NO. 09-17235

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff-Appellee,

v.

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE and DEPARTMENT OF JUSTICE,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANTS

BETH S. BRINKMANN
Acting Assistant Attorney General

JOSEPH P. RUSSONIELLO
United States Attorney

DOUGLAS N. LETTER
SCOTT R. McINTOSH
Attorneys, Appellate Staff
Civil Division, Room 7259
Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530
202-514-4052

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STATEMENT OF JURISDICTION

1. This case presents claims arising under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The district court was vested with subject matter jurisdiction by 5 U.S.C. § 552(a)(4)(B).

2. The district court entered summary judgment in favor of the plaintiff on September 24, 2009. The defendants filed a notice of appeal on October 8, 2009, within the time allowed by 28 U.S.C. § 2107(b) and Rule 4(a)(1)(B) of the Federal

Rules of Appellate Procedure. This Court is vested with jurisdiction over the present appeal by 28 U.S.C. § 1291.

STATEMENT OF ISSUES

In 2007 and 2008, Congress enacted revisions to the Foreign Intelligence Surveillance Act of 1978 (FISA), including the adoption of a statutory immunity provision that provides protection for telecommunications carriers that have been sued for allegedly assisting the United States in specified foreign intelligence gathering activities. Prior to the enactment of the legislation, the Department of Justice (DOJ) and the Office of the Director of National Intelligence (ODNI) engaged in internal deliberations regarding the proposed revisions to FISA, and telecommunications companies communicated with both agencies regarding the statutory immunity issue. The issues presented are:

1. Whether Exemption 3 and Exemption 6 of FOIA permit the defendants to withhold the identities of representatives of telecommunications companies who communicated with DOJ and ODNI regarding the statutory immunity issue.

2. Whether deliberative materials exchanged within and between ODNI and DOJ, and between the agencies and the White House, are "inter-agency or intra-agency" materials for purposes of Exemption 5 of FOIA.

STATEMENT OF THE CASE

A. The Enactment of FISA Reform Legislation

This FOIA action concerns a collaborative effort by the Executive Branch and Congress to reform the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801 *et seq.* (FISA). Congress enacted FISA in 1978 "to accommodate and advance both the government's interest in pursuing legitimate intelligence activity and the individual's interest in freedom from improper governmental intrusion." *United States* v. *Cavanagh*, 807 F.2d 787, 789 (9th Cir. 1987). In general terms, FISA established standards and procedures by which the federal government could engage in electronic surveillance to collect foreign intelligence information. 50 U.S.C. §§ 1801-1811; see also *id.* §§ 1821-1829 (physical searches). FISA created two specialized federal courts to perform the judicial functions required by the statute. *Id.* § 1803(a)-(b).

In the aftermath of the terrorist attacks on September 11, 2001, the Executive Branch determined that the legal framework for foreign intelligence surveillance created in 1978 needed to be updated. Two primary concerns animated the Executive Branch's views regarding reform legislation.

The first concern was that changes in telecommunications technology since 1978 had rendered portions of FISA's legal framework anachronistic and had

disrupted the original balance struck by Congress when FISA was enacted. ER 470-72. The second concern was that numerous suits were being filed against tele-communications companies that were alleged to have assisted the government in carrying out certain post-9/11 intelligence activities. ER 524-27; see generally *Al-Haramain Islamic Foundation, Inc.* v. *Bush*, 507 F.3d 1190 (9th Cir. 2007); *ACLU* v. *National Security Agency*, 493 F.3d 644 (6th Cir. 2007); *In re NSA Telecommunications Records Litigation*, 633 F. Supp. 2d 949, 959 (N.D. Cal. 2009), *appeal pending*, No. 09-16676 (9th Cir.). The suits collectively sought hundreds of billions of dollars in damages against the defendant companies. *In re NSA Telecommunications Records Litigation*, 633 F. Supp. 2d at 959. In the absence of legislative measures to shield telecommunications companies from such suits, the willingness of the private sector to assist the government in future intelligence gathering activities could be seriously impaired. ER 470-72, 529-30.

In April 2007, the Executive Branch submitted draft reform legislation to Congress that was intended to address these concerns. ER 472. In August 2007, Congress took an initial step toward reform by enacting the Protect America Act of 2007 (PAA), Pub. L. No. 110-55, 121 Stat. 552. The PAA was designed as an interim measure, and it expired by its terms in February 2008. In July 2008, Congress passed and the President signed the Foreign Intelligence Surveillance Act of 1978

Amendments Act of 2008 (FISA Amendments Act), Pub. L. No. 110-261, 122 Stat. 2467, which updated FISA on a more permanent basis.

The FISA Amendments Act creates new standards and procedures under FISA for specified forms of electronic surveillance. See, *e.g.*, 50 U.S.C. §§ 1881a-1881g. In addition, the Act adds Section 802 of FISA, 50 U.S.C. § 1885a, which provides immunity from suit for persons who are alleged to have provided certain forms of assistance to the government. Section 802(a) provides that "a civil action may not lie or be maintained in a Federal or State court against any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed," if the Attorney General certifies that the person provided any of several specified types of assistance (*id.* § 802(a)(1)-(4)) *or* that "the person did not provide the alleged assistance" (*id.* § 802(a)(5)). See *In re NSA Telecommunications Records Litigation*, 633 F. Supp. 2d at 956-60 (discussing immunity provision).

