
8 relying on the attorney work product privilege as a basis to withhold these attorney work products.  
9

10 **Deliberative Process Privilege:**

11 44. CRM relied on the deliberative process privilege as the basis for all of its remaining  
12 Exemption 5 withholdings. The deliberative process privilege protects information reflecting  
13 advisory opinions, recommendations and deliberations that are part of the process by which the  
14 Government makes decisions or formulates policies. The privilege is designed to protect the  
15 integrity of the decision-making process by shielding candid discussions among Government  
16 employees and preventing public confusion from premature disclosure of decisions before the  
17 Government has formulated a final opinion.  
18

19 45. For the deliberative process privilege to apply, the information withheld must be  
20 both predecisional and deliberative. Information is predecisional if it temporally precedes the  
21 decision about which it pertains and if it is prepared/compiled to assist decision-makers in reaching  
22 that decision. Information is deliberative if it is actually part of the give-and-take by which the  
23 Government made its decision. Recommendations, draft documents, proposals, suggestions, and  
24 other subjective documents reflecting the opinions of the writers are the types of documents often  
25 found to be deliberative.  
26  
27  
28



***Development of Proposed Legislation to Fix the “Going Dark” Problem:***

46. *CRM-000010 and CRM-000012*: CRM relied on the deliberative process privilege to withhold these two pages of handwritten notes, taken by CRM employees who attended meetings held as part of the Department’s development of proposed legislation to address the “going dark” problem.

*CRM-000013 to CRM-000014; CRM-000037 to CRM-000038*: CRM relied on the deliberative process privilege to withhold internal CRM documents containing draft responses to proposed legislation to address the “going dark” problem.

*CRM-000036, CRM-000039, CRM-000040*: CRM relied on the deliberative process privilege to withhold internal CRM documents containing the Division’s comments about proposed legislation to address the “going dark” problem.

*CRM-000015 to CRM-000019, CRM-000060, CRM-000061*: CRM relied on the deliberative process privilege to withhold documents containing operational examples of “going dark” problems experienced by law enforcement, which were compiled for purposes of developing legislation to address the “going dark” problem.

*CRM-000045, CRM-000045, CRM-000048*: CRM relied on the deliberative process privilege to withhold discussions about what CRM’s role in “going dark” briefings should and would be.

The documents described in the above paragraphs are predecisional. The draft documents described above are, by nature, predecisional, preliminary versions of what may later become a final document or decision, in whole or in part, or what may never ripen to final form as the views and opinions reflected in the drafts may be withdrawn or discarded during the decision-making process. Moreover, all of the documents described above were created during deliberations within the Criminal Division about how to address the “going dark” problem, and in particular, whether

1 and how the problem could be fixed through legislation. These deliberations occurred as part of  
2 and prior to any final decision about proposed legislation being developed by the Department.  
3 Accordingly, all of these documents are predecisional.

4 Furthermore, all of the documents described above are deliberative in that they were created  
5 during and as part of the on-going discussions about possible ways to legislatively address the  
6 “going dark” problem. These documents reflect the authors’ personal opinions, recommendations,  
7 and/or advice, rather than the final position of the Criminal Division or the Department. None of  
8 the authors of these documents were final decision-makers about how the Department would  
9 propose to address the “going dark” problem. Releasing these documents would expose  
10 employees’ candid views and opinions, which do not represent agency policy, to public scrutiny.  
11 Such disclosure would have a chilling effect on those employees’ participation in the deliberations.  
12 Concomitantly, chilling candid discussion and debate among agency employees would negatively  
13 impact the quality of agency decision-making.  
14

15  
16 ***Preliminary and Draft Resource Requests to Address the “Going Dark” Problem:***

17 47. CRM-000032 to CRM-000033, CRM-000031, CRM-000042 to CRM-000043: CRM  
18 also relied on the deliberative process privilege to withhold a preliminary request for resources by  
19 the Child Exploitation and Obscenity Section (CEOS) to combat the “going dark” problem, and  
20 subsequent draft requests prepared by CRM-CEOS to request additional resources.  
21

22 All of these requests for resources are predecisional because they were compiled to be  
23 submitted to CRM’s Office of Administration (ADMIN), which would then make the decision  
24 about additional resources. The preliminary version was submitted to CRM-ADMIN on June 8,  
25 2010, but subsequently, new draft resources requests were created and circulated within CRM-  
26 CEOS in July 2010. These documents are, by nature, predecisional, preliminary requests for what  
27 may or may not later become the final request for resources for CRM-CEOS or the actual  
28

1 allocation of resources by the Division.

