UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Plaintiffs,

v.

FEDERAL BUREAU OF INVESTIGATION, *et al.*,

Defendants.

11 Civ. 7562 (WHP)

ECF Case

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN FURTHER SUPPORT OF THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

PREET BHARARA
United States Attorney for the
Southern District of New York
86 Chambers Street, 5th Floor
New York, New York 10007
Tel.: (212) 637-2716

JOHN D. CLOPPER
EMILY E. DAUGHTRY
Assistant United States Attorneys
— Of Counsel —

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATUTES AND REGULATIONS

PRELIMINARY STATEMENT

Defendant United States Department of Justice ("DOJ" or the "government") respectfully submits this memorandum of law in opposition to the ACLU's cross-motion for summary judgment and in further support of its motion for summary judgment.

As set forth in the government's memorandum of law in support of its motion ("Gov. Opening Br."), DOJ properly withheld from disclosure the records remaining at issue in this litigation. In its brief, the ACLU does not challenge the government's assertions with respect to the applicability of Exemptions 1 or 3: it does not dispute the government's determinations with respect to the harm to national security that could reasonably be expected to result from the release of the remaining FISC opinions and orders, nor does it contest the government's invocation of the protections in the National Security Act and the National Security Agency Act to withhold these documents under Exemption 3.

Instead, the ACLU speculates, despite the government's declarations to the contrary, that there must be some non-exempt information contained in these documents that could be segregated and released. In an attempt to avoid well-established law requiring courts to defer to the government's declarations, especially in the area of national security, the ACLU accuses the government of bad faith and baldly asserts that the government's past assertions regarding segregability—made before the government's discretionary declassification of substantial amounts of information regarding its activities pursuant to Section 215— "strip the government's present justifications of the deference due to them in ordinary FOIA cases." ACLU Br. at 25. The ACLU's allegations are utterly unfounded. For the reasons set forth below, the government's justifications for withholding the remaining documents are "logical and plausible," *Wilner v. NSA,* 592 F.3d 60, 75 (2d Cir. 2009), and the Court should defer to the government's

determinations regarding the continued need to withhold in full this discreet set of FISC opinions and orders, which remain classified after an extraordinary and intensive interagency effort, led by the Director of National Intelligence ("DNI"), to review every line of every document at issue.

ARGUMENT

I. The Government Has Established That the Records Remaining at Issue Are Properly Withheld in Full

As explained more fully in the government's opening brief, the documents remaining at issue are a FISC opinion, dated August 20, 2008 (the "August 2008 FISC Opinion"), and an unspecified number of FISC Orders of various dates, including certain FISC Orders dated October 31, 2006, that were produced to Congress in its oversight capacity pursuant to 50 U.S.C. Section 1871(c)(1) (collectively, the "Additional FISC Orders"). *See* Gov. Opening Br. at 9. The ACLU does not contest that these documents contain classified information exempt from disclosure under the FOIA. Rather, the ACLU challenges the government's withholding of the records only "to the extent that they reflect the FISC's interpretation of Section 215." ACLU Br. at 8. Thus, the only issue remaining in this case is whether the government has made reasonable judgments regarding the segregability of non-exempt information in the documents remaining at issue.

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Of course, if release of a particular portion of a record would disclose an intelligence source or method—or would tend to disclose an intelligence source or method—it is not "reasonably segregable" and need not be released. *See, e.g., Berman v. CIA,* 501 F.3d 1136, 1141-1142 (9th Cir. 2007); *Halperin v. CIA,* 629 F.2d 144, 147-150 (D.C. Cir.

1980). "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007); *Conti v. DHS*, 12 Civ. 5827 (AT), 2014 WL 1274517, at *25 (S.D.N.Y. Mar. 24, 2014) (quoting *Sussman*). Furthermore, in cases implicating national security, such as this one, a reviewing court "'must accord *substantial weight* to an agency's affidavit concerning the details of the classified status of the disputed record.'" *ACLU v. DOJ*, 681 F.3d 61, 69 (2d Cir. 2012) (quoting *Wolf v. CIA*, 473 F. 3d 370, 374 (D.C. Cir. 2007)). "The court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions; to do so would violate the principle of affording substantial weight to the expert opinion of the agency." *Halperin*, 629 F.2d at 148; *accord Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990). Indeed, the Second Circuit has observed that that it is "bad law and bad policy to second-guess the predictive judgments made by the government's intelligence agencies." *ACLU v. DOJ*, 681 F. 3d at 70-71.

