CASE NO. 09-17235

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELECTRONIC FRONTIER FOUNDATION,

PLAINTIFF-RESPONDENT,

V.

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

DEFENDANTS-MOVANTS.

OPPOSITION TO SECOND EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR STAY PENDING APPEAL, OR DECISION OF SOLICITOR GENERAL REGARDING APPEAL, OF ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA THE HONORABLE JEFFREY WHITE, DISTRICT JUDGE CIVIL NOS. 3:08-cv-01023-JSW AND 3:08-cv-02997-JSW

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INTRODUCTION

This motion represents the government's fourth attempt to delay disclosure of documents responsive to several Freedom of Information Act (FOIA) requests submitted by the Plaintiff-Respondent Electronic Frontier Foundation (EFF) to the Defendants-Movants Office of the Director of National Intelligence (ODNI) and Department of Justice (DOJ).

EFF's requests seek information concerning lobbying efforts to and by ODNI and DOJ to ensure telecommunications providers are not held responsible for their participation in a massive, well-documented warrantless surveillance program through which the government has unlawfully gathered information about millions of ordinary Americans. EFF sought, and the government granted, expedited processing of these requests, recognizing the urgent need to inform the public about this concerted effort to avoid liability for unlawful activity.

The agencies have filed this motion seeking a stay of a September 24, 2009, order granting summary judgment in EFF's favor—through Nov. 8, 2009, for some withheld documents, and an indefinite stay through appeal for the remainder. The Court should deny the government's request. First, for the portions of the order it has not committed to appeal, the government has failed to satisfy the requirements to seek a stay *pending appeal* before this Court.

Second, the government has failed to show that the balance of hardships tilts

in its favor. Rather, the balance of hardships favors EFF and the public, which will continue to suffer irreparable harm if this Court grants a stay. The information EFF seeks is particularly time-sensitive because Congress is currently considering two pieces of legislation that would repeal retroactive immunity for the carriers that facilitated the government's warrantless surveillance program. Moreover, the harm the government claims it will suffer with respect to the *potentially* appealed categories is speculative at best until it decides to *actually* pursue an appeal.

Third, as the District Court found, the public interest will benefit from the timely release of the requested records. These documents will provide an invaluable contribution to the active congressional and public discussion over retroactive immunity and the relationship between the Executive branch and the telecom industry. Each day that goes by without full information harms the public interest in a vibrant and well-informed debate.

Finally, the government has failed to show a strong likelihood of success on the merits of any appeal. The government contends that the District Court failed to adequately consider its arguments, but has not shown that this Court would be likely to reverse. Thus, this Second Emergency Motion for a stay should be denied.

STATEMENT OF FACTS

A summary of the factual background was provided by both sides last week. (09-17235 Dkt. 2, 3 & 6.) EFF will only briefly restate the essential facts. This

FOIA case concerns the propriety of the government's withholdings related to unclassified communications between and among executive agencies, Congress, the White House, and telecoms concerning legislative amendments to the Foreign Intelligence Surveillance Act, including the identities of individual agents or representatives of the carriers within those communications.

On September 24, 2009, the District Court denied the government's motion for summary judgment and granted EFF's cross motion, ordering the government to produce all improperly withheld documents by October 9. Sept. 24 Order at 10 (08-1023 Dkt. 90; 08-2997 Dkt. 72). On September 30, the government filed a motion to stay the order for 60 days, which the District Court denied. Oct. 7 Order (08-02997 Dkt. 79). On October 8, the government filed an emergency motion for a stay to this Court (09-17235 Dkt. 2), which was denied on October 9 (09-17235 Dkt. 5). That afternoon, the government went back to the District Court and moved for a stay pending the decision of the Solicitor General (but not pending appeal pursuant to Federal Rule of Civil Procedure (FRCP) 62(c)). The court denied the motion on October 13, but set a temporary stay until today. This Second Emergency Motion followed.

ARGUMENT

I. The Government's Request for a Stay of a Potentially Unappealed Ruling is Neither Ripe Nor Proper Under FRAP 8

When this Court last rejected the government's request for an emergency

stay, the Solicitor General had yet to decide whether to pursue an appeal in this case. Nevertheless, the government had argued for a stay pending that decision. This Court denied the government's motion, citing Federal Rule of Appellate Procedure (FRAP) 8, which provides only for a full stay pending appeal.

