IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRISTOPHER SOGHOIAN Plaintiff, v. DEPARTMENT OF JUSTICE Defendant.	)	No. 11-1080 (ABJ) ECF

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Christopher Soghoian opposes Defendant Department of Justice's ("DOJ") February 6, 2012 Motion for Summary Judgment, and cross-moves for summary judgment in favor of Plaintiff. Specifically Plaintiff challenges the Defendant's withholdings under Exemptions b(5) and (b)(7)(E) and asserts that the Defendant has failed to segregate non-exempt material.

STATEMENT OF FACTS

I. The role played by private companies in facilitating much modern electronic surveillance

In her concurring opinion recently in *U.S. v. Jones*, Justice Sotomayor stated, "I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on." *132 S. Ct.* 956

Although the surveillance method considered by the Supreme Court in *Jones* involved a GPS tracking device placed under a car by government agents, most modern surveillance does not involve such labor intensive methods. Instead, much (if not the vast majority of) modern surveillance is performed with the assistance of the telecommunications and Internet companies to whom consumers entrust their private data. *See* Senate Select Committee on Intelligence, Report on FISA Amendments Act, October 26, 2007 (available at http://www.gpo.gov/fdsys/pkg/CRPT-110srpt209/pdf/CRPT-110srpt209.pdf at 9) ("[E]lectronic surveillance for law enforcement and intelligence purposes depends in great part on the cooperation of the private companies that operate the Nation's telecommunication system").

Surveillance assisted by telecommunications carriers does not require that agents go out into the field and track a target. Instead, the police can now spy on Americans from the comfort of their desks, *See United States v. Pineda-Moreno* 617 F.3d 1124 (9th Cir. 2010) (Kozinski, J., dissenting), using interactive interfaces and surveillance tools provided by telecommunications carriers that cost as little as $30, per person under surveillance, per month. *See* Christopher Soghoian, ACLU docs reveal real-time cell phone location spying is easy and cheap, Slight Paranoia Blog, April 03, 2012 (available at http://paranoia.dubfire.net/2012/04/aclu-docs-reveal-real-time-cell-phone.html) (highlighting particular sections in documents recently obtained by the American Civil Liberties Union through FOIA requests, showing the capabilities and prices charged by Sprint, AT&T and T-Mobile for prospective, real-time GPS tracking of their subscribers).

The cheap and easy surveillance assistance provided by wireless carriers and Internet companies "poses a threat to privacy by enabling an extent of surveillance that in earlier times would have been prohibitively expensive." *See US v. Garcia* 474 F. 3d 994 (7th Cir. 2007). Collectively, government agencies now likely make hundreds of thousands of surveillance requests to telecommunications companies per year. *See* Letter from Randal S. Milch, Sr. Vice Pres., Verizon Bus., to John D. Dingell, Edward J.

Markey & Bart Stupak, U.S. Reps (Oct. 12, 2007), (available at http://markey.house.gov/docs/telecomm/Verizon_wiretaping_response_101207.pdf) (revealing that the company received approximately 90,000 requests from the government for user data each year).

Based on aggregate surveillance data voluntarily disclosed by a few companies, requests for stored communications and geo-location data vastly outnumber wiretaps and other traditional forms of communications surveillance that are documented in official government reports. As a result, the true scale of modern electronic surveillance remains hidden from the general public, Congress and the courts. *See* generally Christopher Soghoian, The Law Enforcement Surveillance Reporting Gap, unpublished manuscript, April 10, 2011 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1806628) (noting that most surveillance occurs "off the books" because Congressional reporting requirements only apply to wiretaps and pen registers, and not requests for stored communications).

Likewise, the public has little insight into the legal standards followed by the government when it engages in such carrier assisted surveillance. *See generally* Kevin Bankston, Only The DOJ Knows: The Secret Law of Electronic Surveillance, University of San Francisco Law Review, Vol. 41, p. 589, 2007 (describing three areas in which federal prosecutors secretly and routinely obtain court authorization for surveillance methods that Congress did not intend). This lack of available information regarding the government's legal surveillance authorities is made only worse by the growing trend of judicial secrecy regarding electronic surveillance orders which are kept secret perpetually, "entirely off the radar screen, not only for the public at large, but also for appellate courts." *See* Stephen Smith, Kudzu in the Courthouse: Judgments Made in the Shade. The Federal Courts Law Review. 3:2 at 211.

