

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

AMERICAN CIVIL LIBERTIES UNION,  
et al.,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY,  
et. al.

Defendants.

Case No. 13-cv-9198 (AT)

SECOND SUPPLEMENTAL DECLARATION OF ANTOINETTE B. SHINER  
INFORMATION REVIEW OFFICER  
FOR THE LITIGATION INFORMATION REVIEW OFFICE  
CENTRAL INTELLIGENCE AGENCY

I, ANTOINETTE B. SHINER, hereby declare and state:

1. I currently serve as the Information Review Officer ("IRO") for the Litigation Information Review Office ("LIRO") at the Central Intelligence Agency ("CIA" or "Agency"). For a detailed description of my experience, responsibilities, and authorities, I refer the Court to the prior declarations submitted by CIA in this matter, dated 26 February 2016 and 08 June 2016. Through the exercise of my official duties, I am familiar with this civil action and the underlying Freedom of Information Act ("FOIA") request submitted to the CIA. I make the following statements based upon my personal knowledge and information made available to me in my official capacity.

2. The purpose of this second supplemental declaration is to address certain issues raised in the Court's 27 March 2017 Memorandum Opinion and Order ("Order"). Specifically, this declaration provides additional information about the Court's questions concerning: (1) how the CIA conducted its search for records that are responsive to Plaintiffs' FOIA request, (2) the basis for withholding 17 documents in full pursuant to Exemption 5, and (3) the Agency's segregability review with respect to five specific documents withheld under FOIA Exemption 1.

**I. SEARCHES FOR RESPONSIVE RECORDS**

3. The scope of CIA's searches for the five categories of records requested by Plaintiffs was limited to specific offices and timeframes, which were agreed upon in advance by the parties and memorialized in the parties' stipulation. See Stipulation and Order Regarding Document Searches, ECF No. 30, ¶¶ 3, 6-7. In the course of conducting searches for this material, personnel from Information Management Services ("IMS"), a component within the CIA that serves as the reception point for all FOIA requests, worked with the Office of General Counsel ("OGC") to develop search strategies to comply with the parties' stipulation agreement.

4. I note that given the CIA's national security mandate, specific information about Agency databases and precisely how these records repositories are structured or queried cannot be

described in great detail publicly. However, I can say that the offices searched pursuant to the stipulation each have discrete record systems and holdings, the contents of which are well-known to the office staff. As described below, for each item in the stipulation, the appropriate Agency personnel knowledgeable about the subject matter were identified. These individuals, in some instances, located the potentially responsive records in their holdings and/or guided IMS search personnel to additional resources. The IMS professionals tailored their search strategies to account for the ways in which each office's records systems are configured in order to retrieve responsive documents from those systems.

5. As described in the Agency's initial declaration, the CIA deliberately cast a wide net for the requested records by employing broad search terms such as "12333" and other variants of "Executive Order 12,333" for each database or repository searched.<sup>1</sup> The search method did not include more precise or narrowed terms because utilizing more specific search terms would not have necessarily been effective in identifying documents responsive to the five categories of items specified

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<sup>1</sup>IMS personnel confined their searches to the Agency's non-operational files. The CIA's operational files (i.e., certain files held by the Directorate of Operations, the Directorate of Science and Technology, and the Office of Security) are exempt from search and review pursuant to the National Security Act, 50 U.S.C. § 3141, unless at least one of three exceptions apply. None of those exceptions are applicable here.

in the parties' stipulation and may have inadvertently excluded otherwise responsive documents that failed to contain the more specific search terms. In devising search strategies for records responsive to each item in the parties' stipulation, IMS professionals were aware that employing such general search terms would likely exceed the parameters of the request. Out of an abundance of caution, however, IMS professionals decided on an initial, broad search method in order to properly capture all documents potentially responsive to Plaintiffs' request. Given that Executive Order 12333 serves as one of the chief legal underpinnings of the work conducted by the Agency, these searches did, in fact, uncover a large volume of non-responsive and duplicative documents. Using a plain reading of the terms of the parties' stipulation, IMS personnel and OGC attorneys then manually reviewed the results to evaluate the responsiveness of each document. Many of the documents retrieved contained a mere mention of the terms "E.O. 12333" or "12333," but clearly had no relation to any of the five items requested by Plaintiffs. As a result, the Agency determined that this material was non-responsive and excluded it from the litigation.

