

EXHIBIT 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

AMERICAN CIVIL LIBERTIES UNION OF
NORTHERN CALIFORNIA; AMERICAN
CIVIL LIBERTIES UNION; AMERICAN
CIVIL LIBERTIES UNION FOUNDATION,
Plaintiffs,

Civil Action No. 17-cv-3571 (JSW)

v.

UNITED STATES DEPARTMENT OF
JUSTICE,
Defendant.

DECLARATION OF SUSAN L. KIM

I, Susan L. Kim, declare as follows:

1. I am an Attorney Advisor in the Freedom of Information Act (“FOIA”) and Declassification Unit (“NSD FOIA”) of the Office of Law and Policy in the National Security Division (“NSD”) of the United States Department of Justice (“DOJ” or “Department”). NSD is a component of the Department. NSD formally began operations on October 2, 2006, by, *inter alia*, consolidating the resources of the Department’s Office of Intelligence Policy and Review (“OIPR”) and the Counterterrorism Section (“CTS”) and the Counterespionage Section (“CES”) of the Department’s Criminal Division.¹ In general, NSD handles the DOJ’s national security operations, including prosecutorial, law-enforcement, and intelligence functions. The statements

¹ OIPR is now known as the Office of Intelligence (“OI”), and CES is now known as the Counterintelligence and Export Control Section.

contained in this declaration are based upon my personal knowledge, information provided to me in the course of my official duties, and determinations I have made following a review of NSD's responsive records. I make this declaration based on my personal knowledge and information provided to me in my official capacity.

2. In an email dated, February 6, 2017, plaintiff, the American Civil Liberties Union ("ACLU"), requested the following:

- I. The memorandum titled "Determining Whether Evidence Is 'Derived From' Surveillance Under Title III or FISA."² as well as:
 - a. Any cover letter or other document attached to this memorandum;
 - b. Any version of this memorandum created or distributed on or after November 23, 2016, whether considered "final" or otherwise; and
 - c. Any record modifying, supplementing, superseding, or rescinding this memorandum or its contents.

ACLU also requested a fee waiver and expedited processing. NSD FOIA received this request on February 7, 2017.

3. In an email dated February 10, 2017, NSD informed plaintiffs that after searching the Office of the Assistant Attorney General for the NSD, NSD located two responsive documents, the first document serving as a cover memorandum for the second. The first document was withheld in full pursuant to FOIA Exemptions (b)(5), (b)(6), and (b)(7)(C).³ The

² The ACLU stated that it understood that a final version of this document was distributed within the Department of Justice on November 23, 2016.

³ NSD incorrectly withheld the name of Steven M. Dunne, the Chief of NSD's Appellate Unit, under Exemptions (b)(6) and (b)(7)(C). NSD is no longer invoking FOIA Exemptions (b)(6) and (b)(7)(C) in this case.

second document was withheld in full pursuant to FOIA Exemption (b)(5). Plaintiffs administratively appealed, and their appeal was denied.

4. The first document is a two-page memorandum dated November 23, 2016, addressed from Patty Merkamp Stemler, Chief of the Appellate Section of the DOJ Criminal Division, and Steven M. Dunne, Chief of NSD's Appellate Unit, to "all federal prosecutors." It is marked "privileged and confidential," and its subject line is "Determining Whether Evidence is 'Derived From' Surveillance under Title III or FISA." In a series of paragraphs, this cover memorandum summarizes the subject, content, and purpose of the second document, and comments more broadly on DOJ efforts to ensure legal compliance in the matters discussed.

5. The second document is a 31-page memorandum (32 pages with title page) titled, "Determining Whether Evidence is 'Derived From' Surveillance under Title III or FISA." It is dated "November 2016," and each page is marked "Attorney Work Product" and "For Official Use Only." This main memorandum consists of four sections—an introduction summarizing the purpose of the memorandum, a table of contents, a summary of conclusions, and a section of legal analysis. The legal analysis section constitutes the vast majority of the document, and is divided into a number of subsections based on the particular legal issue under discussion. Altogether, the FISA Memo consists primarily of legal analysis of Title III of the Omnibus Crime Control and Safe Streets Acts of 1968, 18 U.S.C. § 2510 *et seq.* ("Title III"); the Foreign Intelligence Surveillance Act of 1978 ("FISA"), 50 U.S.C. § 1801 *et seq.* ("FISA"); and relevant case law, with a focus on the present state of the law on when evidence is "derived from" electronic surveillance under Title III and FISA such that notice must be provided to appropriate

parties. Discussions of various strategic considerations—largely what steps Department attorneys should take to ensure they are complying with the relevant law during litigation and what legal arguments and litigation approaches have the greatest chance of success in light of the law in this area—are interwoven throughout this legal analysis.