2       These requests are also deliberative. The drafts represent the views of the employees about  
3 what additional resources would be needed by CRM-CEOS to combat the “going dark” problem.  
4 The preliminary request represents the views of CRM-CEOS about such additional resources.  
5 These requests were formulated as part of the Division’s process of determining how resources  
6 should be allocated. Disclosing the deliberations, as opposed to the final decision, could confuse  
7 the public about how resources were allocated within the Department to address this issue. It could  
8 also chill candid discussions about resource allocation issues by inhibiting employees from making  
9 frank assessments about resource needs.  
10

11       ***Draft Responses to a Proposed Digital Due Process Initiative***

12       48.     CRM-000030, CRM-000034, CRM-000035: CRM relied on the deliberative process  
13 privilege to withhold draft responses prepared by CRM-CCIPS reflecting its views about how the  
14 Division should respond to an initiative proposed by the Digital Due Process (DDP) organization to  
15 limit law enforcement access to electronic evidence.  
16

17       These documents are predecisional. By their very nature as draft documents, they may later  
18 become a final document and reflect a final agency decision or policy, or they may remain drafts  
19 that never become final as the position may be withdrawn or the recommendations and opinions  
20 reflected in them may be discarded during the decision-making process.  
21

22       These documents are also deliberative. They represent employees’ views and opinions  
23 about the advice CRM-CCIPS should give to the Division about responding to the DDP initiative.  
24 They are not the final position of the decision-maker; they represent neither CRM-CCIPS’s  
25 position, as a section, on the initiative, nor the Division’s position, as an agency, on the initiative.  
26 Releasing these draft documents would expose employees’ candid views and opinions, which do  
27 not represent agency policy, to public scrutiny. Such disclosure would have a chilling effect on  
28

1 those employees' participation in the deliberations. Concomitantly, chilling candid discussion and  
2 debate among agency employees would negatively impact the quality of agency decision-making.

3 ***Draft Chapter of "Transnational Crime Threats" Document:***

4 49. CRM-000049: CRM withheld a portion of a draft chapter from a document entitled  
5 "Transnational Crime Threats" pursuant to the deliberative process privilege. This draft was  
6 circulated by the author for comments, edits, and corrections, and as such, it reflected the  
7 preliminary views of the employee who authored it. Consequently, CRM concluded that it was  
8 predecisional. It is also deliberative. It is not the final version of the chapter and does not  
9 represent the Division's or Department's final position on the content of the document. Releasing  
10 it would have a chilling effect on employees who author such documents by exposing their  
11 preliminary, unedited or reviewed work to public scrutiny.  
12

13 ***E-mails Related to Preparing Attorney General Briefing Materials:***

14 50. CRM-000028 and CRM-000047: CRM withheld portions of two e-mails in which a  
15 CRM-CCIPS Assistant Deputy Chief provided her input about the "going dark" issue for inclusion  
16 in briefing materials being prepared for the Attorney General in preparation for a Ministerial  
17 meeting between the United States and the European Union. This information reflected the over-  
18 arching policy debate within the U.S. Government about the "going dark" issue, as well as Ms.  
19 Shave's deliberative process of selecting and suggesting information about the issue for briefing  
20 the Attorney General. In making her recommendations, Ms. Shave exercised her judgment by  
21 anticipating what information the Attorney General would need in order to be prepared to address  
22 any questions or issues regarding the "going dark" problem during the Ministerial meeting.  
23 Moreover, Ms. Shave merely made suggestions about including particular information about the  
24 "going dark" issue in the Attorney General's briefing materials. She did not have final  
25 decisionmaking authority about what would actually be included in the briefing materials.  
26  
27  
28

1 Accordingly, these e-mails were both predecisional (*i.e.*, antecedent to the final decisions about the  
2 content of the Attorney General's briefing materials) and deliberative (*i.e.*, part of the process by  
3 which Department officials/employees decided what to include in those briefing materials).

