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12 **UNITED STATES DISTRICT COURT**
 13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 14 **OAKLAND DIVISION**

17 ELECTRONIC FRONTIER FOUNDATION,) Case No. 4:11-cv-05221-YGR
)
 18 Plaintiff,) **JOINT STATUS REPORT**
 v.)
 19)
 20 UNITED STATES DEPARTMENT OF)
 JUSTICE,)
 21)
 Defendant.)
 22)
 23)

24 The parties, plaintiff Electronic Frontier Foundation and defendant the United States
 25 Department of Justice, by and through their undersigned counsel, provide this Status Report in
 26 response to the Court’s Order dated June 11, 2013 (Dkt. No. 60). Counsel for the parties have
 27

1 conferred and were unable to agree on the appropriate next steps. The parties' respective
2 positions are set forth below.

3 **I. The Government's Position**

4 As noted in the parties' Stipulated Request, dated June 10, 2013 (Dkt. No. 59), in
5 response to the unauthorized disclosure of a top secret U.S. court document, the Director of
6 National Intelligence ("DNI") directed that certain information related to Section 215 of the USA
7 PATRIOT Act of 2001, codified at 50 U.S.C. § 1861 ("Section 215"), the "business records"
8 provision of the Foreign Intelligence Surveillance Act, be declassified and immediately released
9 to the public. *See* DNI Statement on Recent Unauthorized Disclosures of Classified Information,
10 available at [http://www.odni.gov/index.php/newsroom/press-releases/191-press-releases-
11 2013/868-dni-statement-on-recent-unauthorized-disclosures-of-classified-information](http://www.odni.gov/index.php/newsroom/press-releases/191-press-releases-2013/868-dni-statement-on-recent-unauthorized-disclosures-of-classified-information). As the
12 Court is aware, in this lawsuit brought pursuant to the Freedom of Information Act ("FOIA"),
13 plaintiff seeks certain records relating to Section 215.
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16 While the Government's previous withholdings of classified information in this case
17 were appropriate, in light of subsequent developments, the Government is currently engaged in
18 an inter-agency review process designed to assess what additional information, if any, can be
19 declassified consistent with the protection of national security.¹ The review process involves
20 coordination among the Office of the Director of National Intelligence and affected elements of
21 the intelligence community, as well as the Department of Justice, and includes review of
22 information in addition to that pertaining to Section 215. Because of the broad national security
23 interests at stake, the Government can neither review the records at issue in this lawsuit in
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27 ¹ Should the Court find it helpful, the Government is prepared to submit *ex parte* a
28 classified declaration in further support for the Government's request for an abeyance until
September 6, 2013.

1 isolation nor rush to judgment on their disclosure pursuant to FOIA. Rather, once the inter-
2 agency review process has reached a stage when updated judgments can reasonably be made
3 regarding the documents at issue, the Government will need to re-review the documents in order
4 to determine what, if any, information in these particular documents is no longer classified or
5 otherwise exempt from disclosure, and therefore will be released to the plaintiff pursuant to the
6 FOIA. Moreover, because of the equities involved, and national security interests at stake, all of
7 the documents potentially impacted by the process described above will require close scrutiny.
8 This will include line-by-line review and further inter-agency consultation. Until this process is
9 complete the Government cannot predict whether or how much information may ultimately be
10 released to the plaintiff. However, once the documents have been re-reviewed, the Government
11 anticipates that it will withdraw its current motion for summary judgment, and file a new motion
12 for summary judgment, supported by new declarations that take into account, as appropriate,
13 relevant information related to declassifications regarding the Government's program under
14 Section 215.
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17 Accordingly, the Government respectfully requests that the Court continue to hold the
18 pending cross-motions for summary judgment in abeyance until September 6, 2013, at which
19 time the Government will file another status report and will set forth a proposal for further
20 proceedings.² In the interim, the Government will continue to assess the impact of the
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23 ² Plaintiff suggests this Court instead adopt the schedule ordered by the Court in *EFF v.*
24 *Dep't of Justice*, Civ. No. 12-1441 (D.D.C.), which requires any further disclosure be made by
25 August 12, 2013. The Government did not consent to entry of that schedule and respectfully
26 submits it should not serve as a model here. That case involves five, related documents,
27 including a FISC order, a redacted version of that same order, a white paper containing one
28 responsive paragraph, and two statements presented at Congressional hearings. By contrast, the
Government's unclassified *Vaughn* index in this case identified 101 separate documents
including nineteen that contain one or more of the opinions and/or orders of the FISC that
plaintiff asks be reviewed by August 12, as well as 82 other documents that may include an
undetermined number of records that would also be subsumed by plaintiff's request for an

