

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ELECTRONIC FRONTIER)	
FOUNDATION,)	
)	
Plaintiff,)	
)	
v.)	Civil Action Nos. 08-2997 (JSW) &
)	08-1023 (JSW)
OFFICE OF THE DIRECTOR OF)	
NATIONAL INTELLIGENCE)	
)	
and)	
)	
UNITED STATES DEPARTMENT OF)	
JUSTICE,)	
)	
Defendants.)	

DECLARATION OF MELANIE ANN PUSTAY

I, Melanie Ann Pustay, declare the following to be true and correct:

1) I am the Director of the Office of Information Policy (OIP), United States Department of Justice. In this capacity, I am responsible for overseeing the actions of the Initial Request (IR) Staff. The IR Staff is responsible for searching for and reviewing records within OIP and the senior leadership offices of the Department of Justice, including the Offices of the Attorney General, Legal Policy, and Legislative Affairs, in response to requests made under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006), amended by OPEN Gov't Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524. The IR Staff determines whether records responsive to access requests exist and, if so, whether they can be released in accordance with the FOIA. In processing such requests, the IR Staff consults with personnel in the senior leadership offices

and, when appropriate, with other components within the Department of Justice, as well as with other Executive Branch agencies.

2) I make the statements herein on the basis of personal knowledge, as well as on information acquired by me in the course of performing my official duties.

3) On March 23, 2009, the Court in the above-captioned matter granted plaintiff's motion to stay proceedings pending defendants' review of the responsive records in light of the President's January 21, 2009 Memorandum for the Heads of Executive Departments and Agencies concerning the FOIA and the Attorney General's FOIA guidelines dated March 19, 2009.

4) Pursuant to this Order, on April 24, 2009 the parties submitted a Joint Status Report, informing the Court that defendants, after reviewing the withheld documents in light of the new FOIA guidelines, have identified some information for discretionary release. The parties also agreed that by May 12, 2009, defendants would produce the materials for discretionary release to plaintiff and file revised Vaughn Indices with the Court to reflect these additional releases.

OIP's Review of the Documents at Issue and Response to Plaintiff

5) Beginning on March 27, 2009, OIP reviewed the documents at issue, in light of the new FOIA guidelines, and identified some information that potentially could be released to plaintiff as a matter of administrative discretion. Consultations were then conducted with other Department components and other Executive Branch agencies pursuant to Department of Justice regulation 28 C.F.R. ¶ 16.4(c)(1).

6) Based on OIP's review of the documents at issue and after concluding its consultations with other offices, OIP determined that two talking points memoranda, which were originally withheld in full pursuant to Exemption 5, and identified in Group 4 of OIP's Vaughn Index,

could now be released in their entireties as a matter of administrative discretion. OIP also determined that three e-mail messages that were originally released in part and identified in Group 10 of OIP's Vaughn Index, could now be released. Of these e-mail messages, OIP determined that two could now be released in their entireties, and one could be released in part, with redactions now only made pursuant to Exemption 6.

7) By letter dated May 12, 2009, OIP provided plaintiff with these documents as a matter of administrative discretion. In its correspondence, OIP explained that two documents that were previously withheld in full were now being released in their entireties; two e-mail messages that were previously released in part were now being released in their entireties; and one e-mail message that was previously released in part pursuant to Exemptions 5 and 6 of the FOIA, was now being released in part with redactions only made pursuant to Exemption 6.

8) The two talking points memoranda, and three e-mail messages, are also identified in OIP's updated Vaughn Index, which is attached here. These released documents were described in Group 4 and Group 10 of the Index and now those entries have been updated to reflect the discretionary releases that have been made.

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


MELANIE ANN PUSTAY

Executed this 12th day of May, 2009.

Electronic Frontier Foundation v. U.S. Department of Justice
Civil Action No. 08-CV-2997 (JSW)
U.S. District Court
Northern District of California

Office of Information and Privacy (OIP) Updated Vaughn Index

This index contains a description of the records protected either in full or in part by Freedom of Information Act Exemptions 1, 2, 3, 5 and 6. The first portion of the Index describes the records withheld in full, and the second portion describes the records withheld in part.

