

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION,
et al.,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, et al.,

Defendants.

Case No. 12-cv-794 (CM)

SECOND DECLARATION OF MARTHA M. LUTZ
CHIEF OF THE LITIGATION SUPPORT UNIT
CENTRAL INTELLIGENCE AGENCY

I, MARTHA M. LUTZ, hereby declare and state:

1. I am the Chief of the Litigation Support Unit of the Central Intelligence Agency ("CIA" or "Agency"). I have held this position since October 2012. Through the exercise of my official duties, as detailed in my declaration filed on 3 October 2014, which I hereby incorporate by reference, I have become familiar with this civil action and the underlying Freedom of Information Act ("FOIA") request submitted by the ACLU. This declaration will explain, to the greatest extent possible on the public record,¹ the Agency's decision to withhold certain responsive records in this case.

¹I am also submitting a classified declaration for the Court's *ex parte*, *in camera* review that contains additional information justifying the CIA's claims of exemption that cannot be filed on the public record.

I. BACKGROUND

2. In its opinion dated 23 June 2014, the U.S. Court of Appeals for the Second Circuit held that the CIA's "operational role" in the lethal use of drones generally, and in the strike that killed Anwar al-Aulaqi specifically, have been disclosed by virtue of statements made by certain government officials. As part of that holding, the Second Circuit ordered disclosure of portions of a 16 July 2010 memorandum authored by the Department of Justice's Office of Legal Counsel ("OLC") that discussed the legal bases for targeting Aulaqi (referred to as the "OLC-DOD Memorandum"). The Second Circuit released a redacted version of this OLC-DOD Memorandum with the Court's 23 June 2014 opinion.² Additionally, the Second Circuit ordered the government to provide other responsive OLC memoranda to the Court for *in camera* inspection. In accordance with that ruling, the government submitted declarations to this Court to explain why all but one of these memoranda³ are wholly exempt under the FOIA and to demonstrate that no waiver of privilege or exemptions applicable to the information contained in these records had occurred by virtue of the disclosure of portions of the legal reasoning contained in the OLC-DOD Memorandum. By order dated

² The Second Circuit permitted the government to make redactions to the OLC-DOD Memorandum in order to protect certain classified and privileged information.

³ In advance of this filing, the government also released in part a second OLC opinion that pertained to a proposed lethal operation against Anwar Aulaqi.

30 September 2014, this Court held that no waiver of classification or privilege had occurred for the nine remaining OLC memoranda.

3. The Second Circuit also ordered disclosure of certain portions of an index prepared by OLC that documented the records which that office had located in connection with this litigation. OLC has publicly released a version of this index, redacting the material that the Second Circuit indicated could be withheld in its order dated 11 August 2014. Following remand to this Court, the American Civil Liberties Union ("ACLU") identified certain entries on the OLC index for which it sought the corresponding documents. On 3 October 2014, the government submitted public and *in camera*, *ex parte* declarations to explain why the records corresponding to those entries were properly withheld in full.⁴

4. In its 23 June 2014 opinion, the Second Circuit also required the CIA to provide this Court with a classified *Vaughn* index listing the documents responsive to the ACLU's request and to submit affidavits to justify its decision to withhold specific listings. The purpose of the instant declaration is to

⁴ In advance of that filing, the government also released portions of a DOJ Classified White Paper dated 25 May 2011. As explained in my first declaration, this paper, which was prepared by DOJ for Congress, discussed the legal basis upon which the CIA could use lethal force in Yemen against a U.S. citizen. Although the paper did not mention the citizen by name -- the target of the contemplated operation was Anwar al-Aulaqi.

address those documents. In light of the Second Circuit's decision, the CIA has prepared both classified and unclassified *Vaughn* indices, documenting the records that are responsive to the ACLU's FOIA request.⁵ Upon review of the records, the Agency determined that two documents -- a copy of an unclassified declaration by former CIA Director Leon Panetta submitted in a separate civil matter and portions of the accompanying classified declaration filed in that case -- could be released. However, the CIA has determined that disclosure of the other records at issue, and the redacted portions of the classified Panetta declaration, would compromise classified, statutorily-protected and privileged CIA equities. Accordingly, as discussed below, the Agency has asserted Exemptions (b)(1), (b)(3) and (b)(5) to protect this material.

II. FOIA REQUEST

5. By letter dated 18 October 2011, the ACLU submitted a FOIA request seeking several categories of records pertaining to the legality and related processes concerning the U.S. Government's potential use of lethal force against U.S. citizens. In short, the ACLU's request sought five types of records: (1) records pertaining to the legal basis in

⁵ The attached *Vaughn* index describes the unique records located by the CIA in the course of its searches. However, it excludes any documents previously identified by OLC as responsive to plaintiff's request, since the propriety of withholding those records is already before this Court, to the extent the ACLU challenged their withholding.

domestic, foreign and international law upon which U.S. citizens can be subjected to targeted killings, (2) records pertaining to the process by which U.S. citizens can be designated for targeted killing, including who is authorized to make such determinations and what evidence is needed to support them, (3) records pertaining to the legal basis in domestic, foreign and international law upon which the targeted killing of Anwar al-Aulaqi was authorized and upon which he was killed, (4) records pertaining to the factual basis for the targeted killing of Aulaqi, (5) records pertaining to the factual basis for the killing of Samir Khan, and (6) records pertaining to the factual basis for the killing of Abdulraham al-Aulaqi (Anwar al-Aulaqi's son). (See Bennett Decl., filed 20 June 2012, ¶ 8 & Ex. A.)