The FISA reform legislation was the end product of two years of efforts by the political branches. Those efforts involved protracted discussions and negotiations between the Executive Branch and the legislature over various proposed alternatives, in an effort to identify and develop legislation that would be acceptable both to the President and to Congress. See, *e.g.*, ER 470-77, 539-40, 603, 698-700, 719, 722-23, 844-45, 931-34. At the same time, the Executive Branch engaged in internal

deliberations regarding options for FISA reform. Emails and other documents relating to legislative proposals were prepared and circulated within DOJ and ODNI, between the two agencies, and among the agencies and the White House. See, *e.g.*, *id.* at 601-602, 605-606, 718-21, 936-37. Finally, the agencies engaged in communications with telecommunications companies regarding the issue of statutory immunity. See, *e.g.*, *id.* at 477-78, 532-33, 569, 938-39.

B. The Present FOIA Litigation

1. In December 2007, the Electronic Frontier Foundation (EFF) submitted FOIA requests to ODNI and to five components of DOJ.[1] See ER 5. EFF requested "all agency records from September 1, 2007, to the present concerning briefings, discussions, or other exchanges" that agency officials had had with "1) members of the Senate or House of Representatives and 2) representatives or agents of telecommunications companies concerning amendments to FISA, including any discussion of immunizing such companies or holding them otherwise unaccountable for their role in government surveillance activities." *Id.* In April 2008, EFF submitted a second round of FOIA requests to the same agency components, seeking all records concerning briefings, discussions, or other exchanges between ODNI or

[1] The five DOJ components were the Office of the Attorney General (OAG), the Office of Legal Policy (OLP), the Office of Legislative Affairs (OLA), the Office of Legal Counsel (OLC), and the National Security Division (NSD).

DOJ officials and Members of Congress or their staffs or representatives of telecommunications companies, regarding amendments to FOIA. *Id.* at 5-6. EFF also asked for all records reflecting any communications, regardless of subject matter, between ODNI or DOJ officials and certain named persons who were alleged to be telecommunications company representatives. *Id.* at 6.

ODNI and DOJ released certain responsive documents, but withheld others in whole or in part on the basis of various FOIA exemptions. The agencies withheld a number of documents on the basis of Exemption 5, which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). In general terms, Exemption 5 prevents requesters from compelling disclosure of agency documents that would be privileged in litigation. Here, the agencies determined that a number of responsive documents were protected by the deliberative process privilege, and that some were protected by the Presidential communications privilege as well. See, *e.g.*, ER 605-611, 719-27, 849-54.

The agencies asserted Exemption 5 with respect to email messages and other documents exchanged between the agencies and Congress, and between the agencies and telecommunications companies. In addition, the agencies invoked Exemption 5 with respect to emails and documents exchanged entirely within the Executive Branch

– *i.e.*, within each agency, between the two agencies, and between the agencies and the White House. See ER 601-602, 718-22, 846, 848-49, 936-37. As discussed further below, it is this latter category of documents that is at issue in this appeal.

The agencies withheld other information on the basis of Exemption 3. Exemption 3 applies to matters that are "specifically exempted from disclosure by statute * * * ." 5 U.S.C. § 552(b)(3).[2] Here, the agencies determined that some of the information requested by EFF was exempted from disclosure by one or more non-disclosure statutes. Among other things, the agencies relied on Section 102A(d)(3) of the National Security Act of 1947, codified as amended at 50 U.S.C. § 403-1(I)(1), which provides that the Director of National Intelligence "shall protect intelligence sources and methods from unauthorized disclosure."

Relying on the National Security Act and other non-disclosure statutes relating to intelligence gathering, the agencies withheld, *inter alia*, the identities of the telecommunications companies that had communicated with the agencies regarding the statutory immunity proposal, because that information could be used to identify which companies have provided or may in the future provide intelligence gathering

[2] In order to qualify under Exemption 3, a non-disclosure statute must "(A) require[] that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establish[] particular criteria for withholding or refer[] to particular types of matters to be withheld." *Id.*

assistance to the government. ER 479, 604. The agencies also withheld on the same basis the identities of the telecommunications company representatives who took part in the communications, since disclosure of the representatives' identities would readily permit identification of the companies themselves. *Id.* The agencies also withheld the representatives' identities on the basis of Exemption 6, which allows withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

2. EFF filed separate suits in February and June 2008 for release of the documents responsive to its two sets of FOIA requests. The parties thereafter agreed to summary judgment briefing for the two suits on a consolidated basis. The agencies submitted *Vaughn* indexes (see, *e.g.*, *Lion Raisins* v. *U.S. Dep't of Agriculture*, 354 F.3d 1072, 1083 (9th Cir. 2004)) that identified the withheld documents and provided the basis for their withholding, and also submitted declarations that provided additional information about the nature of the withheld materials and the rationales for withholding them. ER 128-202, 465-953.

On September 24, 2009, the district court issued a memorandum order granting EFF's summary judgment motion and denying the agencies' summary judgment

motion. ER 4-13. The order directed agencies to disclose the contested documents by October 9, 2009. *Id.* at 13.

With respect to the materials withheld under Exemption 5, which applies to "inter-agency and intra-agency" documents, the district court held that email and other documents exchanged between the agencies and Congress did not qualify as "inter-agency or intra-agency" documents, and that communications between the agencies and telecommunications companies likewise did not satisfy the inter/intra-agency requirement. ER 10-12.

