

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

.....X
AMERICAN CIVIL LIBERTIES UNION et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF JUSTICE, et al.,

Defendants.

15 Civ. 1954 (CM)

ECF CASE

.....X

DECLARATION OF JOHN E. BIES

I, John E. Bies, declare as follows:

1. I am a Deputy Assistant Attorney General in the Office of Legal Counsel (“OLC”) of the United States Department of Justice (the “Department”). My responsibilities include the supervision of OLC’s responses to requests it receives under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. I submit this declaration in support of the Government’s Motion for Summary Judgment in this case. These statements are based on my personal knowledge, on information provided to me by OLC attorneys and staff working under my direction, and on information provided to me by others within the Executive Branch of the Government. Because of the classified and privileged nature of many of the documents at issue, I have also provided a classified declaration *ex parte* and under seal with additional information for the Court. This declaration incorporates by reference the index of documents withheld in full or in part by OLC attached hereto as Exhibit A.

OLC'S RESPONSIBILITIES

2. The principal function of OLC is to assist the Attorney General in her role as legal adviser to the President of the United States and to departments and agencies of the Executive Branch. OLC provides advice and prepares opinions addressing a wide range of legal questions involving the operations of the Executive Branch. OLC does not purport to make policy decisions, and in fact lacks authority to make such decisions. OLC's legal advice and analysis may inform the decision-making of Executive Branch officials on matters of policy, but OLC's legal advice is not itself dispositive as to any policy adopted.

3. Although OLC publishes some opinions and makes discretionary releases of others, OLC legal advice is generally kept confidential. One important reason OLC legal advice often needs to stay confidential is that it is part of a larger deliberative process—a process that itself requires confidentiality to be effective. If government agencies and OLC had to conduct deliberations with knowledge that their deliberations were open to public view, such discussions would naturally be chilled or inhibited, and the efficiency of government policy making would suffer as a result.

4. These deliberative confidentiality concerns apply with particular force to OLC advice because of OLC's role in the decision-making process: OLC is often asked to provide advice and analysis with respect to very difficult and unsettled issues of law. Frequently, such issues arise in connection with highly complex and sensitive activities of the Executive Branch on matters that can be quite controversial. So that Executive Branch officials may continue to request, receive, and rely on candid legal advice from OLC on such sensitive matters, it is essential that OLC legal advice provided in the context of internal deliberations not be inhibited by concerns about public disclosure.

5. The foregoing considerations regarding the need for confidential Executive Branch deliberations are particularly compelling in the context of the provision of legal advice, given the nature of the attorney-client relationship. There is a special relationship of trust between a client and an attorney when the one seeks and the other provides independent legal advice. When the advice is provided in confidence, it is protected from compelled disclosure. As the Supreme Court has observed, “[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). It is critical to protect this relationship of trust in the governmental context, to ensure such full and frank communication between governmental attorneys and their clients, and thereby promote such broader public interests in the government’s observance of law and the administration of justice. The free and candid flow of information between agency decision-makers and their outside legal advisers depends on the decision-makers’ confidence that such advice will remain confidential. Moreover, disclosure of legal advice may often reveal confidential communications from agency clients made for the purposes of securing advice.

6. When requested to provide counsel on the law, OLC attorneys stand in a special relationship of trust with their agency clients. Just as disclosure of client confidences in the course of seeking legal advice would seriously disrupt the relationship of trust so critical when attorneys formulate legal advice to their clients, disclosure of the advice itself would be equally disruptive to that trust. Thus, the need to protect the relationship of trust between OLC and the client seeking its legal advice provides an additional reason OLC legal advice often needs to stay confidential.

7. The interests protected by the deliberative process and attorney-client privileges continue to apply fully to confidential OLC legal advice in circumstances where the Executive Branch or one of its departments or agencies elects, in the interest of transparency, to explain publicly the Executive Branch's understanding of the legal basis for current or contemplated Executive Branch conduct. There is a fundamental distinction between an explanation of the rationale and basis for a decision, which would not be privileged, and advice received prior to making a decision, which is privileged. Thus, there is no disclosure of privileged legal advice, and therefore no waiver of attorney-client privilege, when, as part of explaining the rationale for its actions or policies, the Executive Branch explains its understanding of their legal basis without reference to any confidential legal advice that Executive Branch decisionmakers may have received before deciding to take the action or adopt the policy. Likewise, confidential advice does not lose the protection of the deliberative process privilege simply because the Executive Branch explains the basis or rationale for its actions or policies without referring to that advice; rather, confidential deliberative advice loses this protection only through adoption, *i.e.*, if the advice is expressly adopted as part of the explanation of the rationale for the decision. I strongly believe that if merely explaining publicly the legal basis for Executive Branch conduct were understood to remove the protection of the deliberative process and attorney-client privileges from the confidential legal advice provided as part of the Executive Branch's internal deliberations, it would substantially harm the ability of Executive Branch decisionmakers to request, receive, and rely upon full and frank legal advice from government lawyers as part of the decisionmaking process, and it would also harm the public by discouraging the Executive Branch from explaining its understanding of the legal basis for its actions publicly in the future.

