

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

WIKIMEDIA FOUNDATION,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:15-cv-00662-TSE
)	
NATIONAL SECURITY AGENCY, <i>et al.</i> ,)	
)	
Defendants.)	

EXHIBIT C

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Plaintiff,)	
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Defendants.)	
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DECLARATION OF LAUREN L. BERNICK

I, Lauren L. Bernick, do hereby state and declare as follows:

I. Introduction

1. I am a Senior Associate Civil Liberties Protection Officer in the Office of Civil Liberties, Privacy, and Transparency (“CLPT”) at the Office of the Director of National Intelligence (“ODNI”). I have held this supervisory position since August 8, 2017. Prior to my current position, I was assigned to the ODNI’s CLPT office as an Associate, and then a Senior Associate, Civil Liberties Protection Officer on a temporary “detail” assignment from the National Security Division of the Department of Justice (“DOJ”). At DOJ, I served as an attorney-advisor in the Office of Intelligence handling issues related to the Foreign Intelligence Surveillance Act (“FISA”), including the drafting of FISA applications and litigating before the Foreign Intelligence Surveillance Court (“FISC”), from February 2004 until my detail assignment to ODNI in June 2013.

2. CLPT’s mission is, among other things, to ensure that the Intelligence Community (“IC”)¹ carries out its national security mission in a manner that protects privacy and

1. The IC is comprised of ODNI; the Central Intelligence Agency; the National Security Agency; the Defense Intelligence Agency; the National Geospatial-Intelligence Agency; the National Reconnaissance Office; other

civil liberties and provides appropriate transparency to the public in accordance with the *Principles of Intelligence Transparency for the Intelligence Community* (hereinafter, “*Transparency Principles*”).² See ODNI, *Intelligence Community Directive 107* (2018), <https://www.dni.gov/files/documents/ICD/ICD-107.pdf>. The Chief of the CLPT office also serves as the ODNI’s Chief Transparency Officer. *Id.* To fulfill its transparency mission, CLPT’s subject matter expertise includes national security laws (e.g., FISA); classification of national security information; and the processes required to effectuate classification and the authorized release of unclassified information.

3. As part of my current and past duties with CLPT, I am responsible for participating in the oversight of the IC’s implementation of Section 702 of FISA.³ Specifically, the Director of National Intelligence (“DNI”) has a statutory duty to assess the IC elements’ compliance with procedures and guidelines promulgated pursuant to Section 702. See 50 U.S.C. § 1881a(m)(1). The IC elements that currently implement Section 702 are the National Security Agency (“NSA”); Central Intelligence Agency (“CIA”); Federal Bureau of Investigation (“FBI”); and ODNI’s National Counterterrorism Center (“NCTC”). I am also responsible for promoting the authorized release of FISA information as it comports with the *Transparency*

offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs; the intelligence elements of the Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Department of Energy; the Bureau of Intelligence and Research of the Department of State; the Office of Intelligence and Analysis of the Department of the Treasury; the Office of Intelligence and Analysis of the Department of Homeland Security; and such other elements of any other department or agency as may be designated by the President, or jointly designated by the DNI and heads of the department or agency concerned, as an element of the IC. See 50 U.S.C. § 3003(4).

2. The IC’s *Transparency Principles* are intended to facilitate IC decisions on making information publicly available in a manner that enhances public understanding of intelligence activities, while continuing to protect information when disclosure would harm national security. See ODNI, *Transparency Principles* (2015), https://www.dni.gov/files/documents/ppd-28/FINAL%20Transparency_poster%20v1.pdf.
3. Under Section 702, the Director of National Intelligence and the Attorney General may jointly authorize, for up to one year, the targeting of non-United States person reasonably believed to be located outside the United States to acquire foreign intelligence information. See 50 U.S.C. § 1881a.

Principles and the USA FREEDOM Act (*see* 50 U.S.C. § 1872),⁴ as well as the protection of national security information as required by Executive Order 13526.