The Declaration of Jennifer L. Hudson, dated April 4, 2014 ("First Hudson Declaration"), amply explains why no there are no reasonably segregable portions of the remaining documents that may be released, and the ACLU fails to rebut the presumption that the agency has complied with its segregability obligations. *Sussman*, 494 F.3d at 1117. The government's determinations, which explain that classified sources and methods would be revealed if any portion of the documents are released, are entitled to deference. *ACLU v. DOJ*, 681 F.3d at 69.[1]

[1] All of the withheld documents fall within Section 1.4(c) of Executive Order ("E.O.") 13526, which allows information to be classified if it pertains to "intelligence activities (including covert action), intelligence sources or methods, or cryptology." One of the documents—the August 2008 FISC Opinion—also falls within § 1.4(d) of E.O. 13526, which allows information to be classified if it pertains to "foreign relations or foreign activities of the United States, including confidential sources," and § 1.4(g), which allows information to be classified if it pertains to "vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security." *See* First Hudson Declaration

A. The August 2008 FISC Opinion Is Not Segregable

This opinion discusses a specific intelligence method, and Ms. Hudson's declaration explains that the specific intelligence method is discussed in "every paragraph of this opinion, including the title." First Hudson Declaration ¶ 41. Ms. Hudson also explains the process that the government undertook to determine whether there was any reasonabley segregable portion of the opinion that could be released. As Ms. Hudson explains, "[a]n intensive, line-by-line review of this opinion was performed by multiple IC agencies, which determined that it contains no reasonably segregable, non-exempt information." *Id.* ¶ 45. Moreover, the segregability review specifically focused on whether there was legal analysis that could be released, and it was determined that there was none. As Ms. Hudson explains, "[t]he legal analysis in this opinion cannot reasonably be segregated and released without risking disclosure of the intelligence method discussed therein." *Id*.

Furthermore, "although certain legal analysis set forth in the August 2008 FISC Opinion may be unclassified when viewed in isolation, it is not reasonably segregable here because, when viewed in the context of this FOIA request and other public information, it would tend to reveal information about the classified intelligence method at issue in the balance of the document." *Id.* ¶ 47. Courts have long recognized and routinely upheld the government's withholding of information that is classified under such a "mosaic" theory of intelligence. *See ACLU v. DOJ*, 681 F.3d at 71 ("even if the redacted information seems innocuous. . . each detail may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself"); *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978) (recognizing that intelligence gathering is "akin to the construction of a mosaic" and that "bits and pieces of

¶ 33. The ACLU's arguments relating to § 1.4(d) and § 1.4(g), *see* ACLU at 20 n. 9, do not differ in substance from its arguments relating to § 1.4(c), and therefore fail for the same reasons.

seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate"). The government has more than met its burden of explaining why there is no reasonably segregable portion of the August 2008 FISC Opinion, and the ACLU has failed to rebut the government's showing.

B. The Additional FISC Orders Are Not Segregable

Nor has the ACLU demonstrated that the government's segregability judgments regarding the Additional FISC Orders are unreasonable and not entitled to deference.

First, pointing to news articles, the ACLU speculates that the Additional FISC Orders contain both FISC Orders that relate to bulk collection of call detail records and FISC Orders that relate to bulk collection of information other than call detail records. *See* ACLU Br. at 5-6. The government can neither confirm nor deny the existence or nonexistence of activities conducted under Section 215, relating to the collection of information other than telephony metadata or call detail records. As Ms. Hudson explains, in a supplemental declaration filed herewith:

> The [intelligence community ("IC")], through [the Office of the Director of National Intelligence] can neither confirm nor deny whether the U.S. Government has also used Section 215 to engage in bulk collection of other kinds of records because confirming or denying the existence or nonexistence of such intelligence activities would reveal classified information that is protected from disclosure by Executive order and statute and would reveal intelligence sources and methods. Because the IC can neither confirm nor deny whether the U.S. Government has also used Section 215 to engage in bulk collection of other records other than telephony metadata, the IC can also neither confirm nor deny whether any of the records identified as responsive to the plaintiffs' FOIA request relate to such matters. Nor can the IC confirm or deny whether other records exist relating to such matters, regardless of whether such documents are responsive to the plaintiffs' FOIA request.

Supplemental Hudson Declaration ¶ 5. The government cannot provide further explanation on the public record because the fact of the "existence or nonexistence of additional IC bulk collection activities under Section 215" is itself classified. Supplemental Hudson Declaration ¶

13. The law does not require the government to disclose "a fact exempt from disclosure under FOIA" in order to explain the basis for its withholdings. *Wilner,* 592 F.3d at 70; *see also Bassiouni v. CIA*, 392 F.3d 244, 246 (7th Cir. 2004) ("[t]he risk to intelligence sources and methods comes from the details that would appear in a *Vaughn* index").

In her Supplemental Declaration, Ms. Hudson sets forth in detail the reasons why the "existence or nonexistence of additional IC bulk collection activities under Section 215" is a properly classified fact under E.O. 13526, including the harms to national security that could reasonably be expected to result from its disclosure. *See* Supplemental Hudson Declaration ¶¶ 9-20. Because the very existence or nonexistence of such intelligence activities is a properly classified fact, that fact is exempt from disclosure under Exemption 1. Additionally, the "fact of the existence or nonexistence of additional IC bulk collection activities under Section 215 is exempt from disclosure under FOIA Exemption 3 pursuant to the National Security Act," because acknowledging the existence or nonexistence of such programs "would reveal information that concerns intelligence sources and methods, which the National Security Act is designed to protect." *Id.* ¶¶ 22, 23; *Wilner*, 592 F.3d at 74-75.