PLAINTIFFS' FOIA REQUEST

8. On October 15, 2013, OLC received a request dated October 15, 2013 from Brett Max Kaufman on behalf of the American Civil Liberties Union Foundation (together with the American Civil Liberties Union, hereinafter the "ACLU"), seeking expedited processing and requesting records in four categories. *See* Ex. B, at 6-7 (FOIA Request (October 15, 2013)) (heinafter, as modified, "the ACLU Request"). Those categories were as follows:

a. "Any and all records pertaining to the legal basis in domestic, foreign, and international law upon which the government may use lethal force against individuals or groups, including any record indicating which groups are considered to be 'associated forces' of Al-Qaeda under the Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001) ('AUMF')." *Id.* at 6.

b. "Any and all records pertaining to the process by which the government designates individuals or groups for targeted killing, including who is authorized to make such determinations and against what evidentiary standard factual evidence is evaluated to support such designations. Specifically included in this Request is the counterpart to the Presidential Policy Guidance, which Attorney General Holder described in his May 2013 letter to Congress as a document that 'institutionalizes the Administration's exacting standards and processes for reviewing and approving operations to capture or use lethal force against terrorist targets outside the United States and areas of active hostilities'— standards that are 'either already in place or are to be transitioned into place.'" *Id.* at 6-7.

c. "Any and all records pertaining to before-the-fact assessments of civilian or bystander casualties in targeted-killing strikes and any and all records concerning 'after-action' investigations into individual targeted-killing strikes." *Id.* at 7.

d. “Any and all records pertaining to the number and identities of individuals killed or injured in targeted-killing strikes, including but not limited to records regarding the legal status of those killed or injured, with these separated out by individuals intentionally targeted and collateral casualties or injuries.” *Id.*

9. By letter dated October 25, 2013, OLC Special Counsel Paul Colborn sent a letter to Mr. Kaufman on behalf of OLC, acknowledging receipt of the ACLU Request. *See* Ex. C, at 1 (OLC Acknowledgment (October 25, 2013)). Mr. Colborn informed Mr. Kaufman that OLC would contact him in the future for clarification of the request, and that his request for expedited processing under 28 C.F.R. § 16.5(d)(1)(ii) had been denied.¹ Mr. Colborn also informed Mr. Kaufman that, out of an abundance of caution, OLC had referred the FOIA Request to the Director of the Office of Public Affairs, who makes determinations for expedited processing under 28 C.F.R. § 16.5(d)(1)(iv).

10. On December 6, 2013, following a determination by the Director of the Office of Public Affairs that expedited processing was warranted under that prong of the regulations, Mr. Colborn sent a follow-up letter to Mr. Kaufman informing him that the ACLU Request would now be given priority and processed after other expedited requests received by OLC. *See* Ex. D (OLC Expedite (December 6, 2013)).

11. On January 6, 2014, following telephone conversations with Mr. Kaufman, an OLC Attorney-Adviser processing the ACLU Request confirmed the following four narrowing agreements by email on behalf of OLC:

a. “First, the ACLU has agreed to limit its request to documents dated September 11, 2001 or later. Second, the ACLU has agreed to limit its request for

¹ Following updates to the Department’s FOIA regulations effective May 6, 2015, the regulations governing expedited processing now appear at 28 C.F.R. § 16.5(e). This Declaration refers throughout to the regulations in effect at the time the determinations were made.

documents dated prior to November 14, 2011 to those that constitute final legal advice.

Third, the ACLU has agreed to limit its request to the Office of Legal Counsel (OLC) to documents responsive to categories 1 and 2 in the ACLU's original request. Finally, the ACLU has agreed to exclude communications that are purely internal OLC communications." *See* Ex. E (OLC Narrowing (January 6-8, 2014)).

12. On January 8, 2014, Mr. Kaufman concurred with the narrowing email and included an additional point clarified in a prior telephone conversation. *Id.*

13. On March 16, 2015, while the ACLU Request remained in OLC's processing queue behind other, earlier-received expedited requests, the ACLU filed this lawsuit.

14. By emails exchanged between Jameel Jaffer, counsel to the ACLU in this matter, and Sarah Normand, an Assistant United States Attorney for the Southern District of New York who represents the government in this matter, the ACLU further agreed "to exclude from the first and second prongs of our request drafts of documents that were eventually finalized, but only where the final versions of the drafts have been disclosed to us or are listed individually on the relevant agency's public Vaughn index" as well as "publicly-available documents," and all documents created for the purpose of litigation or in connection with the processing or litigation of FOIA requests." ACLU also agreed to limit the first category to documents relating to "strikes against al Qaeda, the Taliban, associated forces, or any other terrorist organization, whatever the source of authority for the strike, outside of Afghanistan, Iraq and Syria." On June 24, 2015, the ACLU further clarified that the government could construe "any other terrorist organization," to mean "any other organization the State Department, Defense Department, or CIA consider to be a terrorist organization."

