

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
AMERICAN CIVIL LIBERTIES UNION;)	
ELECTRONIC PRIVACY INFORMATION)	
CENTER; AMERICAN BOOKSELLERS)	Civil Action No.
FOUNDATION FOR FREE EXPRESSION;)) 1:02CV2077 (ESH)
FREEDOM TO READ FOUNDATION,)	
)	(Judge Ellen Segal Huvelle)
Plaintiffs)	
)	
v.)	
)	
UNITED STATES DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
_____)	

ORDER

Upon consideration of Defendant's Motion for Summary Judgment on Behalf of the FBI, and any response thereto, and the record of this motion and this case, it is

HEREBY ORDERED THAT Defendant's Motion is hereby GRANTED and summary judgment on behalf of the Federal Bureau of Investigation is hereby ENTERED.

SO ORDERED:

DATE: _____

Judge Ellen Segal Huvelle
United States District Judge

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DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON BEHALF OF THE FBI

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant United States Department of Justice respectfully moves the Court to enter summary judgment on behalf of the Department of Justice's Federal Bureau of Investigation on plaintiffs' claims pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq., as there are no genuine issues of material fact regarding the FBI's compliance with the FOIA in responding to plaintiffs' FOIA request. The accompanying Memorandum of Law more fully sets forth the reasons that support Defendant's Motion for Summary Judgment on Behalf of the FBI.

Respectfully submitted,

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March 7, 2003

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**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON BEHALF OF THE FBI**

INTRODUCTION

On January 24, 2003, the Department of Justice ("DOJ" or the "Department") filed a motion for partial summary judgment, on behalf of the Department's Offices of Information and Privacy and Intelligence Policy and Review ("OIP" and "OIPR"), in this FOIA case in which plaintiffs seek records concerning the Department's implementation of the USA Patriot Act. The Department now moves for summary judgment on behalf of the third DOJ component that processed plaintiffs' FOIA request, the Federal Bureau of Investigation ("FBI"). Like OIP and OIPR, the FBI produced responsive records to plaintiffs and withheld a limited amount of information pursuant to well-established FOIA exemptions. Having complied with its FOIA obligations, the FBI is entitled to summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Much of the relevant factual and procedural background is the same as that recited in the Memorandum of Law in Support of Defendant's Motion for Partial Summary Judgment ("OIP and OIPR's brief"), as is much of the legal argument. The Department incorporates herein by reference the factual and procedural background section from OIP and OIPR's brief, and will tailor this section to the facts and procedural history relevant to the FBI's response to plaintiffs' FOIA request.

Plaintiffs' FOIA request, submitted to OIP and the FBI on August 21, 2002, sought three categories of records related to the Department's implementation of the new USA Patriot Act (the "Act"). (Ex. 1 to Def's Motion for Partial Summary Judgment on behalf of OIP and OIPR). The first category (request no. 1) sought records related to the Department's classified answers to certain questions posed in a letter to the Attorney General, dated June 13, 2002, from Representatives Sensenbrenner and Conyers, Chairman and Ranking Member of the House Committee on the Judiciary, regarding the Department's implementation of the Act. (Id.; Ex. 3 to Def's Motion for Partial Summary Judgment on behalf of OIP and OIPR). The second category (request nos. 2-6) sought policy directives or guidance issued by the Department regarding the use of authority granted by certain provisions of the Act. (Ex. 1 to Def's Motion for Partial Summary Judgment on behalf of OIP and OIPR). The third category (request nos. 7-14) sought records showing the frequency with which the Department had sought to apply or rely upon various provisions of the Act. (Id.).

In response to plaintiffs' FOIA request, the FBI conducted a comprehensive, thorough search for responsive records, which included system-wide searches as well as individualized

inquiries to those offices most likely to contain responsive records. The details of the FBI's search are set forth in the attached Revised Second Declaration of Christine Kiefer ("Sec. Kiefer Decl.") at ¶¶ 4-9. Plaintiffs have informed the Department that they do not challenge the adequacy of the FBI's search. (March 4, 2003 letter from plaintiffs' counsel Jameel Jaffer, attached hereto as Exhibit A).

