

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

AYMAN LATIF, <i>et al.</i>)	
)	
)	
Plaintiffs,)	
)	Case No. 3:10-cv-00750-BR
v.)	
)	
LORETTA LYNCH, <i>et al.</i> ,)	
)	
Defendants.)	

DECLARATION OF MICHAEL STEINBACH

I, Michael Steinbach, do hereby state and declare as follows:

1. (U) I am the Executive Assistant Director of the National Security Branch of the Federal Bureau of Investigation (“FBI”), United States Department of Justice. Prior to my appointment as the Executive Assistant Director of the FBI’s National Security Branch, I served as the Assistant Director of the FBI’s Counterterrorism Division from September 2014 through February 2016.

2. (U) As the Executive Assistant Director of the FBI’s National Security Branch, I am responsible for, among other things, overseeing the national security operations of the FBI’s Counterintelligence Division, Counterterrorism Division, High-Value Detainee Interrogation Group, Terrorist Screening Center (“TSC”), and Weapons of Mass Destruction Directorate. The FBI’s National Security Branch is also accountable for the functions carried out by other FBI divisions that support the FBI’s national security mission, such as training, human resources, security countermeasures and technology. In my role as Executive Assistant Director, I have official supervision over all of the FBI’s investigations to deter, detect, and disrupt national

security threats to the United States and its interests as well as to protect against foreign clandestine intelligence activities.

3. (U) As the Executive Assistant Director, I also have official supervision and control over the files and records of the National Security Branch and have been delegated original classification authority by the Attorney General. See Executive Order 13,526, Section 1.3(c). As a result, and pursuant to all applicable Executive Orders, I am responsible for the protection of classified national security information within the National Security Branch of the FBI, including the sources and methods used by the FBI in the collection of such information. In my oversight capacity over TSC, I also am responsible for the protection of classified national security information within TSC, including information received from other agencies and otherwise in TSC's possession.

4. (U) The matters stated in this declaration are based on my personal knowledge, my background, training, and experience relating to counterterrorism, my consideration of the information provided to me in my official capacity, and my evaluation of that information. My conclusions have been reached in accordance therewith.

5. (U) Through the exercise of my official duties, I have become familiar with this civil action in which the Plaintiffs challenge their placement on the Government's No Fly List and allege, among other things, the denial of procedural due process, based on an alleged failure to provide them with a meaningful opportunity to challenge their placement on the No Fly List. I understand that the United States Government has revised the Department of Homeland Security's ("DHS") Traveler Redress Inquiry Program ("TRIP") procedures and has applied those revised procedures to the Plaintiffs. I further understand that, in a March 28, 2016 order, the Court directed the Defendants to submit to the Court as to each Plaintiff: "(1) a summary of

any material information (including material exculpatory or inculpatory information) that the Defendants withheld from the notice letters sent to each Plaintiff and (2) an explanation of the justification for withholding that information, including why Defendants could not make additional disclosures.” March 28 Order at 60. I submit this declaration in response to that order and pursuant to my oversight role on behalf of the TSC. I also have submitted an *in camera, ex parte* declaration that provides sensitive national security and law enforcement information in further response to the Court’s March 28 order. If disclosed, that information would, *inter alia*, risk serious damage to the national security.

6. (U) The Government, as part of its revised DHS TRIP procedures, has provided Plaintiffs with notice of their status on the No Fly List and, to the extent feasible and consistent with the national security and law enforcement interests at stake, with an unclassified explanation of the reasons for their inclusion on the No Fly List. The Government has also provided Plaintiffs with the opportunity to respond, and I understand that each Plaintiff did submit a response to DHS. Following additional review, the TSA Administrator issued final orders. As requested by the Court, I discuss below the information underlying each Plaintiff’s inclusion on the No Fly List, including that which was not disclosed to Plaintiffs and the reasons why such information cannot be disclosed.

7. (U). In this declaration, for background purposes, I will first briefly summarize the FBI’s authorities and responsibilities regarding the Terrorist Screening Database and its subsets, including the No Fly List, and application of the revised redress process to Plaintiffs. I will then describe, in unclassified terms and without reference to any particular Plaintiff, various categories of national security or law enforcement information that could underlie a No Fly determination and the harm to national security and law enforcement interests if such

information were disclosed. I will then provide an unclassified summary of the categories of information that were withheld from the Plaintiffs in this case concerning their No Fly status and also address why neither Plaintiffs nor their counsel have been provided access to classified national security information concerning their No Fly status. I then will address, solely for the Court's *ex parte, in camera* review, the particular information withheld with respect to each individual Plaintiff and why disclosure of that information would harm the national security and law enforcement interests of the United States. In the course of this discussion, I will also address the Court's inquiry concerning the disclosure of exculpatory information.