Second, the First Hudson Declaration also explains why there is no reasonably segregable portion of the Additional FISC Orders that may be released. While there has been significant public disclosure of many aspects of the Section 215 telephony metadata program, there are operational details regarding the program that remain classified. Those operational details relate to, among other things, the scope and timing of the program. For example, as Ms. Hudson explains, even "the total number of FISC orders withheld in full cannot be provided on the public record, nor can the records be described individually on the public record[,] because to do so would reveal classified and statutorily-protected information relating to sources and methods of

intelligence collection, including[,] among other things, the identity of telecommunications carriers participating in the bulk telephony metadata program and the timing of their participation." First Hudson Declaration ¶ 50.

Consequently, the Additional FISC Orders must be withheld in full, and no further information regarding the records can be provided on the public record. *See Bassiouni v. CIA*, 392 F.3d 244, 246 (7th Cir. 2004); *see also N.Y. Times Co. v. Dep't of Justice*, Nos. 13-422, 13-445, 2014 WL 1569514 at *15 (2d. Cir. Apr. 21, 2014) (recognizing validity of "no number, no list" response); *accord ACLU v. CIA*, 710 F.3d 422, 433-34 (D.C. Cir. 2013). As explained in its opening brief, the government has provided additional information regarding these records, as well as further explanation of the harm to national security that would result from the release of that additional information, in its classified *ex parte* submission to the Court. *See generally* Classified Hudson Declaration and supporting materials.

The ACLU argues that the government's reliance on the identities of the telecommunications carriers is a "red herring" because the ACLU has never sought the identities of the telecommunications carriers. ACLU Br. at 17. But the ACLU has missed the point. The government cannot release the Additional FISC Orders, either in whole or in part, or disclose the number of orders or their dates, because to do so would reveal classified information relating to operational details of the Section 215 bulk telephony metadata program, including, but not limited to, the identity of telecommunications carriers, regardless of whether any of those details were specifically requested. The First Hudson Declaration makes clear that protection of the identities of the telecommunications carriers is but one example of why the government cannot provide any further information about the Additional FISC Orders. She explains:

> In consultation with IC officials, I have determined that the U.S. Government cannot publicly disclose further details about the number or nature of the

> Additional FISC Orders. . . . The number of Additional FISC Orders being withheld in full, as well as their dates and any additional information regarding the nature or substance of the Additional FISC Orders, is being withheld in full pursuant to FOIA Exemption 1 in order to protect classified intelligence activities, sources and methods used against intelligence targets and adversaries. This includes, among other things, protecting the identity of telecommunications carriers directed to provide bulk business records and the timing of their provision of these records.

First Hudson Declaration ¶¶ 52, 54. Releasing the orders with the names of the telecommunications providers redacted is simply not a feasible solution because release of redacted versions would still reveal classified information regarding the scope and timing of the bulk telephony metadata program. *See id*. ¶¶ 54-57.[2] Ms. Hudson's declaration is more than sufficient to meet the government's burden of explaining why the Additional FISC Orders must be withheld in full, and the ACLU has failed to overcome the presumption that the government has appropriately reviewed the records and determined that there is no reasonably segregable portion that may be released.

C. ACLU's Arguments on the Segregability of "Legal Analysis" and the Official Disclosure Doctrine Are Misplaced

In opposing the government's motion for summary judgment, the ACLU fails to rebut the explanations offered by the government, but instead speculates that the withheld records contain "legal reasoning" that must be segregated and released. Specifically, the ACLU argues that (1) despite the government's declarations, the documents contain "legal reasoning" that cannot be withheld under FOIA, and (2) the government has lost the ability to withhold any legal

[2] The ACLU proposes that the government release one order for each day that the FISC issued orders "while withholding the other equivalent orders issued on the same day." *See* ACLU Br. at 19. This suggestion is unworkable because, even if the identity of the recipient could be redacted, release of one order for every day on which the FISC issued a relevant order would reveal the number of such days, which in turn would reveal significant classified information regarding the scope and timing of the bulk telephony metadata program. *See* First Hudson Declaration ¶¶ 54-57.

interpretation of Section 215 because that interpretation has been "officially disclosed." The ACLU is wrong on both counts. The First Hudson Declaration explains that release of any portion of the withheld records—including any "legal reasoning" that the documents might contain—would risk disclosure of properly classified information about intelligence activities, sources, and methods. Moreover, to the extent the documents contain some information that has been disclosed in other contexts, the documents must be withheld in full because, in the context of the particular FOIA request and the particular documents at issue here, the release of that information would also disclose properly classified information that has not been officially disclosed. Because the government has provided an entirely "logical and plausible" explanation for withholding the documents in full, the government's determination is entitled to substantial deference. *Wilner*, 592 F.3d at 73; *see also ACLU v. DOJ*, 681 F.3d at 69 (citing *Wilner*).