The FBI released a total of 157 pages of documents to plaintiffs. These documents were released as they were discovered and processed, as follows: 23 pages by letter dated November 14, 2002; 14 pages by letter dated January 16; 41 pages by letter dated January 31, 2003; and 79 pages by letter dated February 21, 2003. (Sec. Kiefer Decl. at ¶ 10). Some of these pages were redacted in part pursuant to certain FOIA exemptions, and 50 pages were withheld in full based on FOIA exemptions. (*Id.* at ¶¶ 10, 11).

On March 3, 2003, pursuant to the parties' agreement and the Court's Order entered March 4, 2003, the FBI provided plaintiffs with a Vaughn declaration explaining in detail the nature of the information that was withheld and the bases and rationale for withholding information. The FBI's Vaughn declaration, with Exhibits I-IV, is attached hereto.¹ The FOIA exemptions asserted by the FBI as grounds for nondisclosure of information are Exemptions 1, 2, 5, 7(C) and 7(E).

On March 4, 2003, plaintiffs informed the Department which exemptions they intend to challenge. As stated above, plaintiffs do not challenge the adequacy of the FBI's search. They challenge the FBI's assertion of Exemptions 1, 2, 5 and 7(E), but only with respect to certain

¹The Second Declaration of Christine Kiefer has been modified slightly since it was provided to plaintiffs, and is therefore entitled "Revised Second Declaration of Christine Kiefer."

pages of the release. (Ex. A). The specific pages and exemptions challenged will be discussed below.

ARGUMENT

The FBI incorporates herein by reference the introductory argument section from OIP and OIPR's brief concerning the framework of FOIA, summary judgment standards applicable in a FOIA case, and deference afforded agency affidavits in a FOIA case. (OIP and OIPR's brief at 8-9). The Vaughn declaration submitted by the FBI demonstrates that the FBI properly withheld sensitive information pursuant to FOIA's Exemptions 1, 2, 5 and 7(E).

I. THE FBI PROPERLY WITHHELD CLASSIFIED INFORMATION PURSUANT TO FOIA'S EXEMPTION 1.

Exemption 1 protects records that are: (1) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and (2) are in fact properly classified pursuant to Executive Order. See 5 U.S.C. § 552 (b)(1). Substantial weight is accorded to an agency's determination that potential harm merits classification of particular information. See, e.g., Frugone v. CIA, 169 F.3d 772, 775 (D.C. Cir. 1999); Taylor v. Dep't of the Army, 684 F.2d 99, 109 (D.C. Cir. 1982); Military Audit Project v. Casey, 656 F.2d 724, 745 (D.C. Cir. 1981); Washington Post v. DOD, 766 F. Supp. 1, 6-7 (D.D.C. 1991). As such, summary judgment for the government in an Exemption 1 FOIA action should be granted on the basis of agency affidavits if they simply contain "reasonable specificity" rather than conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith. Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980).

The Executive Order currently in effect is Executive Order ("E.O.") 12958, "Classified National Security Information." An agency can demonstrate that it has properly withheld information under Exemption 1 if it establishes that it has met the substantive and procedural requirements of E.O. 12958. Substantively, the agency must show that the records at issue logically fall within the exemption, *i.e.*, that E.O. 12958 authorizes the particular information sought be kept secret in the interest of national defense or foreign policy; procedurally, the agency must show that it followed the proper procedures in classifying the information. See Salisbury v. United States, 690 F.2d 966, 970-73 (D.C. Cir. 1982); Military Audit Project, 656 F.2d at 737-38.

Plaintiffs challenge the FBI's assertion of Exemption 1 on the following pages of produced documents, which are attached to the Second Kiefer Declaration as Exhibits I and II:²

Exhibit I: page nos. 1-5, 30 and 77-78³

Exhibit II: page nos. 38-43

The Second Kiefer Declaration, supplemented by individual narratives explaining each Exemption 1 withholding (attached as Exhibit IV to Sec. Kiefer Decl.), shows that the FBI has amply complied with the procedural and substantive requirements of E.O. 12958. The FBI conducted a two-tiered classification review of the information at issue. Ms. Kiefer, who has

²The documents released by the FBI to plaintiffs on February 21, 2003, are contained in Exhibit I. Exhibit II contains those documents previously released by the FBI to plaintiffs on November 14, 2002, January 16, 2003, and January 31, 2003. Exhibit III contains one document not previously released to plaintiffs, for which no exemptions were claimed and therefore no challenges are asserted. (Sec. Kiefer Decl. at ¶¶ 10-13; Ex. A).

