

EXHIBIT 3

**THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

ELECTRONIC FRONTIER FOUNDATION,)	
)	
)	
Plaintiff,)	
)	
v.)	No. C 08-1023 JSW
)	
OFFICE OF THE DIRECTOR OF NATIONAL)	
INTELLIGENCE and UNITED STATES)	
DEPARTMENT OF JUSTICE,)	
)	
)	
Defendants.)	
_____)	

DECLARATION OF PAUL P. COLBORN

I, Paul P. Colborn, declare the following:

1. I am a Special Counsel in the Office of Legal Counsel (“OLC” or the “Office”), a component of the United States Department of Justice. I joined OLC in 1986 and have had the responsibility since 1987 of supervising OLC’s responses to requests under the Freedom of Information Act (“FOIA”), 552 U.S.C. § 552. In connection with that responsibility, I have supervised OLC’s response to Plaintiff’s FOIA request in the above-captioned matter. This declaration is based on personal knowledge and information disclosed to me in my official capacity, and it supplements the declaration I submitted in this case on March 17, 2008.

2. As explained more fully in my March 17 declaration, on December 21, 2007, OLC received a FOIA request from Plaintiff seeking “all agency records from September 1, 2007 to the present concerning briefings, discussions, or other exchanges that the Justice Department officials have had with 1) members of the Senate or House of Representatives and 2) representatives or agents of telecommunications companies concerning amendments to FISA

[the Foreign Intelligence Surveillance Act], including any discussion of immunizing telecommunications companies or holding them otherwise unaccountable for their role in government activities.” Consistent with its other FOIA responsibilities, OLC began processing Plaintiff’s request on January 8, 2008, and formally granted the request expedited processing status the following day, January 9, 2008.

3. On April 4, 2008, the Court granted Plaintiff’s motion for a preliminary injunction and ordered the Defendants “to respond to Plaintiff’s FOIA request and provide an initial release of documents no later than April 17, 2008.” The Court further ordered the Defendants “to provide a final release of all responsive, non-exempt documents no later than April 21, 2008.” Finally, the Court directed the Defendants “to file with the Court and serve upon Plaintiff’s counsel, an affidavit or declaration attesting to Defendant’s compliance and setting forth the basis for withholding any responsive document it does not release.” I submit this declaration to comply with the Court’s order.¹

March 25 Interim Response

4. On March 25, 2008, prior to the Court’s order, OLC issued an interim response to Plaintiff’s request. The response explained that OLC had completed searching its files and had identified nine unclassified records (totaling twenty-one pages) and four classified records (totaling fourteen pages) that are responsive to the request. We enclosed copies of two of the unclassified documents (two calendar entries totaling two pages with non-responsive entries redacted), withheld in full two unclassified documents (totaling two pages) pursuant to FOIA

¹ OLC submits this declaration without prejudice to its rights to provide additional information regarding the processing of Plaintiff’s FOIA request or the reasons for any withholdings. OLC specifically reserves the right to submit additional information at the summary judgment stage or in other subsequent proceedings in this case.

Exemption Five, 5 U.S.C. § 552(b)(5),² and explained that the Office was consulting with other agencies and other components of the Department concerning the remaining documents.

5. The two documents the Office withheld under FOIA Exemption Five are one-page e-mails sent by an OLC attorney to other attorneys in the Department, on December 15, 2007, and December 17, 2007, respectively. In both e-mails, the OLC attorney describes a conversation he had earlier in the day with an attorney for a telecommunications carrier and discusses whether the Department should support certain proposed amendments to FISA. Accordingly, as indicated in our March 25 interim response, both documents are highly deliberative and thus protected from disclosure by the privileges recognized under FOIA Exemption Five.

6. Based on subsequent consultations, OLC has determined that the e-mails are protected from disclosure for an additional reason not referenced in our March 25 interim response: Both documents contain information that could reveal the identity of telecommunication carriers that may have assisted, or may in the future assist, the Government in conducting electronic surveillance for foreign intelligence purposes. Such information is properly withheld under FOIA Exemption Three, 5 U.S.C. § 552(b)(3), because it directly implicates sensitive intelligence sources and methods protected from unauthorized disclosure by the National Security Act of 1947, as amended. *See* 50 U.S.C. § 403-1(i).