1. There Is No Freestanding Secret Law Doctrine Mandating Disclosure of Classified National Security Information

The ACLU cannot rebut the reasonableness of the government's segregability determinations, so it instead attempts to reframe the issue by mischaracterizing the government's reasons for withholding the documents, claiming that the government has asserted that legal reasoning is itself a source or method that may be classified. According to the ACLU, "[t]he principal question in this suit is whether the FISC's interpretations of Section 215 are 'intelligence sources or methods' within the meaning of Exemptions 1 and 3." ACLU Br. at 10. Not only is that not the principal question in this case, that question is not raised by this case at all. Contrary to the ACLU's mischaracterization, the government is not asserting that the FISC's interpretations themselves are classified sources and methods. Rather, the documents at issue have been withheld in full because they *discuss* classified intelligence activities, and release of the records would *reveal* classified sources and methods. *See, e.g.,* First Hudson Declaration

¶ 41 ("The August 2008 FISC Opinion *addresses* the NSA's use of a specific intelligence method . . . [T]he specific intelligence method is *discussed* in every paragraph of this opinion . . ." (emphasis added)), ¶ 43 ("[T]he August 2008 FISC Opinion, if disclosed, would *reveal* an intelligence method . . ." (emphasis added)), ¶¶ 57-59 (explaining that release of Additional FISC Orders "would reveal the scope of the U.S. Government's intelligence collection activities"). It is the intelligence methods and activities that the documents discuss that are the sources and methods, not the FISC orders and opinions themselves. The ACLU's claim that the government is asserting that legal reasoning is itself a source or method that may be classified is mere obfuscation, and unhelpful in addressing the actual issues in this case.

For similar reasons, the ACLU's argument that the government is asserting a "blanket" entitlement to withhold "legal analysis that relates to the scope or meaning of Section 215," ACLU Br. at 12, is flatly wrong, and mischaracterizes the government's position. As noted above, and explained throughout the First Hudson Declaration, the government has withheld information that, if released, would reveal information about classified intelligence sources, methods and activities. *See* First Hudson Declaration ¶ 28 (explaining that information has been withheld relating to "operational details as to specific applications of the sources and methods used by the U.S. Government to carry out [Section 215]"), ¶¶ 41-44, ¶¶ 57-59. The government has released segregable legal analysis when it has been possible to do so. After the existence of the Section 215 bulk telephony metadata program was declassified, the government declassified and released several FISC orders and opinions relating to the program, including, when feasible, documents explaining the legal rationale underlying intelligence activities conducted under Section 215. *See* First Hudson Declaration ¶ 25 (describing ODNI's efforts to declassify and release documents to explain legal rationale to the public). The government released such

information when it was able to segregate unclassified information (or, in the unique context of this case, information that the DNI discretionarily declassified) from still-classified information, and when release of the former did not risk disclosure of the latter.

For certain documents, however, including the documents remaining at issue, the government reasonably determined that there was no reasonably segregable portion that could be released. *See* First Hudson Declaration ¶ 28. Far from asserting a "blanket" entitlement to withhold legal analysis, the government has gone to great lengths to release significant legal analysis underpinning intelligence activities conducted under Section 215. Indeed, the ACLU acknowledges that the government has released significant FISC opinions underpinning previously classified intelligence activities. *See* ACLU Br. at 16 (noting documents determined to be segregable and released by government).

The ACLU erroneously argues that the government's withholdings here are inconsistent with the Second Circuit's recent decision in *N.Y. Times Co. v. Department of Justice*, Nos. 13-422, 13-445, 2014 WL 1569514 (2d Cir. Apr. 21, 2014), and wrongly suggests that that case created a special category for legal analysis, requiring its release even when doing so would result in the disclosure of operational information about classified intelligence activities. ACLU Br. at 12-13. Citing inapposite cases about "secret law," the ACLU essentially rehashes the argument that this Court considered and rejected earlier in this case, when the Court granted the government's motion for partial summary judgment. *See New York Times v. DOJ*, 872 F. Supp. 2d 309 (S.D.N.Y. 2012). The government's remaining withholdings are entirely consistent with both this Court's prior decision and the Second Circuit's *New York Times* decision. As this Court rightly held, there is no "freestanding 'secret law doctrine'" that "mandate[s] the

disclosure of classified national security information." *New York Times*, 872 F. Supp. 2d at 317. Nothing in the Second Circuit's *New York Times* decision undermines that conclusion.