II. Plaintiff's FOIA request for documents related to certain surveillance practices

In order to shed additional light on both the legal standards used by the government to compel the surveillance assistance of telecommunications companies, in April 2010 Plaintiff sent a FOIA request to the Department of Justice seeking copies of documents relating to certain surveillance practices. Although DOJ eventually located over 600 pages of material, all were withheld in full, pursuant to FOIA exemptions (b)(2),(3), (5), (6),(7)(C), (7)(E), § 552a (j)(2), 18 U.S.C. § 2705 (b), § 3123(d) and § 3103(b). After DOJ failed to comply with the statutory deadline to reply to Plaintiff's appeals, Plaintiff filed suit on June 13, 2011.

STANDARD OF REVIEW

The Freedom of Information Act is intended to safeguard the American public's right to know "what their Government is up to." *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). The central purpose of the statute is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). "[D]isclosure, not secrecy, is the dominant objective of the [FOIA]." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The Supreme Court has stated that "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within [the] statutory purpose." *Reporters Comm.*, 489 U.S. at 773.

Unless "the requested material falls within one of . . . nine statutory exemptions, the FOIA requires that records and material in the possession of federal agencies be made

available on demand to any member of the general public." *Robbins Tire*, 437 U.S. at 221; *Nat'l Wildlife Fed'n v. U.S. Forest Service*, 861 F.2d 1114, 1116 (9th Cir. 1988). The exemptions "have been consistently given a narrow compass," and agency records that "do not fall within one of the exemptions are improperly withheld[.]" *DOJ v. Tax Analysts*, 492 U.S. 136, 151 (1989) (internal quotation marks omitted). Further, agencies cannot use the FOIA's exemptions to withhold agency "secret law," which runs counter to the FOIA's purpose. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975).

FOIA disputes involving the propriety of agency withholdings are commonly resolved on summary judgment. *Nat'l Wildlife Fed'n*, 861 F.2d at 1114. Summary judgment is proper when no genuine and disputed issues of material fact remain and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Feshbach v. SEC*, 5 F. Supp. 2d 774, 779 (N.D. Cal. 1997) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). A moving party who bears the burden of proof on an issue at trial "must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party." *Id.* "In contrast, a moving party who will not have the burden of proof on an issue at trial can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party's case." *Id.*

A court reviews the government's withholding of agency records *de novo*, and the government bears the burden of proving that a particular document falls within one of the nine narrow exemptions to the FOIA's broad presumption of disclosure. 5 U.S.C. § 552(a)(4)(B); *Reporters Comm.*, 489 U.S. at 755. An agency must prove that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." *Goland v. CIA*, 607 F.2d

339, 352 (D.C. Cir. 1978) (internal citation and quotation omitted). When claiming one of the FOIA's exemptions, the agency bears the burden of providing a "'relatively detailed justification' for assertion of an exemption, and must demonstrate to a reviewing court that records are clearly exempt." *Birch v. U.S. Postal Service*, 803 F.2d 1206, 1209 (D.C. Cir. 1986) (citing *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)). An agency may submit affidavits to satisfy its burden, but "the government may not rely upon conclusory and generalized allegations of exemptions." *Kamman v. IRS*, 56 F.3d 46, 48 (9th Cir. 1995) (quoting *Church of Scientology v. Dep't of Army*, 611 F.2d 738, 742 (9th Cir. 1980) (internal quotation marks omitted)). All doubts as to whether a FOIA exemption applies are resolved in favor of disclosure. *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010).

ARGUMENT

As described in detail below, Defendant has failed to release all non-exempt materials in response to Plaintiff's FOIA requests. Specifically, it has improperly asserted FOIA Exemptions 5 and 7(E), and further, has failed to segregate non-exempt material. As a result, the Court should deny the Plaintiff's motion for summary judgment, grant Plaintiff's cross motion for summary judgment, and order the Defendant to release all improperly withheld material.[1]

I. The Defendant has Wrongly Withheld Records Under Exemption 5

The Defendant has not met its burden to withhold records under Exemption 5 because it has failed to show that the attorney-client, deliberative process, or work product privileges apply to the withheld documents.[2] In addition, the Defendant improperly uses the exemption to shield agency "working law" from the public.