4 ***Internal Briefing Document:***

5 51. CRM-000041: Finally, CRM withheld an e-mail in which a CRM-CCIPS Deputy  
6 Chief briefed his Chief about a variety of issues, and in particular, the portion of the message in  
7 which the Deputy Chief expressed his opinions about a briefing for an ambassador regarding issues  
8 with accessing electronic communications on a particular carriers' system/devices. CRM  
9 concluded that this information was predecisional because it reflected the views and opinions of a  
10 lower-level official about briefing an ambassador, and deliberative because the Deputy Chief was  
11 not the final decision-maker and his views and opinions were merely a part of the process by which  
12 the final decision would be made.  
13  
14

15 **EXEMPTIONS 6 & 7(C)**

16 52. Exemption 6 permits withholding personnel, medical, and similar files where  
17 disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.  
18 § 552(b)(6). The term "similar files" in Exemption 6 is generally read broadly to encompass any  
19 file containing information that applies to a particular person.  
20

21 53. Exemption 7(C) permits withholding records or information compiled for law  
22 enforcement purposes where disclosure "could reasonably be expected to constitute an  
23 unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

24 54. In order to apply either exemption, the same balancing test must occur – *i.e.*, an  
25 individual's privacy interests must be balanced against the public's interest in disclosure. It is  
26 well-recognized that individuals have strong privacy interests in law enforcement records –  
27 whether they are victims, suspects, witnesses, law enforcement officers, or are merely mentioned in  
28

1 the records. In order to obtain disclosure, a requester must establish a public interest sufficient to  
2 overcome these strong privacy interests. In most cases, there is no discernable public interest in  
3 any such disclosure because information about an individual does not shed light on the  
4 Government agency's activities, and any disclosure consequently would constitute a clearly  
5 unwarranted invasion of personal privacy. Accordingly, in order to be entitled to disclosure of  
6 information about a third party, a requester must clearly demonstrate a public interest that would  
7 outweigh the individual's personal privacy interests and would significantly benefit the public.  
8

9 55. CRM withheld the names, contact information, and/or other personally-identifying  
10 information of non-senior level CRM employees, as well as FBI, DEA, ATF, and State Department  
11 employees and foreign law enforcement officers from the Netherlands. CRM also withheld the  
12 name and/or contact information of other third-parties mentioned in the responsive records,  
13 including a technical representative of a telecommunications company, the victim of a death threat,  
14 and targets, witnesses, and confidential sources in several criminal investigations of drug cartels.  
15

16 **Exemption 6's Threshold:**

17 56. CRM determined that the information described in the previous paragraph applies to  
18 particular people and thus, that Exemption 6's threshold was satisfied here.  
19

20 57. CRM withheld the names of three FBI employees from CRM-000004 and one FBI  
21 employee from CRM-000055; details about conversations between an undercover DEA agent and a  
22 target that, if disclosed, could identify the agent, from CRM-000018; the name of an ATF agent  
23 from CRM-000050 and CRM-000052; the e-mail address of a State Department employee and the  
24 names and e-mail addresses of two foreign law enforcement officers from the Netherlands from  
25 CRM-000055; the name, e-mail addresses, and telephone and cell phone numbers for one of the  
26 officers from the Netherlands, from CRM-000058; and the name of a DEA agent from CRM-  
27 000060.  
28

1 CRM also withheld information about several of its employees. Specifically, CRM  
2 withheld the name of an employee in CRM-NDDS in CRM-000001; the direct dial phone numbers  
3 for Mark Eckenwiler, Associate Director for Technology in CRM's Office of Enforcement  
4 Operations and Nathan Judish from CRM's Computer Crimes and Intellectual Property Section  
5 (CCIPS) in CRM-000002, CRM-000004, and CRM-000059; and the names of three non-senior  
6 level CRM attorneys in CRM-000007, CRM-000009, CRM-000040, and CRM-000050 to CRM-  
7 000052.