4. My subject matter expertise focuses on FISA, in particular Section 702. I have developed this expertise through my participation in the following tasks while working at ODNI and DOJ: drafting the joint DNI and Attorney General report assessing the IC elements' compliance with procedures and guidelines promulgated pursuant to Section 702; facilitating review of FISA materials, both within ODNI and among the relevant IC elements, in preparation for authorized release to the public pursuant to the IC's *Transparency Principles*; participating in the interagency classification review process of certain decisions, orders, and opinions issued by the FISC on or after the 2015 enactment of the USA FREEDOM Act; the public reporting of certain statistics relating to national security authorities, such as FISA; processing of FISA materials (including Section 702 materials) through Freedom of Information Act ("FOIA") requests and litigation; intra- and inter-agency coordination of public statements and other public education documents associated with the authorized release of FISA documents, including documents related to Section 702. As a result of these efforts, I developed expertise concerning what aspects of FISA information, and in particular Section 702 information, are and are not classified.

5. In the course of my official duties, I have been advised of the above-captioned lawsuit and the allegations by the plaintiff, Wikimedia Foundation, challenging the NSA's "Upstream" surveillance program conducted pursuant to Section 702 of FISA. I have also been advised of plaintiff's motion to compel the Government to disclose documents, including documents responsive to the following two discovery requests:

4. The USA FREEDOM Act added section 602 to FISA, which required the DNI, in consultation with the Attorney General, to conduct a declassification review of each decision, order, or opinion issued by the FISC that includes a significant construction or interpretation of any provision of law. *See* 50 U.S.C. § 1872.

REQUEST FOR PRODUCTION NO. 21: All Foreign Intelligence Court, Foreign Intelligence Surveillance Court of Review, and Supreme Court orders and opinions CONCERNING Upstream surveillance.

REQUEST FOR PRODUCTION NO. 22: All Foreign Intelligence Surveillance Court, Foreign Intelligence Surveillance Court of Review, and Supreme Court submissions CONCERNING Upstream surveillance.

6. I make the following statements based on my personal knowledge and on information made available to me in my official capacity. The purpose of this declaration is to advise the Court of the time, effort, and resources that would be required if the Court were to direct the IC to conduct a classification review for authorized release of all of the documents responsive to these two discovery requests.

II. Summary

7. Ordering the IC to process all of the documents responsive to these two discovery requests would require the IC to undergo a time-consuming and resource-intensive classification review process of classified FISC orders and opinions, as well as classified submissions to that court, which are estimated to total more than 10,000 pages. While it is extremely difficult to predict how long such a process would take, I can state that, in a recent FOIA case, it took the IC one year to complete the processing of approximately 80 FISC orders, opinions, and decisions, which contained less than 800 pages. *See Elec. Frontier Found. v. DOJ*, 16-cv-2041 (N.D. Cal.) (“*EFF* FOIA case”). The processing of all documents responsive to these two discovery requests is likely to take much longer given that the number of pages of classified information at issue here is more than twelve times the number involved in the *EFF* FOIA case.

III. The Requirements That Would Be Placed on the IC to Process These Two Discovery Requests

8. In the event the Court orders the Government to produce the unclassified portions of the classified documents responsive to the two discovery requests, the IC would need to conduct a classification review of more than 10,000 pages. The classification review of classified documents is extremely time consuming and resource intensive.

9. This is so for several reasons. First, the classification review will not be a generalized “pass/fail” review to determine whether a document as a whole is classified or not; instead, such a review will involve a line-by-line and word-by-word analysis to determine whether the information in each document must remain classified in accordance with applicable classification guidance and, consequently, be withheld from the public. Such a classification review will require comprehensive and consistent analysis of the sensitivities of the information, accurate application of classification guidance, and the precise use of redactions to protect all currently classified information. This process is complex and time-consuming because each redaction applied to classified information must correspond to the applicable classification guidance based on the topic and context of the individual information as well as consideration of whether the information is classified when combined with already officially released information.

10. Second, the classification review of all responsive documents will also entail determining whether any of the documents have previously been officially released in part. If any responsive document has previously been officially released in redacted form, the IC will have to determine whether those redactions remain appropriate in light of any official disclosures that may have occurred since the document was released. And, if the document itself has not been previously officially released in any form, the IC will have to determine whether any information contained in the document nevertheless already has been officially disclosed

through, for example, FOIA document productions, transparency disclosures, disclosures mandated by the USA FREEDOM Act, or various Government reports such as those issued by the NSA's Civil Liberties and Privacy Office or the Privacy and Civil Liberties Oversight Board.