Exemption 5 provides a narrow exception 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 Supreme Court has interpreted Exemption 5 to protect records that fall "within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001); *see also Carter v. Dep't of Commerce*, 307 F.3d 1084, 1088 (9th Cir. 2002). For each claim, the government has failed to show the records withheld fit into one of the

[1] Plaintiff has listed the improperly withheld records he is challenging below in the beginning footnotes under the relevant section that addresses each improperly asserted exemption.

[2] Plaintiff challenges the following documents improperly withheld under Exemption 5: DOJ Criminal Division (CRM) Vaughn items 1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14; Executive Office for United States Attorneys (EOUSA) Vaughn items 3 and 4.

narrow privileges available under Exemption 5; therefore, Defendant has not met its burden and the records must be disclosed.

a. Defendant Has Improperly Withheld Records Under the Deliberative Process Privilege

Defendant has claimed Exemption 5's deliberative process privilege to withhold hundreds of pages of responsive records in their entirety. However, as many of the records are final opinions or contain purely factual information, these records must be released.

The deliberative process privilege protects records that reflect the "opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (internal citations omitted). An agency record may be withheld pursuant to this narrow privilege only if it is "both (1) 'predecisional' or 'antecedent to the adoption of agency policy' and (2) 'deliberative,' meaning 'it must actually be related to the process by which policies are formulated.'" *Nat'l Wildlife Fed'n*, 861 F.2d at 1117 (quoting *Jordan v. DOJ*, 591 F.2d 753, 774 (D.C. Cir. 1978)); *see also Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1093 (9th Cir. 1997).

To support a deliberative process claim, an agency must "establish[] the character of the decision, the deliberative process involved, and the role played by the documents in the course of that process." *United States v. Rozet*, 183 F.R.D. 662, 666 (N.D. Cal. 1998) (citing *Strang v. Collyer*, 710 F. Supp. 9, 11 (D.D.C. 1989), *aff'd*, 899 F.2d 1268 (D.C. Cir. 1990) (internal quotation marks omitted)). An agency must also "*identify a specific decision* to which the document is predecisional." *Maricopa Audubon Soc'y*, 108 F.3d at 1094 (emphasis added). As detailed below, Defendant has failed to meet its burden to withhold documents under the deliberative process privilege.

b. Defendant Has Improperly Withheld Records Reflecting Final Agency Positions or Opinions

For an agency record to be withheld under the deliberative process privilege, the agency must identify "a specific decision to which the document is predecisional." *Maricopa Audubon Soc'y*, 108 F.3d at 1094. Even if a document is predecisional at the time it is prepared, the document can "lose that status if it is adopted, formally or informally, as the agency position on an issue." *NRDC v. DOD*, 388 F.Supp. 2d at 1098 (citing *Coastal States*, 617 F.2d at 866. Here, because Defendant has failed to identify a specific decision to which many of the records at issue preceded and contributed, the records should be treated as the final agency positions and, thus, may not be withheld under the deliberative process privilege.

For example, CRM's withholding of 28 pages of slides for a presentation on "Leveraging Emerging Technologies in Prosecuting Cases: Opportunities and Challenges" likely contain established agency positions (Cunningham Declaration at 6 (describing CRM Vaughn item 1)). This documents, and similar presentations withheld by the Defendant serve as guidance to prosecutors "select[ing] certain investigative techniques" to be used in the field. As such, they are improperly withheld under the deliberative process privilege. *See Tax Analysts v. IRS*, 117 F.3d 607 (D.C. Cir. 1997).

c. Defendant Has Improperly Withheld Purely Factual Information

"[M]emoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context" may not be withheld under the deliberative process privilege. *EPA v. Mink*, 410 U.S. 73, 88-89 (1973); *see also Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep't of State*, 818 F. Supp. 1291, 1297 (N.D. Cal. 1992) (same). While the rationale behind the deliberative process privilege encourages candor in deliberative discussions, the requirement that facts must be disclosed is intended to enhance the integrity of agency

deliberations. *See Quarles v. Dep't of Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990) (noting that "the prospect of disclosure is less likely to make an advisor omit or fudge raw facts").