The government now moves for stays under two distinct theories. First, with respect to those categories of documents about which the Solicitor General has decided to appeal, it requests a full stay pending appeal under FRAP 8. 2d Emer. Mot. at 11 n.1. Second, for the remaining categories of documents about which the Solicitor General is yet undecided, the government again requests a stay "until November 8 to allow completion of the consultation process for the Solicitor General to decide whether the appeal will include those documents." *Id*. at 10.

The failure of the government's FRAP 8 motion with respect to the first category will be addressed in depth in Section II, *infra*. With respect to the matters about which the Solicitor General remains undecided, (1) the government's motion is not ripe; and (2) the government has failed to properly move under FRAP 8, which provides for a stay pending appeal.

A. The Government's Motion to Stay Pending the Solicitor General's Decision Whether to Appeal Is Not Yet Ripe

An appeal may only be taken by those who meet the jurisdictional requirement of ripeness. *Jacobus v. Alaska*, 338 F.3d 1095, 1104 (9th Cir. 2003). The government's request for a stay until November 8 is not yet ripe because it is based

on the hypothesis that the Solicitor General will choose to pursue an appeal of certain portions of the order—if the Solicitor General does so, the government contends, then it will face injury from disclosure. The "injury must have actually occurred or must occur imminently; hypothetical, speculative or other 'possible future' injuries do not count[.]" *Schmier v. U.S. Court of Appeals for Ninth Circuit,* 279 F.3d 817, 821 (9th Cir. 2002) (finding no standing where appellant contends he might cite to an unpublished decision in the future). Here, however, the government resolutely refuses to declare any intent to appeal (or not) whole categories of documents. "The fact that such a dispute is likely, or even predictable in the future, does not satisfy the justiciability requirement that there by a *present controversy*." Goelz & Watts, FEDERAL NINTH CIRCUIT CIVIL APPELLATE PRACTICE (Rutter Group 2009) at § 2:755 (emphasis original, citations omitted).[1]

B. The Government's Motion to Stay Pending the Solicitor General's Decision Does Not Comply With FRAP 8

The purpose of FRAP 8 is to preserve the status quo while the Court of Appeals makes a determination on the merits during the pendency of an actual appeal, not while the appellant decides whether to pursue such an appeal. *See* FRAP 8

[1] At best, with respect to the unappealed categories of documents, the Second Emergency Motion still amounts to a request for this Court to review the District Court's denial of a stay to allow the government more time to consider an appeal. The Ninth Circuit "review[s] denial of a motion for stay for an abuse of discretion." *MacKillop v. Lowe's Mkt., Inc*., 58 F.3d 1441, 1446 (9th Cir. 1995). Because the government has not shown any abuse of discretion, the motion must be denied.

(Advisory Committee Notes, 1967 Adoption, Subdivision (a)). Because FRAP 8 does not provide for the relief the government seeks, Movants rely on this Court's inherent powers and the All Writs Act, 28 U.S.C. § 1651(a), in their request for such a stay. 2d Emer. Mot. at 10. However, "[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Penn. Bureau of Correction v. U.S. Marshals Svc.*, 474 U.S. 34, 43 (1985); *see also Kushner v. Winterthur Swiss Ins. Co.*, 620 F.2d 404, 406 (3rd Cir. 1980) (The FRAP "have the force and effect of statutes.") (citing 28 U.S.C. §§ 2071-72 (the Rules Enabling Act)). Because the motion seeks a remedy virtually identical to that provided by FRAP 8, but does not satisfy the substantive requirements of that rule or comport with the policy behind it, the government's continued attempt to end-run the Rules should be denied.

Furthermore, the principles of statutory construction militate against the availability to a potential appellant of a stay pending her determination whether to appeal. The drafters of the FRCP and FRAP knew how to provide for stays in specific situations where they felt such relief was warranted. *See, e.g.,* FRAP 8; FRCP 62(c) (providing for a discretionary stay of a district court judgment pending appeal); FRCP 62(a), 62(e) (automatic 10-day stay of a money judgment against the government when it appeals). Yet nowhere in the Rules did the drafters provide for the stay pending a determination whether to appeal that the government persists

in requesting. Where the Federal Rules provide for certain categories of stays, but fail to provide for the stay requested, this Court should not stretch the Rules to accommodate an appellant's indecision. *See generally Iselin v. U.S.*, 270 U.S. 245, 250 (1926) (to extend the coverage of a statute would amount to "enlargement" rather than "construction").