As noted above, some of the documents being withheld under Exemption 5 were exchanged solely within the Executive Branch, and EFF itself conceded that "some of the records at issue in this case qualify as 'inter-agency or intra-agency memoranda.'" Opposition to Defendants' Consolidated Motion for Summary Judgment at 14 & n.9 (No. 08-2997 Docket # 43) (listing documents conceded to satisfy inter-agency/intra-agency requirement). Nevertheless, the district court ordered the disclosure of *all* materials withheld under Exemption 5, even materials that were exchanged exclusively within the Executive Branch. ER 13. The district court did so, moreover, without ever resolving the agencies' underlying privilege claims. ER 12 ("the Court need not reach the applicability of the specific privileges Defendants have asserted").

The district court also ordered the agencies to disclose the identities of the telecommunications company representatives. ER 12-13. The court held that the identities were not subject to withholding under Exemption 6 because, in the court's view, the privacy interest in maintaining the confidentiality of the representatives' identities was outweighed by the public interest in disclosure. ER 13.

The district court acknowledged that the agencies were also withholding the identities on the basis of Exemption 3. ER 12. Moreover, the court noted that EFF "no longer challenges" the agencies' Exemption 3 withholding decisions. *Id.* at 12 & n.1; see Opposition to Defendants' Consolidated Motion for Summary Judgment at 8 (No. 08-2997 Docket # 43) ("EFF has decided not to challenge * * * the withholding of any material under Exemptions 1, 2, 3, or 7(E)"). But having done so, the court proceeded to order the disclosure of the identities on the basis of its Exemption 6 ruling alone, and never addressed the applicability of Exemption 3 at all. ER 12-13.

3. The agencies sought leave to file a motion for reconsideration under Rule 59(e). See No. 08-2997 Docket # 75. In their motion, the agencies pointed out that the district court had ordered the disclosure of documents that are conceded to meet Exemption 5's inter-agency/intra-agency requirement, and had done so without ever deciding the privilege issues relating to those documents. *Id.* The agencies also

pointed out that the court had ordered disclosure of the identities of the telecommunications company representatives without ever addressing the applicability of Exemption 3 to that information. *Id.* The district court denied the agencies leave to move for reconsideration, characterizing them as "reargu[ing] points previously asserted to the Court," and also denied a request for a temporary stay pending the Solicitor General's determination regarding appeal of the court's disclosure order. ER 1-3.

The agencies then sought a temporary stay from this Court. While the temporary stay request was pending, the Solicitor General decided to pursue an appeal with respect to: (1) emails and other documents withheld under Exemption 5 that were exchanged exclusively within the Executive Branch; and (2) information regarding the identities of the telecommunications company representatives. This Court then granted a stay pending appeal with respect to those two categories of materials, and granted a temporary stay until November 9, 2009, to allow the Solicitor General to decide whether to appeal with respect to the remaining materials at issue – the materials withheld under Exemption 5 that were exchanged with Congress and with the telecommunications companies.

On November 6, 2009, the Solicitor General decided not to pursue an appeal with respect to those materials, and the agencies so apprised the Court and EFF. As

a consequence of that decision, the agencies have now disclosed all of the communications between the agencies and Congress, and all of the communications between the agencies and the telecommunications companies (with redactions for information protected by exemptions other than Exemption 5 itself). The agencies are continuing to withhold materials under Exemption 5 that were circulated solely within the Executive Branch, and are also continuing to withhold the identities of telecommunications company representatives under Exemption 3 and Exemption 6. This appeal contests the portion of the district court's order that requires the disclosure of these two categories of materials.

SUMMARY OF ARGUMENT

1. Exemption 3 of FOIA permits the government to withhold information "specifically exempted from disclosure by statute * * * ." In this case, the agencies relied on Exemption 3 to withhold information that could reveal which tele-communications companies assisted the government in carrying out particular foreign intelligence activities. That highly sensitive information is protected by the National Security Act of 1947, which requires the Director of National Intelligence to protect "intelligence sources and methods" from unauthorized disclosure, and by the National Security Agency Act of 1959, which protects all information regarding the organization, functions, and activities of the National Security Agency.

As explained by the agencies' declarations, including the declaration of the Director of National Intelligence, knowing which companies communicated with the Executive Branch regarding statutory immunity, and the extent of their communications, would allow inferences to be drawn about which companies provided intelligence gathering assistance. And in turn, disclosing the companies' representatives would be tantamount to disclosing the companies themselves. As a result, Exemption 3 protects not only the identities of the companies – a result that neither EFF nor the district court has questioned – but the identities of their representatives as well. The Supreme Court has made clear that the judgment of the Director of National Intelligence in this area are entitled to great deference from the judiciary, and that judgment must be sustained here.

2. The identities of the telecommunications company representatives are also independently subject to withholding under Exemption 6, which protects individual information whose disclosure would constitute "a clearly unwarranted invasion of personal privacy." Persons who contact the government confidentially on political and legal issues have a legitimate interest in maintaining the privacy of their names and other identifying information, particularly when the subject matter about which they are communicating is politically sensitive and controversial. On the other side of the balance, the only public interest in disclosure identified by EFF is an asserted

interest in knowing whether and how the Executive Branch's position regarding statutory immunity was influenced by telecommunications company lobbying. But knowing the identities of the individuals who acted on the companies' behalf does nothing to further that interest. And now that the agencies have released the contents of the communications between the telecommunications companies and the agencies, the case for disclosing the names of the representatives is particularly unconvincing, for doing so can hardly cast any additional light on the government's activities.