In applying Exemption 5 to hundreds of pages of records withheld in their entirety, it is a near-certainty that Defendant has withheld some purely factual material. The purposes underlying the deliberative process privilege are not served by permitting agencies to shield factual information from disclosure to the public. *See Quarles*, 893 F.2d at 392; *see also NRDC v. DOD*, 442 F. Supp. 2d 857, 877 (C.D. Cal. 2006) (ordering defendant to disclose factual material withheld under Exemption 5).

d. Defendant Has Improperly Withheld Records Under the Work Product Doctrine

Defendant has withheld information based on the work product doctrine. The doctrine applies to documents with "two characteristics: (1) they must be prepared in anticipation of litigation or for trial, and (2) they must be prepared 'by or for another party or by or for that other party's representative.'" *United States v. Torf (In re Grand Jury Subpoena)*, 357 F.3d 900, 907 (9th Cir. 2003) (quoting *In re Calif. Pub. Utils. Comm'n*, 892 F.2d 778, 780-81 (9th Cir.1989)); *see also* Fed. R. Civ. P. 26(b)(3). In the FOIA context, to promote the statute's objective of disclosure over secrecy, the work product doctrine only applies to records that are created "because" of pending or potential litigation. *See Maine v. Dep't of Interior*, 298 F. 3d 60, 68 (1st Cir. 2002). Documents that are "prepared in the agency's ordinary course of business" and "not sufficiently related to litigation may not be accorded protection." *Public Citizen, Inc. v. Dep't. of State*, 100 F. Supp. 2d 10, 30 (D.D.C. 2000) (citing *Hennessey v. United States Agency for Int'l Dev.*, No. 97-1113, 1997 U.S. App. LEXIS 22975, at *17, No. 97-1113 (4th Cir. Sept. 2, 1997)) *rev'd in part on other grounds*, 276 F.3d 634 (D.C. Cir. 2002). "[A]t a minimum, an agency seeking to withhold a document . . . must identify the litigation for which the document was created (either by name or through factual description) and

explain why the work-product privilege applies to all portions of the document." *Church of Scientology Int'l v. DOJ*, 30 F.3d 224, 237 (1st Cir. 1994).

Here, Defendant has failed to meet these requirements; it has failed to specifically identify the litigation for which the slides and presentations such as CRM Vaughn 1 were prepared and has failed to show they were prepared "because" of pending or potential litigation and not merely in the "agency's ordinary course of business." Instead it merely appears these slides were discussing the general legal strategies used to conduct surveillance of various forms. Because Defendant has failed to show these records are protected by the work product doctrine, they must be released.

e. The Defendant Has Improperly Withheld Documents That Constitute the "Working Law" of the agency

Exemption 5 does not allow agencies to withhold documents that "constitute the 'working law' of the agency." *Sears*, 421 U.S. at 153. "Exemption 5, properly construed, calls for disclosure of all opinions and interpretations which embody the agency's effective law and policy including final opinions, statements of policy and interpretations which have been adopted by the agency, and instructions to staff that affect a member of the public." *Id*. (citing 5 U.S.C. § 552(a)(2)) (internal quotations omitted). Such documents "are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public." *Niemeier v. Watergate Spec. Prosecution Force*, 565 F.2d 967, 974 (7th Cir. 1977).

Defendant asserts Exemption 5's attorney-client privilege to impermissibly shield agency policy and working law. The privilege protects confidential communications by a specific client to a specific attorney to obtain legal advice for a specific set of circumstances, *Fischer v. U.S.*, 425 U.S. 391, 403 (1976), and opinions from the attorney

to the client based on those specific facts. *Feshbach*, 5 F. Supp. 2d at 784 (N.D. Cal. 1997) (citing *Brinton v. Dep't of State*, 636 F.2d 600, 603 (D.C. Cir. 1980)). However, the privilege is narrowly construed, protecting "only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (citing *Fischer*, 425 U.S. at 403).

The information Defendant has withheld reflect recitations of established agency policy dictated by the Office of Enforcement Operations within the Department of Justice, which "review[s] all applications seeking to use electronic surveillance in federal criminal investigations" in order to ensure that each application "meets all of the statutory and policy requirements." *See* Doc 15-1, pages 2-3. The withheld material, including a chapter from the OEO Manual titled "Obtaining Location Information from Wireless Carriers" (CRM Vaughn 2) sounds like the "neutral, objective analysis" of existing policy, similar to that released in *Coastal States*. Because these documents do not contain legal advice, they are outside the scope of the attorney-client privilege and must be disclosed.