9 Finally, CRM withheld information about other third parties. Specifically, CRM withheld  
10 the name and e-mail address of an employee of a telecommunications company who engaged in an  
11 e-mail exchange with Mark Eckenwiler, OEO Associate Director for Technology, from CRM-  
12 000005 to CRM-000007; the names, details of conversations involving, and/or the activities of  
13 targets, witnesses, and confidential sources in several criminal investigations of drug cartels, from  
14 CRM-000015 to CRM-000018; and the name of the victim of a death threat from CRM-000058.

16 **Exemption 7's Threshold:**

17 58. CRM also determined that the records from which this information was withheld  
18 were compiled for law enforcement purposes. Specifically, CRM withheld personal information  
19 from records compiled in conjunction with CRM's performance of its law enforcement functions,  
20 and/or in conjunction with the performance of law enforcement functions exercised by the Federal  
21 Bureau of Investigation, Drug Enforcement Administration, and Bureau of Alcohol, Tobacco,  
22 Firearms and Explosives, and by the government of the Netherlands. *See* Paragraphs 34-35, *supra*.

24 **Exemptions 6 and 7(C) Balancing Test:**

25 59. CRM next determined that these individuals have cognizable privacy interests in  
26 this information. Courts have consistently concluded that law enforcement agents/officers and  
27 other Federal and foreign government employees mentioned in law enforcement records have  
28



1 privacy interests in their names and contact information. At a minimum, public disclosure of this  
2 information could subject these individuals to unwarranted attention or harassment in the  
3 performance of their duties. Moreover, employees involved in criminal law enforcement  
4 investigations, especially law enforcement agents, could also face physical harm if their identities  
5 are disclosed.

6  
7 60. CRM further concluded that no significant public interest in this information exists,  
8 and, thus, that the individuals' privacy interests must prevail. In order to be entitled to disclosure  
9 of information about a third party in a law enforcement record, a requester must clearly  
10 demonstrate a public interest that would outweigh the individual's personal privacy interests and  
11 would significantly benefit the public. The names of Federal employees, foreign law enforcement  
12 officers, victims, targets, confidential sources, witnesses, and other third parties that CRM withheld  
13 do not shed any light on any agency activities in relation to the "going dark" problem, nor would  
14 the public significantly benefit from disclosure of this information. Consequently, CRM concluded  
15 that the privacy interests possessed by these individuals must prevail in this instance.  
16

17 **EXEMPTIONS 7(A), 7(D), AND 7(F)**

18 61. CRM relied on Exemptions 7(A), 7(D), and 7(F) to withhold information from one  
19 document (CRM-000015 to CRM-000019), which is an internal document prepared by CRM's  
20 Narcotics and Dangerous Drugs Section (NDDS) to provide investigative/operational examples of  
21 how drug cartels were using technology to circumvent law enforcement efforts to wiretap or  
22 conduct electronic surveillance. The information in this document reflects investigative activities  
23 in several criminal investigations, which was subsequently re-compiled for purposes of addressing  
24 the "going dark" problem. CRM thus concluded that this information was compiled for law  
25 enforcement purposes, regardless of its subsequent re-compilation. *See Federal Bureau of*  
26  
27  
28



1 *Investigation v. Abramson*, 456 U.S. 615, 631-32 (1982) (law enforcement information retains  
2 Exemption 7 protection even if re-compiled for other purposes). *See also* Paragraphs 34-35, *supra*.

3 62. Exemption 7(A) permits withholding records or information compiled for law  
4 enforcement purposes where disclosure “could reasonably be expected to interfere with  
5 enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A).