8. (U) Each paragraph in this declaration begins with letter markings within parentheses, called portion markings, indicating the level of classification and restrictions on dissemination applicable to that paragraph. Paragraphs portion-marked with a "U" are unclassified.

(U) THE FBI'S AUTHORITIES AND RESPONSIBILITIES REGARDING THE TERRORIST SCREENING DATABASE AND ITS EXPORT LISTS

9. (U) As discussed at length in my previous declaration,¹ the FBI and other federal agencies use the TSC's Terrorist Screening Database ("TSDB") and its subsets, the No Fly and Selectee Lists, as preventative measures to protect against terrorist threats. These preventative measures differ in fundamental respects from the FBI's role in the criminal process, because the overriding goal in using the TSDB, and in maintaining the No Fly List, is to protect the United States from harm, not to collect evidence of a crime already committed for purposes of prosecution.

10. (U) As one of numerous members of the watchlisting community, the FBI nominates known or suspected terrorists for inclusion in the TSDB. FBI nominations of

¹ (U) Declaration of Michael Steinbach, May 28, 2015, [Dkt. No. 254].

international terrorists are submitted for inclusion in the Terrorist Identities Datamart Environment (“TIDE”), and are processed through the National Counterterrorism Center (“NCTC”). Since the FBI is also responsible for the nomination of purely domestic terrorists, TSDB nominations are submitted directly to the TSC, via the Terrorist Records Examination Unit (“TRES”). TRES also coordinates the transmission of international terrorist nominations from the FBI to NCTC for inclusion in TIDE.

11. (U) As a nominating agency, the FBI can recommend that an individual be included on one of the subset lists within the TSDB, such as the No Fly List, when additional heightened derogatory criteria exist to meet one of the four criteria for inclusion. The TSC reviews all nominations, and determines whether an individual meets the derogatory criteria for placement.

12. (U) As discussed further below, in cases where the FBI is the nominator,² the underlying derogatory information supporting its nominations is typically derived from classified national security investigative case material, which often consists of sensitive sources and methods. This includes material such as undercover employee and confidential human source information, foreign government information, information gathered by other members of the Intelligence Community, and information from sensitive collection methods. The dynamic nature of investigations and the continuously-developing information that support nominations often affect placement determinations; therefore, new or updated information must be continuously submitted for consideration.

² (U) Nothing in this declaration is intended to confirm or deny whether the FBI was the nominating agency in any particular Plaintiff’s determination.

(U) APPLICATION OF REVISED DHS TRIP PROCESS TO PLAINTIFFS

13. (U) As the Court is aware, the Government recently revised the redress procedures for U.S. Persons. Under the new redress procedures, a U.S. Person who (a) purchases an airline ticket for a flight to, from, or over the United States; (b) is denied boarding on that flight; (c) subsequently applies for redress through DHS TRIP about the denial of boarding; (d) provides all information and documentation required by DHS TRIP; and (e) is determined to be appropriately included on the No Fly List following a review of the redress inquiry, may receive information concerning his or her status on the No Fly List, including, to the extent possible when considering the national security and law enforcement interests at stake, an unclassified summary of information supporting the individual's No Fly List status, if they are on the List. The amount and type of information provided, however, will vary on a case-by-case basis depending on the facts and circumstances of any national security and law enforcement interests. In some circumstances, an unclassified summary may not be provided when the national security and law enforcement interests at stake are taken into account.

14. (U) As the Court also is aware, the revised redress procedures were applied, as described, to Plaintiffs in this case. Each Plaintiff received notification of his status and an accompanying summary of unclassified information. Each Plaintiff responded with written submissions. TSA, after considering Plaintiffs' submissions, as well as the information provided through TSC to TSA and other available information, made a final determination that each of the Plaintiffs should remain on the No Fly List. Plaintiffs were informed, through the initial letters and through TSA's final determination, that additional information was withheld for national security and law enforcement reasons, as well as for privacy reasons.

(U) HARMS TO NATIONAL SECURITY FROM DISLCOSURE OF NATIONAL SECURITY AND LAW ENFORCEMENT PRIVILEGED INFORMATION REGARDING AN INDIVIDUAL'S INCLUSION ON THE NO FLY LIST

15. (U) In this section, I discuss, in general unclassified terms, the harms to national security that reasonably could be expected to flow if the DHS TRIP procedures required the disclosure of national security or law enforcement information about why a person is included on the No Fly List. I previously provided a declaration discussing these matters, dated May 28, 2015, but for the convenience of the Court address them again here.

