UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, ELECTRONIC PRIVACY INFORMATION CENTER, AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, and FREEDOM TO READ FOUNDATION, Plaintiffs, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Civil Action No. 02-CV-2077 (ESH)

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION[1]

Remaining at issue in this case is Defendant's assertion that certain information that would otherwise have to be released under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, may be withheld from the public on the authority of Exemptions 1 and 5 of that Act. The records consist principally of aggregate, statistical data indicating the extent to which the Federal Bureau of Investigation ("FBI") has relied on controversial new surveillance powers authorized by the USA PATRIOT Act ("Patriot Act"), Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001). Neither Exemption 1 nor Exemption 5 authorizes the government to withhold this basic information from the public.

ARGUMENT

The records sought by Plaintiffs in this case are critical to the public's ability to evaluate new surveillance authorities and the government's use of them. Americans cannot evaluate government conduct if they are not permitted to know what the government's policies are. The former Chairman of the Senate Intelligence Committee, discussing the President's signing of a new classification-related Executive Order, last week expressed the widely-shared concern that the government is unjustifiably withholding critical information from the public:

> The public has the right to know what its Government has done and is doing to protect Americans and United States interests. . . . Ultimately, excessive secrecy will undermine the public's confidence in our Government and its essential institutions. Excessive secrecy denies to the American people their full capability to participate, evaluate, and act as they determine to be in the national interest.

Cong. Rec. S4547-4548 (Mar. 31, 2003) (statement of Sen. Graham).

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[1] Defendant filed on March 28 a document captioned "Reply Memorandum in Support of Defendant's Motions for Summary Judgment." Counsel for Defendant informed Plaintiffs on April 3 that this document should have been captioned "Reply Memorandum in Support of Defendant's Motions for Summary Judgment and Opposition to Plaintiffs' Cross-Motion for Summary Judgment."

The FOIA was enacted to address exactly these concerns. The statute reflects a recognition that "a democracy cannot function unless the people are permitted to know what their government is up to." *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 772-73 (internal quotation marks and emphasis omitted). The statute was enacted "to permit access to official information long shielded unnecessarily from public view and . . . to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *Environmental Protection Agency v. Mink*, 410 U.S. 73, 80 (1973).[2]

I. Defendant improperly asserts Exemption 1

Defendant invokes Exemption 1 to justify its refusal to disclose aggregate, statistical information indicating the extent to which the FBI has relied on new surveillance authorities.

In arguing that the public has no right to know the extent to which the FBI has relied on new surveillance authorities, Defendant repeatedly insists that this Court should defer to the government's own determination that disclosure of the information would jeopardize national security. While Plaintiffs do not dispute that a certain degree of deference is appropriate, the question whether particular records fall within the ambit of Exemption 1 is a question ultimately to be answered by the courts, *not* by the executive branch. As the D.C. Circuit has explained, "[c]ourts were given authority to review *de novo* any denial of access in order that the ultimate

[2] Plaintiffs explained in their Memorandum filed on March 21 that various Congressional committees, including the House Judiciary Committee, have become increasingly frustrated with Defendant's refusal to cooperate with oversight efforts. *See* Memorandum in Support of Plaintiffs' Cross-Motion for Summary Judgment, pp.3-6. Defendant contests this characterization, contending that senior members of the House Judiciary Committee were satisfied with Defendant's cooperation. *See* Defendant's Reply Memorandum, p.7 n.2. Plaintiffs note that on April 1, four days after Defendant filed its Reply Memorandum, the House Judiciary Committee sent yet another letter to the Attorney General requesting information about Defendant's use of new surveillance authorities. The April 1 letter is available at http://www.fas.org/irp/congress/2003_cr/patriot040103.html.

decision as to the propriety of the agency's action is made by the court and [to] prevent [review] from becoming meaningless judicial sanctioning of agency discretion." *Ray v. Turner*, 587 F.2d 1187, 1190 n.7 (D.C. Cir. 1978) (internal quotation marks omitted). The Court explained:

> The legislative history underscores that the intent of Congress regarding *de novo* review stood in contrast to, and was a rejection of, the alternative suggestion . . . that in the national security context the court should be limited to determining whether there was a reasonable basis for the decision by the appropriate official to withhold the document. In proposing a "reasonable basis" standard, the Administration and supporting legislators argued that *de novo* responsibility and *in camera* inspection could not properly be assigned to judges, in part because of logistical problems, and in part because of their lack of relevant experience and meaningful appreciation of the implications of the material involved. *Those who prevailed . . . stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security.*

Ray v. Turner, 587 F.2d at 1193-94 (footnotes omitted and emphasis added).

In the instant case, Defendant's proffered explanation for withholding the challenged records cannot withstand even minimal scrutiny. First, Defendant fails to distinguish the withheld information in any meaningful way from information that Defendant regularly discloses under 50 U.S.C. § 1807. Section 1807 requires Defendant routinely to release statistics indicating the FBI's use of FISA's electronic surveillance provisions. Defendant does not explain why statistics relating to the FBI's use of those provisions can safely be released to the public whereas the public must be kept in the dark concerning the FBI's use of FISA's physical search, pen register, and "tangible things" provisions.