³Exhibit I contains 29 numbered pages that were released to plaintiffs with redactions. Pages numbered 30-79 were withheld in full and thus do not appear as part of Exhibit I. (See "Deleted Page Information Sheet" following page 29, Exhibit I).

original classification authority, personally and independently examined each and every page of the documents over which the FBI has claimed Exemption 1 as the basis for withholding information. (Sec. Kiefer Decl. at ¶ 26). She made sure that the procedural requirements of E.O. 12958 were followed. (*Id.* at ¶¶ 23-24).

After reviewing the documents, Ms. Kiefer determined that they satisfied the classification criteria of E.O. 12958. (*Id.* at ¶ 26). Specifically, Ms. Kiefer concluded that disclosure of the information would reveal intelligence activities or methods of the FBI and therefore that the information was properly classified under Section 1.5(c) of E.O. 12958, related to intelligence activities, sources or methods. (*Id.*). In addition to Ms. Kiefer's classification review, each of the claimed Exemption 1 withholdings were reviewed and approved by DOJ's Department Review Committee. ("DRC"). The DRC is the FBI's appellate authority with respect to the implementation and administration of E.O. 12958. As such, it provides an additional review of the FBI's classification review process. The DRC approved each of the Exemption 1 withholdings claimed by the FBI in this case. (Sec. Kiefer Decl. at ¶¶ 11, 25).

Ms. Kiefer explains in her declaration how the withheld information, if released, would reveal intelligence activities and methods currently being utilized by the FBI, and how such disclosure could reasonably be expected to cause serious damage to national security. (*Id.* at ¶¶ 27-28). The nature of the information withheld in each page over which the FBI has claimed Exemption 1, and the reasons why disclosure of the information would reveal intelligence activities or methods, are further described in as much detail as possible, given the national security concerns, in the page-by-page narratives attached as Exhibit IV to the second Kiefer declaration. (See Exhibit IV to Sec. Kiefer Decl.; Sec. Kiefer Decl. at ¶¶ 29-31). The declaration

and narratives together establish that E.O. 12958 authorizes that the particular information challenged here – the Exemption 1 withholdings on pages 1-5, 30 and 77-78 of Exhibit I, and in pages 38-43 of Exhibit II – be kept secret in the interest of national security. See Salisbury, 690 F.2d at 970-73; Military Audit Project, 656 F.2d at 737-38.

The information withheld as classified on pages 1 and 2 of Exhibit I consists of a report listing "Court-authorized FISAs active within a specific time frame." (Ex. IV at 1). The Foreign Intelligence Surveillance Act ("FISA") authorizes certain techniques for use against clandestine intelligence and international terrorist activities. (See Declaration of James A. Baker at ¶ 16, submitted in support of OIP and OIPR's motion for summary judgment). A "FISA" refers to a court order issued pursuant to the FISA which authorizes the use of a FISA technique in a particular investigation. The withheld information on pages 1 and 2 includes "the specific target of each FISA; the file number assigned to each Foreign Counterintelligence/International Terrorism ("FCI/IT") investigation involving the FISA; the specific field office or office of origin where the investigation is ongoing; the authorization and expiration dates of each listed FISA; and the total number of FISAs." (Ex. IV at 1).