16. (U) As noted above, inclusion on the No Fly List is often based on highly sensitive national security and law enforcement information that is properly protected from disclosure under law, including: (i) information that could tend to reveal whether an individual is or has been the subject of an FBI counterterrorism investigation or of other intelligence interest, including the basis, status, or results of the investigation or interest, and the content of any relevant investigative or intelligence files; and (ii) information that could tend to reveal whether particular sources and methods were used by the Government in a counterterrorism investigation or intelligence activity related to the individual on the No Fly List or his associates. As explained below, disclosure of this information would provide adversaries with valuable insight into the specific ways in which the Government goes about detecting and preventing terrorist attacks, with potentially grave consequences for the national security.

(U) Subject Identification and Reasons for Investigations and/or Intelligence Activities

17. (U) Requiring nominating agencies to disclose all of the reasons for including individuals on the No Fly List would cause significant harm to ongoing counterterrorism investigative or intelligence activities. In many cases, such disclosures would reveal information that would tend to confirm or deny whether a particular individual is the subject of an

investigation or intelligence operation, as well as the reasons for such investigation or operation. For example, in the case of FBI activities, disclosure of the existence of an FBI record about an individual, whether contained in the TIDE database or any other FBI counterterrorism investigative files, could alert the individual to the Government's investigative or intelligence interest in him and cause him to take counter-measures to evade detection. The risk of harm to national security would be amplified were such disclosure to include the contents of an FBI counterterrorism investigative or operational file, thereby revealing to the individual what the FBI knows about his plans. This might include information that could tend to reveal the reason for initiating the investigation or intelligence activity, the status of the investigation or operation, or other sensitive information that the investigation had brought to light.

18. (U) Disclosures of this nature would be particularly damaging where subjects or former subjects have associates whom the Government may still be investigating for potential ties to terrorist activity. Information regarding one subject may reflect investigative interest in other subjects, with the result that releasing such information reasonably could be expected to alert the other subjects that they are of interest to the Government. This, in turn, could cause the other subjects to flee, destroy evidence, or take steps to alter their conduct or communications so as to avoid detection of future activities. In these circumstances, law enforcement and intelligence officers would be significantly hindered in gathering further information on the activities of the other subjects or in determining their whereabouts. In addition, an individual's knowledge that he is under investigation might enable him to anticipate law enforcement actions by, for example, conducting counter-surveillance, which could place federal agents at higher risk of harm.

(U) Sources and Methods

19. (U) The disclosure of national security information, if required in the course of the No Fly redress process, could also reveal sensitive, classified, or previously undisclosed sources and methods used in counterterrorism investigations and intelligence activities, as well as the type of information derived from such techniques.³

20. (U) In particular, such disclosures could reveal the specific investigative methods used with respect to a certain individual target, such as court-ordered searches or surveillance, confidential human sources, undercover operations, or various forms of national security process. This, in turn, could further reveal the reasons for initiating an investigation, the steps taken in the investigation, the reasons certain methods or sources were used, the status of the use of such methods or sources, and any results derived from those techniques. To the extent the FBI is involved in a nomination, the disclosure of sensitive and classified techniques and methods would provide a roadmap to adversaries as to how the FBI goes about the vital task of detecting and preventing terrorist attacks and would allow them to engage in countermeasures to escape detection and frustrate the FBI's ongoing counterterrorism mission.

21. (U) Additionally, and again using the FBI as an example, although the FBI's general use of certain methods, such as physical surveillance, are known to the public, the release of information derived from such a method in a particular matter could, in some circumstances, jeopardize the success of investigations. For example, where surveillance is being conducted of a group of associates, providing one of the targets with information sufficient to identify where and when the surveillance took place, and even which agency was responsible for the

³ (U) Again, nothing in this declaration is meant to confirm or deny that the FBI was the nominating agency as to any Plaintiff or that any of these types of sources or methods were used with regard to the determination to include any Plaintiff on the No Fly List.

surveillance, could lead a single target to warn his associates. That, in turn, would eliminate the effectiveness of the continued use of the surveillance with regard to the other associates.