7 63. Exemption 7(D) permits withholding of records or information compiled for law  
8 enforcement purposes where disclosure “could reasonably be expected to disclose the identity of a  
9 confidential source, including a State, local, or foreign agency or authority or any private  
10 institution which furnished information on a confidential basis, and, in the case of a record or  
11 information compiled by criminal law enforcement authority in the course of a criminal  
12 investigation or by an agency conducting a lawful national security intelligence investigation,  
13 information furnished by a confidential source.” 5 U.S.C. § 552(b)(7)(D).

15 64. Exemption 7(F) permits withholding of records or information compiled for law  
16 enforcement purposes where disclosure “could reasonably be expected to endanger the life or  
17 physical safety of any individual.” 5 U.S.C. § 552(b)(7)(F).

18 **Exemption 7(A):**

19 65. CRM applied Exemption 7(A) to withhold information in CRM-000015 to CRM-  
20 000019 to protect on-going criminal investigations. Premature release of information about  
21 surveillance and undercover activities and about witnesses/cooperators, targets, and other  
22 individuals mentioned in relation to those investigations could adversely impact on-going and  
23 prospective enforcement proceedings by: prejudicing future testimony of witnesses in the pending  
24 investigation and resulting prosecutions; discouraging individuals from assisting the Government  
25 for fear that their assistance may be publicly disclosed, thus endangering them or at very least,  
26 subjecting them to possible harassment or embarrassment; tipping off individuals who are/may be  
27  
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1 targets of investigations; and/or endangering the safety of law enforcement officials involved in the  
2 investigations.

3 **Exemption 7(D):**

4           66. This document also provides information about three confidential sources  
5 participating in drug cartel investigations, including information about the location of the sources,  
6 details about their participation in the investigations, and other information that, if disclosed, could  
7 identify them. The document also refers to information provided to law enforcement by the  
8 sources during the criminal investigations. CRM relied on Exemption 7(D) to justify withholding  
9 this information. The cases involved are investigations conducted by the DEA under the purview  
10 of the Special Operations Division of CRM's NDDS.<sup>3</sup> Under these circumstances, there is at least  
11 an implied assurance of confidentiality to these individuals who were working with law  
12 enforcement to bring down significant domestic and international drug traffickers, one of whom  
13 severely injured a law enforcement official. *See, e.g., Mays v. Drug Enforcement Administration*,  
14 234 F.3d 1324, 1331 (D.C. Cir. 2000) (holding that there is "no doubt that a source of information  
15 about a conspiracy to distribute cocaine typically faces a sufficient threat of retaliation that the  
16 information he provides should be treated as implicitly confidential"). Consequently, CRM  
17 protected information about and from the three confidential sources mentioned in this document  
18 pursuant to Exemption 7(D).  
19  
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24 <sup>3</sup> CRM-NDDS's mission is to reduce the supply of illegal drugs in the United States by investigating and  
25 prosecuting priority national and international drug trafficking groups and by providing legal, strategic, and policy  
26 guidance in support of that end. CRM-NDDS's Special Operations Division (SOD) is a multi-agency body designed to  
27 identify and dismantle significant international and domestic drug trafficking and money laundering organizations.  
28 CRM-NDDS directs and coordinates SOD investigations with U.S. Attorneys' Offices nationwide to ensure that each  
district involved in a nationwide investigation is informed as to the actions taking place in the other districts and the  
interrelationship of each district in the overall criminal conspiracy. Through SOD, CRM-NDDS ensures that each  
district agrees to a coordinated plan of attack, so that large, nationwide trafficking groups are taken down in a single,  
well-timed enforcement action.