OLC'S SEARCH

15. There are a number of locations where OLC's substantive records are stored. OLC's unclassified substantive records may be located in the paper files of individual OLC employees or stored electronically in two types of electronic systems: a shared central storage system for the office's final unclassified work product and the computer accounts of individual employees. The central storage system consists of documents in their original file format (e.g., Microsoft Office, WordPerfect, PDF) collected in folders, which are organized by date, on a shared network drive on the Department of Justice electronic file server. It is OLC's practice to save all final unclassified work product to this central storage system; accordingly, if OLC has provided any unclassified written advice or has memorialized any unclassified oral advice in writing, that advice should be accessible through this system. OLC uses a search engine, called ISYS Search Software ("ISYS"), to perform keyword searches of this collection of final work product files.² ISYS searches the full text of documents (including PDF files) within this collection of final work product, as opposed to searching only document titles or email subject lines. The keyword searches in ISYS capture variations on the terms used without the need for wildcards or expanders.

16. Given that ACLU agreed to narrow the ACLU Request to final legal advice only with respect to documents dated prior to November 14, 2011, emails sent or received by OLC attorneys after that date could also include potentially responsive documents. The Department's unclassified emails, covering at least the relevant time period, are archived and may be recovered and searched using an eDiscovery search tool, called Clearwell. Clearwell searches the full text

² This software was subsequently rebranded by its developer, and the version currently in use by OLC is now known as Perceptive Search.

of emails and their attachments, including PDF files, and has extensive support for wildcards, expanders, and other search techniques.

17. In addition, OLC may have classified substantive records that could be responsive to a FOIA request. Paper files containing classified documents must be stored either in individual safes or in OLC's Sensitive Compartmented Information Facility ("SCIF"). These paper files include classified records that are not part of any individual custodian's files but rather are maintained as a part of the Office's records regarding final classified legal advice that has been provided by OLC. Electronic classified records might also be stored in a secure computer system, in which records might be located in the accounts of individual users, in shared folders, or in the classified email accounts of individual users.

The Search for Documents Responsive to the ACLU Request

18. Beginning on May 23, 2014, an OLC lead paralegal initiated a search for records responsive to the ACLU Request, including any final legal advice provided by OLC with respect to the subjects of the requests located either in the ISYS database of unclassified, final legal advice, or in secure locations identified by a long-tenured senior career OLC attorney as locations that possibly could contain potentially responsive records. All such locations identified were searched. Shortly thereafter, the lead paralegal initiated the process to conduct searches of e-mails for records responsive to the Request in an effort to ensure that any technical issues relating to the search would be resolved before the Request reached the top of her search and processing queue, notwithstanding the fact that other expedited, earlier-received FOIA requests remained ahead of the Request in the search and processing queue.

19. Upon receipt of this Court's April 30, 2015 Order, in order to attempt to meet the litigation deadlines established in that Order, the lead paralegal turned to processing the

classified documents and e-mail searches required by the Request, notwithstanding the fact that one earlier-received, expedited FOIA request from another requester still remained at the top of her processing queue ahead of the Request, and the processing of that earlier-received, expedited FOIA request had not been completed.

20. OLC is a very small component of the Department of Justice, employing approximately twenty to twenty-five attorneys at any one time. In consultation with OLC attorneys likely to be familiar with the assignment of OLC attorneys on national security matters, OLC identified six current and four former attorneys as individual custodians who might potentially have records responsive to the FOIA Request.

21. With each of the six current employees identified as potential custodians of responsive records, an OLC attorney discussed locations where potentially responsive documents might be located, and the paper files of each attorney were searched for potentially responsive documents. In addition, an OLC attorney discussed with each of the identified custodians who are current employees if there were secure locations in individual safes or in the SCIF that should be searched for potentially responsive classified records, and any locations so identified were also searched for potentially responsive documents. An OLC lead paralegal also reviewed any individual paper files left by the four departed custodians for potentially responsive documents.

22. An OLC attorney also reviewed the results of keyword searches of the classified and unclassified e-mails of all ten potential custodians. Department IT staff responsible for classified email systems ran keyword searches against the ten custodians' classified email accounts and provided the OLC attorney and lead paralegal with access to the results. Department IT staff responsible for the operation of Clearwell on the custodians' unclassified email accounts provided the OLC attorney with access to the results of the same keyword

searches.³ Using Clearwell to review the unclassified emails and Microsoft Outlook to review the classified emails, the OLC attorney reviewed all of the potentially responsive emails.

23. All of the potentially responsive documents identified by OLC's search of its final legal advice database, the e-mails of the potential custodians identified, and OLC's classified records were reviewed by an OLC attorney to determine whether they were responsive to the ACLU Request and to evaluate the application of any FOIA exemptions to the documents. OLC determined that its evaluation of the responsiveness of any particular record to the ACLU Request—which sought, inter alia, records “pertaining to the legal basis in domestic, foreign, and international law upon which the government may use lethal force against individuals or groups”—had to take into account the fact that OLC's role is to provide legal advice to Executive Branch clients on potential actions. Consequently, with respect to the period after November 14, 2011, OLC determined that it would treat as responsive records it identified, if any, that had been provided to OLC in connection with a request for legal advice relating to a potential use of lethal force against any qualifying individual or organization, whether in general or in particular.