22. (U) In addition, the Government has a compelling interest in protecting the secrecy of the use of particular national security legal process, such as National Security Letters (“NSLs”), Foreign Intelligence Surveillance Act (“FISA”) surveillance, or other judicial process.⁴ To the extent that the reasons for inclusion on the No Fly List are based, even in part, on information obtained through such legal process, disclosure of that fact, or of the information derived from those methods, would pose serious risks to national security and law enforcement interests, including jeopardizing further surveillance activity and putting the success of the entire investigation or intelligence operation at risk. Moreover, revealing the use of legal process with regard to a particular subject could tip off that subject’s associates that the Government may be aware of communication between the subject and his associates.

23. (U) The disclosure of information concerning the basis for an individual’s placement on the No Fly List could also reveal the identity of confidential human sources (“CHSs”), where such sources are used as part of an investigation. At the very least, such a disclosure could reveal information that a subject or his associates could use to determine that a CHS has been used and to discover the identity of that CHS. The risks posed by the discovery of a CHS’s identity are twofold. First, when the identity of a CHS is disclosed, the CHS’s usefulness to the ongoing investigation is greatly diminished, if not eliminated altogether. More importantly, however, the CHS’s safety, and possibly the safety of his family, may be put at risk.

⁴ (U) For example, when used, NSLs can be important in the early phases of national security investigations, by providing subscriber telephone numbers and other non-content information, which can assist investigators in developing leads to determine, among other things, investigative subjects’ true identities, actions, intent, associates, and financial transactions. Just as critically, the Government uses NSLs to remove individuals from suspicion.

Where the disclosure of information regarding one subject leads to additional subjects learning that they too are of interest to the Government, such disclosure could enable subjects to ascertain the identities of additional confidential informants or other sources of intelligence, putting those sources at risk as well.

24. (U) In addition, where foreign government information has been used in an investigation, revealing such information could compromise the confidentiality of an agreement with a foreign government. This reasonably could be expected to strain relations between the United States and the foreign government, disrupting the free flow of vital information to United States intelligence and law enforcement agencies. Information about the FBI's relationships with certain foreign government entities, for example, is subject to constraints on disclosure. Some national security and law enforcement information shared by a foreign government is classified by the foreign government, while the U.S. Government may classify or assert the law-enforcement privilege over other sensitive foreign government information. The FBI's ability to carry out its responsibilities to conduct counterterrorism investigations often depends on the cooperation of certain foreign government officials, foreign intelligence services, or foreign security services. Maintaining the confidentiality of foreign government information is critical to the maintenance of ongoing productive cooperation with friendly foreign nations in the field of counterterrorism. The free exchange of information among United States intelligence and law enforcement services and their foreign counterparts is predicated upon the understanding that, not only must the information exchanged be kept in confidence, but that the relationships themselves likewise be kept confidential. Indeed, in many instances, information received from a foreign government remains the property of that government and is provided under the express

condition that it may not be released outside the agency to which it is disclosed or used in legal proceedings without that government's express permission.

(U) Law Enforcement Privilege

25. (U) In addition to reliance on national security information, inclusion on the No Fly List can also be based on sensitive law enforcement information, including information that pertains to law enforcement techniques and procedures, information that could undermine the confidentiality of sources, information that could endanger witness and law enforcement personnel, information that could undermine the privacy of individuals involved in an investigation, or information that could seriously impair the ability of a law enforcement agency to conduct future investigations. Revealing such information, beyond the types already contemplated in the revised TRIP procedures, would risk the revelation of law enforcement privileged information. In the case of the FBI, such information could include, among other things, information about individuals contained in FBI files, the identities of FBI agents and TSC personnel, and policies and procedures relating to the watchlisting process.

* * *

26. (U) Finally, the disclosure of national security and law enforcement information, if required in the course of the No Fly redress process, would have a potentially dangerous chilling effect on the use of such information in the nomination process, which in turn could undermine the effectiveness of the No Fly List. If the Government were required to provide full notice of its reasons for placing an individual on the No Fly List and to turn over all evidence considered in making the No Fly determination, the No Fly redress process would place highly sensitive national security information directly in the hands of individuals subject to counter-terrorism investigative or intelligence interest, and risk disclosure to foreign terrorist

organizations and other adversaries. This in turn would create an incentive for adversaries to manipulate the DHS TRIP redress procedures in order to allow individuals or organizations to discover whether they or their members are subject to investigation or intelligence operations, what sources and methods the Government employs to obtain information, or what type of intelligence information is sufficient to trigger an investigation in the first place. For these reasons, if nominating agencies had reason to believe that national security information used to support their No Fly nominations would be disclosed, there would be a strong reluctance to share such information in the nomination process and, potentially in some cases, to forego a nomination entirely. The No Fly listing process would become self-defeating if, in order to protect against terrorist threats to aviation and national security, the Government were required to disclose classified national security information or law enforcement information about a particular known or suspected terrorist included on the List. In my judgment, agencies that use intelligence or investigative information to nominate a person to the No Fly List to help prevent a terrorist attack, should not then be forced to disclose such information, which reasonably could be expected to compromise an investigation, expose a source, or reveal sensitive surveillance techniques.