Ms. Kiefer explains in her narrative how disclosure of the information on pages 1 and 2 could reveal the scope and thrust of the FBI's intelligence activities and methods. The withheld information includes information about individual FCI/IT investigations, such as the target of the investigation, the type of investigation, and the FBI field office associated with the investigation, as well as aggregate information about the FBI's FISA activity. The disclosure of all of this information could lead to the exposure of actual, current intelligence operations, and to the exposure of the FBI's intelligence activities or methods, all with negative consequences for

national security, for all the reasons detailed by Ms. Kiefer. (Ex. IV at 1-3).⁴

Similarly, pages 3 and 4 of Exhibit I are a report concerning orders authorizing pen registers since October 26, 2001. (Ex. IV at 5-6). A pen register is an investigative tool authorized under 18 U.S.C. § 3123 of the Patriot Act or under the FISA (50 U.S.C. § 1801 et seq.). The withheld information consists of project numbers, which are numbers chronologically assigned to each request by an FBI field office to FBI Headquarter's National Security Law Unit ("NSLU"), OGC, for the issuance of a pen register; the completion date of each pen register; and the total number of pen registers issued since October 26, 2001. As with the FISA report, release of this report on pen register activity could reveal the scope and thrust of the FBI's intelligence activities and methods, with harmful consequences to national security. (Ex. IV at 5-6). As Ms. Kiefer states:

The release of this information could permit hostile governments to accurately evaluate the FBI's counterintelligence capabilities during a particular time frame, and [conduct] an evaluation of hostile intelligence plans and programs that have or have not been compromised. This would allow hostile agents to devise countermeasures to circumvent these intelligence activities and render them useless in providing intelligence information, as well as make present and prospective U.S. counterintelligence operations more difficult if not impossible.

(Id. at 6).

Page 5 of Exhibit I contains a similar report, with similar information, on the number of requests pursuant to the FISA to obtain business records made since October 26, 2001. The

⁴We note that OIPR also withheld this type of information pursuant to Exemption 1 – that is, information concerning the frequency or manner of use of specific techniques authorized under FISA for use against clandestine intelligence and international terrorist activities. See OIP and OIPR's brief at 13-14; Baker Decl. at ¶¶ 15-23.

withheld information consists of project numbers, "which are numbers chronologically assigned to each FISA request from the field offices to the National Security Law Unit at FBI Headquarters, the date the NSLU received each request and the total number of requests received since 10/26/2001." (Ex. IV at 7). Disclosure of this information too could reveal the existence, method and time frame of FBI counterintelligence activities, which could in turn adversely impact the FBI's intelligence gathering capabilities and the national defense. (Id. at 7-8).

The FBI withheld as classified from page 30 of Exhibit I handwritten information about the total number of National Security Letters ("NSLs") that were authorized within specific time periods. (Ex. IV at 9). NSLs are tools available in investigations conducted under the Attorney General guidelines for FBI foreign intelligence collection and foreign counterintelligence investigations. They are administrative subpoenas that can be utilized to obtain several types of records. Again, disclosure of statistics about the FBI's use of NSLs during a specific time period could reveal the scope and thrust of the FBI's intelligence activities and methods, and this information is properly considered classified. (Id. at 9-10). For all the same reasons, the FBI withheld as classified a computer-generated report on the FBI's use of NSLs. This information, which is contained in pages 38-43 of Exhibit II, identifies project numbers (numbers chronologically assigned to each request to FBI headquarters for the issuance of an NSL) and the date that FBI headquarters approved and issued the NSL. (Id. at 67-68).

Finally, the information withheld from pages 77 and 78 of Exhibit I is of the same nature – information that indicates the approximate number of times each investigatory tool authorized under the Patriot Act has been utilized by the FBI in its intelligence gathering operations. (Ex. IV at 63). Disclosure of this information could identify the FBI's specific intelligence activities

and methods and how aggressively the FBI is utilizing those activities and methods, which could permit hostile entities to evaluate and disrupt the FBI's counterintelligence activities in the ways described by Ms. Kiefer. (Id. at 63-64).

II. THE FBI PROPERLY WITHHELD INFORMATION PROTECTED BY THE DELIBERATIVE PROCESS PRIVILEGE AND THE ATTORNEY-CLIENT PRIVILEGE UNDER FOIA'S EXEMPTION 5.

Exemption 5 exempts from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 incorporates the privileges available to an agency in civil litigation; the three principal privileges are the deliberative process privilege, the attorney-client privilege, and the attorney work-product doctrine. See United States v. Weber Aircraft Corp. , 465 U.S. 792, 799-800 (1984); National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); Florida House of Representatives v. Dep't of Commerce, 961 F.2d 941, 944-45 (11th Cir.), cert. dismissed, 506 U.S. 969 (1992). The FBI withheld certain information pursuant to Exemption 5 based on the deliberative process and attorney-client privileges.