Categories of documents:

- Group 1: E-mail messages between officials in DOJ, other Executive Branch (EB) offices, and the White House (WHO)
- Group 2: E-mail messages between officials in DOJ and EB
- Group 3: E-mail messages only between officials in DOJ
- Group 4: Talking point drafts and notes
- Group 5: E-mail messages between officials in DOJ, EB, and congressional staff, with attachments
- Group 6: E-mail messages between officials in DOJ, EB, and congressional staff
- Group 7: E-mail messages between officials in DOJ and congressional staff
- Group 8: E-mail messages between officials in DOJ, congressional staff, and WHO
- Group 9: E-mail messages between officials in DOJ, released in part, with Exemption 5 withholdings
- Group 10: E-mail messages released in part with WHO e-mail addresses withheld
- Group 11: E-mail messages released in part all with Exemption 3 withholdings on behalf of NSA and CIA
- Group 12: E-mail messages released in part with only Exemption 2 and 6 withholdings on behalf of ODNI and NSD
- Group 13: Document released in part with classified material withheld on behalf of NSD

Part I: Description of documents protected in full. All documents withheld in full were protected pursuant to Exemption 5 (deliberative process privilege, the presidential communications privilege and the inter-branch joint deliberative privilege). Portions of those documents are also protected pursuant to Exemptions 2, 3, and 6.

Group Number	Date	Description	Exemptions	Pages
1	10/09/07	Two electronic mail (e-mail) messages between officials in OLA, OLP, OLC, NSD and WHO discussing what may occur in a House Judiciary Committee mark-up to the RESTORE Act and what options DOJ has in areas in which it will be impacted; one follow-up e-mail message characterizing Hill reception of DOJ material.	<u>Exemption 5</u> Presidential communications privilege Deliberative process privilege Inter-branch joint deliberative privilege	12
	10/15/07	E-mail message from an official in OLP to WHO officials forwarding an October 15, 2007 e-mail message from a congressional staffer discussing and making suggestions on specific legislative provision (this e-mail is referenced in Category 6).	<u>Exemption 6 in part</u> Personal privacy <u>Exemption 2 in part</u> Internal agency practices	
	10/16/07	Five e-mail messages among officials in ODNI, OLP, OLA, and WHO regarding the appropriateness of a possible briefing of Members of Congress.	<u>Exemption 3 in part</u> Information exempt pursuant to 50 U.S.C. § 402 note	
	10/16/07	Two e-mail messages between officials in OLP, OLC and WHO deliberating a possible response to issues raised in an October 16, 2007 e-mail from a congressional staffer making suggestions on a various proposed statutory provision (this email is referenced in Group 6).		

<p>10/19/07</p>	<p>One e-mail message from an official in OLP to officials in OLC, OLA, WHO, NSD, and ODNI summarizing a discussion with a congressional staffer regarding the contents of the current draft of the FISA, and a follow-up e-mail message with a question from an official in OAG to the official in OLP concerning merits of particular provisions.</p>		
<p>10/23/07</p>	<p>One e-mail message from an official in OLP to officials in OLA, ODNI and WHO summarizing a briefing with Representatives Barton, Upton, and Whitfield.</p>		
<p>11/06/07</p>	<p>One e-mail message from an official in OLP to officials in OLA, ODAG, OLC, NSD, NSA, ODNI and WHO summarizing a discussion with a congressional staffer regarding the language in a draft of amendments to the FISA, and offering an opinion regarding the impact of these provisions.</p>		
<p>11/09/07</p>	<p>Six e-mail messages between officials in ODAG, CRM, OLA and WHO discussing DOJ's proposed revisions to technical issues in the amendments to FISA that DOJ was preparing for transmittal to congressional staff.</p>		

	<p>1/23/08</p>	<p>Two e-mail messages from an OLA official to officials in WHO, copying an official in OAG and ODNI, summarizing closely held calls with Members of Congress regarding the amendments to the FISA.</p> <p>Of the e-mail messages in category one, ten contain non-public names, e-mail addresses, or phone numbers of ODNI employees; two contain non-public FBI e-mail addresses; and two e-mails contain e-mail addresses of non-public NSA officials, all of which are protected.</p>		
<p>2</p>	<p>10/15/07</p>	<p>One e-mail message from an ODNI official to NSD, ODNI, OLC, OLP, OLA, CIA and NSA officials discussing potential participants to conduct a briefing before Congress regarding FISA and the PAA.</p> <p>This e-mail message contains non-public e-mail addresses of NSA, CIA and ODNI officials, which are protected, pursuant to Exemptions 2, 3, and 6.</p>	<p><u>Exemption 5</u> Deliberative process privilege Presidential communications privilege Inter-branch joint deliberative privilege</p> <p><u>Exemption 3 in part</u> Information exempt pursuant to 50 U.S.C. § 402 note and 50 U.S.C. § 403g</p> <p><u>Exemption 2 in part</u> Internal agency practices</p>	<p>1</p>

