

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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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.	)	

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**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S**  
**MOTIONS FOR SUMMARY JUDGMENT**

**INTRODUCTION**

At issue in this FOIA case are the Department of Justice's ("DOJ") claims that certain classified information is protected by FOIA's Exemption 1 and that certain deliberative, predecisional information is protected by FOIA's Exemption 5. The information that plaintiffs' seek, and that DOJ has properly withheld, relates to the frequency with which the Government has sought to use particular investigative and surveillance techniques authorized by the Foreign Intelligence Surveillance Act ("FISA"), as amended by the USA Patriot Act. This information has long been treated by the Government as classified, for good reason, and now is no time to change that well-established practice. If released to the public, the information would provide our nation's adversaries with critical information about the Government's counterintelligence capabilities, targets and areas of relative safe harbor, and allow them

to avoid and defeat our counterintelligence efforts. This information is rightly classified in the interests of protecting our national security.

Plaintiffs' opposition to DOJ's motions for summary judgment fails to refute the Government's sound rationale for classifying the withheld information and for withholding deliberative, predecisional material. Much of plaintiffs' argument is simply irrelevant to the narrow issues before the Court. The Court should grant summary judgment in DOJ's favor.

### **SUMMARY OF CONTROVERTED ISSUES**

Through the course of this FOIA litigation, as DOJ released records responsive to plaintiffs' FOIA requests and submitted Vaughn declarations, plaintiffs evaluated the produced materials and DOJ's claimed FOIA exemptions, and both parties filed summary judgment briefs, the controverted issues have substantially narrowed. DOJ produced to plaintiffs numerous documents responsive to their request for certain information concerning DOJ's implementation of the USA Patriot Act and withheld certain sensitive information pursuant to well-established FOIA exemptions.

Plaintiffs now only challenge DOJ's assertions of Exemption 1 and Exemption 5 to protect information about the number of times that DOJ has used particular surveillance and investigatory tools authorized by the FISA during a specific time period. (See Memorandum in Support of Plaintiffs' Cross-Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment ("Plaintiffs' Brief") at 8-10). Plaintiffs have withdrawn their challenges to the other FOIA exemptions invoked to protect other sensitive information, as well as to the adequacy of DOJ's search. They further concede that information related to particular investigations, and information indicating the extent to which individual FBI field offices (as opposed to the FBI as a whole) have relied on particular

surveillance tools, is properly classified under Exemption 1. (Id. at 7-8).

The following specific documents remain at issue, to the extent that they contain statistical information indicating the extent to which the Government has relied upon particular FISA surveillance tools:

**Exemption 1:**

OIPR documents

DOJ's Classified Answers to the House Permanent Select Committee on Intelligence and certain pages from the Attorney General's Report to Congress on FISA relied upon in connection with DOJ's classified response to the June 13, 2002 letter from Representatives Sensenbrenner and Conyers. (See Plaintiffs' Brief at 9)

FBI documents

Pages 1-5, 30 and 77-78 of Exhibit I to the Revised Second Declaration of Christine Kiefer ("Sec. Kiefer Decl."); pages 38-43 to Exhibit II to the Sec. Kiefer Decl. (See Plaintiffs' Brief at 9-10, 24).

**Exemption 5:**

OIP documents

Portions of 26 pages of email messages and a handwritten note, generated by individuals in DOJ as they worked on responding to the Sensenbrenner and Conyers letter. (See Plaintiffs' Brief at 8).

OIPR documents

Six documents in full and portions of 18 documents, consisting of email messages generated by individuals in DOJ as they worked on responding to the Sensenbrenner and Conyers letter, and drafts generated in connection with OIPR's efforts to establish channels for disseminating classified FISA information, also in response to the Sensenbrenner and Conyers letter. (See Plaintiffs' Brief at 9; Declaration of James A. Baker ("Baker Decl.") at ¶¶ 24-26).