24. The searches identified a significant volume of documents as responsive to the ACLU Request that are not classified or specifically protected from disclosure under FOIA by statute. OLC is providing 171 of those documents to the ACLU in full or partially redacted form, and is withholding 87 of those documents in whole. The withheld documents and the redacted portions of the produced documents are exempt from disclosure under Exemption Five of FOIA, 5 U.S.C. § 552(b)(5), because they are protected by the deliberative process and attorney-client privileges, and some are protected by the attorney work product doctrine and/or

³ The keywords for the search included the following terms: nomination, "lethal force", "targeted kill*", "targeted action", ppg, "policy guidance", "lethal op*", "op ed".

the presidential communications privilege, and portions of the documents are also exempt from disclosure under FOIA Exemption Six, § 552(b)(6). In addition, OLC referred a number of the unclassified documents it identified as potentially responsive to the ACLU Request to other agencies for processing and direct response to the ACLU. OLC's searches also identified additional responsive records marked as classified or protected from disclosure by statute, and OLC also referred some potentially responsive documents marked classified or protected from disclosure by statute identified by its search to other agencies for processing and direct response. OLC processed and is withholding approximately 244 responsive records marked classified or protected from disclosure by statute. These documents are all exempt from disclosure under FOIA Exemptions One, Three, and/or Five, 5 U.S.C. § 552(b)(1), (3), and (5). In addition, I have been advised that certain information relating to the personnel of other agencies reflected in the documents is also protected by FOIA Exemption Six, 5 U.S.C. § 552(b)(6).

APPLICABLE PRIVILEGES

25. The withheld records consist primarily of records conveyed to OLC in the course of preparing confidential, predecisional OLC legal advice to assist Executive Branch clients in making policy decisions; records memorializing such advice; records reflecting interagency deliberations regarding the appropriate legal analysis; or records relating to policy deliberations conveyed to OLC in connection with such legal deliberations or the preparation of such legal advice. Accordingly, such records are covered by the deliberative process and/or attorney-client privileges, and therefore are exempt under FOIA Exemption Five, unless those privileges have been waived.

26. The deliberative process privilege protects documents that are (a) predecisional, in that they were generated prior to decisions or potential decisions, such as decisions regarding

contemplated counterterrorism operations or decisions regarding the drafting of contemplated opinions or legal analyses; and (b) deliberative, in that they contain, reflect, or reveal discussions, proposals, and the “give and take” exchanges that characterize the government’s deliberative processes.

27. As discussed below, the withheld records are protected by the deliberative process privilege in whole or in part. They are predecisional, in that they contain, reflect, or reveal discussions, proposals, and the “give and take” exchanges that characterize the government’s deliberative processes. Requiring disclosure of these documents would undermine the deliberative processes of the government and chill the candid and frank communications necessary for effective governmental decisionmaking. It is essential to OLC’s mission and the deliberative processes of the Executive Branch that the development of OLC’s considered legal advice not be inhibited by concerns about the compelled public disclosure of predecisional matters, including factual information necessary to develop accurate and relevant legal advice, and draft analyses reflecting preliminary thoughts and ideas. Protecting the withheld documents from compelled disclosure is central to ensuring that Executive Branch attorneys will be able to examine relevant facts and analysis, and draft and vet legal arguments and theories thoroughly, candidly, effectively, and in writing, and to ensuring that Executive Branch officials will seek legal advice from OLC and the Department of Justice on sensitive matters.

28. The attorney-client privilege protects documents that contain or reflect confidential legal advice provided by an attorney to a client, and confidential client requests for legal advice and other confidential communications and facts conveyed by the client to the attorney for the purpose of receiving legal advice.

29. As discussed below, certain of the withheld records are protected by the attorney-client privilege in whole or in part. Many of the documents contain or reflect legal advice or drafts of legal advice that was ultimately communicated in confidence from OLC to Executive Branch clients, or disclose confidential client requests for legal advice. In addition, many of the documents also contain factual information that was communicated in confidence by Executive Branch clients to OLC for the purpose of obtaining confidential legal advice, and the existence of confidential legal advice documents reflects the privileged fact that a client requested confidential legal advice on a particular subject. Having been asked to provide legal advice, OLC attorneys stood in a relationship of trust with their Executive Branch clients. Just as disclosure of client confidences provided in the course of seeking legal advice would seriously disrupt the relationship of trust so critical when attorneys formulate legal advice for their clients, so too would disclosure of the legal advice itself undermine that trust.

30. In addition, the withheld or redacted records also include material covered by the presidential communications privilege, which protects confidential communications that relate to presidential decisionmaking and involve the President or his senior advisers. The privilege protects both the advice or recommendations conveyed to the President by his advisers and communications among those presidential advisers made in the course of formulating such advice or recommendations, as well as direct, confidential communications from the President to senior officials on sensitive topics where disclosure would inhibit the President's ability to engage in effective communications and decisionmaking.