The Second Circuit did not hold that legal analysis must be segregated and released, irrespective of whether release of such legal analysis would also disclose classified operational details. To the contrary, the Second Circuit made clear that legal analysis is not always segregable. *New York Times*, Nos. 13-422, 13-445, 2014 WL 1569514, at *14 ("We also recognize that in some circumstances legal analysis could be so intertwined with facts entitled to protection that disclosure of the analysis would disclose such facts. Aware of that possibility, we have redacted . . . the entire section of the OLC-DOD Memorandum that includes any mention of intelligence gathering activities."). The government's withholdings in this case are entirely consistent with *New York Times*. The government has released segregable information—including legal analysis—when it has been possible to do so without also revealing information about classified intelligence activities. But where, as with the remaining documents at issue, it has determined after careful scrutiny that release of redacted versions of the records would reveal properly classified information about intelligence activities, sources, or methods, the government has withheld the documents in full. First Hudson Declaration ¶¶ 40-59.

2. The "Official Disclosure" Doctrine Does Not Compel Release of the Records At Issue

The ACLU also speculates that the withheld records contain broad categories of segregable information that the government has officially acknowledged. Specifically, the ACLU argues that the government has waived its ability to withhold any information regarding "the types of records the FISC has permitted the government to collect in bulk," information "concerning Section 215's relevance requirement," and "the legal restrictions that the FISC has imposed on the government in order to comply with Section 215, the Constitution, or any other

law." ACLU Br. at 14-15. The ACLU is wrong here too. While the government has disclosed a significant amount of information about previously classified intelligence activities conducted pursuant to Section 215, other information regarding the government's use of Section 215 remains highly classified and has not been disclosed. First Hudson Declaration ¶ 28. That some of the information released as part of the transparency initiative could be characterized as relating to Section 215's "any tangible thing" or relevance requirements does not mean that the government has lost the ability to withhold other information the release of which would disclose operational details of intelligence activities. *See Military Audit Project v. Casey*, 656 F.2d 724, 752 (D.C. Cir. 1981) (rejecting argument that "because some information about the project ostensibly is now in the public domain, nothing about the project in which the appellants have expressed an interest can properly remain classified"). Moreover, to the extent that some information in the withheld records has been disclosed in other contexts, its release in the context of the documents at issue, as narrowed by the ACLU, would reveal operational details that have not been officially disclosed. First Hudson Declaration ¶ 28.

The ACLU argues, in essence, that because the government has acknowledged some information about intelligence activities under Section 215, it must now release all information about all intelligence activities under Section 215, even if the information remains currently and properly classified. In short, the ACLU would convert the strict "official disclosure" doctrine into a broad subject-matter waiver of large swaths of classified information, applicable whenever the government has acknowledged anything about a particular area of classified intelligence activity (even in response to unauthorized disclosures of classified information).

Nothing in law or logic requires the absurd and extreme result that the ACLU seeks, and other courts have specifically rejected such a sweeping interpretation of the official disclosure

doctrine. *See Wilner*, 592 F.3d at 69-71 (allowing agency to withhold specific operational information about a formerly-classified program that was subsequently publicly acknowledged); *Military Audit Project*, 656 F.2d at 752-53. The ACLU claims that the Second Circuit's decision in *New York Times* supports its expansive view of the official disclosure doctrine, but the Second Circuit's holding in that case does not support the ACLU's argument here. In *New York Times*, the Second Circuit specifically reaffirmed the three-part test for official disclosure that was set forth in *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009). *See New York Times*, Nos. 13-422, 13-445, 2014 WL1569514, at *17, n.19 (stating that "*Wilson* remains the law of this Circuit . . ."). In *Wilson*, the Second Circuit stated the test as follows:

> A strict test applies to claims of official disclosure. Classified information that a party seeks to obtain or publish is deemed to have been officially disclosed only if it (1) is as specific as the information previously released, (2) matches the information previously disclosed, and (3) was made public through an official and documented disclosure.

Wilson, 586 F.3d at 186 (internal quotation marks omitted). While the Second Circuit stated that it did not "understand the 'matching' aspect of the *Wilson* test to require absolute identity," *New York Times,* Nos. 13-422, 13-445, 2014 WL1569514, at *14, the Court did not adopt the breathtaking expansion of the official disclosure doctrine the ACLU advocates here—which would require release of highly classified operational details regarding intelligence activities that have been only generally acknowledged. Indeed, as discussed above, the Court clarified that it was *not* requiring release of undisclosed operational information relating to classified intelligence activities. *See New York Times,* Nos. 13-422, 13-445, 2014 WL 1569514, at *10 ("no waiver of any operational details"); *id.* at *14 ("we have redacted . . . the entire section of the OLC-DOD Memorandum that includes any mention of intelligence gathering activities"). Here, the First Hudson Declaration establishes that the documents remaining at issue contain the

kinds of operational details of intelligence activities—such as the manner of querying telephony metadata and the timing and scope of the telephony metadata program—that the Second Circuit held is exempt from disclosure. *See* First Hudson Declaration ¶¶ 40-59.