Moreover, because some of the documents contain guidelines for how the agency must interact with Internet service providers and telecommunications carriers, rather than reflecting an attorney's confidential opinions, they are "working law" that cannot be withheld under Exemption 5. In *Tax Analysts v. IRS*, the court ordered the release of legal memoranda because their primary purpose was to create "a body of private law, applied routinely as the government's legal position in its dealings with taxpayers" and to ensure

that agency staff applied regulations correctly and uniformly. 117 F.3d 607, 608-19 (D.C. Cir. 1997).

Because the withheld documents do not reflect attorney-client confidences, and in some instances even act as guidelines governing how the government interacts with the public, the attorney-client privilege does not apply.

II. Defendant has Wrongly Withheld Records Under Exemption 7(E)[3]

Defendant has claimed Exemption 7(E) on almost every page of records in this case. Exemption 7(E) allows an agency to withhold documents "compiled for law enforcement purposes" that "would disclose techniques and procedures for law enforcement investigations or prosecutions" only if the agency demonstrates a reasonable risk that criminals will use the information to circumvent detection, apprehension or prosecution. 5 U.S.C. § 552(b)(7)(E); *Gordon v. FBI*, 388 F. Supp. 2d 1028, 1035-36 (N.D. Cal. 2005). Furthermore, Exemption 7(E) "only exempts investigative techniques not generally known to the public." *Rosenfeld v. DOJ*, 57 F.3d 803, 815 (9th Cir. 1995). Defendant has failed to show that disclosing records withheld under Exemption 7(E) would lead to circumvention or that the records describe techniques not generally known to the public. As such, these records must be released.

a. Defendant's Boilerplate *Vaughn* Submission Fails to Show That Releasing Records Would Allow Criminals to Circumvent Detection, Apprehension or Prosecution

For each of the categories of records Defendant withheld under Exemption 7(E), Defendant has asserted only broad, speculative, and unsupported claims that disclosure would risk circumvention of the law or that they should otherwise be withheld.

[3] Plaintiff challenges the following documents improperly withheld under Exemption 7(E): DOJ Criminal Division (CRM) Vaughn items 1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14; Executive Office for United States Attorneys (EOUSA) Vaughn items 3 and 4.

Specifically, despite the fact that Defendant has claimed Exemption 7(E) on hundreds of pages of responsive records, the government memos include just a few, vague statements, each repeating the same or similar arguments regarding circumvention risk.

Courts have repeatedly rejected similar declarations that offer only "boilerplate" explanations "drawn from a 'master' response filed by the [government] for many FOIA requests." *See Wiener*, 943 F.2d at 978-79 (citing similar declaration filed by FBI in *King*, 830 F.2d at 224 and found by that court to be "clearly inadequate"). The paragraphs in the Boseker and Cunningham Declarations offer "little more than a generic assertion that disclosure" could lead to circumvention and are "insufficient to carry the [Defendant]s burden with respect to Exemption 7(E) withholdings." *ACLU v. ODNI*, 2011 U.S. Dist. LEXIS 132503 at *34-35 (rejecting FBI's withholding under 7(E) of "internal emails, training slides, legal opinions and interpretations of techniques, Standard Operating Procedures, electronic communications concerning investigations, case write-ups and miscellaneous reports" because the government offered "little more than a generic assertion that disclosure could enable targets . . . to avoid detection or develop countermeasures to circumvent law enforcement." (internal quotations and citations omitted)); *see also ACLU of Wash. v. DOJ*, 2011 U.S. Dist. LEXIS 53523 at *5-6, 29 (citing *Wiener*, 943 F.2d at 977). Such records must be released unless the government presents substantial evidence that criminals are actually likely to use the information to thwart law enforcement efforts. *See Gerstein v. DOJ*, No. C-03-04893, 2005 U.S. Dist. LEXIS 41276, *41 (N.D. Cal. Sept. 30, 2005) (rejecting agency's claim that providing information on where and with what frequency a technique is used would "allow criminals to direct [their] efforts to a disclosed weakness and avoid a disclosed strength in the national law enforcement system" *id.* at *39, 43 (internal quotations omitted)).