Deliberative Process Privilege

The deliberative process privilege exempts from mandatory disclosure documents that reflect predecisional agency deliberations. See NLRB, 421 U.S. at 150-52; Wolfe v. Dep't of Health & Human Servs., 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc). The privilege is based on the recognition that public disclosure of predecisional, deliberative documents would harm the quality of agency decision-making. Florida House of Representatives, 961 F.2d at 944. "The

deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government." Dep't of Interior v. Klamath Water Users Protective Assoc., 532 U.S. 1, 8-9 (2001) (internal quotations and citation omitted). The purpose of the deliberative process privilege is to "encourage the frank discussion of legal and policy issues" and "protect[] the decisionmaking processes of government agencies." Wolfe, 839 F.2d at 773 (internal quotations and citation omitted). It also serves "to ensure that a decisionmaker will receive the unimpeded advice of his associates." Florida House of Representatives, 961 F.2d at 947 (emphasis in original) (citing Federal Open Market Comm. v. Merrill, 443 U.S. 340 (1979)).

Documents falling within the deliberative process privilege include those "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." NLRB, 421 U.S. at 150 (internal quotations and citations omitted). These documents must be both predecisional and deliberative. See Florida House of Representatives, 961 F.2d at 945. "In deciding whether a document should be protected by the privilege we look to whether the document is 'predecisional' [-] whether it was generated before the adoption of an agency policy [-] and whether the document is 'deliberative' [-] whether it reflects the give-and-take of the consultative process." Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). "There should be considerable deference to the [agency's] judgment as to what constitutes. . . 'part of the agency give-and-take – of the deliberative process – by which the decision itself is made.'" Chemical

Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. 114, 118 (D.D.C. 1984) (quoting Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975)). The agency is best situated "to know what confidentiality is needed 'to prevent injury to the quality of agency decisions . . . while the decisionmaking process is in progress.'" Id. at 118 (quoting NLRB, 421 U.S. at 151).

Plaintiffs challenge the FBI's invocation of the deliberative process privilege over the following pages of documents:

Exhibit I: pages 30-79

Exhibit II: pages 36-37⁵

As the FBI's Vaughn declaration makes clear, pages 30-79 of Exhibit I include a collection of emails, memoranda and handwritten notes protected from disclosure by the deliberative process privilege. (Sec. Kiefer Decl. at ¶¶ 37-41; Declaration of Charles M. Steele, Deputy General Counsel, OGC, FBI, at ¶¶ 6-11 ("Steele Decl.")). These documents reflect an internal dialogue about the FBI's implementation of the Patriot Act's investigative tools and ways in which new legislation could refine or improve the tools provided by the Patriot Act – a dialogue that was initiated by the Investigative Law Unit of the FBI's Office of General Counsel in response to Congressional inquiries. The dialogue that is captured in the withheld emails, memoranda and handwritten notes was between and among OGC attorneys, field office Special Agents and field office Chief Division Counsels. It is part of a larger, still ongoing, internal DOJ dialogue occurring in response to Congressional inquiries regarding the use of the Patriot Act's

⁵The information in pages 36-37 of Exhibit II was withheld pursuant to Exemption 5 by OIPR and OIP. (Sec. Kiefer Decl. at ¶ 46 n. 11). The substance of this information and the reasons for withholding it are discussed in the Exemption 5 sections of the declarations filed by OIPR and OIP. (See Declaration of James A. Baker, OIPR, at 13-15 (filed January 24, 2003); Second Declaration of Melanie Ann Pustay, OIP, at 8-10 (filed January 24, 2003)).

tools and the identification of potential new tools in the war against terrorism. (Sec. Kiefer Decl. at ¶ 37; Steele Decl. at ¶¶ 6, 8). Also included in pages 30-79 are two pages containing the notes and comments of the FBI's Deputy General Counsel Charles M. Steele, based in part on the internal dialogue between OGC attorneys and the field offices. These notes and comments are a collection of statistics, thoughts, ideas and proposals, and were prepared by Mr. Steele in order to formulate oral responses to Congressional requests for the FBI's feedback on the Patriot Act and potential future legislation. (Sec. Kiefer Decl. at ¶ 38; Steele Decl. at ¶ 9).