			<u>Exemption 6 in part</u> Personal privacy	
3	<p>9/16/07</p> <p>9/20/07</p> <p>October, 2007</p>	<p>One e-mail message from an official in OLP to officials in OLA and OLP discussing items to prepare for AG's testimony in Congress.</p> <p>One e-mail message from an official in OLP to officials in NSD, CIV, and OLC providing draft language for a provision in the FISA amendments.</p> <p>Twenty-six e-mail messages between officials in OLP, OLC, CIV, OLA, NSD, OAG, and/or ODAG discussing various drafts of the FISA amendments, identifying various issues for discussion within DOJ, providing summaries of conversations with congressional staffers and committees, offering advice for communications with Congress, discussing potential witnesses to appear at hearings where DOJ is testifying, summarizing activity in Congress regarding amendments, and circulating documents with suggestions for handling before transmittal to the Hill for internal DOJ review.</p>	<p><u>Exemption 5</u> Deliberative process privilege Presidential communications privilege Inter-branch joint deliberative privilege</p> <p><u>Exemption 6 in part</u> Personal privacy</p>	59

November, 2007	<p>Thirty-four e-mail messages and nine attachments, between officials in OLP, CIV, OLA, NSD, OLC, and OAG, discussing various drafts of the FISA amendments, identifying various issues for discussion within DOJ, presenting questions and offering advice for communications with Congress, preparing for possible briefings with Congress, circulating memoranda presenting DOJ summaries of Hill activity for discussion, circulating draft language for DOJ talking points on FISA amendments. One e-mail message contains a personal comment between OLA officials which is also protected pursuant to Exemption 6.</p>		
December, 2007	<p>Two e-mail messages from an official in OAG to NSD, CIV, OLA, and/or OLC officials, preparing for a preparatory session for the AG prior to his testimony before the Senate, with three follow-up e-mail messages between the OAG official and an official in NSD regarding the specifics of the briefing; and one e-mail message inquiring about specific aspect of particular FISA amendments.</p>		
February, 2008	<p>Sixteen e-mail messages between officials in OAG, ODAG, OLP, OLA, OLC, and NSD circulating draft DOJ testimony for comments and edits before transmittal to Congress, circulating potential questions that may be given</p>		

	March, 2008	<p>to the AG during congressional testimony, discussing potential witnesses to appear on behalf of DOJ, concerning FISA amendments.</p> <p>One e-mail message, and attachment, from an official in NSD to officials in OLA providing a draft letter from the AG and DNI to Members of Congress and an e-mail message from an official in OLA in response to NSD's e-mail message, copying officials in OLA, OAG, and OLC, and providing comments on the letter; five e-mail messages among OLA officials discussing draft language for this letter.</p> <p>Of the e-mail messages in category three, twenty-four contain names of non-public NSD officials which are protected.</p>		
4	10/9/07	<p>E-mail message from an OLA official to a congressional staffer, forwarding comments and edits back to House on talking points memorandum on the RESTORE Act, and on draft statement of Congressman Lamar Smith, as well as its accompanying e-mail from a NSD official to officials in OAG, OLP, NSD, and OLC. The e-mail message contains an e-mail address for a Congressional staffer in which the prefix is protected and the accompanying e-mail message</p>	<p><u>Exemption 5</u> Deliberative process privilege Presidential communications privilege Inter-branch joint deliberative privilege</p> <p><u>Exemption 6 in part</u> Personal privacy</p>	18

		has the name of a non-public NSD official that is protected.		
	10/10/07	E-mail message from an OLA official to congressional staffers with a talking points memorandum on the RESTORE Act attached. Attachment released in its entirety by letter dated May 12, 2009.		
	Undated	Talking points regarding the RESTORE Act. Released in its entirety by letter dated May 12, 2009.		
	Undated	Talking points regarding the impact of modernization of FISA.		
	Undated	Handwritten notes taken by an OLA official describing the Department's meetings with congressional staff regarding the amendments to the FISA, and noting future activity on this subject matter.		
5	10/8/07	One e-mail message from a congressional staffer to an OLA official forwarding a draft of the RESTORE Act and two accompanying e-mail messages between congressional staffers. Two subsequent e-mail messages (one dated October 9, 2007) between OLA officials discussing and characterizing the attached draft.	Exemptions 5 Deliberative process privilege Presidential communications privilege Inter-branch joint deliberative privilege	192