If the government's proposed rule were correct, any litigant could delay a court order merely by dragging out the consideration of whether to appeal. After all, just as the Solicitor General is doubtless very busy, so too are the general counsel of corporate parties. It would do no more than put sand in the gears of justice to allow a corporate party to delay the operation of a judgment because its general counsel had an another important legal issue to address, and was too busy to decide whether or not to pursue an appeal. The court should not sanction any party's improper effort to avoid playing by the rules.

II. The Government Has Failed to Demonstrate That It Is Entitled to a Any Stay of the District Court's Order

Under the well-established test for a stay pending appeal, the Court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill,* 481 U.S. 770, 776 (1987).

A. The Balance of Hardships Tilts in Favor of Disclosure

The District Court correctly found the balance of hardships favors disclosure, supported by findings of fact that EFF and the public interest will suffer irreparable harm if these documents continue to be withheld during the ongoing legislative debate.[2]

1. EFF Will Suffer Irreparable Harm If the Court Stays the District Court's September 24 Order

This Court should deny the government's motion because the requested stay will substantially and irreparably injure EFF. *See Payne Enters., Inc. v. U.S.*, 837 F.2d 486, 494 (D.C. Cir. 1988) ("stale information is of little value"). EFF submitted the first of these FOIA requests nearly two years ago, and ODNI and DOJ granted them all expedited processing pursuant to the FOIA and applicable agency regulations, recognizing the urgent need to inform the public about the concerted push for telecom immunity.

As the District Court reiterated when it denied the government's motion for a stay earlier this week, "irreparable harm exists where Congress is considering legislation that would amend the FISA and the records may enable the public to

[2] The government makes no attempt show that these findings are clearly erroneous. *See Textile Unlimited, Inc. v. Abmhand Co., Inc*., 240 F.3d 781, 786 (9th Cir. 2001) (findings of irreparable harm and public interest are reviewed under clear error standard); *see also Hayes v. Woodford*, 301 F.3d 1054, 1067 n.8 (9th Cir. 2002) ("To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must ... strike us as wrong with the force of a five-week-old unrefrigerated dead fish.") (internal quotation omitted).

participate meaningfully in the debate." Oct. 13 Order at 4:7-12 (citing *Elec. Frontier Found.*, 542 F. Supp. 2d 1181, 1187 (N.D. Cal. 2008)). The timely release of the information requested by EFF is particularly important because Congress is again considering retroactive immunity legislation, as described more fully in EFF's Opposition to First Emergency Motion (09-17235 Dkt. 6). *See also* Oct. 13 Order at 4:12-19. Further delay will continue to harm the legislative and public debate over updating foreign intelligence surveillance law and EFF's ability to take part meaningfully in that debate. The goals of the FOIA, "efficient, prompt, and full disclosure of information," are only frustrated by additional delay. *See August v. FBI*, 328 F.3d 697, 699 (D.C. Cir. 2003) (*quoting Senate of the Commonwealth of P.R. v. Dep't of Justice*, 823 F.2d 574, 580 (D.C. Cir. 1987). Finally, irreparable harm is presumed for violation of statutes, like FOIA, that provide for injunctions. *See* 5 U.S.C. § 552(a)(4)(B) (district court may "enjoin the agency from withhold agency records..."); *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001); *Burlington N. R.R. Co. v. Dep't of Revenue*, 934 F.2d 1064, 1074 (9th Cir. 1991).

2. The Government Has Not Shown It Will Be Irreparably Harmed in the Absence of a Stay

As an initial matter, the government has not demonstrated that it will be irreparably harmed if the Court does not grant a stay to allow the Solicitor General additional time to decide whether to pursue an appeal with respect to a subset of

documents. The harm the government claims it will suffer is speculative because it will incur no injury whatsoever if the Solicitor General ultimately decides not to appeal with respect to those records. "Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction," nor, under the preliminary injunction standard, a stay pending appeal. *Caribbean Marine Servs. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988).

Moreover, the government's protestation of harm from disclosure is called into doubt by a report filed last night by the Washington news outlet *Politico,* which stated:

> House legal counsel Irv Nathan wrote in an e-mail to House leaders "The Executive Branch *will be providing* to the Electronic Frontier Foundation in its FOIA suit a large number of e-mail communications between House staffers and Executive branch employees regarding the legislation involving immunity to telecommunications companies enacted as part of the [revised Foreign Intelligence Surveillance Act] legislation last year."