Significantly, the internal dialogue in pages 30-79 about the effectiveness of Patriot Act provisions, challenged by plaintiffs as not protected by the deliberative process privilege, is not responsive to plaintiffs' FOIA request. The responsive information in these pages, which consists only of a few lines of statistics regarding individual field office use of certain Patriot Act provisions, has also been classified and withheld under Exemption 1, but plaintiffs do not challenge these Exemption 1 withholdings. (Compare Ex. IV to Sec. Kiefer Decl. at 11-62, 65-66, describing Exemption 1 withholdings on pages 31, 33, 37, 39, 40-41, 42-43, 45, 46, 47, 49, 51, 52, 53, 54, 55, 56, 58-59, 68, 70, 71, 72, 73, 75, 76 and 79; with Jaffer letter (Ex. A), stating that plaintiffs do not challenge the invocation of Exemption 1 on these pages). Therefore, the responsive information in these pages is protected in any event by Exemption 1, and the non-responsive internal dialogue information is information that plaintiffs never asked for.

The internal dialogue contained in pages 30-79 is quintessential deliberative process material. The thoughts of FBI personnel about the usefulness of Patriot Act tools and their ideas for new or refined investigative tools manifestly "reflect[] the give-and-take of the consultative process" by which agency decisions are made. Coastal States Gas Corp., 617 F.2d at 866. The

discussions in these pages are clearly predecisional, as the process of identifying new tools in the war on terrorism is ongoing. (Steele Decl. at ¶ 8). Disclosure of this type of information would have an adverse impact on the give-and-take that is inherent in an agency's evaluation of its activities and development of proposed legislative changes. (Sec. Kiefer Decl. at ¶ 39; Steele Decl. at ¶ 10). The same is true of the two pages containing Mr. Steele's notes and comments on how various Patriot Act provisions have been used by the FBI and suggestions for legislative proposals. (Steele Decl. at ¶ 9). Documents which an agency decisionmaker himself prepared as part of his deliberations and decisionmaking process are protected by the deliberative process privilege. See Judicial Watch v. DOJ, 102 F. Supp. 2d 6, 14 (D.D.C. 2000).

Accordingly, the information in pages 30-79 of Exhibit I has been properly withheld as protected by the deliberative process privilege pursuant to Exemption 5.⁶

Attorney-Client Privilege

The attorney-client privilege protects confidential communications made between clients and their attorneys when the communications are for the purpose of securing legal advice or services. See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Fisher v. United States, 425 U.S. 391, 403 (1976); In re Sealed Case, 737 F.2d 94, 98-99 (D.C. Cir. 1984). The privilege applies to communications between agency counsel and agency officials and employees who are their clients. See, e.g., In re: Lindsey, 148 F.2d 1100, 1104-05 (D.C. Cir. 1998) (per curiam), cert. denied, 525 U.S. 996 (1998).

⁶As Mr. Steele explains, the FBI carefully reviewed these pages to determine whether any purely factual material could be segregated and released. He concluded that factual material in these pages was itself deliberative and was so intertwined with the remaining material that it could not be released. (Steele Decl. at ¶ 11; see also Sec. Kiefer Decl. at ¶ 40).