	<p>One dated 10/9/07, one dated 10/11/07, three dated 10/23/07, one dated 11/7/07</p> <p>11/7/07</p>	<p>Six e-mail messages, and attachments, between congressional staffers in SSCI and officials in OLA, OLP, OLC, NSD, NSA, FBI, or ODNI forwarding versions of draft congressional bills, or other proposals submitted to Congress, regarding the FISA amendments; e-mail messages provide commentary on or summarize the substance of the attachments.</p> <p>Four e-mail messages, with attachments, from congressional staffers in SJC forwarding draft amendments to FISA bills, to officials in OLA or OLP, and summarizing the contents of the draft or including an e-mail chain of messages among congressional staff, which includes a summary of the attached documents; two e-mail messages from an OLA official forwarding these e-mail messages to other OLA officials.</p> <p>Of the e-mail messages in category five, eleven contain the personal portion (i.e., prefix) of congressional staffer e-mail addresses; three contain e-mail addresses of non-public ODNI officials; and one contains the name of a non-public NSA official, all of which are protected.</p>	<p><u>Exemption 3 in part</u> Information exempt pursuant to 50 U.S.C. § 402 note</p> <p><u>Exemption 2 in part</u> Internal agency practices</p> <p><u>Exemption 6 in part</u> Personal Privacy</p>	
6	10/10/07-2/21/08	Eighty-five e-mail messages among several congressional staffers in either SSCI, SJC, or in the House and officials in OLP, ODNI, OAG,	<u>Exemptions 5</u> Presidential communications privilege	55

		<p>OLC, CIV, and NSD, and/or NSA forwarding document to the Hill for consideration, discussing specific language to use in drafts of congressional bills of amendments to the FISA, providing suggestions and comments on those drafts, offering candid opinions on others' suggestions, presenting arguments for language to insert, raising issues for further discussion, debating the various interpretations of potential language to include in those congressional bills.</p> <p>Of the e-mails messages in category six, thirty-four contain the personal portion (i.e., prefix) of congressional staffer e-mail addresses; fifty-six contain the e-mail addresses of non-public ODNI officials; sixteen e-mails contain the names of non-public ODNI officials; and thirty-one contain the names of non-public NSA officials, all of which are protected.</p>	<p>Deliberative process privilege Inter-branch joint deliberative privilege</p> <p><u>Exemption 2 in part</u> Internal agency practices</p> <p><u>Exemption 3 in part</u> Information exempt pursuant to 50 U.S.C. § 402 note</p> <p><u>Exemption 6 in part</u> Personal privacy</p>	
7	1/17/07 to 2/07/08	<p>Fourteen e-mail messages between House congressional staffers and officials in OLA discussing potential responses to public inquiries regarding the FISA amendments, considering congressional inquires, or discussing status of congressional activity.</p> <p>Twenty e-mail messages between congressional staffers in SSCI and officials in OLP, OLC, and/or CIV providing draft language for</p>	<p><u>Exemptions 5</u> Deliberative process privilege Presidential communications privilege Inter-branch joint deliberative privilege</p> <p><u>Exemption 6 in part</u> Personal privacy</p>	25

	<p>9/24/07 to 11/08/07</p> <p>One dated 1/22/08, two dated 1/24/08</p> <p>10/29/07</p>	<p>congressional bills and amendments, offering suggestions to draft language proposals by others, acknowledging receipt of suggestions, requesting insight into particular provisions, discussing the status of specific bills under discussion.</p> <p>Three e-mail messages between congressional staffers in SJC and officials in OLA, discussing draft language for amendments to the FISA.</p> <p>One e-mail message from a congressional staffer in SJC to an official in OLA, copying congressional staffers in SSCI responding to a question regarding access to testimony.</p> <p>Of the e-mail messages in category seven, twenty-two contain the personal portion (i.e. prefix) of congressional staffer e-mail addresses, which is protected.</p>		
<p>8</p>	<p>One dated 11/07/07, one dated 11/14/07</p> <p>11/14/07</p>	<p>Two e-mail messages from congressional staffers in SJC to officials in OLP, OLA, and WHO, each of which forwards an e-mail message from a congressional staffer to other congressional staff that summarizes the issues or drafting amendments to the FISA.</p> <p>E-mail message from a congressional staffer in SJC to officials in OLA and one in WHO,</p>	<p><u>Exemptions 5</u> Deliberative process privilege Presidential communications privilege Inter-branch joint deliberative privilege</p> <p><u>Exemption 6 in part</u> Personal privacy</p>	<p>110</p>

	11/14/07	<p>requesting advice on potential language to amend FISA.</p> <p>Four e-mail messages from a congressional staffer in SJC to officials in OLP, OLA, and WHO attaching versions of draft FISA amendments, and forwarding e-mail messages among congressional staff summarizing the attachments.</p> <p>Of the e-mail messages in category eight, ten contain the personal portion (i.e., prefix) of congressional staffer e-mail addresses.</p>		
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Part II: Description of documents released in part with excisions made pursuant to Exemptions 1, 2, 3, 5 and 6 of the FOIA.