John Bresnahan & Josh Gerstein, *WH readies phone-tap case concession*, POLITICO (Oct. 15, 2009) (emphasis added) (Ex. 1).[3] If the White House already plans to provide the documents to EFF, in keeping with its stated policies on transparency and openness, then there can be no harm from court-ordered disclosure.

Finally, the government can face little harm from disclosure of the identities of the telecom lobbyists because their identities are already widely known. Not

[3] Available at http://www.politico.com/news/stories/1009/28364.html.

only have some identities been reported in the media (*see, e.g.,* (Hofmann Decl.[4] at ¶ 11 (article in *Newsweek*)), the lobbyists have filed publicly available disclosure forms describing their activities (Hofmann Decl. at ¶¶ 22-23 (listing Lobbying Disclosure Act forms)).

B. The Public Interest Will Be Served By the Expeditious Release of Documents At Issue In This Case

As the District Court found, "the public interest lies in favor of disclosure." Oct. 13 Order 4:7. As discussed more fully in EFF's Opposition to the First Emergency Motion, Congress is actively considering two bills that would repeal the grant of retroactive immunity that is the primary subject of EFF's FOIA requests. The requests go to the heart of an already vigorous public and congressional debate that "cannot be based solely upon information that the Administration voluntarily chooses to disseminate." *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 41 n.9 (D.D.C. 2006). It is critical that the information EFF seeks be disclosed while debate is ongoing because that debate "cannot be restarted or wound back." *Elec. Frontier Found.*, 542 F. Supp. 2d at 1186 (quoting *Gerstein v. CIA*, 2006 WL 3462659 at *4 (N.D. Cal. Nov. 29, 2006)).[5]

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[4] The Hofmann Declaration is attached to EFF's Opp. to 1st Emer. Mot. (Dkt. 6).

[5] The government has not even attempted to show that the District Court clearly erred in finding a strong public interest in disclosure of the identity of the telecom lobbyists (Sept. 24 Order at 10), nor the finding of public interest in the "current

(Footnote continued)

C. The Government is Not Likely to Succeed on the Merits of Any Appeal

The government has not shown that it is likely to succeed on the merits of any appeal, whether for claims it has indicated it will pursue or those it continues to mull over. In FOIA cases, "[a]lthough any factual conclusions that place a document within a stated exemption of FOIA are reviewed under a clearly erroneous standard, the question of whether a document fits within one of FOIA's prescribed exemptions is one of law," reviewed *de novo*. *Schiffer v. FBI*, 78 F.3d 1405, 1409 (9th Cir. 1996). When reviewing factual issues arising in a FOIA appeal, the Ninth Circuit "inquire[s] whether an adequate factual basis supports the district court's ruling. If such a basis exists, we overturn the ruling only if it is clearly erroneous." *Frazee v. United States Forest Serv.*, 97 F.3d 367, 370 (9th Cir. 1996) (quoting *Rosenfeld v. Dep't of Justice*, 57 F.3d 803, 807 (9th Cir. 1995)).

The Ninth Circuit may affirm the District Court's order on any ground supported by the record, even if not relied upon by the District Court. *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003). Moreover, the Ninth Circuit may affirm the decision "even if the district court relied on the wrong grounds or wrong reasoning." *Cigna Property and Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 418 (9th Cir. 1998) (citation omitted). Therefore, the gov-

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debate regarding legislation designed to repeal the retroactive immunity." Oct. 13 Order at 4:13-14.

ernment must do more than simply argue that the District Court failed to address its arguments; it must also show that if the Ninth Circuit does address those arguments, the government has a substantial likelihood of success on the merits.

1. The Government Has Failed to Show a Likelihood of Success on the Merits of Its Exemption 5 Arguments

The government fails to demonstrate a likelihood of success on the merits of an appeal of the District Court's decision with respect to "deliberative documents exchanged entirely within the Executive Branch." *See* 2d Emer. Mot. at 10. The government contends that the Court erred by "order[ing] disclosure of [documents] exchanged entirely within the Executive Branch … without resolving the government's claims of privilege for those documents—something that the court explicitly declined to do." 2d Emer. Mot. at 16-17. The District Court had no need to reach those privilege arguments, however, because it found the government failed to meet its burden of establishing the threshold requirement for claiming them. Sept. 24 Order at 9:8-9. Even assuming *arguendo* that the government had carried its burden, the Court noted that it was "not persuaded by Defendants' further arguments on the applicability of the presidential communications privilege, the deliberative process privilege, the common interest privilege, or the attorney work product doctrine." Sept. 24 Order at 9:4-9; *see also* Oct. 13 Order at 3:24-26 ("The Court reviewed and explicitly rejected Defendants' contentions that any exemption under FOIA or privilege barred disclosure ...").