FBI documents

Pages 30-79 of Exhibit I to the Sec. Kiefer Decl., which reflect an internal dialogue about the FBI's implementation of the Patriot Act's investigative tools and possible

refinements to the Patriot Act. (See Plaintiffs' Brief at 26 n. 18).<sup>1</sup>

### **ARGUMENT**

At the risk of stating the obvious, this is a FOIA case. Plaintiffs challenge the Government's withholding of certain limited information as exempt under two exemptions to the FOIA – Exemption 1, related to information withheld as classified on national security grounds, and Exemption 5, related to information withheld pursuant to the deliberative process privilege. It is helpful at this stage of the case, particularly given the thrust of Plaintiffs' Brief, to emphasize what this case is not about. This case is not, nor could it be, a challenge to DOJ's cooperation with Congressional committees in their efforts to oversee DOJ's implementation of the Patriot Act. This case is not a referendum on the expanded investigatory powers Congress enacted under the Patriot Act, or on the Executive Branch's use of those powers, or on whether Congress should broaden or retract those powers. This case is not even about the public's ability to assess the Executive Branch's use of the Patriot Act powers. Much of Plaintiffs' Brief is devoted to these immaterial issues that simply have no bearing on the issues before the Court.

What this case is about is whether DOJ properly classified material pursuant to FOIA's Exemption 1 and Executive Order 12958, and whether DOJ properly segregated information in claiming the deliberative process privilege under Exemption 5. The portions of Plaintiffs' Brief that are relevant to the issues in the case fail to refute the detailed, reasonable declarations submitted by DOJ which demonstrate the necessity of withholding the challenged information pursuant to Exemptions 1

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<sup>1</sup>As the FBI explained in its summary judgment brief, pages 36-37 of Exhibit II to the Sec. Kiefer Decl. overlap with the materials withheld by OIP and OIPR. See FBI's Brief at 12 n. 5.

and 5.

I. PLAINTIFFS' ASSERTED NEED FOR THE WITHHELD INFORMATION, TO ADVANCE THE PUBLIC INTEREST, IS IRRELEVANT TO THE MERITS OF THIS CASE.

Plaintiffs' entire first argument, that they seek disclosure of the withheld information because the public has an interest in it, is wholly irrelevant to this case. As a threshold matter, it is black-letter law that the purpose for which a document is requested is irrelevant in a FOIA action. See, e.g., DOD v. Reporters Comm. for Freedom of the Press, 489 US. 749, 771-72 (1989); Abraham & Rose, P.L.C. V. United States, 138 F.3d 1075, 1078-79 (6th Cir. 1998); Reed v. NLRB, 927 F.2d 1249, 1252 (D.C. Cir. 1991), cert. denied, 502 U.S. 1047 (1992). Even more fundamentally, the structure of FOIA is such that certain government information is exempted from public disclosure despite the fact that the public may have an interest in disclosure of the information. Thus, the mere fact that there may be a public interest in disclosure does not warrant disclosure if the material falls within one of the well-recognized FOIA exemptions.

While there are FOIA exemptions that do require a reviewing court to balance the public's interest in disclosure against the interest Congress intended the exemption to protect, such as Exemption 7(C), the two FOIA exemptions at issue in this case, Exemptions 1 and 5, are not such exemptions. Inherent in Congress' enactment of Exemptions 1 and 5 is a balancing of interests and a decision to elevate national security concerns and the Government's need to conduct confidential deliberations over the public's interest in certain government information. The tests for exempting classified national security information from disclosure under Exemption 1 and for exempting material protected by the deliberative process privilege from disclosure under Exemption 5, as set forth in DOJ's

opening briefs, do not permit a court reviewing an individual FOIA case to take into consideration assertions about the public's interest in the withheld materials. Exemption 1 protects records that are specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and are in fact properly classified pursuant to an Executive Order. Exemption 5 protects material pursuant to the deliberative process privilege that reflects predecisional agency deliberations. Neither the requester's asserted need for the material nor the public's interest in disclosure are factors in either analysis.

In any event, plaintiffs' assertion that, without access to this information, "Americans will simply not know how the government has exercised unprecedented surveillance authority" (Plaintiffs' Brief at 12), ignores the information on the Government's use of FISA that is made public and that is provided to Congress. Pursuant to 50 U.S.C. § 1807, DOJ submits, on an annual basis, data on the use of FISA to the Administrative Office of the United States Courts and to Congress. Specifically, the Attorney General reports the total number of applications made for orders and extensions of orders approving electronic surveillance under FISA, and the total number of orders and extensions granted, modified or denied. 50 U.S.C. § 1807; see also Ex. 3 to Baker Decl. Although not required under FISA, the Attorney General also reports such data on physical searches applied for under FISA, providing a combined total for electronic surveillance and physical searches. (See Ex. 3 to Baker Decl.; Attorney General's Section 1807 Report for 2000, available online at <http://www.usdoj.gov/04foia/readingrooms/2000fisa-ltr.pdf>). All of this information is made publicly available. 50 U.S.C. § 1807; Ex. 3 to Baker Decl. Plaintiffs themselves acknowledge the value of this information to the public's ability to access and monitor the Government's FISA activity. (Plaintiff's

Brief at 21-22). Plaintiffs use information obtained from the annual reports to compare and contrast the number of FISA orders obtained by the FBI over time, and in relation to orders obtained under Title III, all in making the point that the Government has increased its reliance on FISA. (Id.).