3. Finally, the district court erred in requiring the agencies to disclose materials withheld under Exemption 5 that were exchanged entirely within the Executive Branch. By its terms, Exemption 5 protects "inter-agency or intra-agency" materials that would be privileged in non-FOIA litigation. In this case, a number of documents withheld under Exemption 5 were circulated solely within and between DOJ and ODNI, both of which are Executive Branch agencies, and those documents indisputable satisfy the inter-agency/intra-agency requirement. Other documents were exchanged between the agencies and the White House, and it is well settled that such documents also qualify as "inter-agency or intra-agency" for purposes of Exemption 5. The district court therefore was obligated to address the merits of the privilege claims asserted for these documents – a step that the court expressly declined to take. This Court therefore should vacate the district court's disclosure

order with respect to the intra-Executive Branch documents and remand for further proceedings on those materials.

ARGUMENT[3]

I. Exemption 3 and Exemption 6 Authorize Withholding of the Identities of the Telecommunications Company Representatives

A. Exemption 3

As noted above, the agencies invoked Exemption 3 to withhold information that would reveal which telecommunications companies communicated with the government about statutory immunity, including information identifying the company representatives who participated in the communications. Yet the district court, after having noted that the agencies were invoking Exemption 3, proceeded to order the agencies to disclose the representatives' identities without ever deciding whether Exemption 3 applies. That failure on the part of the district court cannot be excused, for the information is clearly protected from disclosure by Exemption 3.

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[3] District court orders granting summary judgment in FOIA cases are subject to "a two-step standard of review." *Milner* v. *U.S. Dep't of the Navy*, 575 F.3d 959, 963 (9th Cir. 2009). The Court first determines under a *de novo* standard whether an adequate factual basis exists to support the district court's decisions. If an adequate factual basis exists, then this Court reviews the district court's conclusions of fact for clear error, while the district court's legal rulings, including its rulings on whether a particular exemption applies, are reviewed *de novo*. *Id.* The issues presented in this appeal were raised in the agencies' summary judgment memoranda (No. 08-2997 Docket ## 29 & 46) and were also raised in their motion for leave to move for reconsideration (No. 08-2997 Docket #75).

1. Exemption 3 permits the government to withhold information "specifically exempted from disclosure by statute * * * ." In this case, the agencies withheld information under Exemption 3 on the basis of several non-disclosure statutes. For present purposes, the most important of these statutes is Section 102A(I)(1) of the National Security Act of 1947, which requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-1(i)(1).

The leading case on the withholding of information under Section 102A(i)(1) is *CIA* v. *Sims*, 471 U.S. 159 (1985). At the time that *Sims* was decided, the duty to protect intelligence sources and methods was vested in the Director of Central Intelligence and was set forth in Section 102(d)(3) of the National Security Act. The responsibility has since been transferred to the Director of National Intelligence and has been recodified as Section 102A(i)(1), but the non-disclosure requirement itself remains unchanged, and the Court's analysis in *Sims* therefore continues to control. See National Security Intelligence Reform Act of 2004, Pub. L. No. 108-458, Title I, § 1101(a), 118 Stat. 3643 (2004); *Berman* v. *CIA*, 501 F.3d 1136, 1140 n.1 (9th Cir. 2007).

In *Sims*, the Court held that Section 102(d)(3) permitted the Director to withhold the names of private researchers who had participated in intelligence-related

research for the CIA. 471 U.S. at 174-77. As a threshold matter, the Court held that "§ 102(d)(3) qualifies as a withholding statute under Exemption 3." *Id.* at 168. Then, emphasizing "the broad sweep" of the provision (*id.* at 169) and the "wide-ranging authority" that it conferred on the Director (*id.* at 177), the Court held that the researchers qualified as "intelligence sources" for purposes of Section 102(a)(3) "because these persons provided, or were engaged to provide, information the Agency needs to fulfill its statutory obligations with respect to foreign intelligence." *Id.* at 174. As the Court explained, "forced disclosure of the identities of its intelligence sources could well have a devastating impact on the Agency's ability to carry out its mission":

> If potentially valuable intelligence sources come to think that the Agency will be unable to maintain the confidentiality of its relationship with them, many could well refuse to supply information to the Agency in the first place. Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to "close up like a clam."

Id. at 175.

The Court also held that Section 102(d)(3) authorized the Director to withhold "superficially innocuous information on the ground that it might enable an observer to discover the identity of an intelligence source." *Id.* at 178. The Court emphasized that "[t]he decisions of the Director, who must of course be familiar with 'the whole

picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake." *Id.* at 179. The Court explained that "it is the responsibility of the Director * * * , not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." *Id.* at 180.