To the contrary, it is likely that this Court will affirm. The FOIA contains a narrow exemption for "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). The exemption protects a record from disclosure where "its source [is] a government agency," and where the withheld material falls "within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001); *see also NLRB v. Sears*, 421 U.S. 132, 149 (1975). By its very terms, Exemption 5 protection is limited to "inter-agency or intra-agency" materials. The FOIA unambiguously defines an "agency" as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(f)(1).[6]

The government does not contend that the District Court lacked an adequate factual basis for its decision, or attempt to show that the District Court's factual

[6] Furthermore, the legislative history of the FOIA indicates that the term "Executive Office of the President" within the definition of "agency" was not intended to include the "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." H.R. Conference R. No. 93-1380 at 232 (1974); *see also Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980).

findings were clear error. The government also fails to offer any reason why the Ninth Circuit would reach a different conclusion on any of the legal questions, including the privilege claims, on appeal.[7]

The Solicitor General apparently continues to weigh the possibility of appealing the District Court's decision to order the release of communications between the agencies and Congress. 2d Emer. Mot. at 17; *but see* Ex. 1 (*Politico* article). While the government contends that the application of Exemption 5 to these documents "is a matter of first impression," 2d Emer. Mot. at 18, courts have repeatedly addressed this issue, as discussed in EFF's prior briefing. Exs. 2 & 3.

Communications between Congress and federal agencies are not "inter-agency or intra-agency" communications because Congress is not an "agency" under the plain language of the FOIA. 5 U.S.C. § 552(f)(1). As the D.C. Circuit has noted, "It may well be true that if Congress had thought about this question, the Exemption would have been drafted more broadly to include Executive Branch communications to Congress[.] But Congress did not, and the words simply will not stretch to cover this situation, because Congress simply is not an agency [within the statutory definition]." *Dow Jones & Co. v. Dep't of Justice,* 908 F.2d

[7] For a discussion of the deficiencies of the government's privilege claims, EFF respectfully refers the Court to its summary judgment briefing, filed concurrently with this opposition for the Court's convenience. *See* Mot. for Cross Summ. J. (08-2997 Dkt. 43) and Reply (08-2997 Dkt. 67) (attached as Exs. 2 & 3).

1006, 1009 (D.C. Cir. 1990).

The courts have fashioned an exception to this general rule: communications between agency officials and non-agency officials may satisfy the threshold where the agency has solicited the communication from the outside party to facilitate its *own* deliberative process, so that the outside party is effectively a consultant, employee or advisor to the agency. The Supreme Court has found that records fall within this exception if they

> ha[ve] been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity other than on behalf of another agency—*e.g.*, in a capacity as employee or consultant to the agency, or as employee or officer of another governmental unit (not an agency) that is authorized or required to provide advice *to the agency*.

Klamath, 532 U.S. at 9-10 (emphasis added). *See also Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980); *Dow Jones & Co.,* 908 F.2d at 1009; *Nat'l Inst. of Military Justice v. Dep't of Defense*, 512 F.3d 677, 681 (D.C. Cir. 2008). Thus, any communications between agencies and non-agency parties that do not facilitate the agencies' deliberative processes do not satisfy the "inter-agency or intra-agency" threshold, and cannot qualify for Exemption 5 protection. Accordingly, communications between an agency and Congress satisfy the "inter-agency or intra-agency" threshold only when they are made to assist the *agency's* deliberative process, not that of Congress. *See Rockwell Int'l Corp. v. Dep't of Justice*, 235 F.3d 598, 604 (D.C. Cir. 2001); *Dow Jones & Co.*, 908 F.2d at 1009.