31. I understand that the Second Circuit found that a waiver occurred with respect to certain portions of the legal analysis contained in an OLC opinion on subjects related to the topics covered by the ACLU Request. *See New York Times Co. v. Department of Justice*, 762

F.3d 233 (2014). My understanding is that the Second Circuit reached this conclusion primarily due to the release of a draft Department of Justice white paper in February 2013 containing some legal analysis similar to the OLC opinion at issue, and also due to certain public statements officially acknowledging the identity of the relevant target and the existence of relevant OLC advice. Given the materials that formed the basis of the Second Circuit's finding of waiver and official acknowledgement, in considering how to apply that finding of waiver to documents responsive to the present ACLU request, OLC understood the waiver found by the Second Circuit to apply only to legal analysis contained in a final OLC legal advice document, such as an OLC opinion, where the analysis is the same or closely related to legal analysis contained in the draft white paper, and where the target at issue has been officially acknowledged by the Government. None of the withheld or redacted material falls within the scope of the waiver found by the Second Circuit.

32. In addition, on remand in the same case, the District Court found that the government had officially acknowledged a number of facts. *See* Memorandum Decision and Order, June 23, 2015. I am also familiar with the purported "disclosures" identified by the ACLU in its motion in this case, many of which do not constitute official disclosures for the reasons explained in the Government's memorandum of law. In reviewing the documents responsive to the present ACLU Request, OLC considered whether the records contained officially acknowledged facts, including those that the Court determined had been officially acknowledged in that Order, and, if so, whether that material was reasonably segregable from exempt material. None of the withheld or redacted material contains facts that the Court determined had been officially acknowledged that is reasonably segregable from exempt

material. Further information regarding each withheld document is provided in the Government's classified, ex parte index.

DOCUMENTS AT ISSUE

33. I am personally familiar with the withheld documents that are at issue in this case.

Withholdings Pursuant to Exemption Five

Unclassified OLC Records

34. I will first address the documents OLC identified as responsive that were not marked classified. The portions of the unclassified documents not protected from disclosure by statute and identified as responsive to the ACLU's request, as identified by redactions in the documents, are protected by the deliberative process and the attorney-client privileges. These redactions are described in greater detail in the index attached as Exhibit A to this declaration.

35. As delineated in that index, OLC Documents 2, 5, 6, 7, 9, 10, 11, 12, 13, 17, 19, 20, 21, 23, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 60, 66, 70, 71, 72, 73, 74, 75, 76, 77, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 104, 105, 106, 107, 108, 109, 115, 117, 121, 122, 123, 124, 125, 126, 137, 140, 150, 186, 187, 196, 199, 204, 207, 208, 234, 237, and 240 contain deliberative content and legal advice or communications seeking legal advice regarding contemplated, draft, or proposed public statements by employees of the Department of Justice or members of the Executive Branch. As deliberations or advice regarding contemplated, draft, or proposed public statements, these materials are pre-decisional to any final determination about whether to make such a public statement and its content, and are deliberative with respect to such determinations, and thus are protected by the deliberative process privilege. Moreover, the proposed content of any draft public statements reflected in these documents would itself be pre-decisional and deliberative. Finally, as delineated in the

attached index, many of these documents reflect confidential communications between clients and their attorneys in the Executive Branch seeking or providing confidential legal advice protected by the attorney-client privilege.

36. OLC Documents 22, 25, 47, 48, 49, 50, 51, 52, 53, 54, 56, 57, 58, 59, 96, 100, 101, 102, 103, 110, 111, 112, 113, 114, 116, 118, 119, 120, 130, 131, 132, 133, 134, 135, 136, 141, 142, 148, 160, 163, 169, 185, 195, 214, 222, 223, 226, 229, 230, 238, 239, 244, 250, 251, 252, 253, 255, 256, 257, and 258 contain deliberative content and legal advice or communications seeking legal advice regarding contemplated, draft, or proposed congressional testimony by employees of the Department of Justice or members of the Executive Branch. As deliberations or advice regarding contemplated, draft, or proposed testimony, these materials are pre-decisional to any final determination about the content of such testimony, and are deliberative with respect to such determinations, and thus are protected by the deliberative process privilege. Moreover, the proposed content of any draft testimony reflected in these documents would itself be pre-decisional and deliberative. Finally, as delineated in the attached index, many of these documents reflect confidential communications between clients and their attorneys in the Executive Branch seeking or providing confidential legal advice protected by the attorney-client privilege.