III. DESCRIPTION OF RESPONSIVE RECORDS

6. The responsive records located by the CIA fall into four broad categories consisting of intelligence products, classified inter-agency correspondence, classified correspondence with Congress, and CIA internal discussions and deliberations. The intelligence products at issue contain sensitive reporting on Anwar Aulaqi and his associates, which were used to assess the threat that he posed to U.S. persons and interests. The inter-agency correspondence consists of legal analysis, some of which was already processed in connection with

this litigation, such as copies of the OLC opinions on Aulagi and the DOJ Classified White Paper. These communications also include draft versions of those documents and discussions and comments related to that analysis. Other responsive correspondence relates to a civil action brought by Anwar al-Aulagi's father. As noted above, the CIA has released documents related to that litigation -- specifically, the unclassified declaration of Director Panetta and portions of the corresponding classified declaration. Both of these declarations were submitted in that civil action in order to support the government's assertion of the state secrets privilege. The CIA also located records that reflect communications with Congress, including discussions related to the DOJ Classified White Paper, which was prepared by DOJ for Congress. Records in this category include drafts of the paper and pre-decisional exchanges reflecting the comments and input of different agencies. Lastly, the CIA identified certain records containing internal discussions among Agency officials regarding the matters discussed above.

7. To the extent possible, the CIA has provided descriptions of these responsive records on the attached public *Vaughn* index. However, many details, such as the dates, individuals involved, and fuller descriptions of the records at issue cannot be disclosed on the public record because they

would reveal information that is currently and properly classified, statutorily protected and/or privileged.

Accordingly, the CIA submits a classified declaration and Vaughn index for the Court's *ex parte, in camera* review, which contain additional information about the documents at issue.

IV. FOIA EXEMPTIONS PROTECTING CLASSIFIED INFORMATION

8. As explained below, all of the records for which the CIA asserted Exemption (b)(1) are currently and properly classified. I respectfully refer the court to the first Lutz Declaration, filed on 3 October 2014, see ¶¶ 7-18, for a full discussion of the procedural and substantive requirements of Executive Order 13526. I have determined that these documents satisfy the procedural requirements - they contain government information, are classified for a proper purpose, and are properly marked. Likewise, I have determined that these records also meet the substantive requirements of the Executive Order. As outlined below, release of this information could lead to the identification of intelligence sources, methods and activities of the CIA and/or cause damage to foreign relations or foreign activities of the United States, including confidential sources within the meaning of sections 1.4(c) and 1.4(d) of Executive Order 13526. Accordingly, I have determined that disclosure of this information could reasonably be expected to result in damage, including exceptionally grave damage, to national

security and therefore this information is currently and properly classified at the TOP SECRET level.

9. In addition, the CIA asserted Exemption (b)(3) in conjunction with the National Security Act of 1947, as amended, 50 U.S.C. § 3093(e) (the "National Security Act") to withhold these records. This statute, which protects "intelligence sources and methods from unauthorized disclosure," applies because disclosure of the records at issue would tend to reveal intelligence sources and methods. Releasing the sensitive intelligence reporting at issue here would directly reveal the sources and methods of that collection. Disclosure of this information would also impair the CIA's intelligence collection capabilities because sources would be less inclined to share information for fear that the Agency would not be able to effectively control against its unauthorized dissemination. Accordingly, as noted on the attached *Vaughn* index, Exemption (b)(3) and the National Security Act were invoked, along with Exemption (b)(1) to protect all of the classified information at issue in this litigation.

10. The CIA also invoked Section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 3507 (the "CIA Act"), in conjunction with Exemption (b)(3). Section 6 of the CIA Act protects from disclosure information that would reveal the CIA's organization, functions, including

the function of protecting intelligence sources and methods, names, official titles, salaries, or numbers of personnel employed by the CIA. The CIA Act has been widely recognized by courts to be a federal statute that "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). In this case, the CIA Act was asserted to protect the names of CIA personnel mentioned throughout the records.

V. DAMAGE TO NATIONAL SECURITY

A. Glomar Response

11. The ACLU requested records pertaining to the "factual basis for the killing" of Samir Khan and Abdulhahman al-Aulaqi (Anwar al-Aulaqi's son). Specifically, the ACLU seeks records that would show whether these individuals were "intentionally targeted," "whether U.S. Government personnel were aware of" their presence when missiles were launched, whether Aulaqi's son was "targeted on the basis of his kinship," whether "the United States took measures to avoid [their] death[s]," and any other factors "relevant to the decision to kill [them] or the failure to avoid causing [their] death[s]." (See Bennett Decl. ¶ 8 & Ex. A.) I note that, in advance of his speech at the National Defense University on 23 May 2013, the President directed the Attorney General to disclose information that until that point remained properly classified. In a letter to the Senate