1 Government's recent declassification of information concerning intelligence collection pursuant
2 to Section 215 on both the arguments in the Government's pending Motion for Summary
3 Judgment and the underlying withholdings in this case. The requested period of abeyance
4 attempts to strike the appropriate balance between, on the one hand, moving this case forward to
5 a prompt final resolution and, on the other, affording the Government sufficient time to
6 coordinate the inter-agency review process described above in light of the significant equities
7 and public interests involved. While the Government anticipates that the re-review of documents
8 at issue in this case will extend beyond September 6, 2013, the Government anticipates that, by
9 that date, it will be better able to estimate the time for completing the re-review and for filing
10 briefs in support of renewed motions for summary judgment.
11

12 **II. The Electronic Frontier Foundation's Position**

13 In 2011, Senator Ron Wyden warned: "When the American people find out how their
14 government has secretly reinterpreted [Section 215 of the] PATRIOT Act, they are going to be
15 stunned and they are going to be angry." 157 Cong. Rec. S3386 (daily ed. May 26, 2011). On
16 June 6, the American people learned of the consequences of that secret reinterpretation — a
17 records collection program that gathers the private communications records of millions of
18 Americans. Now, Defendant asks this Court to allow a further, seemingly limitless delay in
19 releasing the legal interpretation that purportedly justify such a program. EFF urges this Court to
20 reject that request.
21

22 The ongoing, public debate on the scope and propriety of the government's surveillance
23 activities vitally depends on the public's access to the records at issue in this case — documents
24

25 August 12 production. Moreover, many of the officials who are reviewing documents as part of
26 the inter-agency review process discussed herein are the same officials required to re-review the
27 documents at issue in the D.D.C. litigation, and would also be the same officials required to re-
28 review documents in this case should the Court grant plaintiff's request. As noted in footnote 1,
supra, the Government is prepared to submit *ex parte* for *in camera* review a declaration
containing a further, classified discussion of the reasons the Government asks the Court to
continue to hold the cross-motions in abeyance until September 6.

1 containing “significant legal analysis or interpretation of Section 215.” Pl.’s Cross Mot. for
 2 Summ. J. at 5 (ECF No. 41). Now that the records collection program supported by Section 215
 3 has been publicly disclosed and confirmed by the government, *see* DNI Statement on Recent
 4 Unauthorized Disclosures of Classified Information (June 6, 2013),³ there is no valid basis for
 5 withholding the *legal analysis* on which that program rests.

6 Accordingly, EFF respectfully requests an order requiring Defendant, on or before
 7 August 12, 2013, to:

- 8 (1) Finalize any declassification determinations for the following responsive
 9 records at issue in this case:
 - 10 a) Significant opinions or orders of the FISC,⁴ and;
 - 11 b) Any significant documents, procedures, or legal analyses incorporated
 12 into FISC opinions or orders and treated as binding by the Department
 of Justice or the National Security Agency;⁵
- 13 (2) Release to Plaintiff any non-exempt portions of those records identified in
 (1)(a) and (b), and;
- 14 (3) Provide a schedule for the declassification review and production of the
 15 remaining responsive records at issue in this case.

16 EFF’s suggested course in this case is identical to the approach taken by Judge Jackson in *EFF v.*
 17 *Dep’t of Justice*, 12-cv-1441 (D.D.C. filed August 30, 2012), another EFF FOIA case concerning
 18 a separate aspect of the NSA’s domestic surveillance program. There, the government requested
 19 an identical, months-long and indeterminate stay of proceedings, which EFF opposed. *Id.* (ECF
 20 No. 14). By minute order on July 9, 2013, Judge Jackson rejected the government’s request,
 21 ordering it to “assess its position and make any additional disclosures it intends to make” by
 22 August 12, 2013. The same approach is equally justified here.