37. OLC Documents 26, 156, 157, 158, 159, 161, 162, 170, 171, 172, 174, 175, 176, 177, 184, 188, 190, 191, 192, 205, 206, 235, 236, 241, 242, 243, 245, 246, and 247 contain deliberative content and legal advice or communications seeking legal advice regarding contemplated, draft, or proposed filings or presentations before an international body by the Executive Branch on behalf of the United States Government. As deliberations or advice regarding contemplated, draft, or proposed filings or presentations before an international body,

these materials are pre-decisional to any final determination about the content of such filings or presentations, and are deliberative with respect to such determinations, and thus are protected by the deliberative process privilege. Moreover, the proposed content of any draft filings or presentations reflected in these documents would itself be pre-decisional and deliberative. Finally, as delineated in the attached index, many of these documents reflect confidential communications between clients and their attorneys in the Executive Branch seeking or providing confidential legal advice protected by the attorney-client privilege.

38. OLC Documents 55, 64, 65, 78, 152, 153, 154, 155, 209, 210, 212, 213, 215, 217, 219, 225, 227, 228, 231, 232, and 233 contain deliberative content and legal advice or communications seeking legal advice regarding contemplated, draft, or proposed responses to proposed legislation by the Executive Branch. As deliberations or advice regarding contemplated, draft, or proposed responses to proposed legislation by the Executive Branch, these materials are pre-decisional to any final determination about whether to make such a response and its content, and are deliberative with respect to such determinations, and thus are protected by the deliberative process privilege. Moreover, the proposed content of any draft responses reflected in these documents would itself be pre-decisional and deliberative. Finally, as delineated in the attached index, many of these documents reflect confidential communications between clients and their attorneys in the Executive Branch seeking or providing confidential legal advice protected by the attorney-client privilege.

39. OLC Documents 98, 149, 164, 167, 168, 183, 189, 203, 221, and 254 contain deliberative content and legal advice or communications seeking legal advice pertaining to the Presidential Policy Guidance described in the FOIA Request. *See supra* at ¶ 12(b). As deliberations or advice pertaining to the Presidential Policy Guidance, including the development

and implementation of that guidance, these materials are pre-decisional to any final determination about whether to issue such guidance and its content, and are deliberative with respect to such determinations, and thus are protected by the deliberative process privilege. Moreover, the proposed content of any drafts of the guidance reflected in these documents would itself be pre-decisional and deliberative. Finally, as delineated in the attached index, many of these documents reflect confidential communications between clients and their attorneys in the Executive Branch seeking or providing confidential legal advice protected by the attorney-client privilege. Additionally, OLC Documents 24, 46, 60, 69, 81, 83, 87, 92, 99, 104, 106, 118, 121, 127, 137, 140, 143, 144, 149, 152, 153, 154, 155, 157, 158, 159, 164, 165, 167, 180, 189, 207, 224, 231, and 250 contain confidential communications that relate to presidential decisionmaking and involve senior advisers to the President, and thus are protected by the presidential communication privilege.

40. Additionally, OLC Documents 9, 10, 11, 12, 25, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 44, 62, 63, 64, 70, 71, 72, 73, 74, 75, 76, 79, 80, 81, 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 100, 101, 102, 103, 137, 140, 141, 142, 145, 148, 156, 157, 158, 159, 161, 162, 163, 186, 205, 206, 208, 225, 246, and 247 contain attorney work product prepared with respect to ongoing or anticipated litigation, and have been withheld in full on that basis. In addition to the other reasons that they are exempt, these documents contain consultations and deliberations relating to ongoing or anticipated litigation and reflect the opinions and mental impressions of attorneys prepared in connection with such litigation, and so are also protected by the attorney work product doctrine and therefore are exempt under Exemption Five.

41. All of the withheld OLC documents and portions of documents are protected by the deliberative process privilege because they are confidential, pre-decisional, and deliberative. As legal deliberations or legal advice, these documents are (a) pre-decisional, *i.e.*, were prepared in advance of Executive Branch decisionmaking; and (b) deliberative, *i.e.*, reflect advice, the preparation of advice, or other deliberations by OLC attorneys or other Executive Branch officials in connection with that decisionmaking. Consequently, these documents fall squarely within the protection of the deliberative process privilege. Compelled disclosure of these documents would undermine the deliberative processes of the Government and chill the candid and frank communications necessary for effective governmental decision-making.

42. Many of these documents are deliberations regarding and comments on draft legal analysis or other work product. There is a strong need for confidentiality with respect to drafts and other preliminary work product. By their very nature, these drafts are pre-decisional and deliberative—part of the exchange of ideas and suggestions that accompanies careful Executive Branch decisionmaking. Drafts are especially sensitive in the deliberative process within OLC, where OLC attorneys make extensive use of drafts to focus, articulate, and refine their legal advice and analysis. Compelled disclosure of such preliminary analysis would seriously inhibit the candor and effectiveness of the advisers engaged in this highly deliberative process, and the quality and integrity of the final result would inevitably suffer.

43. As part of its deliberative process in the preparation of legal advice for client agencies, OLC seeks and receives input from client agencies concerning legal theories and arguments and sometimes will share aspects of draft legal analysis with client agencies for input and comment. When formulating its legal advice, OLC depends upon these submissions and input by officials of the client agencies with knowledge or expertise in relevant subject matters.

The confidentiality of this input allows OLC to receive candid and fully reasoned legal arguments from client agencies. Like draft legal analysis, the confidentiality of this input also is integral to the deliberative processes of the Office, and such input is likewise protected by the deliberative process privilege.