II. The Government's Declarations Are Entitled to a Presumption of Good Faith and Substantial Deference

Perhaps recognizing that it cannot overcome the presumption that the government has complied with FOIA's segregability requirement, the ACLU accuses the government of bad faith. But as explained in the government's opening brief, agency declarations in FOIA cases are entitled to a presumption of good faith. Gov. Opening Br. at 11; *Wilner*, 592 F. 3d at 69. To overcome this presumption, moreover, a FOIA plaintiff must provide concrete "evidence of agency bad faith." *Id.* at 73; *see also Carter v. Dep't of Commerce*, 830 F.2d 388, 393 (D.C. Cir. 1987) ("[T]he mere allegation of bad faith does not undermine the sufficiency of agency submissions. There must be tangible evidence of bad faith; without it the court should not question the veracity of agency submissions."). Despite the ACLU's repeated assertions, there is no such evidence here.

A. The Government's Previous Withholdings Were Not Overbroad and Were Made in Good Faith

The ACLU incorrectly argues that the government's release of information in FISC opinions and orders that it had previously withheld in full is evidence that those documents were never properly withheld in the first place, and therefore the government's prior declarations supporting the withholding of those documents in full must have been made in bad faith. Absent from the ACLU's brief is any appropriate recognition that the government's previous withholdings were made before the unauthorized disclosures of highly classified documents published by *The Guardian* and *The Washington Post* in June 2013, and before the discretionary

decision by DNI to declassify certain information revealed in those documents, including information regarding the telephony metadata collection program under Section 215. *See* First Hudson Declaration ¶¶ 17, 23, 27. The government has explained that the unauthorized disclosures have in fact "caused exceptionally grave harm to our national security and threaten long-lasting and potentially irreversible harm to our ability to identify and respond to threats." First Hudson Declaration ¶ 23. However, in order to "correct misinformation flowing from the unauthorized disclosures," and after a comprehensive and detailed review directed by the President, "the DNI chose to exercise his discretion under E.O. 13526 to declassify certain information because he found extraordinary circumstances existed where the public interest in disclosure outweighed the harm to national security that would result." First Hudson Declaration ¶¶ 23, 27.

Those extraordinary events, not bad faith, explain the government's altered withholdings. Much information that was previously classified is no longer classified as a result of the DNI's discretionary determinations, resulting in the release of many documents either in full or in redacted form. But because other information remains classified, some documents must remain withheld in full. There is simply no reason to equate that change in circumstances with bad faith.

1. The Government Previously Withheld Documents in Full to Protect, Among Other Classified Facts, the Disclosure of the NSA's Association With Section 215

The ACLU's disagreement with the government's prior declarations supporting its now-withdrawn motion for summary judgment does not support a finding of bad faith. As explained in the redacted and now unclassified declaration of Diane M. Janosek, dated February 6, 2013, which the government previously submitted *ex parte* in unredacted form ("Janosek Declaration"), the government previously was unable to segregate any information from the

FISC opinions and orders that were subsequently released with redactions, for to do so would have revealed then-classified intelligence sources and methods.

For example, one key piece of information that was previously classified is the very association of the NSA with Section 215. *See* Janosek Declaration ¶¶ 3, 4, 13, 17, 23, 25, 26, 31-34, 41 (describing NSA's association with Section 215 as classified). The release of this fact prior to its declassification by the DNI would have revealed then-classified intelligence sources and methods. *Id.* The government's previous declarations supporting the withholding in full of FISC opinions, orders, and other documents in order to protect the classified status of the NSA's association with Section 215 were thus unquestionably made in good faith.

As Ms. Janosek explained, "in the context of this FOIA Request, the particular content of the paragraphs portion-marked (U) in the responsive material is immaterial because the classification designations at the top and bottom of each page themselves reveal NSA's participation in a classified intelligence collection operation under Section 215." *Id.* ¶ 32. The classification designations on these documents included the identifier for communications intelligence or "COMINT," which is an identifier for Sensitive Compartmented Information ("SCI") that is associated with the NSA and "subject to special access and handling requirements because it involves or derives from particularly sensitive intelligence sources and methods." *Id.* ¶¶ 6, 32. Ms. Janosek further averred that it was not possible to simply redact the SCI identifier COMINT because DOJ was the only agency publicly associated with the responsive documents, and DOJ "would not ordinarily redact its own classification markings." *Id.* ¶ 33. Redacted classifications markings would have "necessarily reveal[ed] that another agency, to whom those classification markings would be attributed, was associated with the responsive material." *Id.* Ms. Janosek then explained that "any adversary with basic knowledge of the mission of NSA"

would have then been able to "conclude that NSA is the agency most plausibly conducting a program under this authority." *Id.*