11. Third, the classification review will involve multi-layered review by each applicable IC element. Each IC element has multiple internal stakeholders, such as FISA compliance officers, General Counsel offices, privacy and civil liberties offices, and classification offices, each of which may need to be consulted as part of the internal review of any particular document.

12. Finally, for each document, the classification review process will need to be coordinated among each IC element identified as possessing an equity in that document. This consultation necessarily takes time. As I stated above, the IC elements that currently implement Section 702 of FISA are the NSA, the CIA, the FBI, and NCTC. This means that, for any particular document, one or more of these equity holders will need to review every responsive document line-by-line. And, for submissions made by DOJ to the FISC, DOJ officials will also need to review those documents. Coordination between and among all of these equity holders takes time to ensure internal consistency within a document, consistency within a set of responsive documents, and consistency with documents and information previously officially disclosed.

13. If the Court orders the Government to produce the unclassified portions of the classified documents responsive to the two discovery requests, this extremely time-consuming and resource-intensive classification review process would be imposed upon a limited number of subject matter experts who have the necessary and appropriate training and experience to conduct such a review. Classification review for most of these subject matter experts is a collateral duty. These experts have significant competing priorities and responsibilities in their

respective IC elements that include, for example, supporting the operational and mission needs of their respective IC element; preparing statutorily mandated reports to Congress and transparency reports; supporting criminal and military commission cases; and handling FOIA requests and FOIA litigation. The most important of these responsibilities—supporting operational work—takes precedence over other duties. Therefore, imposing the additional duty of an onerous classification review of more than 10,000 pages will necessarily require the IC to reallocate resources from these competing priorities to the classification review, adversely affecting operational and other mission needs.

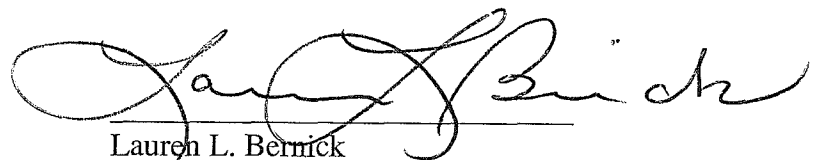
14. For all of the reasons described above, it is extremely difficult to predict the exact amount of time needed to conduct a classification review. Typically, it is not until the process has run its course that an accurate determination can be made as to the difficulty of a review. Nevertheless, I have recent experience with a similar kind of classification process that should serve as a guidepost for the Court as to the time likely required to complete the review Plaintiff seeks here. In the *EFF* FOIA case, the IC conducted a review of approximately 80 FISC orders, opinions, and decisions; about half of the documents were released in redacted form while the remainder were withheld in full. That process took one year. Less than 800 pages were at issue in that review, which is far less than the over 10,000 pages sought by plaintiff in the two discovery requests discussed herein. While it is unlikely that the review sought here would take more than a decade, a twelve-fold increase in the pages at issue means that, at the very least, the classification review Plaintiff seeks here would take more than one year, and possibly several years, to complete. The only way to reduce processing time would be for each respective IC element to divert significant resources away from operational tasks and other mission needs to process these documents.

15. While my understanding is that the Plaintiff has not narrowed its two discovery requests to seek only those documents that have not been previously subject to classification review, I can state that if such a narrowing of the requests were to be made, it would not significantly affect the processing time for all responsive documents. This is primarily because the bulk of documents responsive to these two requests are submissions to the FISC, the vast majority of which have not been previously subject to classification review. If Plaintiff were to withdraw Request for Production No. 22, and narrow Request for Production No. 21 by limiting it to solely those orders and opinions that have not been previously subject to classification review, only then would the drain on IC resources be significantly eased.

16. In sum, based on my experience in conducting classification reviews in the context of FOIA cases, transparency initiatives, and as part of the mandatory classification process established by the USA FREEDOM Act, I estimate that a court order requiring the IC to conduct a classification review of more than 10,000 pages of classified materials would take at least one year and could take several years to complete.

17. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 27th day of April, 2018.

A handwritten signature in black ink, appearing to read "Lauren L. Bernick", written over a horizontal line.

Lauren L. Bernick
Senior Associate Civil Liberties Protection Officer
Office of the Director of National Intelligence