44. In addition, as reflected in Exhibit A, certain of the withheld OLC documents and portions of documents contain legal advice that is protected by the attorney-client privilege. The responsive documents either (a) contain confidential legal advice provided to OLC's Executive Branch clients; (b) reflect confidential communications between OLC and Executive Branch clients made for the purpose of providing legal advice; and/or (c) are internal drafts by OLC attorneys that contain confidences OLC received from its Executive Branch clients for the purpose of providing legal advice. As such, these documents fall squarely within the attorney-client privilege. The foregoing considerations regarding the need for confidential deliberations are particularly compelling in the context of the provision of legal advice by OLC.

Classified OLC Records

45. As discussed above, in addition to these documents, OLC's search also located responsive documents marked classified or protected from disclosure by statute. The classified material processed by OLC is being withheld in full pursuant to FOIA Exemptions One, Three, and/or Five,, as discussed more fully in my classified *ex parte* declaration.

46. The withheld classified records include documents falling in the following categories:

- a. Classified documents providing confidential OLC legal advice to Executive Branch policymakers that pertain to or discuss, inter alia,
 - (1) legal analysis of the use of lethal force against individual terrorists or

terrorist groups; (2) the development and implementation of Executive Branch processes for making determinations regarding the use of such force; or (3) the content of speeches or public statements regarding such legal analysis or Executive Branch processes;

- b. Classified documents containing or reflecting confidential, predecisional legal advice provided by OLC or other Executive Branch attorneys to Executive Branch policymakers that pertain to or discuss, inter alia, (1) legal analysis of the use of lethal force against individual terrorists or terrorist groups; (2) the development and implementation of Executive Branch processes for making determinations regarding the use of such force; or (3) the content of speeches or public statements regarding such legal analysis or Executive Branch processes;
- c. Classified requests from Executive Branch officials for such legal advice, and including confidential and classified factual information potentially relevant to the requests;
- d. Classified interagency Executive Branch communications reflecting legal deliberations regarding the appropriate legal analysis of potential actions or legal determinations pertaining to or discussing, inter alia, (1) legal analysis of the use of lethal force against individual terrorists or terrorist groups; (2) the development and implementation of Executive Branch processes for making determinations regarding the use of such force; or (3) the content of speeches or public statements regarding such legal analysis or Executive Branch processes, and including communications

seeking and providing factual information determined to be potentially relevant to that analysis, as well as comments and legal deliberations regarding draft legal advice and analysis, including views provided to OLC by other agencies regarding the appropriate legal analysis, many of which include classified factual information conveyed as part of those legal deliberations;

- e. Classified interagency Executive Branch communications reflecting policy deliberations that pertain to or discuss, inter alia, (1) legal analysis of the use of lethal force against individual terrorists or terrorist groups; (2) the development and implementation of Executive Branch processes for making determinations regarding the use of such force; or (3) the content of speeches or public statements regarding such legal analysis or Executive Branch processes,
- f. Classified factual information regarding terrorist organizations and individuals involved with such organizations provided to OLC in connection with a request for legal advice, including factual information identified as potentially relevant to such legal analysis by OLC or other components or agencies and factual responses to such questions; and
- g. Classified and confidential Executive Branch documents provided to OLC in connection with interagency legal deliberations or requests for legal advice that pertain to or discuss, inter alia, (1) legal analysis of the use of lethal force against individual terrorists or terrorist groups; (2) the development and implementation of Executive Branch processes for

making determinations regarding the use of such force; or (3) the content of speeches or public statements regarding such legal analysis or Executive Branch processes.

47. As described more fully in my classified, *ex parte* declaration, in the context of the ACLU Request and OLC's possession of the documents, all of the classified responsive records would be protected from disclosure in civil litigation discovery because of the applicability of one or more privileges. Accordingly, they are properly withheld from disclosure under FOIA pursuant to Exemption Five, 5 U.S.C. § 552(b)(5). These privileges include the deliberative process privilege, the attorney-client privilege, and/or the presidential communications privilege.

48. Except as noted in my classified *ex parte* declaration, all of the classified OLC documents are protected by the deliberative process privilege because they are confidential, pre-decisional, and deliberative. As legal deliberations or legal advice, these documents are (a) pre-decisional, *i.e.*, were prepared in advance of Executive Branch decisionmaking; and (b) deliberative, *i.e.*, reflect advice, the preparation of advice, or other deliberations by OLC attorneys or other Executive Branch officials in connection with that decisionmaking. Consequently, these documents fall squarely within the protection of the deliberative process privilege. Compelled disclosure of these documents would undermine the deliberative processes of the Government and chill the candid and frank communications necessary for effective governmental decision-making.