In addition, DOJ provides to Congress the very information that plaintiffs seek in this case. Congress has determined that while the total number of FISA orders applied for and obtained should be publicly available, data on orders for specific FISA techniques should be disclosed to certain Congressional committees in classified form. See 50 U.S.C. §§ 1808, 1826, 1846, and 1862; Baker Decl. at ¶ 19; Ex. 3 to Baker Decl. Members of Congress are, of course, the actual elected representatives of the public. Thus, the public's interest in knowing this information is in fact accommodated by the disclosure of this information to the public's elected representatives, while at the same time the protection of national security interests (which is also in the public interest) is served by keeping this information out of the public domain and out of the hands of our enemies.<sup>2</sup>

Plaintiffs' argument that they need the withheld information in order to protect the public interest is simply irrelevant and fails to rebut the detailed declarations submitted by DOJ in support of its judgment that the withheld information is exempt under FOIA.

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<sup>2</sup>Contrary to the suggestions in Plaintiffs' Brief, Representatives Sensenbrenner and Conyers were satisfied with the way in which DOJ submitted classified FISA information in response to their letter – that is, by providing the classified information to the House Permanent Select Committee on Intelligence for sharing with the Judiciary Committee, in keeping with the longstanding Executive Branch practice on sharing operational intelligence information with Congress. See Sensenbrenner Press Release on Justice Department's Answers to USA-Patriot Act Oversight Questions, Oct. 17, 2002, available online at <http://www.house.gov/judiciary/news101702.htm>.

## II. DOJ PROPERLY WITHHELD CLASSIFIED INFORMATION PURSUANT TO FOIA'S EXEMPTION 1.

The declarations submitted by James A. Baker, on behalf of OIPR, and Christine Kiefer, on behalf of the FBI, described the content of the classified information withheld pursuant to Exemption 1, the procedures used to classify the information, and the reasons why disclosure of classified information about the frequency and nature of the Government's use of specific FISA techniques would harm our national security. These detailed, reasonable declarations remain uncontroverted and are entitled to substantial weight.

### OIPR

Mr. Baker stated in his declaration that the material withheld as classified by OIPR consisted of the Classified Answers to the House Permanent Select Committee Intelligence and certain information relied upon in preparing those answers. (Baker Decl. at ¶ 13). He then set forth the six questions to which the withheld classified answers responded, explaining that the answers to each of the six questions described the frequency or manner of use of specific techniques authorized under FISA for use against clandestine intelligence and international terrorist activities. (*Id.* at ¶¶ 15, 16).

Mr. Baker summarized the rationale for classifying this information as follows:

Each technique authorized under FISA is a tool employed by the Government flexibly and covertly, as a part of a larger deployment of all the tools of FISA, against the changing ways and tradecraft of the national security threats against us. Hostile intelligence services and international terrorist groups operating in the U.S. are sensitive to information that points to certain categories of targets or certain types of methods as either the focus or the relative safe harbors from the eyes and ears of the FBI through the Bureau's use of FISA. Each of the documents classified and withheld under Exemption 1 would, if publicly disclosed, harm our national security by enabling our adversaries to

conduct their intelligence or international terrorist activities against us more securely[.]

(Id. at ¶ 17). He then applied this rationale to the six classified answers, showing how disclosure of this information could assist our enemies and harm our national security. (Id.). For example, Mr. Baker explained that "[d]isclosing the number of U.S. persons or U.S. person facilities targeted by FISA would, against the statutorily mandated disclosure of overall numbers of FISA applications made and approved, provide our adversaries with an official measure of whether and how much safer their operations would be if they recruit and use U.S. persons as their agents." (Id.). Mr. Baker elaborated that "[d]isclosing such data over time, furthermore, could, in a particular operational circumstance, be revealing of an operation by a hostile intelligence service or international terrorist group using U.S. persons and provide that service or group with an inkling that its operation was compromised and monitored by the Bureau." (Id.).