In this case, it is undisputed that the former Section 102(d)(3), now Section 102A(i)(1), protects the identities of telecommunications companies that provide assistance to the government in carrying out foreign intelligence surveillance. As explained by the Director of National Intelligence, "[w]hether any private party assists the government with intelligence activities is highly sensitive and must not be publicly disclosed." ER 478. Private entities that cooperate in intelligence activities "do so at great financial and personal risk," and potential public disclosure of such participation "could lead private entities to refuse to assist the government in the future," which would jeopardize the government's ability to gather vital foreign intelligence information. *Id.* Moreover, public disclosure "provides our adversaries with extremely valuable information about our [intelligence] sources, methods and capabilities." *Id.* at 478-79. Among other things, adversaries "could avoid certain communication methods or could target their resources against particular private

entities and attempt to impede them from assisting the government in this way," with consequent damage to the nation's intelligence gathering capabilities. *Id.* For these reasons, it is imperative that the government be able to protect the identities of telecommunications companies and other private entities that assist the government's intelligence operations, and Section 102A(i)(1) provides that protection.[4]

Congress recognized the importance of shielding the identities of telecommunications carriers that may have assisted the government when it added the statutory immunity provision to FISA. See S. Rep. 110-209, at 9 (2007) ("the identities of persons or entities who provide assistance to the U.S. Government are protected as vital sources and methods of intelligence[,] * * * [and] [i]t would be inappropriate to disclose the names of the electronic communication service providers from which assistance was sought"). Accordingly, while Section 802(a) of FISA requires the Attorney General to certify that the defendant company has provided one of the specified types of assistance *or* that the company did not provide assistance, it does not require him to specify on which of these predicates he is relying. See *In re NSA Telecommunications Records Litigation*, 633 F. Supp. 2d at 957 (dismissing

[4] By its terms, Section 102A(i)(1) protects intelligence sources and methods without regard to whether their disclosure would cause any identifiable harm. But as the foregoing discussion indicates, this is a case in which the harm is both identifiable and significant.

claims against telecommunications companies under Section 802 on basis of Attorney General's certification that the claims "'fall within at least one provision contained in Section 802(a)'"); ER 531. Section 802(a) is thus designed to ensure that the Attorney General can protect telecommunications companies without disclosing whether any particular firm did or did not provide assistance to the government.

In this case, EFF sought the identities of telecommunications companies and their representatives who contacted ODNI and DOJ regarding statutory immunity from the numerous pending (and potential future) suits relating to the companies' alleged involvement in post-9/11 intelligence gathering. The Director of National Intelligence determined that information showing which companies and representatives contacted the government (and how extensive the contacts were) "would allow the public and our adversaries to draw inferences about which companies are assisting us and which are not," making it necessary to protect such information under Section 102A(i)(1). ER 479.

In making this judgment, the Director recognized that it would be possible for a telecommunications company to contact the government regarding statutory immunity even if it had not provided any intelligence assistance, but the Director nevertheless concluded that "the type of information being withheld from plaintiffs could be viewed as confirming which private parties are or are not assisting the

government, and * * * this information must be protected." *Id.* While statutory immunity may be of interest to any company that has been sued, it is far more urgent for firms that provided assistance to the government than for firms that did not, because only firms that assisted the government would be at risk of liability in the absence of such immunity. See ER 569 (NSA) (importance of statutory immunity "is especially true for companies that may potentially assist the Intelligence Community in its collection efforts"); *id.* at 939 (ODNI) (requested records show communications "only with certain telecommunications companies," and "some communicated with the government far more than others").

Faced with these declarations, EFF abandoned its demand for the identities of the telecommunications companies themselves, but continued to seek disclosure of the identities of the companies' representatives.[5] But it would be pointless to protect the identities of the companies under Exemption 3 while disclosing the identities of

[5] EFF informed the district court that it "has decided not to challenge * * * the withholding of any material under Exemptions 1, 2, 3, or 7(E)." Opposition to Defendants' Consolidated Motion for Summary Judgment at 8 (No. 08-2997 Docket # 43). EFF contested the withholding of materials under Exemption 5 and Exemption 6, but only "to the extent that records can be disclosed without revealing classified information or the government's intelligence sources and methods." *Id.* at 8 n.5. EFF made no claim that the identities of the telecommunications companies themselves could be disclosed without revealing intelligence sources and methods. Instead, it argued only for the disclosure of the identities of the companies' representatives. See Reply to Opposition to Cross Motion for Summary Judgment at 15-16 (No. 08-2997 Docket # 67).

their representatives, because once the representative's identity is known, it is a straightforward matter to determine who he or she is representing. For example, if the general counsel of a particular company contacted the government, an observer who was given the general counsel's name could identify the company in a matter of minutes.

Moreover, the Supreme Court held in *Sims* that the Director can withhold even "superficially innocuous information" if he determines that "it might enable an observer to discover the identity of an intelligence source," and his judgment is entitled to "great deference" from the courts. 471 U.S. at 178-79. In *Berman*, this Court added that the Director "need not demonstrate to a certainty that disclosure will result in intelligence sources or methods being revealed," but instead may withhold information on the basis of his judgment that disclosure would create an "unacceptable risk" that sources or methods will be revealed. 501 F.3d at 1143. And because the Director "is better situated to gauge the national security implications of disclosure," *Berman* held that the court "must therefore defer to the CIA's determination that disclosure would run the unacceptable risk that sources or methods would be revealed." *Id.* Particularly when judged against these standards, the Director's determination that release of the requested information, including the identities of the companies' representatives, would create an "unacceptable risk"

(*Berman*, 501 F.3d at 1143) of revealing which companies have assisted the government's intelligence activities must be sustained.