6. Both memoranda were written and reviewed by groups of senior DOJ attorneys at the request of senior DOJ officials seeking both legal guidance for themselves regarding the Government's Title III and FISA notice obligations, and a way to assist DOJ attorneys confronting these issues preparing for or during litigation. By way of background, the need to determine such Title III and FISA notice obligations arises periodically in Government litigation, especially criminal prosecutions. Title III and FISA both authorize the Government to conduct certain forms of electronic surveillance under certain circumstances, and both allow evidence obtained or "derived from" such surveillance to be used in litigation if certain conditions are met. In particular, although the details differ between Title III and FISA, both require the Government to provide notice of the surveillance to certain persons—generally criminal defendants—before evidence obtained or "derived from" Government electronic surveillance may be used in trial or other such proceedings. As a result, in cases in which the Government has conducted related electronic surveillance, federal prosecutors and other DOJ attorneys may be required to determine whether evidence on which they intend to rely was in any respect "derived from" the electronic surveillance, in order to know whether they are required to provide notice of that surveillance to litigants.

7. The memoranda at issue here do not provide authoritative instructions for DOJ decision-makers or litigating attorneys, with the cover memorandum specifically noting that the memoranda were not intended to provide comprehensive guidance regarding the matters discussed, but only an overview of relevant legal and strategic considerations for attorneys' use. The main memorandum notes that it is simply setting forth the basic law and legal frameworks at issue, that such law remains the ultimate standard, and that courts could conceivably disagree with its conclusions in some contexts. Accordingly, the cover memorandum states that the documents are to be used as a starting point for determining whether evidence is "derived from" surveillance, to be supplemented as appropriate by an attorney's own updated legal research and consultation with knowledgeable DOJ attorneys. DOJ attorneys are thus encouraged in the documents to seek further guidance from other attorneys within the Department, especially when encountering difficult questions; and the cover memorandum notes that the main memorandum was designed to facilitate further discussion on these issues within the Department, and that it may be updated in the future.

Exemption (b)(5)

8. Both memoranda are exempt in full from disclosure pursuant to FOIA Exemption (b)(5). FOIA Exemption (b)(5) protects "inter-agency or intra-agency memorandums or letters which would not be available by law or to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption protects documents that would normally be privileged in the civil discovery context.

9. Among the privileges incorporated into Exemption (b)(5) is the work product privilege, which protects documents prepared as part of, or in reasonable anticipation of, litigation. The purpose of the privilege is to protect the adversarial process by insulating the attorney's preparation of litigation materials, and the mental impressions, conclusions, opinions, or theories of an attorney or other representative of a party concerning litigation.

10. In this case, Government attorneys prepared both memoranda in reasonable anticipation of litigation—in particular, possible criminal prosecutions or other adjudications. As noted above, the cover memorandum summarizes the main memorandum, discussing some of the nuances involved in determining whether trial evidence is “derived from” Title III and FISA surveillance and also describing the litigation consequences of such a determination. The main memorandum more fully addresses how to determine if information has been derived from FISA for use in criminal prosecutions or other adjudications and the application of FISA's notice provision in those proceedings. It also sets out the conclusions, opinions, and legal theories of its authors in anticipation of positions to be taken in criminal prosecutions or other adjudications. Because both of these memoranda would be protected in civil discovery pursuant to the work product privilege, they are protected from disclosure by FOIA Exemption (b)(5).

11. Further, both memoranda are also exempt under Exemption (b)(5) pursuant to the attorney-client privilege. The attorney-client privilege protects confidential communication between an attorney and his/her client pertaining to a legal matter for which the client has sought the attorney's counsel. This privilege's purpose is to encourage attorneys and their clients to communicate fully and honestly without fear of embarrassment and other harms. Particularly in

the context of Government attorneys, the privilege further serves to promote the public interest in the observance of law and the administration of justice.

12. In this case, both of the withheld memoranda contain legal advice prepared by Government attorneys for other Government personnel, themselves attorneys, who could be expected to litigate notice issues in court on behalf of the United States. This advice is based in part on confidential information provided by the DOJ attorneys who sought the creation of the memoranda. These memoranda reflect the authoring attorneys' views on how to determine if information is derived from FISA and on how the Government should comply with FISA's notice provision, along with related strategic considerations. These memoranda were sought by the Government's decision-makers and their representatives through confidential, internal discussion to obtain legal advice on those issues and indeed provided such advice. The materials furthermore were intended to be, and were in fact, kept confidential—they were circulated only within the Executive Branch and accessed only by Government lawyers working on the issues addressed by the memoranda. They are therefore protected by the attorney-client privilege.

Segregation

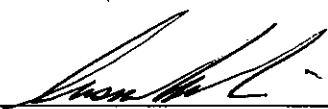
13. NSD conducted a line-by-line analysis of both withheld memoranda for segregable material. NSD did not identify any reasonably segregable information in these documents. All substantive information in these documents is subject to the withholdings described above. In particular, all portions of the withheld documents are both attorney work product and privileged attorney-client communications, reflecting attorneys' legal analysis and strategic considerations for litigation. Any other information in the memoranda—such as the

dates and privilege markings described in this declaration—is of little or no informational value, and its release would provide no meaningful information responsive to plaintiffs’ FOIA request.

CONCLUSION

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of September, 2017.



SUSAN L. KIM