Accordingly, the government withheld in full any document that included the classification designation COMINT in order to protect the classified fact of NSA's association with Section 215. The documents withheld in full on this basis included all but one of the FISC opinions that the ACLU claims "were readily segregable and subject to release under FOIA." ACLU Br. at 24 (citing the Supplemental Opinion addressing the Stored Communications Act, 18 U.S.C. § 2702; a FISC Order, dated March 2, 2009; and a FISC Order, dated Jan. 28, 2009). In fact, the phrases cited by the ACLU were not previously segregable because an original classification authority had determined that there was no way to release them without revealing the involvement of the NSA in a program conducted under Section 215, which at the time was highly classified information. While the ACLU may not agree with the government's previous classification determinations, its views on this point are not entitled to any weight. *See Diamond v. FBI*, 707 F.2d 75, 79 n. 6 (2d. Cir. 1983) (rejecting argument that materials "do not in [requester's] opinion exhibit any significant connection to national defense or foreign policy"); *cf. Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982) (noting that test is not even whether "the court personally agrees" with agency's evaluation of danger). Certainly, there is no evidence whatsoever for the ACLU's baseless speculation that the government withheld these documents because they were "embarrassing to the government." ACLU Br. at 24. Nothing in the record suggests that the government classified anything at issue in this case for any improper purpose.

2. The Government Previously Withheld FISC Opinions and Orders in Full Because of Its Good-Faith Belief That the FISC's Rules Prevented Disclosure of Its Opinions and Orders

As the ACLU acknowledges, "the government previously argued in this case that the FISC's rules barred it from releasing FISC opinions under FOIA." ACLU Br. at 4 n.2 (citing Second Supp. Bradley Declaration ¶ 12 (ECF No. 55)). At that time, the government understood the FISC rules—specifically Rule 62(b) and Rule 62(c)(1)—to prohibit it from releasing any FISC opinions or orders, or portions of such opinions or orders, without a FISC order. Second Supp. Bradley Declaration ¶ 12 (ECF No. 55). Accordingly, the government previously withheld in full all of the responsive FISC opinions and orders so as not to contravene the FISC's own rules and procedures. While the ACLU is correct that the FISC has since clarified that its rules do not independently prevent the government from releasing any portion of a FISC record, *see* ACLU Br. at 4 n.2 (citing *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, No. Misc. 13-02 (FISC Sept. 13, 2013)), it adduces nothing to indicate that the government's position prior to the FISC's clarification was taken in bad faith.[3]

[3] One of the few responsive documents that is unrelated to the NSA's association with Section 215 and that the government previously had withheld in full, but subsequently released in redacted form, is a supplemental order analyzing whether the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422, prohibited the collection of financial records under Section 215. *See* Supplemental Order (Sims Declaration, Ex. 5). Although this document is no longer at issue in this case, the ACLU cites this FISC order as an example of a document that it suggests should have been released previously. *See* ACLU Br. at 24-25. While this document was marked SECRET, and still contains information that is currently and properly classified, its classification designations did not implicate the NSA, and it was not withheld in full for that reason. Rather, it was withheld in full at that time based on the government's good-faith understanding of the FISC's rules and procedures. It has since been released with redactions.

B. The Government's Discretionary Release of Previously Classified Information Demonstrates the Government's Commitment to Transparency and is Further Evidence of Its Good Faith

The government in this case has taken the extraordinary step of declassifying and releasing the vast majority of the records responsive to the ACLU's FOIA request. To date, the government has released more than "2,400 pages of material related to intelligence surveillance activities under the Section 215 telephony metadata collection program," First Hudson Declaration

¶ 27, and only a relatively small number of records remain at issue in this litigation. As explained in the First Hudson Declaration, the "overarching policy goal" of the government's effort to review, declassify and release information related to Section 215 is to "inform the public as much as possible, consistent with protecting the national security, for the purpose of fostering an informed public debate and restoring public confidence that surveillance intelligence programs are lawful, properly authorized, and conducted in a manner consistent with the privacy and civil liberties of Americans." *Id.* ¶ 25. Rather than acknowledge the government's demonstrated commitment to transparency on these issues, the ACLU attempts to use the government's release of information against it, arguing instead that the government's voluntary releases of information constitute bad faith. *See, e.g.,* ACLU Br. at 1-2. But courts have soundly rejected such arguments, noting that the government's voluntary release of substantial amounts of responsive documents suggests "a stronger, rather than a weaker, basis for the classification of those documents still withheld." *Military Audit Project,* 656 F.2d at 754.