The only argument Defendant advances in this respect is that FISA's electronic surveillance and physical search provisions authorize "general surveillance techniques" whereas FISA's "tangible things" and pen register provisions authorize "specific surveillance techniques." Defendant's Reply Memorandum, p. 10. (It is in Defendant's Reply Memorandum

that the argument is advanced for the first time.) The argument is merely a word game. While it is true that electronic surveillance and physical searches can be conducted in various ways, the same holds true of FISA's other surveillance methods. Under FISA's pen register provision, *see* 50 U.S.C. § 1842, the FBI might track the incoming calls to a particular telephone number, or it might track the outgoing calls. It might track e-mails rather than telephone calls. A statistic indicating the number of times the FBI has relied on FISA's pen register provision would disclose nothing about the way in which the FBI used the provision generally or in any particular case. Similarly, FISA's "tangible things" provision, *see* 50 U.S.C. § 1861, might be used in any number of ways. The FBI could use the provision to obtain records pertaining to a specific individual from a particular library. It could use the provision to obtain records about an entire class of individuals from a particular hospital. It could use the provision to obtain a membership list from a political organization. A statistic indicating the number of times the FBI has relied on FISA's "tangible things" provision would disclose nothing about the way in which the FBI used the provision generally or in any particular case.

Defendant also fails to explain why statistics concerning FISA surveillance must be withheld on national-security grounds even though FISA can now be used in ordinary criminal investigations. *See* Patriot Act, § 218. While Defendant correctly notes that the FBI still cannot rely on FISA unless "a significant purpose" of the surveillance is to gather foreign intelligence, this point has no bearing on Plaintiffs' argument. Plaintiffs' point is that some of the information that Defendant here seeks to withhold pertains to surveillance in criminal investigations – that is, to surveillance whose primary purpose is law enforcement. *See* Memorandum in Support of Plaintiffs' Cross-Motion for Summary Judgment, pp. 17-18. Before the Patriot Act, the government was required regularly to disclose detailed information indicating its use of

surveillance in *all* investigations whose primary purpose was law enforcement, *including* those investigations in which a significant purpose of the surveillance was to gather foreign-intelligence. *See* 18 U.S.C. § 2519 (setting out information that government must regularly disclose concerning surveillance conducted under Title III). The government now seeks to withhold certain of this information on the ground that the surveillance is conducted under FISA rather than Title III. It is difficult to understand why information about surveillance in criminal investigations should be withheld simply because the government chooses to conduct surveillance under FISA rather than Title III. Certainly, nothing in the Patriot Act indicates that Congress intended this result.

Defendant repeatedly asserts that the Baker Declaration provides "detailed" explanations for withholding the statistics that Plaintiffs seek. *See, e.g.,* Defendant's Reply Memorandum, pp. 8, 10. It is perhaps worth noting that this professedly detailed explanation occupies, in total, just over one double-spaced page. *See* Baker Decln. ¶ 17. The remainder of the Baker Declaration is dedicated principally to speculation about Congress's intent in drafting FISA's various reporting provisions.[3] Further, the one-page explanation essentially repeats the same argument three times – once with respect to FISA's "roving" surveillance provision; once with respect to FISA's "tangible things" provision; and once, finally, with respect to FISA's electronic surveillance provision. Disclosure of the statistics sought, the Baker Declaration states,

> 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. Disclosing 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

[3] The explanations advanced in Exhibit IV to the Revised Second Declaration of Christine Kiefer are no more detailed than, and are substantively identical to, those advanced in the Baker Declaration.

> that service or group with an inkling that its operation was compromised and monitored by the Bureau.

Baker Decln. ¶17.[4] The explanation is entirely unpersuasive. As Plaintiffs have noted, the statistics that Plaintiffs seek are historical ones; the statistics do not indicate in any way whether the FBI is currently monitoring the communications of United States persons or anyone else. *See* Memorandum in Support of Plaintiffs' Cross-Motion for Summary Judgment, pp. 15-16. Thus, a hostile group could not reasonably conclude from the statistics, whatever the statistics may indicate, that a particular operation had or had not been compromised. Indeed, because the FBI conducts national-security surveillance not only under FISA but also under Title III, a hostile group could not reach that conclusion even if it *could* establish that the FBI had not targeted its agents under FISA. *See* 18 U.S.C. § 2516(1)(a) (authorizing surveillance in criminal investigations related to espionage, sabotage, and treason).