2. In addition to Section 102A(i)(1) of the National Security Act, the agencies also relied on Section 6 of the National Security Agency Act of 1959, Pub. L. No. 86-36, 73 Stat. 63, codified at 50 U.S.C. § 402 note. See ER 563-64. Section 6 provides that "[n]othing in this Act or any other law * * * shall be construed to require the disclosure of the organization or any function of the National Security Agency, [or] of any information with respect to the activities thereof * * * ." Like Section 102A(i)(1), Section 6 qualifies as a non-disclosure statute for purposes of Exemption 3. See, *e.g.*, *Hayden* v. *National Security Agency/Central Security Service*, 608 F.2d 1381, 1389 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980). Moreover, the protection that Section 6 provides for "information with respect to the activities" of NSA is absolute and does not require a "specific showing of potential harm to national security." *Linder* v. *NSA*, 94 F.3d 693, 696 (D.C. Cir. 1996); *Hayden*, 608 F.2d at 1390.

Whether or not the government, including NSA, has relationships with various private companies falls squarely within the scope of Section 6. See ER 568 (NSA declaration). Information about which companies may have assisted the government necessarily "tend[s] to reveal a method by which NSA may collect foreign

communications." *Id.* at 570. And as discussed above, knowing which companies communicated with ODNI and DOJ regarding statutory immunity would allow inferences about "the existence or nonexistence of US Government relationships with specific telecommunications carriers," which in turn "would allow adversaries to accumulate information about how the US government collects communications, its technical capabilities, and its sources and methods of collection." *Id.* at 569-70. Accordingly, the identities of the companies and their representatives are also protected from disclosure under Exemption 3 by virtue of the non-disclosure mandate in Section 6 of the National Security Agency Act.

B. Exemption 6

In addition to relying on Exemption 3, the government also withheld the identities of the telecommunications company representatives on the basis of Exemption 6, which allows withholding of personnel and medical files and "similar files" whose disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). If the Court agrees that the identities of the company representatives were properly withheld under Exemption 3, it need not address Exemption 6. See, *e.g.*, *Milner*, 575 F.3d at 971 n.8 ("Because we conclude the requested information was properly exempted under Exemption 2, we need not reach the alternative argument that Exemption 7 also applies"); *Painting Industry of Hawaii*

Market Recovery Fund v. *U.S. Dep't of Air Force*, 26 F.3d 1479, 1486 (9th Cir. 1994) ("Because we hold that Exemption 6 justifies the government's action * * * , we need not reach the Exemption 7(C) issue").[6] But as we now show, the identities were properly withheld under Exemption 6 as well.

The threshold question under Exemption 6 is whether the records in question qualify as "similar files." "The phrase 'similar files' has a 'broad, rather than a narrow, meaning.'" *Forest Service Employees for Environmental Ethics* v. *U.S. Forest Service*, 524 F.3d 1021, 1024 (9th Cir. 2008) (quoting *U.S. Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 602 (1982)). More particularly, this Court "ha[s] previously held that '[g]overnment records containing information that applies to particular individuals satisfy the threshold test of Exemption 6.'" *Id.* (quoting *Van Bourg, Allen, Weinberg & Roger* v. *NLRB*, 728 F.2d 1270, 1273 (9th Cir. 1984)); *Washington Post*, 456 U.S. at 602 (Exemption 6 applies to records that contain "information which applies to a particular individual"). The records at issue here

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[6] The district court's opinion stands this elementary principle on its head: having concluded that the information was not properly withheld under one exemption (Exemption 6), the court evidently thought it unnecessary to decide whether the information was protected by another exemption (Exemption 3). As cases like *Milner* and *Painting Industry* illustrate, when the government withholds information on the basis of more than one FOIA exemption, a single applicable exemption suffices to sustain the withholding; the government does not have to "run the table" by showing that all of the exemptions apply.

readily satisfy this minimal requirement, for they contain the names of individuals and other identifying information, such as their email addresses and their employers. See ER 856, 938-39. Neither EFF nor the district court has suggested otherwise.

To determine whether information in an Exemption 6 file is properly withheld, a court "must balance the privacy interest protected by the exemptions against the public interest in government openness that would be served by disclosure." *Lahr* v. *NTSB*, 569 F.3d 964, 973 (9th Cir. 2009). "Personal privacy interests encompass a broad range of concerns relating to an 'individual's control of information concerning his or her person,' and an 'interest in keeping personal facts away from the public eye.'" *Id.* at 974 (quoting *U.S. Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 763, 769 (1989)).[7] Moreover, personal information "need not be personally embarrassing for it to be protected." *Professional Programs Group*

[7] *Lahr* and *Reporters Committee* involve Exemption 7(C), which protects information in law enforcement records whose disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Although Exemption 7(C) strikes a somewhat different balance between privacy and disclosure, the private and public interests in Exemption 7(C) are the same as those in Exemption 6, and. As a result, "precedents that apply Exemption 7(C) are relevant to our analysis of Exemption 6 insofar as they identify cognizable public and private interests." *Forest Service Employees*, 524 F.3d at 1024-25 n.2; see, *e.g.*, *U.S. Dep't of Defense* v. *FLRA*, 510 U.S. 487, 496 n.6 (1994); *Rosenfeld* v. *U.S. Department of Justice*, 57 F.3d 803, 812 n.7 (9th Cir. 1995), *cert. dismissed*, 516 U.S. 1103 (1996).

v. *Department of Commerce*, 29 F.3d 1349, 1354 (9th Cir. 1994); see *Washington Post*, 456 U.S. at 600.