As courts have noted, the public is ill-served by a plaintiff's efforts to force disclosure of further specific, classified details where considerable public disclosures have been made. Compelled disclosure of the details that remain classified would discourage public officials from

discussing important national security matters even in broad generalities. *See Bassiouni v. CIA*, 392 F.3d at 247 ("And [the FOIA requestor] is better off under a system that permits the CIA to reveal some things . . . without revealing everything; if even a smidgen of disclosure required the CIA to open its files, there would be no smidgens."). In *Military Audit Project*, the plaintiff made an argument virtually identical to the one advanced by the ACLU here; namely, that by voluntarily releasing information that it previously had withheld, the government "admitted that it was initially in error, from which it follows that the agency is fallible, and its affidavits, suspect." 656 F.2d at 754. The D.C. Circuit "emphatically reject[ed] this line of argument," noting that "[i]f accepted, it would work mischief in the future by creating a disincentive for an agency to reappraise its position, and when appropriate, release documents previously withheld. It would be unwise for [courts] to punish flexibility, lest we provide the motivation for intransigence." *Id.*

Contrary to the ACLU's assertions, therefore, the government's discretionary decision to declassify and release information demonstrates, rather than undermines, its good faith. *See ACLU v. DOD*, 628 F.3d 612, 627 (D.C. Cir. 2011) (finding "the government demonstrated good faith by voluntarily reprocessing the documents after the President declassified the OLC memoranda and the CIA Inspector General's report," and declining "to penalize a government agency for voluntarily reevaluating and revising its FOIA withholdings").

III. *In Camera* Review is Unwarranted

There is no need for the Court to undertake *in camera* review of the documents at issue. In FOIA cases, "[i]n camera review is considered the exception, not the rule." *ACLU v. ODNI*, No. 10 Civ. 4419 (RJS), 2011 WL 5563520, at *12 n.9 (S.D.N.Y. Nov. 15, 2011). "*In camera* inspection is particularly a last resort in 'national security' situations like this case," and "a court

should not resort to it routinely on the theory that 'it can't hurt.'" *Donovan v. FBI*, 806 F.2d 55, 59 (2d Cir. 1986) (internal quotation marks omitted) (citing *Weissman v. CIA,* 565 F.2d 692, 697 (D.C. Cir. 1977), *Ray v. Turner,* 587 F.2d 1187, 1195 (D.C. Cir. 1978)); *Wilner*, 592 F.3d at 76.

Here, the government's declarations, which are entitled to substantial deference, provide the Court with sufficient information to evaluate the basis for the government's withholdings even without *in camera* review. *See Larson*, 565 F.3d at 870 (noting that "when an agency meets its burden by means of affidavits, *in camera* review is neither necessary nor appropriate" (internal quotation marks omitted)). Furthermore, the burden on the Court would not be insignificant. While the precise number of documents at issue is classified and cannot be discussed on the public record, the government has acknowledged that there are more than five. *See Donovan*, 806 F.2d at 59 ("Most often, *in camera* inspection has been found to be appropriate when only a small number of documents are to be examined."). Nor is there any evidence in the record of bad faith on the part of the government. *See supra* Part II.

The government's declarations in this case include the Classified Hudson Declaration and accompanying materials. Should the Court direct the government to provide the withheld documents for *in camera* review, the government will, of course, promptly arrange to make the documents in question available consistent with established procedures for the handling of classified information. In the interests of judicial economy, however, and consistent with the case law, the government urges the Court to fully consider the government's *ex parte*, classified submission before resorting to *in camera* review of the withheld documents.

Although the ACLU has argued that the Court should not consider the government's *ex parte* submission, asserting that the government seeks to "substitute a classified declaration for the detailed public submissions ordinarily required by FOIA," ACLU Br. at 22 n.10, the

government's classified submission is entirely proper in this case. The government has submitted robust public declarations in support of its withholdings. *See generally* First Hudson Declaration and Supplemental Hudson Declaration. Nevertheless, the government believes that the Court's review would be aided by the additional explanation of the government's withholdings in the Classified Hudson Declaration. The explanation in the Classified Hudson Declaration, however, is itself classified and its release would risk harm to national security. The declaration therefore must be submitted *ex parte* to protect the compelling interest in preventing public disclosure of sensitive and classified information. *ACLU v. DOJ*, 681 F.3d at 70 (discussing review of government's *ex parte* classified declarations).

In light of this compelling interest, courts have consistently recognized (and exercised) their "inherent authority to review classified material *ex parte*, in camera as part of [their] judicial review function." *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004). While Plaintiff is unable to respond to the *ex parte* submission, in sensitive national security cases, "it is simply not possible to provide for orderly and responsible decisionmaking about what is to be disclosed, without some sacrifice to the pure adversary process." *Hayden v. NSA*, 608 F.2d 1381, 1385 (D.C. Cir. 1979); *see also In re New York Times Co.,* 577 F.3d 401, 410 n.4 (2d Cir. 2009).

CONCLUSION

The government's motion for summary judgment should be granted, and the ACLU's cross-motion for summary judgment should be denied.

Dated: New York, New York
May 30, 2014

Respectfully submitted,

PREET BHARARA
United States Attorney

By: /s/ John Clopper
JOHN D. CLOPPER
EMILY E. DAUGHTRY
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone: (212) 637-2716 (Clopper)
(212) 637-2777 (Daughtry)
Facsimile: (212) 637-0033
john.clopper@usdoj.gov
emily.daughtry@usdoj.gov