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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, *et ano.*,

Plaintiffs,

-against-

FEDERAL BUREAU OF INVESTIGATION, *et ano.*,

Defendants.

11cv7562

MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge:

Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (together, "ACLU"), commenced this Freedom of Information Act ("FOIA") action seeking the disclosure of documents relating to the Government's use of section 215 of the USA PATRIOT Act. After resolving one issue on summary judgment in the Government's favor, this Court reserved decision on the remainder of the parties' summary judgment motions pending in camera review of documents and additional classified submissions from the Government. For the reasons that follow, this Court concludes that the Government may withhold the documents listed on its Vaughn index and any further information about them under Exemptions 1 and 3 of FOIA. Accordingly, the remainder of the Government's summary judgment motion is granted and the ACLU's motion is denied.

BACKGROUND

Familiarity with this Court's October 6, 2014 Memorandum and Order is presumed. See generally ACLU v. FBI, --- F. Supp. 3d ----, No. 11cv7562, 2014 WL 4979251

(S.D.N.Y. Oct. 6, 2014). In that decision, this Court considered summary judgment motions pertaining to the ACLU's challenge to "fully withheld opinions or orders of the Foreign Intelligence Surveillance Court [("FISC")] that relate to the bulk collection of any information (i.e., not just telephony metadata)." ACLU, 2014 WL 4979251, at *2 (quoting Email from Patrick Toomey, Esq., Feb. 7, 2014 (Ex. A to Decl. of John Clopper (ECF No. 86)). The Government produced a Vaughn index referencing an August 2008 FISC Opinion, October 2006 FISC Orders, and a general category of "Multiple FISC Orders." (See Hudson Decl. Ex. 1 (ECF No. 87-1)). This Court granted that branch of the Government's summary judgment motion seeking to interpose a Glomar response (neither confirming nor denying the existence of responsive records) with respect to documents relating solely to the bulk collection of any information other than telephony metadata.

However, this Court expressed skepticism about the Government's segregability determinations with respect to documents it acknowledged existed but continued to withhold in full, including its general "no-number, no list" response for FISC orders. This Court determined an in camera review was warranted. Thereafter, the Government submitted a classified brief and two supporting declarations as well as responsive records concerning telephony metadata.

DISCUSSION

I. Legal Standard

FOIA requires "broad disclosure of Government records." CIA v. Sims, 471 U.S. 159, 166 (1985). On request, the Government must disclose any document that does not fall within one of FOIA's nine exemptions. See Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 7 (2001). "An agency withholding documents responsive to a FOIA request bears the burden of proving the applicability of claimed exemptions." ACLU v. Dep't of Justice,

681 F.3d 61, 69 (2d Cir. 2012) (citing Wilner v. NSA, 592 F.3d 60, 68 (2d Cir. 2009)). "Affidavits or declarations . . . giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." ACLU, 681 F.3d at 69 (quoting Carney v. U.S. Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994)). "In the national security context, . . . [a court] must accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." ACLU, 681 F.3d at 69 (quoting Wolf v. CIA, 473 F.3d 370, 374 (D.C. Cir. 2007)) (emphasis in original). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." Wilner, 592 F.3d at 73 (quoting Larson v. Dep't of State, 565 F.3d 857, 865 (D.C. Cir. 2009)).

Even if portions of documents are exempt from disclosure, the statute requires the Government to disclose "[a]ny reasonably segregable portion." 5 U.S.C. § 552(b). "[N]on-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1116 (D.C. Cir. 2007) (quoting Mead Data Central, Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977)). "Before approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld." Sussman, 494 F.3d at 1116.

In addition to withholding documents on the basis of a claimed exemption, "[a]n agency may withhold information on the number of responsive documents and a description of their contents if those facts are protected from disclosure by a FOIA exemption." N.Y. Times Co. v. U.S. Dep't of Justice, 752 F.3d 123, 142 (2d Cir. 2014) ("N.Y. Times I") (citing Wilner, 592 F.3d at 67–69) (subsequent case history omitted). However, such a "no-number, no-list"

response "would only be justified in unusual circumstances, and only by a particularly persuasive affidavit." N.Y. Times I, 752 F.3d at 142 (quoting ACLU v. CIA, 710 F.3d 422, 433 (D.C. Cir. 2013)).

II. FOIA Exemptions

a. FOIA Exemption 1

Under Exemption 1, FOIA's disclosure mandate does not apply to materials that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Further, in the case of "no-number, no-list" responses, "[w]hen the itemization and justification are themselves sensitive, . . . to place them on [the] public record could damage security in precisely the way that FOIA Exemption 1 is intended to prevent." N.Y. Times Co. v. U.S. Dep't of Justice, 758 F.3d 436, 440 (2d Cir. 2014) (quoting Hayden v. NSA, 608 F.2d 1381, 1384 (D.C. Cir. 1979)) (subsequent case history omitted).

Executive Order 13526, 75 Fed. Reg. 707 (Dec. 29, 2009), provides the operative classification standard. Under this Executive Order, (1) an "original classification authority" must classify the information; (2) the information must be "owned by, produced by or for, or . . . under the control of the United States Government"; (3) the information must fall within one or more of eight protected categories listed in section 1.4 of the Order; and (4) an original classification authority must "determine[ ] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and be "able to identify and describe the damage." Exec. Order 13526 § 1.1(a)(1)-(a)(4). The first two criteria are easily satisfied. (See Hudson Decl. ¶¶ 42-43, 52-53 (ECF No. 87).)