6. For item 1, which requested "formal regulations or policies" relating to the CIA's authority under Executive Order 12333 to undertake electronic surveillance that implicates U.S.

Persons, IMS personnel discussed the case with Agency officials who are familiar with the Agency's implementation of Executive Order 12333. Through this process, IMS personnel determined that the central database that houses all Agency regulatory issuances would be the place that would contain any formal regulations or policies relating to the Agency's authority under Executive Order 12333. As a result of this search, and as described in the Agency's initial declaration, the CIA located and processed Agency Regulation 2-2 and its appendices and annexes. Agency Regulation 2-2 along with its supplementary material is the foundational CIA regulation that implements the provisions of Executive Order 12333. IMS personnel determined that there were no additional nonoperational files that would contain records responsive to item 1 of the parties' stipulation.

7. For item 2, which concerns official documents authorizing or modifying certain activities carried out pursuant to Executive Order 12333, IMS personnel conducted searches in accordance with the terms of the parties' stipulation for records residing in the offices of the Director, Deputy Director, and Executive Director of the CIA ("Director's area") and materials maintained in the "front offices" of each of the Agency's directorates. In the course of conducting searches for responsive material, IMS personnel further consulted with the

IROs for the Director's area and each directorate, to identify the specific databases and repositories reasonably likely to contain responsive records. For each office, they identified and searched each database, Agency share drive, and archival records that would contain any documents that officially authorize or modify the use of specific techniques and methods regarding electronic surveillance or documents that modify the rules or procedures on this subject.

8. For the Director's area, IMS professional searched the official tracking system that provides centralized management, tracking, and coordination of internal and external action items that require Agency-wide input. IMS personnel also conducted a search, of the database that serves as an inventory of retired or archived Agency records. Together these databases contain the current and archived official records held by the Director, Deputy Director and Executive Director of the CIA. As such, no other databases or repositories were deemed reasonably likely to contain additional responsive records. Additionally, IMS searched the "front office" of each Agency directorate - which consists of that directorate's leadership. Given that these were discrete offices, IMS personnel worked with front office staff to identify any records responsive to item 2 of the stipulation. As written, item 2 does not describe a readily identifiable subset of Agency records and, accordingly, IMS

personnel relied upon the expertise of individuals in each of the respective offices to identify the relevant databases and then search for records containing some mention of Executive Order 12333. Records were then compared with the terms of the stipulation to ascertain responsiveness.

9. For item 3, which pertains to formal legal opinions, IMS personnel conducted searches that were limited, in accordance with the parties' stipulation, to records maintained in a particular division of the CIA's Office of General Counsel ("OGC Division") that is responsible for providing legal advice on complex or novel legal questions. In the course of conducting the search, IMS personnel consulted with the employee within the OGC Division responsible for maintaining the database that contains formal legal opinions, including those requested by Plaintiffs. This database serves as the sole repository for formal legal opinions responsive to item 3 of the parties' stipulation. IMS personnel additionally queried OGC's main records portal, which serves as the centralized hub for OGC-wide records management. IMS personnel also asked individual OGC staff attorneys with knowledge and job responsibilities related to the subject matter of the request to search their individual files for any records potentially responsive to item 3 of the request. No other databases or repositories were deemed reasonably likely to contain additional responsive records.

10. For item 4, which concerned formal training materials or reference materials, in accordance with the parties' stipulation, IMS personnel searched for documents currently in use or effect created by the OGC Division identified above and those created or maintained by the front offices of Agency directorates. Because OGC attorneys conduct the training for Agency personnel regarding compliance with Executive Order 12333, CIA tasked the attorneys staffing the OGC Division as well as those attorneys serving in the front offices of Agency directorates to provide the formal training or reference materials on Executive Order 12333 in current use. These attorneys are well-familiar with the item 4 records, because they presently conduct the briefings and have authored the training and reference materials. As such, OGC attorneys searched their individual files and provided this material to IMS for processing in conjunction with this litigation. In addition, IMS supplemented the attorney-provided material with office searches of the OGC Division referenced above, which oversees aspects of the Executive Order 12333 training and serve as a resource for component attorneys. Given their role in training, personnel in this division are well-acquainted with training and reference materials in the office's holdings and were able to provide the versions currently in effect to IMS for processing. There are no other databases, repositories or



individuals deemed reasonably likely to possess additional records responsive to item 4.