Nor could a hostile group glean useful information from the disclosure of such statistics over time. Defendant appears to fear that a hostile group could conclude from the fact that the number of FISA surveillance warrants against United States persons had remained constant, for example, that the FBI had not begun to monitor any foreign agent that it had not already been monitoring previously. But the fact that the number of surveillance orders had remained constant would say nothing about the identity of the surveillance targets. While the FBI might have had 10 surveillance orders outstanding against United States persons in both 2000 and 2001, the 10 targets might have been different in 2000 than in 2001, or they might have been the

[4] The Baker Declaration provides no independent explanation for Defendant's decision to withhold the Attorney General's Reports to Congress on FISA. The Declaration asserts without explanation that the document falls within the ambit of Executive Order 12958, *see* Baker Decln. ¶ 13, but then never mentions the document again.

same. Knowing the total number of FISA surveillance orders over time would not allow a hostile group to determine whether its operations had been compromised.

Perhaps because it can offer no persuasive reason for withholding the challenged records, Defendant reiterates its argument that Congress "has determined" that the statistics sought by Plaintiffs must remain classified. *See* Defendant's Reply Memorandum, p. 12. There is absolutely no statutory support for this argument, and accordingly Defendant cannot cite any. While the FOIA contemplates the possibility that Congress will exempt particular records from disclosure, it makes abundantly clear what Congress must say in order to do so. The relevant language of the FOIA reads:

> This section does not apply to matters that are . . . specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the maters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. § 552(b)(3) ("Exemption 3"). Defendant concedes that the records at issue here are not "specifically exempted from disclosure" within the meaning of this provision. *See* Defendant's Reply Memorandum, p. 12 n.4. Defendant proposes, however, that Congress has nonetheless made clear its intent that the records sought by plaintiffs should be exempt from disclosure. *See id*. Had Congress determined that the records sought here should be withheld from the public, however, it could easily have complied with the terms of Exemption 3, as it has done with respect to other categories of records in the past. *See* Memorandum in Support of Plaintiffs' Cross-Motion for Summary Judgment, p. 20. As to Defendant's assertion that Congress could have amended the FISA expressly to provide for the disclosure of the kinds of records that Plaintiffs seek here, *see* Defendant's Reply Memorandum, p. 13, Plaintiffs submit that there was simply no need for Congress to make the amendment, because the FOIA provides that the

records sought by Plaintiffs must be disclosed on request. Congress could have amended FISA, of course, if it had wanted to prohibit such disclosure.[5]

II. Defendant improperly asserts Exemption 5

Plaintiffs have challenged Defendant's reliance on Exemption 5 to withhold statistical and other factual material that can reasonably be segregated from material that is deliberative and predecisional. Defendant concedes that the withheld records include statistical or other factual information but contends that such information can be withheld under Exemption 5. *See* Defendant's Reply Memorandum, p. 15.

Plaintiffs do not deny that statistical information may in certain rare instances fall within the ambit of Exemption 5. There is no dispute that in certain contexts numerical information is presented as part of a recommendation or estimate or hypothesis; in these contexts the numerical data is itself deliberative. In *Florida House of Representatives v. United States Department of Commerce*, 961 F.2d 941 (11th Cir.), *cert. dismissed*, 506 U.S. 969 (1992), on which Defendant relies, the requester sought data that the defendant agency had developed in the course of preparing the 1990 census. The Eleventh Circuit upheld the agency's decision to withhold certain statistical information on the authority of Exemption 5. In explaining its decision, however, the Court emphasized that the withheld data was "a numerical recommendation," and it stated that it had "no problem characterizing the [statistic sought] as a proposal or a recommendation that eventually was rejected by the person in charge." *Id*. at 949-50. The other case on which Defendant relies is to similar effect. *See Quarles v. Department of the Navy*, 893

[5] Plaintiffs have noted that Congress is considering a proposal to require the regular disclosure of many of the statistics Plaintiffs seek here. *See* Memorandum in Support of Plaintiffs' Cross-Motion for Summary Judgment, p. 19 n.12. The question before Congress is whether such statistics should be disclosed *on a regular basis*, not whether the FOIA requires such statistics to be disclosed *on request*.

F.2d 390 (D.C. Cir. 1990) (upholding defendant agency's decision to withhold cost estimates on the authority of Exemption 5). These cases certainly do *not* endorse the proposition, advanced in Defendant's Reply Memorandum, that numerical information can be withheld on the ground that "[t]he entire context . . . was deliberative and predecisional." Defendant's Reply Memorandum, p.16. If the context was deliberative, the question remains whether factual information can be separated from opinion and recommendation. Again, Plaintiffs challenge Defendant's determination to withhold records only insofar as the withheld records include statistical or other factual material that can reasonably be segregated from material that is deliberative and predecisional.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that Defendant's motion for summary judgment be denied and Plaintiffs' cross-motion for summary judgment be granted. The Court indicated at the hearing held in this case on November 26, 2002, the possibility that it would conduct an *in camera* review of the records that Defendant seeks to withhold. Plaintiffs respectfully suggest that *in camera* review is particularly appropriate here because the segregability of factual and other non-exempt material is in dispute.

Respectfully submitted,

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