April 17 Interim Response

7. In light of the Court's April 4 order, OLC provided a second interim response on April 17, 2008. In that response, OLC indicated that it is withholding in full pursuant to FOIA

² Our March 25 interim response erroneously indicated that the two e-mails totaled four pages; in fact, the two e-mails total two pages.

Exemption Five the five unclassified documents identified in its March 25 interim response as requiring consultations. In addition, OLC explained that certain information in the documents is also protected from disclosure by FOIA Exemptions Two and Three, 5 U.S.C. §§ 552(b)(2)-(3).

8. The documents addressed in our April 17 interim response are e-mails to or from attorneys in the Department. In three of the e-mails, attorneys from the Department or another government agency summarize recent conversations with Members of Congress concerning amendments to FISA and discuss possible legislative strategies. The remaining two e-mails forward communications between Department attorneys and attorneys for certain telecommunication carriers, in which the attorneys seek or discuss recommendations on legislative strategy. Given their highly deliberative nature, each of the five unclassified documents addressed in our April 17 interim response is protected by the privileges recognized by FOIA Exemption Five.

9. In addition, portions of the five documents contain information that could reveal the identity of telecommunication carriers that may have assisted, or may in the future assist, the Government in conducting electronic surveillance for foreign intelligence purposes. Such information is properly withheld pursuant to FOIA Exemption Three because it directly implicates sensitive intelligence sources and methods protected from unauthorized disclosure by the National Security Act of 1947, as amended. *See* 50 U.S.C. § 403-1(i). Further, some of the e-mails contain non-public telephone numbers, non-public fax numbers, and non-public e-mail addresses used by Government employees in carrying out official business. Because disclosure of this information would not serve any public interest and could impede agencies' effectiveness (*e.g.*, by subjecting employees to harassing communications), OLC is withholding that information pursuant to FOIA Exemption Two.

10. Finally, based on recent consultations, OLC has concluded that one of the e-mails addressed in the April 17 interim response also contains information protected by FOIA Exemption Six, 5 U.S.C. § 552(b)(6). Specifically, one of the e-mails lists the name of a National Security Agency employee, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

April 21 Final Response

11. Today, April 21, 2008, OLC is providing a final response to Plaintiff's FOIA request, in which we address the four classified documents first identified in our March 25 interim response. Our letter explains that the Office of the Director of National Intelligence ("ODNI") and the Department's Office of Information and Privacy ("OIP") are responding directly to Plaintiff with respect to two of the documents. In particular, OLC understands that OIP is responding on (and releasing in redacted form) a three-page letter dated October 10, 2007, and that ODNI is responding on (and releasing in redacted form) a six-page letter dated December 18, 2007. Our letter also explains that OLC is withholding in full pursuant to FOIA Exemptions One, Three, and Five the remaining two documents, which total five pages.

12. The two classified documents that OLC is withholding consist of notes generated by an OLC attorney during meetings with Members of Congress. The notes are properly classified at the Top Secret level, which means that their unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security of the United States. Portions of the notes also contain information that implicates sensitive intelligence sources and methods protected from disclosure by the National Security Act of 1947, as amended. *See* 50 U.S.C. § 403-1(i). Finally, the notes are highly deliberative in nature; they reflect the thoughts and impressions of an OLC attorney concerning ongoing discussions with Members of Congress

concerning possible amendments to FISA. Accordingly, the Office is withholding the two documents pursuant to FOIA Exemptions One, Three, and Five, 5 U.S.C. § 552(b)(1), (3), (5).

13. In sum, OLC has completed processing Plaintiff's FOIA request. The Office identified nine unclassified documents (totaling twenty-one pages) and four classified documents (totaling fourteen pages) that are responsive to the request. It released two of the unclassified documents (totaling two pages); withheld in full the remaining seven unclassified documents (totaling nineteen pages); and withheld in full two classified documents (totaling five pages). ODNI and OIP are responding with respect to the two remaining classified documents (totaling nine pages).

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

Executed on April 21, 2008.



Paul P. Colborn