11. For item 5, which concerns certain reports, IMS personnel conducted searches of the relevant databases located in the Office of the Inspector General (OIG), the Office of Congressional Affairs (OCA), and the Director's area. For OCA, IMS searched the OCA database that contains all information and records regarding the processes and activities of OCA and the hard copy files located in that office. Because OCA personnel maintain correspondence with Congress as well as its committees and members, IMS was able to identify all reports submitted by the Agency to Congress on Executive Order 12333 simply by searching the OCA database. For OIG, information professionals conducted a search of OIG's internal share drive and standalone systems, which contain OIG reports. For the Director's area, IMS conducted a search of the tracking system described above, which contains official records of the Director, Deputy Director and Executive Director. IMS personnel also searched the database that contains an inventory of retired or archived Agency records. IMS determined that these were the only locations that are reasonably likely to contain the formal reports as described in item 5.

**II. EXEMPTION 5**

**A. CIA 80-91**

12. The Court ordered CIA to further supplement its description of CIA 80-91 so that the Court may determine whether these documents constitute "working law," noting that CIA did not address the application of Exemption 5 to these twelve documents in its prior declaration.<sup>2</sup> I have reviewed CIA's prior declarations as well as the contents of these twelve documents and determined that the omission of CIA 80-91 from the citation provided in paragraph 3 of CIA's prior supplemental declaration represented an administrative error. Supp. CIA Decl. ¶ 3. As with CIA 13-21, 23-35, 37-41, 44, 47-76, 78, 79, and 92-94, which the Court properly found do not constitute working law, CIA 80-91 similarly constitute classified memoranda providing legal advice in response to confidential requests from client-offices about the legal implications associated with certain proposed courses of action. These memoranda are likewise not controlling interpretations of policy that the Agency relies upon in discharging its mission, nor do they constitute the final legal position of the Agency regarding a given activity. Rather, the memoranda at CIA 80-91 reflect confidential, fact-specific legal analysis and advice that served as one consideration, among others, weighed by Agency personnel in

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<sup>2</sup> In addition, I note that the Court has held that the information contained in these twelve documents was properly withheld in full pursuant to Exemptions 1 and 3. See Order at 35-36.

deciding whether to undertake a particular intelligence activity.

**B. CIA 42, 43, and 45**

13. The Court also directed CIA to provide further information to justify its Exemption 5 assertion with respect to CIA 42, 43, and 45,<sup>3</sup> each of which the Court held to be independently covered and properly withheld in full by CIA pursuant to Exemptions 1 and 3. See Order at 39. Below are additional descriptions supporting the privilege assertions for these three documents.

14. CIA 42 consists of a rough outline of classified talking points drafted by CIA attorneys to use as a reference tool when advising Agency clients or when conducting in-person briefings of Agency employees on specific topics related to Executive Order 12333. The document appears to be a working draft of a planned presentation. It contains an internal notation indicating it is a "redraft" from a specific date, variations in font size and style, and handwritten margin annotations indicating its unfinished status. Moreover, there is no evidence that the document was ever finalized or utilized in practice to advise Agency personnel. The CIA included this

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<sup>3</sup> The Court ordered the Agency to provide additional details regarding CIA 46. Upon further review, I have determined that the CIA as a matter of administrative discretion can release this document to Plaintiffs without redaction to the content (only the classification block was withheld).

document as part of the production to Plaintiffs, but as the Court's recent order indicates, due to the informal nature of the record, it should fall outside the scope of responsive material. See Order at 27. To the extent that the Court deems it responsive, the deliberative process and attorney client privileges would apply, because the document would reveal the attorney's deliberative process in preparing the presentation as well as the legal advice provided to the client. Moreover, as noted above, this Court has held that this document is currently and properly classified and protected by statute and, accordingly, is appropriately withheld in full by CIA pursuant to Exemptions 1 and 3.

15. Upon additional review, I have determined that CIA 43 is an exact duplicate of the first three pages of CIA 42. The Agency has asserted and this Court has affirmed that the CIA 42, which contains these three pages, is properly withheld in full pursuant to Exemptions 1 and 3.

16. CIA 45 consists of a rough outline containing several hypothetical scenarios specific to CIA operations created by OGC attorneys to use as presentation aids in order to promote oral discussion of potential legal issues among Agency personnel receiving training on the legal requirements of Executive Order 12333. It consists solely of operational descriptions, settings, and fact patterns drawn from classified examples.