In seeking a stay now, the government contends that the District Court mis-

applied *Klamath* because the court did not accept the government's contention that "in providing the agencies with information and views about legislative options for use in the development of the Executive Branch's own legislative position, Congress was participating in a common effort with the Executive Branch to advance the public interest." 2d Emer. Mot. at 18-19. The District Court found, however, that the government failed to demonstrate that certain agency communications with Congress were made in the course of the agencies' *own* deliberative processes, determining instead that ODNI and DOJ were communicating with Congress to facilitate the legislators deliberative efforts to reform FISA. Sept. 24 Order at 8:13-14. This is a factual finding reviewed for clear error.

Finally, the Solicitor General is still considering whether to appeal the District Court's decision to order the release of communications between the agencies and telecoms. 2d Emer. Mot. at 19. EFF is likely to prevail because the FOIA is clear on this point: private companies do not fall within the statutory definition of "agency," and so cannot exchange "inter-agency or intra-agency" communications with government agencies. 5 U.S.C. § 552(f)(1). Again, *Klamath* governs. In that case, the Supreme Court found that correspondence from Indian tribes to the Department of the Interior did not qualify for Exemption 5 status where the tribes had communicated with the agency "with their own ... interests in mind," rather than to serve the agency's interests. 532 U.S. at 11. For the documents at issue in this

case, the District Court found that "the telecommunications companies communicated with the government to ensure that Congress would pass legislation to grant them immunity from legal liability for their participation in the surveillance," similarly advancing their own interests. Sept. 24 Order at 8:20-24. Again, Movants fail to show that the District Court clearly erred in making this factual finding, and fail to establish a likelihood of success on the merits of this possible appeal. Following *Klamath*, Exemption 5 does not apply and the documents must be released.

2. The Government Has Not Met Its Burden Regarding the Identities of Telecom Carrier Representatives and Agents

The government fails to show that this Court is likely to reverse the order to disclose the identities of representatives of telecoms who lobbied the agencies. Its primary complaint is that the District Court failed to address its earlier argument. As noted above, the District Court's failure to discuss the government's argument is not a basis for reversal. Instead, the government must carry its burden of showing a likelihood that this Court would find the decision wrong.

As the government well knows, EFF is only seeking records to the extent that they can be disclosed without revealing classified information or the government's intelligence sources and methods. Ex. 2 at 8 n.5. The government's disclosure of the identities of individual agents or representatives of the carriers would not disclose intelligence sources or methods. Telecom lobbyists themselves are surely not intelligence sources or methods.

Even so, the government suggests that disclosure of who lobbied for the telecoms might lead to the "drawing [of] inferences about whether certain telecommunications companies may or may not have assisted the government." 2d Emer. Mot. at 15. The evidence before the District Court showed that this cat is well out of the bag. *See, e.g.,* Hofmann Decl. at ¶¶ 3 (Summary of Evidence showing various carriers' involvement in the unlawful warrantless wiretapping program), 22-23 (Lobbying Disclosure Act forms showing telecom lobbying activity).[8] Moreover, this is a factual question, and "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *U.S. v. Elliott*, 322 F.3d 710, 714 (9th Cir. 2003).

Finally, the government cannot only "rely 'on general assertions that disclosure of certain categories of facts may result in disclosure of the source and disclosure of the source may lead to a variety of consequences detrimental to national security.'" *Rosenfeld*, 57 F.3d at 807 (quoting *Wiener v. FBI,* 943 F.2d 972, 980 (9th Cir. 1991)); *see also Navasky v. CIA*, 499 F. Supp. 269, 278 (S.D.N.Y. 1980) (in-

[8] Indeed, it is hard to reconcile the government's purported concern with "inferences" with the factual summary in its brief, which notes that the Executive Branch engaged in communications with telecom companies, and then noted it "was aligned with the companies" in litigation two lines later. 2d Emer. Mot. at 3. It is well known which companies are involved in the warrantless wiretapping litigation. *See In re National Security Agency Telecom Records Litig*. (N.D. Cal. No. 06-1791-VRW). Likewise, the government's assertion of the common interest privilege gives away that the communications were with the telecoms known to be parties to the warrantless wiretapping litigation.

formation must "reasonably be expected to lead to disclosure"). Movants must do better than suggest a speculative chain of possibly detrimental inferences.

CONCLUSION

For the reasons stated above, and in EFF's Opposition to the First Emergency Motion, the Plaintiff-Respondent respectfully requests that this Court deny the government's Second Emergency Motion for a stay.

Respectfully submitted,

DATED: October 16, 2009

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