Plaintiffs fail to respond in any substantive way to the reasons set forth in Mr. Baker's declaration for classifying this information. Plaintiffs appear to argue that because the information does not identify particular surveillance targets, or relate to future surveillance activities, public disclosure of the information cannot and does not pose a risk of harm to national security. But plaintiffs never explain why this is so. More importantly, they never address or refute Mr. Baker's discussion of how disclosing the frequency and manner of use of specific FISA techniques by the Government against clandestine intelligence and international terrorist activities risks harm to the national security. Indeed, plaintiffs respond to Mr. Baker merely by summarily declaring that "[i]t is implausible that the public disclosure of the withheld documents could jeopardize national security." (Plaintiffs' Brief at 16).

Plaintiffs are not, however, charged with possessing the relevant expertise in national security matters to opine on the effect that disclosure of this information could have on our national security, and their conclusory, unsupported opinion in this regard is entitled to little or no weight. In contrast, the Government's reasoned judgment that disclosure of the information would pose a risk to national security is entitled to substantial weight. See Gardels v. Central Intelligence Agency, 689 F.2d 1100, 1106 (D.C. Cir. 1982); Assassination Archives and Research Center v. Central Intelligence Agency, 177 F. Supp. 2d 1, 5-6 (D.D.C. 2001). Thus, Mr. Baker's detailed, reasonable declaration concerning OIPR's Exemption 1 withholdings stands uncontroverted.<sup>3</sup>

Plaintiffs' argument that the withheld information is virtually "identical" to the statistics on FISA use that the Attorney General is required to make publicly available misunderstands the nature of the information. (See Plaintiffs' Brief at 20 n. 13). The total number of applications for FISA orders approving electronic surveillance, which are made public under 50 U.S.C. § 1807, are indeed qualitatively different from the numbers of applications for orders approving specific FISA techniques that are not disclosed to the public under 50 U.S.C. §§ 1826, 1846, and 1862. "Electronic surveillance" orders authorize a general surveillance technique (i.e., electronic surveillance), whereas orders approving physical searches involving U.S. persons, pen registers, trap and trace devices, and requests for tangible things authorize specific surveillance techniques. "Physical search" orders is also a general description encompassing a number of categories and techniques for physical search. Unlike the data revealing the number of orders authorizing specific FISA techniques, the total number of

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<sup>3</sup>Plaintiffs do not challenge the procedures used by OIPR or the FBI to classify the material withheld pursuant to Exemption 1.

electronic surveillance and physical search orders does not provide our adversaries with critical information about specific categories of targets or methods as either the focus of or relative safe harbors from the U.S. intelligence community, and therefore its disclosure to the public does not raise the same security concerns.

Plaintiffs' additional arguments here fail to persuade. Plaintiffs argue that the Government's reliance on section 1.5(c) of Executive Order 12958, which allows for the classification of intelligence activities, sources or methods, is unfounded because the Government's use of FISA surveillance authorities now extends beyond intelligence gathering. (Plaintiffs' Brief at 16-18). However, the very sources that plaintiffs cite clearly stand for the proposition that a significant foreign intelligence purpose is still required for the use of a FISA authority. See In re Sealed Case, 310 F.3d 717, 734-35 (Foreign Int. Surv. Ct. of Rev. 2002); Memorandum of Attorney General John Ashcroft to Director, FBI, dated March 6, 2002, at 2 (attached to Plaintiffs' Brief as Exhibit 1). As the Attorney General explained in the document attached to Plaintiffs' Brief, the Patriot Act "allows FISA to be used primarily for a law enforcement purpose, as long as a significant foreign intelligence purpose remains." Ex. 1 to Plaintiffs' Brief at 2 (emphasis in original). Therefore, an investigation conducted under FISA, as amended by the Patriot Act, would indeed still have to be intelligence-related, even if it could also have a law enforcement purpose, and such an investigation would, by definition, still fall within the category of information protected under section 1.5(c) of Executive Order 12958. Mr. Baker's assertion that the withheld information about the use of FISA tools falls within section 1.5(c) of Executive Order 12958 is consistent with the Patriot Act, and plaintiffs' argument does nothing to undermine it.