**Exemption 7(F):**

67. Finally, CRM relied on Exemption 7(F) to protect the three confidential sources discussed above as well as an undercover DEA agent mentioned in the document. CRM concluded that public disclosure of this information would identify these individuals to the drug traffickers under investigation and that this could reasonably be expected to endanger these individuals' health or physical safety. CRM also considered that courts have protected such information pursuant to Exemption 7(F) under similar circumstances. *See Diaz v. Drug Enforcement Admin.*, 555 F.Supp.2d 124, 126 (D.D.C. 2008) (protecting identity and history of individual who assisted DEA agents in several drug investigations); *Jimenez v. Federal Bureau of Investigation*, 938 F.Supp. 21, 30-31 (D.D.C. 1996) (protecting the names of DEA Special Agents). *See also Rugiero v. Department of Justice*, 257 F.3d 534, 552 (6th Cir. 2001) (protecting names of DEA Special Agents); *McQueen v. U.S.*, 264 F.Supp.2d 502, 521 (S.D. Tex. 2003) (protecting names of undercover agents in criminal investigations), *aff'd*, 100 Fed.App'x 964 (5th Cir. 2004); *Amro v. U.S. Customs Serv.*, 128 F.Supp.2d 776, 788 (E.D. Pa. 2001) (DEA Special Agents); and *Hronek v. Drug Enforcement Admin.*, 16 F.Supp.2d 1260, 1275-76 (D. Or. 1998) (DEA Special Agents).

**REFERRALS**

68. During its search for records responsive to plaintiff's FOIA request, CRM located records originating from various DOJ components and other Federal agencies. CRM referred those records to the originating agencies for processing and a direct response to plaintiff, consistent with DOJ regulation, which establishes a presumption that the component from which a record originates is best able to determine whether to disclose it. *See* 28 C.F.R. § 16.4(c). Specifically, CRM referred approximately 122 pages to the Federal Bureau of Investigation (FBI); 19 pages to the Drug Enforcement Administration (DEA); one page to the U.S. Marshals Service (USMS);

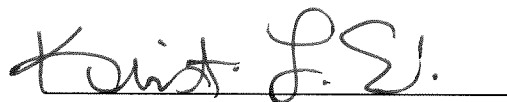
1 three pages to the National Security Division (NSD); three pages to the Naval Criminal  
2 Investigative Service (NCIS); two pages to the U.S. Special Operations Command (SOCOM); and  
3 six pages to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). Additionally, CRM  
4 referred approximately 351 pages of records originating from the Office of the Deputy Attorney  
5 General (ODAG), Office of Legal Policy (OLP), and/or the Office of Legislative Affairs (OLA) to  
6 DOJ's Office of Information Policy (OIP), which processes FOIA requests on behalf of those  
7 organizations.  
8

9 69. CRM originally referred three pages of records to the Executive Office for United  
10 States Attorneys (EOUSA). EOUSA treated this referral as a consult request instead and returned  
11 the pages to CRM for a response to plaintiff after providing its input regarding the disposition of  
12 the records. CRM processed these records and withheld them in full pursuant to FOIA Exemptions  
13 5 and 7(E) as part of our 4<sup>th</sup> interim response to plaintiff, dated June 20, 2011. *See* Exhibit 7.  
14

15 70. CRM originally referred two pages of records to the Department of State (DOS), but  
16 after consultation with DOS, CRM concluded that the documents actually originated from/were of  
17 primary interest to one of OIP's client offices. Consequently, DOS returned the pages to CRM and  
18 CRM then referred them to OIP for processing and a direct response to plaintiff. That referral  
19 occurred on June 6, 2011; CRM notified plaintiff about the referral in its final response dated  
20 August 1, 2011. *See* Exhibit 8.  
21

22 71. CRM's referrals of information to other DOJ components and other Federal  
23 agencies for processing and a direct response to plaintiff were made promptly upon discovery of  
24 the records and CRM notified plaintiff about each referral in its interim response letters. *See*  
25 Exhibits 4 – 8. Furthermore, CRM promptly processed and responded to plaintiff concerning the  
26 referrals returned from EOUSA and DOS, completing processing prior to/in conjunction with  
27 CRM's final response to plaintiff in this matter.  
28

1  
2 I declare under penalty of perjury that the foregoing is true and correct.

3  
4   
5 Kristin L. Ellis

6 DATED: FEBRUARY 24, 2012  
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