Each of the scenarios presented in CIA 45 tend to reflect the legal advice provided by attorneys to component personnel on specific topics related to operations. In any case, this Court has already ruled that the CIA properly withheld the document pursuant to Exemptions 1 and 3 given its classified and statutorily protected content. See Order at 39.

**C. CIA 36**

17. The Court directed CIA to provide further information regarding the nature of the classified correspondence in CIA 36 in order to further justify the assertion of the presidential communication privilege with respect to this document. In particular, the Court noted that CIA's prior declaration did not indicate whether this correspondence between the National Security Council and CIA was sent from the National Security Advisor or another high level National Security Council official as part of presidential decisionmaking. I have reviewed CIA 36 and confirm that the document is a one-page memorandum signed by the President of the United States and sent through the National Security Council to the Director of Central Intelligence. It consists of direct, confidential communications from the President to the CIA Director on a sensitive topic, disclosure of which would inhibit the President's ability to engage in effective communications and decisionmaking. In any event, the Court's order held, the document is properly withheld in full on

the basis that it is currently and properly classified and protected by the National Security Act in accordance with Exemptions 1 and 3.

**III. EXEMPTIONS 1 and 3, and SEGREGABILITY**

18. This section provides additional information concerning the CIA's withholdings from specific OIG and compliance report documents. Specifically, the Court's order instructed CIA to address two issues with respect to five documents that were withheld at least in part: CIA 8, 10, 12, 30, and 77. First, the Court noted that CIA did not address in its reply whether it had conducted a line-by-line segregability review of these documents and directed the CIA to conduct such a segregability review or inform the Court that this review has already occurred. Second, the Court instructed CIA to further review each of these five documents for improper withholding of any unclassified material under Exemption 1 and inform the Court of the results. See Order at 36-37. I have re-reviewed the five documents at issue and determined the following:

19. I note that CIA 8 and CIA 12 are the Annual Reports of the National Clandestine Service on specified CIA activities related to Executive Order 12333 for Fiscal Year 2008 and 2012, respectively, which were submitted to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence. CIA 77 consists of classified follow-up responses

to questions posed by the Senate Select Committee on Intelligence about the Fiscal Year 2009 Annual Report. Each of these documents contain classified and statutorily protected information, which the CIA redacted on the basis of Exemptions 1 and 3.<sup>4</sup> I confirm that the CIA conducted a page-by-page and line-by-line review and released all reasonably segregable non-exempt responsive information to Plaintiffs. In instances where no reasonably segregable, non-exempt responsive portions of documents could be released without potentially compromising classified, statutorily-protected or privileged information, then such documents were withheld from Plaintiffs in full. In addition, I also reviewed these documents for any inadvertent withholding of unclassified material under Exemption 1 and confirmed that all information redacted on this basis is currently and properly classified.

20. With respect to CIA 10, the CIA Inspector General's Intelligence Activity Assessment regarding the Agency's compliance with Executive Order 12333, although one heading is portion marked "U//FOUO," this information is mismarked and is, in fact, currently properly classified pursuant to Exemption 1

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<sup>4</sup> As explained in CIA's prior declaration and noted on CIA's *Vaughn* index, portions of CIA 8, 12, and 77 were redacted on the basis that they are non-responsive to the litigation. These non-responsive portions contain classified and statutorily protected information concerning other CIA activities, which do not involve electronic surveillance under Executive Order 12333 implicating U.S. persons.

as well as protected by Exemption 3 in connection with the National Security Act as an intelligence source and method. I have conducted a page-by-page, line-by-line re-review of this document and confirm that all reasonably segregable non-exempt information has been released to Plaintiffs and there is no unclassified information improperly withheld under Exemption 1.

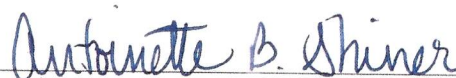
21. With respect to CIA 30, this document consists of internal memorandum from the Inspector General to the CIA Director and a separate memo from the Inspector General to the Director of Science and Technology discussing and transmitting the CIA Inspector General's Intelligence Activity Assessment, which is listed as CIA 10 in the Agency's *Vaughn* index. It was inadvertently included in the production and is not a formal report relating to electronic surveillance under Executive Order 12333 as described by the terms of the parties' search stipulation. Upon further review, I have determined that CIA 30 should not have been treated as responsive to the request.



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I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14th day of June 2017.



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Antoinette B. Shiner  
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