Information in pages 54-57 and 71-74 of Exhibit II has been withheld pursuant to the attorney-client privilege. The redacted information at pages 54-57 of Exhibit II is the same as the redacted information at pages 71-74 of Exhibit II. (Sec. Kiefer Decl. at ¶ 35 n. 1). The information is redacted from a document entitled "What do I have to do to get a FISA?" The FBI has withheld from this document legal advice to FBI personnel regarding the specific procedures and policies for application, review and approval of authorizations to conduct electronic surveillance or physical searches for foreign intelligence purposes pursuant to the FISA. (Id. at ¶ 35; pages 44, 63 of Exhibit II). The redacted material under the subtitle "Verification Procedures" includes an extensive, detailed discussion of initial field office responsibilities for putting together a FISA application. The redacted material under the subtitle "FISA Court's Rule 11" includes an extensive, detailed discussion of the FBI Headquarters supervisory special agent responsibilities in the FISA application process. (Sec. Kiefer Decl. at ¶ 41). The information redacted from both of these subsections contains advice and guidance from attorneys in the National Security Law Unit in OGC to FBI Special Agents concerning FISA verification procedures, rather than a mere recitation of governing law. (Id.). This constitutes confidential legal advice from attorneys to their clients (the document at pages 63-78 of Exhibit II is posted on FBI's intranet, access to which is restricted to FBI personnel). Application of the attorney-client privilege to this material is necessary and appropriate to promote candid exchanges between FBI attorneys and their clients. (Id.).

III. THE FBI PROPERLY WITHHELD INFORMATION RELATED TO ITS INTERNAL RULES AND PRACTICES UNDER FOIA'S EXEMPTION 2.

FOIA's Exemption 2 protects from disclosure "matters that are . . . related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). At issue here is what is known as "high 2," which protects information related to an agency's rules and practices that is predominantly internal, if its disclosure would significantly risk circumvention of statutes or regulations. See, e.g., Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1073-74 (D.C. Cir. 1981) (en banc) (holding a Bureau of Alcohol, Tobacco and Firearms training manual on surveillance techniques exempt from disclosure under Exemption 2). Information is "predominantly internal" if it was developed predominantly for internal use and does not constitute "secret law" – that is, it does not purport to regulate conduct among members of the public. See Crooker, 670 F.2d at 1073-74; Wiesenfelder v. Riley, 959 F. Supp. 532, 535 (D.D.C. 1997).

Plaintiffs challenge the FBI's assertion of "high 2" over the following pages of documents:

Exhibit I: pages 30-79⁷

Exhibit II: pages 54-57 and 71-74

As noted above, pages 54-57 and 71-74 of Exhibit II are part of a document entitled "What do I have to do to get a FISA?" The FBI has withheld from this document, at pages 54-57 and 71-74, legal advice to FBI Special Agents and support personnel regarding the specific

⁷Although (b)(2)-2 was checked on the deletion sheet for pages 30-79 of Exhibit I, upon further review, the FBI has determined that (b)(2)-2 does not apply to pages 30-79 of Exhibit I and is not claiming that exemption.

procedures and policies for application, review and approval of authorizations to conduct electronic surveillance or physical searches for foreign intelligence purposes pursuant to the FISA. (Id. at ¶ 35; pages 44, 63 of Exhibit II). These procedures include such things as language regarding file searches which should be conducted by FBI agents applying for FISAs, specific authorization forms and signatures required by FBI policy, and verification procedures to ensure the accuracy of FISA applications. (Id. at ¶¶ 35, 41).

The specific procedures used by FBI personnel to obtain FISAs relate to the FBI's internal rules and practices, do not regulate the public's conduct, and would risk circumvention of law if released to the public, and were therefore properly withheld pursuant to the "high 2" exemption. (Id.). Courts have upheld as exempt under "high 2" similar documents that provide guidance for agency personnel as to the procedures and practices related to a substantive aspect of their jobs. See, e.g., Dirksen v. U.S. Department of Health and Human Services, 803 F.2d 1456, 1458-59 (9th Cir. 1986) (holding medicare policy guidelines, used by claims processing personnel, exempt); Hardy v. Bureau of Alcohol, Tobacco & Firearms, 631 F.2d 653, 656-57 (9th Cir. 1980) (holding document instructing ATF personnel in conducting raids and searches exempt); Caplan v. Bureau of Alcohol, Tobacco & Firearms, 587 F.2d 544, 546-47 (2d Cir. 1978) (same); Wiesenfelder, 959 F. Supp. at 536-37 (holding trigger figures, error rates and amounts of fines used by Department of Education employees to determine whether educational institutions are in compliance with Title IV exempt); Institute for Policy Studies v. Department of the Air Force, 676 F. Supp. 3, 4-5 (D.D.C. 1987) (holding guide used by Air Force personnel to classify documents exempt); Cuneo v. Laird, 338 F. Supp. 504, 506 (D.D.C. 1972) (holding manual instructing Defense Department personnel in auditing contractors exempt). Guidance to FBI

personnel in the procedures used to obtain FISAs is particularly analogous to law enforcement manuals containing guidance on various subjects to law enforcement personnel, which courts have consistently protected from disclosure under the "high 2" exemption. See, e.g., Crooker, 670 F.2d 1051; Hardy, 631 F.2d 653; Caplan, 587 F.2d 544.

