

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY
INFORMATION CENTER,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant.

No. 06-ca-0096 (HHK)

AMERICAN CIVIL LIBERTIES UNION,
et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant.

No. 06-ca-0214 (HHK)

**PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF
PLAINTIFFS' CROSS-MOTION FOR *IN CAMERA* REVIEW**

These consolidated cases involve requests filed under the Freedom of Information Act ("FOIA") for records concerning the legal basis for the National Security Agency's warrantless domestic wiretapping program (hereinafter "NSA program") in the possession of the defendant Department of Justice ("DOJ"). The DOJ has moved for summary judgment, contending that records withheld by the agency are exempt from disclosure. Plaintiffs have opposed DOJ's motion for summary judgment on the grounds that DOJ has not supplied a

sufficient basis for withholding the records. Plaintiffs have also cross-moved for *in camera* review. Plaintiffs are filing this supplemental memorandum in order to apprise the Court of testimony provided by former Deputy Attorney General James Comey to the Senate Judiciary Committee on May 15, 2007 regarding the determination that Mr. Comey and other high-ranking officials at the DOJ had made regarding the legality of the NSA program. *See James Comey Testimony Transcript, available at http://gulcfac.typepad.com/georgetown_university_law/files/comey.transcript.pdf; see also David Johnston, *Bush Intervened in Dispute Over N.S.A. Eavesdropping*, New York Times, May 16, 2007; David Stout, *Gonzales Pressed Ailing Ashcroft on Spy Plan, Aide Says*, New York Times, May 15, 2007.*

Mr. Comey's testimony confirms that at least some of the records at issue here relate to unlawful government activity. In his testimony, Mr. Comey indicated that attorneys from the DOJ's Office of Legal Counsel ("OLC") concluded in March of 2004 that the NSA program, which had by that time been operating for more than two years, was without legal basis. On Wednesday, March 10, 2004, against the forceful demands of the President's Counsel and the Chief of Staff, Mr. Comey and then-Attorney General John Ashcroft therefore refused to recertify the NSA program as lawful. Rather than discontinue the NSA program, however, President Bush reauthorized the program without DOJ's endorsement – indeed, in the face of an OLC opinion that the NSA program was against the law. President Bush then made unspecified changes to the program only after Mr. Comey and other senior DOJ officials threatened to resign.

Mr. Comey's testimony underscores the need for *in camera* review in this case. As the D.C. Circuit has recognized, *in camera* review is particularly necessary when the records

relate to unlawful government activity. *See Allen v. CIA*, 636 F.2d 1287, 1299 (D.C. Cir. 1980) (ordering *in camera* review of withheld documents; “since it is in these instances that the representations of the agency are most likely to be protective and perhaps less than accurate, the need for in camera inspection is greater.”) (overruled on other grounds in *Founding Church of Scientology of Wash. D.C. v. Smith*, 721 F.2d 828 (D.C. Cir. 1983)); *id.* at 1300 (“Such a FOIA request, in an area of great public interest and that seeks to demonstrate the impropriety of the Agency’s actions, makes in camera inspection especially appropriate.”); *see also Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978) (“A judge has discretion to order *in camera* inspection on the basis of an uneasiness, or a doubt he wants satisfied before he takes responsibility for a *de novo* determination.”).

For these reasons, plaintiffs respectfully renew their request that the Court conduct an *in camera* review of the withheld records and order the DOJ to release those records that are being unlawfully withheld.

Respectfully submitted,

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