Plaintiffs' next argument, in which they attempt to dismiss the intent and import of the

Congressional scheme for disclosure of FISA statistics, is equally unconvincing. As Mr. Baker explained in his declaration, Congress has determined that certain information concerning the Government's use of FISA be made public, and other more sensitive FISA information be made available only to certain Congressional oversight committees. (Baker Decl. at ¶¶ 18, 19). Congress decided to make public the overall total numbers of FISA applications, but the more detailed, sensitive information about the numbers of applications for each FISA technique are submitted to specific Congressional committees only in classified form in order to protect against harm to national security. (Id. at ¶ 19; 50 U.S.C. §§ 1807, 1808, 1826, 1846, and 1862). This disclosure scheme reflects a balancing between the often conflicting goals of informing the public about intelligence activities and protecting those activities. (Baker Decl. at ¶ 18). Plaintiffs' contention that FISA's reporting requirements "create a floor, not a ceiling," on public disclosure of sensitive FISA information, is not supported by any authority. (Plaintiffs' Brief at 18). The passage from the February 2003 Leahy Report that plaintiffs quote for this proposition concerns the importance of congressional oversight in reviewing the FBI's use of its FISA power. (Id. at 18-19, quoting Feb. 2003 Leahy Report at 13). Neither it nor the rest of the Leahy Report addresses whether FISA contemplates public disclosure of the sensitive statistical information that plaintiffs seek.<sup>4</sup>

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<sup>4</sup>The Government does not contend that the FISA reporting requirements contain explicit nondisclosure provisions such that the withheld information is exempt under FOIA's Exemption 3, pertaining to information specifically exempted from disclosure by other federal statutes. (See Plaintiffs' Brief at 20). The Congressional disclosure scheme embodied in these FISA provisions nonetheless demonstrates Congress' intent to limit disclosure of sensitive FISA information to the appropriate and secure Congressional committees, and clearly supports the Government's judgment that the withheld information must not be publicly disclosed in order to protect national security.

Congress has also rejected subsequent proposals to make the statistical information that plaintiffs seek publicly available, and this too is indicative of Congress' intent on the subject. (See Baker Decl. at ¶¶ 20, 21). The fact that Congress has rejected these proposals while expanding FISA's powers only strengthens the conclusion that public accountability over the Government's use of specific FISA techniques is to be achieved through Congressional oversight rather than through direct dissemination of this sensitive intelligence information to the public. Congress may, of course, at any time enact legislation making this information publicly available (as plaintiffs imply it is poised to do), but until that actually occurs, DOJ and this Court are bound by the laws currently on the books. Obviously, the existence of pending, recently introduced bills and advocates' wish lists for legislation do not amount to Congressional intent. (See Plaintiffs' Brief at 19 n. 12, 23-24).

Moreover, as Mr. Baker explained in his declaration, the sharing of sensitive FISA information with certain Congressional committees only is part of a larger accommodation between the branches over access to national security information. (Baker Decl. at ¶¶ 22, 23). Plaintiffs' request to obtain through FOIA the very information that has been disseminated only to select Congressional committees, pursuant to longstanding practices, would gravely upset the statutory scheme and delicate compromises that have been struck between the branches. Having failed to rebut Mr. Baker's declaration, plaintiffs have presented no compelling reason why the Court should construe FOIA in a way that effectively overrides the statutory scheme and established practices for disclosure of sensitive FISA information, and in a way that results in providing a primer to our adversaries on how to avoid and defeat the tools of FISA.

## FBI

Plaintiffs challenge the FBI's withholding of documents based on Exemption 1, but, again, solely to the extent that the records indicate the total number of times the FBI has used particular surveillance and investigatory authorities during a specified time period. (Plaintiffs' Brief at 24). Consequently, with respect to the FBI, plaintiffs challenge the application of Exemption 1 to the same type of information withheld by OIPR pursuant to Exemption 1, and all of the reasons articulated by OIPR as to why this information should be protected from public disclosure support the FBI's invocation of Exemption 1 as well. Indeed, plaintiffs provide no independent response to the Revised Second Declaration of Christine Kiefer, submitted on behalf of the FBI. (Plaintiffs' Brief at 24-25).

Ms. Kiefer provided specific descriptions of the information that the FBI withheld pursuant to Exemption 1 and reasoned explanations of the FBI's justification for the withholdings. (Sec. Kiefer Decl.; Ex. IV to Sec. Kiefer Decl.). For example, Ms. Kiefer explained that disclosure of the number of pen registers issued in a particular time period would reveal the methodology and time frame of FBI counterintelligence activities directed at specific targets, and that the revelation of this information could allow our adversaries to evaluate the FBI's counterintelligence capabilities and determine whether hostile intelligence plans have been compromised. (Ex. IV to Sec. Kiefer Decl. at 5-6). Just as with OIPR, the FBI's judgment, which plaintiffs too fail to rebut, is entitled to substantial weight.