Here, the district court acknowledged that the individuals who communicated with ODNI and DOJ on behalf of the telecommunications companies have a cognizable privacy interest in their names and other personally identifying information. ER 13. Individuals who communicate confidentially with the Executive Branch on sensitive and controversial subjects "have an expectation that their names and other identifying information will not be publicly disclosed," and disclosure of such information will tend to impair the lines of communication between the Executive Branch and private individuals. ER 938 (ODNI); see, *e.g.*, *Lakin Law Firm, P.C.* v. *FTC*, 352 F.3d 1122, 1125 (7th Cir. 2003) (sustaining withholding of names and addresses of persons who contacted agency to complain about credit card company practices); *Strout* v. *U.S. Parole Board Comm'n*, 40 F.3d 136, 139 (6th Cir. 1994) (approving withholding of names and addresses of persons who contacted agency to oppose convict's parole).

In the proceedings below, EFF suggested that the company representatives whose identities are at issue here have no expectation of privacy because the Lobbying Disclosure Act of 1995 (LDA), 2 U.S.C. §§ 1601 *et seq.*, requires lobbyists to identify themselves and to disclose publicly for whom and on what matters they are

lobbying. But EFF's request for the identities of the representatives who communicated with DOJ and ODNI regarding the statutory immunity issue is not confined to registered lobbyists, and the kinds of communications here appear unlikely to come within the scope of the LDA's disclosure requirements.[8] Moreover, while LDA reports might disclose that a registered lobbyist contacted Executive Branch agencies regarding FISA, they would not necessarily disclose whether the lobbyist (or his client) had engaged in lobbying regarding the statutory immunity provision in particular, or the extent of any such contact.

On the other side of the scale, "the only relevant public interest under Exemption 6 is the extent to which the information sought would she[d] light on an

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[8] The LDA's definition of "lobbyist" excludes all individuals whose lobbying activities for a client "constitute less than 20 percent of the time engaged in the services provided by such individual[s] to that client over a 3-month period." 2 U.S.C. § 1602(10). In addition, the Act's definition of "lobbying activity" excludes communications "made to an official in an agency with regard to * * * a judicial proceeding * * * if that agency is charged with responsibility for such proceeding * * * ." *Id.* § 1602(8)(B)(xii)(I)). Communications by a telecommunications company's lawyers regarding proposed legislation that would result in the dismissal of pending civil actions against the company are likely to be excluded from the scope of the LDA by either or both of these definitional provisions. Moreover, to the extent that the communications involve information that is protected by non-disclosure statutes (see pp. 16-25 *supra*), they would appear to fall outside the definition of "lobbying activity" on that ground as well. See *id.* § 1602(8)(B)(xii)(II) ("lobbying activity" excludes communications regarding "a filing or proceeding that the Government is specifically required by statute * * * to maintain or conduct on a confidential basis").

agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Forest Service Employees*, 524 F.3d at 1027 (internal quotation marks omitted); *U.S. Dep't of Defense* v. *FLRA*, 510 U.S. 487, 495, 497 (1994); *Reporters Committee*, 489 U.S. at 773. Here, EFF has asserted that the public has an interest in knowing whether and how the Executive Branch's position regarding statutory immunity was influenced by lobbying by telecommunications companies. But EFF has wholly failed to explain how that interest would be advanced by knowing *the identities of the individuals* who communicated with the Executive Branch on the companies' behalf. And even if EFF's public-interest rationale for seeking these individual identities made sense before, which it did not, it has no force whatsoever now.

As explained above, the agencies have now released the previously withheld communications between the telecommunications companies and the government, and are withholding only the information that would identify the companies and their representatives involved in the communications. To the extent that EFF is seeking to "shed[] light on an agency's performance of its public duties" (*Reporters Committee*, 489 U.S. at 773), the release of the *contents* of these communications fully serves that goal. The additional light that could be cast on the Executive Branch's activities by disclosing the identities of the individuals involved in the

communications is nil. See *U.S. Department of State* v. *Ray*, 502 U.S. 164, 178 (1991) (when government released summaries of State Department interviews with Haitian returnees but redacted identifying information, public interest in assessing State Department's monitoring of returnees' treatment was "adequately served" by release of the summaries themselves, and "[t]he addition of the redacted identifying information would not shed any additional light on the Government's conduct of its obligation"); *Forest Service Employees*, 524 F.3d at 1028 ("As a result of the substantial information already in the public domain, * * * the release of the identities of the employees who participated in the [agency action] would not appreciably further the public's important interest in monitoring the agency's performance"); *Painting Industry*, 26 F.3d at 1486 ("the requesters already have a substantial amount of the information they seek," and "as a matter of law, the employees' privacy interests are not outweighed by the marginal additional usefulness that the names and addresses would serve in uncovering what the government is up to"). Because the individuals' names and other identifying information would shed no additional light on the agencies' performance of their duties, disclosure necessarily would constitute a clearly unwarranted invasion of personal privacy, and Exemption 6 therefore provides an additional ground for withholding.

II. Materials Exchanged Within and Between Executive Branch Agencies, and Between Agencies and the White House, are "Inter-Agency or Intra-Agency" Materials For Purposes of Exemption 5

As noted above, Exemption 5 protects "inter-agency or intra-agency" documents that would be privileged in civil litigation. 5 U.S.C. § 552(b)(5). In this case, the agencies originally withheld a large volume of documents under Exemption 5. The agencies relied on several privileges, including the deliberative process privilege and the Presidential communications privilege. The district court, however, ordered the disclosure of all of the material withheld under Exemption 5 without ever deciding whether the materials were privileged.