(U) UNCLASSIFIED DESCRIPTION OF THE REASONS WHY ADDITIONAL INFORMATION WAS WITHHELD FROM PLAINTIFFS

27. (U) In my capacity as an original classification authority with oversight responsibilities for TSC, I provide a classified summary that discusses the information withheld from Plaintiffs, including both material inculpatory and exculpatory information, if any. In unclassified terms that I am able to present on the public record, the Government withheld from Plaintiffs: (a) the identities of subjects of investigation or intelligence interest; (b) sources and methods information; and (c) law enforcement information. These withholdings were made

because their disclosure reasonably would be expected to cause serious damage to the national security, and/or because disclosure would harm important law enforcement interests and impede law enforcement activities. In addition, certain privacy information relating to third parties was withheld from Plaintiffs. In the case of classified information, I have determined, as an original classification authority with oversight responsibilities for the TSC, that the withheld national security information is currently and properly classified.

28. (U) In this same capacity as an original classification authority with responsibility for TSC, I have likewise determined that, in accordance with Executive Order 13,526, Plaintiffs' counsel should not be granted access to such information.⁵ As I explained in my May 28, 2015 declaration, the release of national security information even to cleared counsel would present significant risks to investigative or intelligence activities and would create a severe disincentive to use such information to nominate individuals to the No Fly List. It must be stressed that No Fly determinations are made in the midst of ongoing investigative or intelligence activities, not during a post-investigation criminal proceeding, and that these activities are directed at the most significant of interests — detecting and preventing terrorist attacks. In these circumstances, the need to protect investigative or intelligence information and the sources and methods used to obtain it is at its zenith. Any disclosure in the administrative process, whether intentional or inadvertent, risks compromising an ongoing counterterrorism activity and the corresponding risk to national security — no matter what kind of protective

⁵ (U) Under E.O. 13,526, individuals may not access classified national security information unless, among other things, two requirements are met. First, a favorable determination of eligibility for access must be made; and second, the person has a need-to-know the information. E.O. 13,526 Sec. 4.1. A need-to-know is defined as “a determination within the executive branch in accordance with directives issued pursuant to this order that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.” E.O. 13,526 Sec. 6.1(dd).

procedures might be adopted. Any such efforts at a secure process would only give rise to the added risk of public disclosure. In my informed judgment, disclosure of information to counsel for suspected terrorists on the No Fly List, in general, raises significant risks of harm to national security. By contrast, it is my judgment that the development of unclassified summaries to eligible requesters whose status would be revealed, paired with the disclosure of applicable No Fly List criteria – itself disclosures that present some risk of harm to national security – establishes a balanced process that provides notice to an individual and an opportunity to respond to the concerns identified. For these reasons, I have determined that disclosure of the withheld classified information should not be made to Plaintiffs’ counsel.

29. (U) Finally, and to address the requirements of the Court’s order concerning “exculpatory” information, I have reviewed both the material information disclosed to Plaintiffs and withheld from Plaintiffs for purposes of assessing whether any additional exculpatory information could have and should have been provided to Plaintiffs. Apart from that information already disclosed to Plaintiffs, some of which could be considered exculpatory, additional material exculpatory information, to the extent any such information exists, was properly withheld and cannot be disclosed to Plaintiffs without risking significant harm to the national security and/or to law enforcement activities and interests.

(U) CONCLUSION

30. (U) Based on my consideration of this matter, and in my capacity as an original classification authority with supervisory responsibilities for the TSC, I have concluded that the disclosure of the classified national security and law enforcement privileged information that was withheld from the five Plaintiffs in this case reasonably could be expected to cause serious damage to the national security of the United States. I have also concluded that Plaintiffs' counsel do not have a need to know withheld classified national security information and that disclosure to them would likewise risk serious damage to the national security. Finally, I have concluded that additional material exculpatory information, to the extent any such information exists, was properly withheld and cannot be disclosed to Plaintiffs without risking significant harm to the national security and/or to law enforcement activities and interests.

31. (U) I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5 day of May, 2016.



Michael Steinbach
Executive Assistant Director
National Security Branch
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Washington, D.C.