24 ³ Available at <http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/868-dni-statement-on-recent-unauthorized-disclosures-of-classified-information>

25 ⁴ EFF believes this includes, but may not be limited to, the following document numbers:
 26 30, 33, 35, 36, 39, 48, 51, 52, 53, 100, 101. *See* Second Supp. Decl. of Mark Bradley, 15-17, 22
 27 (ECF No. 51-1).

28 ⁵ EFF believes this includes, but may not be limited to, the following document numbers:
 16, 17, 31, 34, 37, 38, 42, 55, 76, 77, and 95. *See id.* at 13, 15-17, 19, 21 (ECF No. 51-1).

1 EFF respectfully urges this Court to reject the government's attempt to stifle public
2 debate on its domestic surveillance operations by delaying access to the documents at issue in
3 this case. The nation is in the midst of the most far-reaching public debate on surveillance since
4 the 1970s and the proceedings of the Church Committee. Further delay in this case curtails the
5 public's ability to make informed judgments about the legality and propriety of the NSA's
6 spying program. Such restriction is inconsistent with the principles animating FOIA and the
7 significant public interest in disclosure that exists here. If FOIA's fundamental purpose — "to
8 ensure an informed citizenry, vital to the functioning of a democratic society, needed to check
9 against corruption and to hold the governors accountable to the governed," *NLRB v. Robbins Tire*
10 *& Rubber Co.*, 437 U.S. 214, 242 (1978) — is to have any effect, it is in precisely these
11 circumstances that the law must be forcefully applied.
12

13 Defendant Has Had Ample Opportunity to Reconsider Its Position in This Case

14 On June 10, 2013, EFF agreed to a stipulated request of this Court to hold the summary
15 judgment motions in abeyance, (ECF No. 59), solely to provide Defendant the time and
16 opportunity to consider the effect of the government's declassification decisions on this case. By
17 August 12, 2013, the date EFF proposes for further action here, Defendant will have had over
18 two months to assess that effect. Defendant cannot blame disclosures of classified information
19 that occurred over a month ago to justify an indefinite delay in these proceedings. Two months
20 provides Defendant ample opportunity to review and release approximately twenty documents
21 providing the legal basis for an already-publicly disclosed and confirmed records collection
22 program.

23 In contrast, Defendant asks this Court to countenance an extension without end —
24 suggesting a vague and amorphous "inter-agency review process" must take place, followed by
25 "re-review" of the records at issue in this case, followed by a further "line-by-line" review of
26 records, then followed by yet *another* inter-agency review process. In effect, Defendant asks this
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1 Court to let public scrutiny and controversy subside before it takes action. Defendant provides no
2 valid justification for such a delay.⁶

3 Indeed, and in contrast to the extended delay proposed by Defendant, the government has
4 been able to marshal rapid — and public — responses to disclosures in the face of public
5 criticism, often taking steps to *immediately* declassify information. Defendant provides no reason
6 that the government may not proceed with similar promptness here. For example, on June 6,
7 2013, the *Guardian* and *Washington Post* published previously classified documents —the
8 Section 215 FISC order as well as records concerning surveillance under Section 702 of the
9 FISA Amendments Act. That *same day*, the Director of National Intelligence (“DNI”) released
10 two statements confirming and addressing the recent disclosures. *See* DNI Statement on Recent
11 Authorized Disclosures of Classified Information (June 6, 2013); DNI Statement on Activities
12 Authorized under Section 702 of FISA (June 6, 2013).⁷

13
14 Two days later, on June 8, the DNI posted a statement and accompanying three-page
15 “fact sheet,” providing further description of surveillance activities under Section 702 of FISA.
16 *See* DNI Statement on the Collection of Intelligence Pursuant to Section 702 of the Foreign
17 Intelligence Surveillance Act (June 8, 2013);⁸ DNI, *Facts on the Collection of Intelligence*
18 *Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* (June 8, 2013).⁹ The DNI’s
19 statement specifically noted that information within the fact sheet had been “declassified for
20 release” in order to “add necessary context to what has been published.” *Id.* Additionally,
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22 ⁶ Making matters worse, Defendant offers to explain its request for an open-ended delay
23 through an *in camera*, *ex parte* filing. Defendant provides *no* reason — let alone a reason
24 sufficient to overcome the normal practice of public filings in the courts — for its inability to
25 explain itself on the public record.