Group Number	Date	Description	Exemptions	Pages
9	One dated 1/22/08, and one dated 11/27/08	Portions of two e-mail messages, one from an official in OLA to an official in OAG, the other from an official in NSD to an official in OLA and an official in OAG, describing discussions with officials outside DOJ, regarding the amendments to FISA.	<u>Exemption 5</u> Deliberative process privilege Presidential communications privilege Inter-branch joint deliberative privilege	3 partial pages
	12/13/07	Portion of one e-mail message from an official in OLC to an official in OAG characterizing the AG's testimony before the Hill.		

10	<p>10/11/07, 11/14/07</p> <p>1/7/08</p>	<p>Portions of two e-mail messages containing the name of a WHO official in the recipient or copied line of the e-mail message. Released in their entirety by letter dated May 12, 2009.</p> <p>Portion of an e-mail message containing name of a WHO official in the copied line of the e-mail message. In addition, the personal portion (prefix) of a congressional staffer e-mail address was withheld. Name of WHO official released by letter dated May 12, 2009.</p>	<p><u>Exemption 5</u> Presidential communications privilege</p> <p><u>Exemption 6</u> Personal privacy</p>	5 partial pages
11	10/13/07 to 2/14/08	<p>Portions of thirty e-mail messages containing names for non-public officials in NSA, or CIA, as well as e-mail addresses and phone numbers for all NSA officials. On eight of these e-mail messages the personal portion (i.e., prefix) of congressional staffer e-mail addresses was also withheld pursuant of Exemption 6. In addition, twenty-seven of these e-mail messages contained the e-mail address of public and non-public ODNI officials and/or the telephone numbers of direct lines for ODNI officials were withheld under Exemptions 2 and 6. Furthermore, on eleven of these e-mail messages, the names of non-public ODNI or NSD officials were withheld</p>	<p><u>Exemption 3 in part</u> Information exempt pursuant to 50 U.S.C. § 402 note and 50 U.S.C. § 403g</p> <p><u>Exemption 2</u> Internal agency practices</p> <p><u>Exemption 6</u> Personal privacy</p>	16 partial pages

		pursuant to Exemption 6.		
12	1/17/07 to 5/20/08	Portions of thirty-two e-mail messages containing the personal portion (i.e., prefix) of congressional staffer e-mail addresses or telephone numbers for the non-public direct lines or cell phone numbers of congressional staffers.	<u>Exemption 2</u> Internal agency practices <u>Exemption 6</u> Personal privacy	25 partial pages
	10/03/07- 5/19/08	Portions of eighteen e-mail messages, or Outlook calendar entries, containing the e-mail addresses of ODNI officials, the telephone numbers of direct lines for ODNI officials, or names of non-public ODNI and NSD officials.		11 partial pages
	10/03/07- 5/19/08	Portions of ten e-mail messages that containing both the personal portion (i.e., prefix) of congressional staffer e-mail addresses, or telephone numbers for the direct lines of congressional staffers, as well as e-mail addresses of ODNI officials, the telephone numbers of direct lines for ODNI officials, or the names of non-public ODNI officials.		7 partial pages
13	10/10/07	Letter from Senators John D. Rockefeller, IV and Christopher S. Bond to Acting Attorney General Peter D. Keisler concerning Foreign Surveillance	<u>Exemption 1</u> Information properly classified in the interest of national security	

		Courts, which contained Top Secret information	<u>Exemption 3</u> Information exempted by statutes 50 U.S.C. § 403-1(i), 50 U.S.C. § 402 note and 18 U.S.C. § 798	2 pages
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Legend

DOJ – Department of Justice

OAG – Office of the Attorney General

ODAG – Office of the Deputy Attorney General

OLA – Office of Legislative Affairs

OLP – Office of Legal Policy

OLC – Office of Legal Counsel

NSD – National Security Division

CIV – Civil Division

EB – Executive Branch

ODNI – Office of the Director of National Intelligence

WHO – White House

NSA – National Security Agency

CIA – Central Intelligence Agency

SSCI – Senate Select Committee on Intelligence

SJC – Senate Judiciary Committee

FISA – Foreign Intelligence Surveillance Act

PAA – Protect America Act