The FBI's internal procedures for obtaining FISAs are predominantly internal and do not purport to regulate the public. The "high 2" exemption recognizes that all internal agency rules and practices have some effect on the public. So long as information related to an agency's rules and practices is used for predominantly internal purposes and is not directed at regulating the public, it will be protected under "high 2." Crooker, 670 F.2d at 1073. The specific procedures utilized by the FBI in obtaining FISAs were developed and are used predominantly (indeed solely) for internal purposes and do not purport to regulate conduct among members of the public. See Crooker, 670 F.2d at 1073-74; Wiesenfelder, 959 F. Supp. at 535.

Moreover, release of the FBI's internal procedures for obtaining FISAs would risk circumvention of agency regulations or statutes. Ms. Kiefer explains that release of this information "could be expected to impede law enforcement efforts in that targets of such national security enforcement techniques [*i.e.*, FISAs] could use this information to avoid detection and defeat the effectiveness of such techniques." (Sec. Kiefer Decl. at ¶ 35).

IV. THE FBI PROPERLY WITHHELD INFORMATION REVEALING LAW ENFORCEMENT TECHNIQUES AND PROCEDURES UNDER FOIA'S EXEMPTION 7(E).

The same information about the FBI's procedures for obtaining FISAs discussed above is also exempt from release under FOIA's Exemption 7(E), pertaining to law enforcement techniques and procedures.

Exemption 7(E) protects from disclosure information compiled for law enforcement purposes where release of the information "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). In order to show that information was compiled for law enforcement purposes, an agency whose primary function is law enforcement, such as the FBI, must show that (1) the activity that gives rise to the documents is related to the enforcement of federal laws or the maintenance of national security; and (2) the nexus between the activity and one of the agency's law enforcement duties is based on information sufficient to support at least a "colorable claim" of its rationality. Keys v. DOJ, 830 F.2d 337, 440 (D.C. Cir. 1987); Pratt v. Webster, 673 F.2d 408, 420-21 (D.C. Cir. 1982); Blanton v. DOJ, 63 F. Supp. 2d 35, 44 (D.D.C. 1999). This exemption generally will not apply to information that is already well known to the public.

Information about the procedures used by the FBI in obtaining FISAs easily meets the test for withholding under Exemption 7(E). The activity of obtaining FISAs in connection with Foreign Counterintelligence/International Terrorism investigations is directly related to the FBI's law enforcement efforts to maintain national security by rooting out and preventing terrorism. FISAs constitute an essential tool in the war on terrorism. (Sec. Kiefer Decl. at ¶ 48). The nexus between the FBI's activity of securing FISAs and the goal of protecting national security could not be closer. Moreover, disclosure of the FBI's specific procedures for obtaining FISAs would reveal techniques and procedures used in law enforcement investigations, and such disclosure could reasonably be expected to risk circumvention of the law. (Id.). In addition, "[a]lthough the

existence of FISA procedures is publicly known, the specific internal application and approval procedures [followed by the FBI] are not commonly known." (Id.). Thus, the redacted procedures for obtaining FISAs are exempt under Exemption 7(E).

CONCLUSION

For all of the foregoing reasons, the Department of Justice respectfully requests that the Court enter judgment in its favor as a matter of law on the grounds that the FBI has fully complied with the FOIA in responding to plaintiffs' FOIA request and that all of the FBI's withholdings are proper.

Respectfully submitted,

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March 7, 2003

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2003, a true and correct copy of the foregoing Defendant's Motion for Summary Judgment on Behalf of the FBI, accompanying Memorandum of Law, Exhibits and Declarations, was served upon plaintiffs' counsel of record at the addresses listed below:

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