As the district court noted, a large number of the withheld materials consisted of communications (largely in the form of email messages) between the agencies and Congress, as well as communications between the agencies and telecommunications companies. See ER 10. The court concluded that those communications do not constitute "inter-agency or intra-agency" documents and therefore fall outside the scope of Exemption 5, making further inquiry into their privileged status unnecessary. *Id.* at 11-12 ("As they fail to meet the threshold burden of demonstrating protection from disclosure [under the inter-agency/intra-agency standard], Defendants may not withhold those documents from disclosure that were exchanged between ODNI and DOJ officials and congressional staff or those documents regarding communications

between representatives of the telecommunications companies and government officials."). As noted above, those communications have now been released.

However, a number of the documents being withheld by the agencies under Exemption 5 were exchanged within DOJ and ODNI, between the agencies, and between the agencies and the White House – in short, entirely within the Executive Branch. The responsive documents withheld by the Office of the Attorney General, the Office of Legal Policy, and the Office of Legislative Affairs are illustrative. Four of the categories of documents identified in the *Vaughn* index for these offices (categories 1, 2, 3, 9) consist of "confidential communications exchanged within the Executive Branch or between offices within the Department of Justice discussing options, forwarding draft language, and exchanging ideas regarding FISA amendments," and another (category 4) contains DOJ "draft memoranda, notes, and talking points regarding amendments to the FISA, all working documents created to aid deliberations." ER 718-19; see also *id.* at 720-22 (describing deliberative emails exchanged within DOJ (categories 3 and 9) and with other Executive Branch officials (categories 1 and 2)). All of the other agency components involved in this litigation – the Office of Legal Counsel, the National Security Division, and ODNI – are withholding similar intra-Executive Branch materials. See ER 601-602 (National Security Division); *id.* at 846, 848-49 (Office of Legal Counsel); *id.* at 936-37

(ODNI)). It is these documents, and only these documents, that are now being withheld under Exemption 5 and are at issue in this appeal.

The district court's rationale for ordering the disclosure of communications with Congress and private companies has no bearing on the withholding of these documents. Emails and other materials circulated within DOJ and ODNI and between the two agencies are "inter-agency or intra-agency" documents in the most elementary sense of those terms. And communications between the agencies and the White House likewise constitute "inter-agency" documents.

By its terms, FOIA's definition of "agency" specifically "includ[es] the Executive Office of the President * * * ." 5 U.S.C. § 552(f)(1). As the district court noted, the definition does not extend to "the President's immediate staff or units in the Executive Office whose sole function is to advise and assist the President." *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 157 (1980). But it is nevertheless well settled that Exemption 5 protects deliberative communications between agencies and the President and his immediate advisors. See, *e.g.*, *EPA* v. *Mink*, 410 U.S. 74, 85 (1973) ("It is beyond question" that agency documents prepared for a presidentially created committee organized to advice to the President "are 'inter-agency or intra-agency' memoranda or 'letters' that were usedin the decisionmaking processes of the Executive Branch"); *Judicial Watch* v.

Department of Energy, 412 F.3d 125, 129-31 (D.C. Cir. 2005); *Berman* v. *CIA*, 378 F. Supp. 2d 1209, 1219-20 (E.D. Cal. 2005), *aff'd on other grounds*, 501 F.3d 1136 (9th Cir. 2007). As the D.C. Circuit explained in *Judicial Watch*, "[w]e are aware of no reason to believe — indeed, we think it inconceivable — the Congress intended Exemption 5 to protect the decision-making processes of the Executive Branch when the decision is to be made by 'agency' officials subject to oversight by the President and not when the decision is to be made by the President himself and those same agency officials are acting in aid of his decision-making processes." 412 F.3d at 130.

In short, the documents in this case that were exchanged within the Executive Branch fall squarely within the "inter-agency or intra-agency" scope of Exemption 5. As a result, the district court was obligated to resolve the claims of privilege regarding those documents, and could not order disclosure until and unless the court determined that the documents are not privileged. This Court should therefore vacate the district court's disclosure order with respect to the intra-Executive Branch materials withheld under Exemption 5, and should remand for the district court to address the merits of the privilege claims.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be: (1) reversed insofar as it orders disclosure of the identities of telecommunications company representatives; and (2) vacated and remanded for further proceedings insofar as it orders disclosure of materials withheld under Exemption 5 that were exchanged within the Executive Branch.

Respectfully submitted,

BETH S. BRINKMANN
Acting Assistant Attorney General

JOSEPH P. RUSSONIELLO
United States Attorney

/s/ Douglas N. Letter
DOUGLAS N. LETTER

/s/ Scott R. McIntosh
SCOTT R. McINTOSH

Attorneys, Appellate Staff
Civil Division, Room 7259
Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530
202-514-4052

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, that the attached opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 7,949 words.

Date: 11/16/09

/s/ Scott R. McIntosh
Scott R. McIntosh
Counsel for Appellant

STATEMENT OF RELATED CASES

No known related cases are pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2009, I electronically filed the foregoing BRIEF FOR THE APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Scott R. McIntosh
Scott R. McIntosh