### III. DOJ PROPERLY APPLIED EXEMPTION 5 TO INFORMATION PROTECTED BY THE DELIBERATIVE PROCESS PRIVILEGE.

Plaintiffs challenge the Government's assertion of the deliberative process privilege over "statistical or other factual material" that plaintiffs claim can reasonably be segregated from material that

is deliberative and predecisional.<sup>5</sup> (Plaintiffs' Brief at 8-10, 26-28). Again, the Government's declarations meet its burden in defending its invocation of Exemption 5.

Plaintiffs' argument that statistical information was not segregated and was improperly withheld pursuant to the deliberative process privilege is based on a flawed presumption. Plaintiffs' argument presumes that statistical information is per se "factual" and cannot be deliberative or predecisional. The law is, however, to the contrary. See Florida House of Representatives v. Dep't of Commerce, 961 F.2d 941, 949-50 (11th Cir.) (holding that adjusted census numbers were characterized as opinion rather than fact and thus enjoyed protection of deliberative process privilege), cert. dismissed, 506 U.S. 969 (1992); Quarles v. Department of Navy, 893 F.2d 390, 392-93 (D.C. Cir.1990) (holding that deliberative process privilege applied to cost estimates prepared by Navy in course of Navy's selection of homeports for ships). In Florida House of Representatives, the court explained that just because the census information at issue was in the form of numbers, it was still advice which the decisionmaker ultimately rejected, and not facts. In reaching its conclusion, the court addressed the significance of the numeric quality of the information, relying on the reasoning of Quarles, as follows:

One reason the information in this case is difficult to classify is because the data are numbers. The District of Columbia Court of Appeals best illustrated the amorphous personality of numbers in Quarles v. Department of Navy, 893 F.2d 390 (D.C.Cir.1990):

Numbers have a surface precision that may lead the unsophisticated to think of them as fixed, and of course some are--Waterloo was fought in 1815. But cost

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<sup>5</sup>Plaintiffs never indicate what they believe this "other factual material" consists of, yet they maintain that the withheld information contains "other factual material" that is reasonably segregable from the deliberative and predecisional material.

estimates such as these are far from fixed, as anyone knows who has had two contractors bid on a home improvement or has compared budget estimates with final costs of a government project. *They derive from a complex set of judgments--projecting needs, studying prior endeavors and assessing possible suppliers. They partake of just that elasticity that has persuaded courts to provide shelter for opinions generally.*

Id. at 392-93 (emphasis added).

Florida House of Representatives, 961 F.2d at 949-50. Disclosure of numerical information is certainly capable of causing harm to the decisionmaking process. See Quarles, 893 F.2d at 393.

As the OIP, OIPR and FBI declarations provide, the material withheld pursuant to the deliberative process privilege was generated by agency staff as they worked on responding to congressional inquiries about DOJ's implementation of the Patriot Act. The entire context of these discussions was deliberative and predecisional, including any discussion about how many times various Patriot Act and FISA tools had been used. The Government did attempt to segregate and release purely factual material, but any purely factual material – including statistical information – was determined to itself be deliberative. (See Steele Decl. at ¶ 11; Second Declaration of Melanie Anne Pustay at ¶ 16). Moreover, any aggregate statistical information of the type that plaintiffs challenge – that is, the total number of times that the Government applied for orders authorizing specific FISA techniques – was classified, for all of the reasons discussed above. In fact, the material withheld by OIP as protected by the deliberative process privilege did not include any statistical information on the Government's FISA use. The declarant for OIP, Melanie Anne Pustay, has clarified that:

The withheld portions of the e-mails include draft narrative language,

none of which constitutes statistical information regarding the use of the various provisions of the Patriot Act. Any discussion in the e-mails of "what the answers to the questions might consist of" (see Second Pustay Decl. ¶ 12), does not include statistical information. OIP released all reasonably segregable, non-deliberative material.

Third Declaration of Melanie Anne Pustay at ¶ 4, attached hereto.

**CONCLUSION**

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

Respectfully submitted,

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March 28, 2003

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2003, a true and correct copy of the foregoing Reply Memorandum in Support of Defendant's Motions for Summary Judgment was served upon plaintiffs' counsel of record at the addresses listed below:

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