After considering the Government's classified submissions, this Court finds that the Section 1.4(c) exemption applies to the records listed in the Government's Vaughn index. In short, disclosure of responsive records or any further information about them (i.e., their nature or number) would reveal classified intelligence activities, sources or methods. (See Hudson Decl. ¶¶ 41, 43, 54-55, 59).[1] This Court credits the Government's assertion that such disclosure could enable America's adversaries to develop means to degrade and evade the NSA's querying of bulk metadata, (Hudson Decl. ¶ 44), or take other countermeasures that would undermine the intelligence community's mission (Hudson Decl. ¶¶ 56-57). The Government's supplemental classified submissions provide further justification for withholding the documents and are "particularly persuasive." N.Y. Times I, 752 F.3d at 142. This Court concludes that the only additional information the Government could provide would disclose sources, methods, or other intelligence activities, and is therefore properly withheld under Exemption 1.

b. FOIA Exemption 3

Under Exemption 3, FOIA's disclosure mandate does not apply to materials "specifically exempted from disclosure" by certain statutes. 5 U.S.C. § 552(b)(3). In evaluating whether Exemption 3 applies, a court should "not closely scrutinize the contents of the withheld document; instead, [it should] determine only whether there is a relevant statute and whether the document falls within that statute." Krikorian v. Dep't of State, 984 F.2d 461, 465 (D.C. Cir. 1993).

[1] The August 2008 FISC Opinion also implicates sections 1.4(d), which includes foreign relations or foreign activities of the United States, including confidential sources, and 1.4(g), which includes vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security. (See Hudson Decl. ¶¶ 35, 43.)

The Government invokes Exemption 3 pursuant to Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. § 3024(i)(1), which provides that "the Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." The Government asserts that disclosing the FISC opinion or any other information about FISC orders beyond what is listed on its Vaughn index would reveal intelligence sources and methods. (See Hudson Decl. ¶¶ 37, 58.) And for the August 2008 FISC Opinion, the Government also asserts it is properly withheld pursuant to the statutory privilege provided by Section 6 of the National Security Agency Act, Pub. L. No. 86-36, which protects from disclosure any information relating to NSA activities. (Hudson Decl. ¶¶ 38, 44.) This Court agrees. "The [Government] has stated as much detail publicly in this case as it reasonably could without revealing sensitive information, and presented further specifics in camera. This is the proper way to satisfy FOIA Exemption 3." Hayden v. NSA, 608 F.2d 1381, 1390-91 (D.C. Cir. 1979). Accordingly, the responsive records and any other information concerning their existence, are exempt from disclosure under Exemption 3.

III. Segregability

Turning to the question of segregability, any portions of a document that fall outside of FOIA's exemptions must be disclosed unless they are "inextricably intertwined" with the exempt material. Inner City Press v. Bd. of Governors of the Fed. Reserve Sys., 463 F.3d 239, 249 n.10 (2d Cir. 2006). In its motion papers, the ACLU raised significant questions regarding segregability. The Government offered inconsistent responses to the ACLU's arguments. Therefore, this Court determined an in camera review was appropriate. See ACLU, 2014 WL 4979251, at *5 ("The deference the Government ordinarily receives in FOIA cases is rooted largely in the courts' trust that the Government will comply with its statutory obligations.

That compliance is not apparent here."). After considering all of the classified submissions, this Court finds the Government's justifications particularly persuasive and concludes that its segregability determinations were lawful.

The Government asserts that the August 2008 FISC Opinion "contains no reasonably segregable, non-exempt information" because "the specific [classified] intelligence method is discussed in every paragraph of this opinion, including the title." (Hudson Decl. ¶¶ 41-42, 45-47.) With respect to the October 2006 and Multiple FISC Orders, the Government maintains that "no further information about the nature or substance [of the orders] can be provided without revealing classified information." (Hudson Decl. ¶ 52.) In short, the Government contends that any additional disclosure would enable discerning observers to connect the dots. This Court agrees. The records are exempt from disclosure and can be fully withheld under FOIA Exemptions 1 and 3. Any additional disclosure or further information regarding the responsive documents is neither feasible nor warranted. Cf. New York Times Co. v. U.S. Dep't of Justice, 872 F. Supp. 2d 309, 318 (S.D.N.Y. 2012).

Segregability determinations are not made in a vacuum. They require careful assessments of how "[m]inor details of intelligence information may reveal more information than their apparent insignificance suggests because, much like a piece of jigsaw puzzle, [each detail] may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself." Wilner v. NSA, 592 F.3d 60, 73 (2d Cir. 2009) (alteration in original) (quoting Larson v Dep't of State, 565 F.3d 857, 864 (D.C. Cir. 2009)). The Government is acutely aware of the consequences of revealing filaments of its intelligence gathering. And its assessments are informed by hard-learned lessons. The intelligence community is tasked with staying at least one step ahead of evolving threats. That mission

requires operational foresight and stealth. Where, as here, the Government has offered a reasoned and persuasive explanation for withholding information, its judgment should not be second guessed. This Court is convinced that release of any further information could breach the informational levee that FOIA exemptions are designed to protect.

CONCLUSION

For the foregoing reasons, this Court concludes that the Government may withhold the documents listed on its Vaughn index and any further information about them, under Exemptions 1 and 3 of FOIA. Accordingly, the remainder of the Government's summary judgment motion is granted and the ACLU's motion for summary judgment is denied.

The Clerk of the Court is directed to terminate all pending motions and mark this case as closed.

Dated: March 31, 2015
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J.

All Counsel of Record via ECF.