26 ⁷ Available at <http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/869-dni-statement-on-activities-authorized-under-section-702-of-fisa>

27 ⁸ Available at <http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/872-dni-statement-on-the-collection-of-intelligence-pursuant-to-section-702-of-the-foreign-intelligence-surveillance-act>

28 ⁹ Available at <http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/872-dni-statement-on-the-collection-of-intelligence-pursuant-to-section-702-of-the-foreign-intelligence-surveillance-act>

1 administration officials have provided more detail on the NSA's programs in press briefings,
2 interviews, and sworn Congressional testimony over the past month. Administration officials
3 have thus shown an ability to rapidly and publicly responded to recent disclosures in an attempt
4 to quell public criticism: Defendant provides no reason that it cannot act with similar immediacy
5 here.

6 And, in other litigation, the government has been able to promptly address the effect of
7 the government's confirmations and, accordingly, has declassified information in light of those
8 confirmations. On June 14, 2013, a communications provider filed a motion with the FISC
9 seeking publication of a decision to which it was a party. *See Provider's Unclassified Motion*
10 *Under FISC Rule 62 for Publication of this Court's Decision and Other Records*, Dkt. No.
11 105B(g07-01) (filed June 14, 2013).¹⁰ A mere eleven days later, the government was able to
12 respond and confirm that information the provider sought to disclose had been declassified:
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14 The Government has already determined that, pursuant to EO 13526 section
15 3.1(d) and the public interest in disclosure of the information in the Motion and
16 due to specific facts related to Movant and to statements that the Government has
made in response to recent unauthorized disclosures, the identity of Movant and
its association with this case can now be declassified.

17 *United States' Response to Provider's Motion Under FISC Rule 62 for Publication of this*
18 *Court's Decision and Other Records*, Dkt. No. 105B (g07-01), at 1-2 (filed June 25, 2013).¹¹

19 The government has thus demonstrated that, when it serves its perceived interests, it can
20 conduct prompt declassification reviews. *See* DNI Statement on Recent Authorized Disclosures
21 of Classified Information (June 6, 2013). It has also demonstrated its ability to act quickly in
22 response to pending litigation. Defendant offers no reason that its classification review of the
23 records at issue in this case cannot be conducted in similar fashion.
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28 ¹⁰ Available at <http://www.uscourts.gov/uscourts/courts/fisc/105b-g-07-01-motion-130614.pdf>

¹¹ Available at <http://www.uscourts.gov/uscourts/courts/fisc/105b-g-07-01-motion-130625.pdf>

1 The Public’s Vital Interest in Disclosure of Responsive Records Warrants Proceeding
2 Expediently in the Case

3 Over two years ago, Defendant acknowledged that an “urgency to inform the public”
4 existed about the records at issue in this lawsuit. *See* First Amended Complaint ¶¶ 15, 17, 20, and
5 30. (ECF No. 9) (describing agency grants of expedited processing). Yet today — two years
6 later — Defendant has failed to disclose even *a single record* shedding light on the ultimate
7 focus of this suit: the secret legal analysis the government relies on to collect the telephone
8 records of millions of innocent Americans. With legislation pending before Congress and an
9 ongoing, national public debate, the “urgency to inform the public” about Section 215’s secret
10 interpretation remains as compelling today as it was two years ago.

11 Thus, further delay in this case is unwarranted and is in neither the public’s nor EFF’s
12 interest. Defendant provides no valid justification for the lengthy and indefinite delay it requests.
13 Accordingly, EFF respectfully requests the Court enter an order requiring Defendant, on or
14 before August 12, 2013, to: (1) finalize its classification review of specific records; (2) release
15 any non-exempt portions of those records; and (3) provide a schedule for the production of the
16 remaining responsive records at issue in this case.

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18 *****

19 Dated: July 12, 2013

 Respectfully submitted,

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21 Principal Deputy Assistant Attorney General

22 MELINDA HAAG
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25 Deputy Director, Federal Programs Branch

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13 **DECLARATION**

14 I, Steven Y. Bressler, hereby declare that I have obtained the concurrence in the filing of
15 this document from the other signatory listed above. I declare under penalty of perjury that the
16 foregoing is true and correct. Executed this 12th day of July, 2013, at Washington, D.C.

17 /s/ Steven Y. Bressler
18 STEVEN Y. BRESSLER
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