Because Defendant's claims that disclosure would risk circumvention of the law are vague, speculative and unsupported by specific facts tied directly to the material in

the records themselves, the Defendant has failed to meet its burden to support its Exemption 7(E) claims.

b. Defendant Has Improperly Withheld Law Enforcement Techniques That Are Generally Known or Routine

Defendant has failed to show that the numerous records it withheld under Exemption 7(E) do not describe law enforcement techniques or procedures that are routine or well-known to the public. *See Rosenfeld*, 57 F.3d at 815. As such these records must be released.

Defendant cannot withhold information about techniques or procedures that "would leap to the mind of the most simpleminded investigator." *Id.* (citing *Nat'l Sec. Archive v. FBI*, 759 F. Supp. 872, 885 (D.D.C. 1991)); *Albuquerque Publ'g Co. v. DOJ*, 726 F. Supp. 851, 857 (D.D.C. 1989). In *Albuquerque Publishing*, the court directed agencies to release records "pertaining to techniques that are commonly described or depicted in movies, popular novels, stories or magazines, or on television," including "eavesdropping, wiretapping, and surreptitious tape recording and photographing." 726 F. Supp. at 858; *see also Hamilton v. Weise*, No. 95-1161, 1997 U.S. Dist. LEXIS 18900, at *30-32 (M.D. Fla. Oct. 1, 1997) (generally known techniques include those discussed in judicial opinions); *Rosenfeld*, 57 F.3d at 815 (details about a pretextual phone call were not protected because the technique would "leap to the mind of the most simpleminded investigator"). *See also Warshak v. U.S.*, 532 F.3d 521, 524-25 (6th Cir. 2008) (describing law enforcement technique for gaining access to suspects' email); *Dunaway*, 519 F. Supp. at 1082-83 (describing law enforcement technique for gaining access to suspects' physical mail as "commonly known").

Defendant has failed to even argue that the law enforcement techniques it has withheld are not routine and that any possible limitations in their surveillance capabilities are not well-known to the public. Because the public—including criminals—already knows that the government can obtain cellular location information, subscriber records

and stored emails, disclosing the documents sought in this case will not create a circumvention risk. As such it, they must be released.

III. Defendant Has Failed to Segregate and Release All Non-Exempt Information

The FOIA explicitly requires that "[a]ny reasonably segregable potion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt[.]" 5 U.S.C. § 552(b); *see also Church of Scientology*, 611 F.2d at 744 ("[I]t is error for a district court to simply approve the withholding of an entire document without entering a finding on segregability, or the lack thereof."). The duty to segregate extends to material withheld under all of the FOIA's nine exemptions. *Id*.

"District court[s] must review the agency's 'segregability' decisions on a document-by-document basis." *NRDC v. DOD*, 388 F. Supp. 2d at 1096 (citing *Wiener*, 943 F.2d at 988). To satisfy its burden, the agency must "describe what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document." *Mead Data Cent.*, 566 F.2d at 261; *see also NRDC v. DOD*, 388 F. Supp. 2d at 1105 (finding an agency declaration inadequate on segregability grounds when it stated merely that "none of the withheld documents contain reasonably segregable information that is not exempt").

Defendant states that it has "provided all 'reasonably segregable' responsive information that is not protected by an exemption." (Doc 15 at 37.) Despite this assurance, hundreds of pages of records at issue in this case have been withheld in their entirety. Given the broad brush with which Defendant has painted exempt material, as discussed within the sections addressing each exemption claim above, it is a near certainty that Defendant has withheld more information than is otherwise justifiable. The examples discussed above only underscore the need for this Court's searching review of the Defendant's compliance with FOIA's obligation to provide "[a]ny reasonably segregable potion" of the records at issue in this case. *See* 5 U.S.C. § 552(b). Thus,

despite Defendant's assertions that it has complied with FOIA's segregability requirement, Defendant has not satisfied its burden and is not entitled to summary judgment.

CONCLUSION

For the foregoing reasons, the government's motion for summary judgment should be denied, and Plaintiff's Cross Motion for summary judgment should be granted.

Respectfully submitted,

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