49. Except as noted in my classified *ex parte* declaration, all of the classified OLC documents are protected by the attorney-client privilege. The responsive documents either (a) are confidential legal advice provided to OLC's Executive Branch clients; (b) reflect confidential

communications between OLC and Executive Branch clients made for the purpose of providing legal advice; and/or (c) are internal drafts by OLC attorneys that contain confidences OLC received from its Executive Branch clients for the purpose of providing legal advice. As such, these documents fall squarely within the attorney-client privilege. The foregoing considerations regarding the need for confidential deliberations are particularly compelling in the context of the provision of legal advice by OLC.

50. Many of the withheld classified records contain or reflect confidential, predecisional legal advice provided to Executive Branch policymakers or internal Executive Branch legal deliberations regarding such advice. As discussed above, documents consisting of or containing legal advice provided to Executive Branch decisionmakers in connection with their policymaking deliberations or deliberations regarding such advice fall squarely within the deliberative process privilege, because they are both predecisional and deliberative. Such documents are predecisional because they were prepared in connection with contemplated future Executive Branch policy decisions. They are deliberative because they constituted advice used by decisionmakers during interagency deliberations. As confidential legal advice provided to Executive Branch clients, such documents are also protected by the attorney-client privilege.

51. Many of the withheld classified records are deliberations regarding and comments on draft legal analysis or other work product. As discussed in paragraph 42 above, there is a strong need for confidentiality with respect to drafts and other preliminary work product.

52. Many the withheld classified records derive from formal policy deliberation processes and include extensive predecisional materials and recommendations related to potential policy decisions, and which are responsive only because they discuss or pertain to responsive legal advice and analysis. These records are highly deliberative with respect to the

policy deliberations for which they were prepared, in addition to the privileges attaching to the legal advice and legal deliberations reflected within them.

53. Other withheld classified records are factual materials or other confidential Executive Branch materials provided to OLC or other Executive Branch attorneys in connection with interagency legal deliberations or requests for legal advice. These documents are likewise protected by the deliberative process and attorney-client privileges, insofar as they were provided to OLC or other attorneys in connection with ongoing, predecisional deliberations regarding legal advice and analysis to be provided to Executive Branch decisionmakers, and disclosing the documents here would disclose the nature and substance of those deliberations.

54. As discussed in my classified, *ex parte* declaration, certain of the classified records are protected by the presidential communications privilege. These documents are either advice or recommendations conveyed to the President or his senior advisers, or direct, confidential communications from the President to senior officials on sensitive topics where disclosure would inhibit the President's ability to engage in effective communications and decisionmaking. Included among these documents are the Presidential Policy Guidance identified in the request and emails sharing and discussing drafts of that document.

Withholdings Pursuant to Exemptions One and Three

55. In connection with seeking advice from OLC, OLC's Executive Branch clients sometimes provide OLC with classified information or other information specifically protected from disclosure under FOIA by statute. OLC does not have original classification authority, but when it receives or makes use of classified information provided to it by its clients, OLC is required to mark and treat that information as derivatively classified to the same extent as its clients have identified such information as classified. Accordingly, all classified information in

OLC's possession or incorporated into its products has been classified by another agency or component with original classifying authority.

56. I am familiar with the documents marked classified that are at issue in this case. These documents are marked as classified because they were marked as classified when OLC received them or because they contain information OLC received from other components or agencies that was marked as classified. OLC has also been informed that information contained in these documents is protected from disclosure under FOIA by statute.

57. Accordingly, OLC also withheld these documents at issue pursuant to Exemptions One and Three. Exemption One, 5 U.S.C. § 552(b)(1), exempts documents classified in the interest of national defense or foreign policy pursuant to an Executive Order from disclosure under FOIA. Exemption Three, 5 U.S.C. § 552(b)(3), exempts documents "specifically exempted from disclosure by statute" from disclosure under FOIA. The application of these exemptions to these documents is further addressed in the classified, *ex parte* declarations being filed in connection with this motion.

Withholdings Pursuant to Exemptions Six

58. Some of the identified responsive OLC documents include the names of OLC employees whose identity is protected by Exemption Six, which exempts the disclosure of records which would otherwise constitute a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Additionally, I have been advised that some of the identified responsive OLC documents include the names of employees at other departments and agencies whose identity is protected by Exemption Six. *See* Declarations of John Hackett, Martha Lutz, Jennifer Butler, Rear Admiral Andrew J. Lewis, Douglas Hibbard, and Brad Wiegmann, filed

contemporaneously herewith. The names of these employees are withheld on this additional basis as well.

Segregability and Waiver

59. None of the withheld documents or redacted portions of produced documents contain reasonably segregable, nonexempt information.

60. None of the withheld documents or redacted portions of produced documents falls within the scope of the waiver found by the Second Circuit discussed above in paragraph 31.

61. None of the withheld documents or redacted portions of produced documents contains facts that the Court determined had been officially acknowledged (as discussed above in paragraph 32) in a manner reasonably segregable from exempt material.

62. I am also familiar with the purported “disclosures” identified by the ACLU in its motion in this case, many of which do not constitute official disclosures for the reasons explained in the Government’s memorandum of law. None of the purported disclosures identified by the ACLU has resulted in an official acknowledgement with respect to the information contained in the documents and redacted material withheld by OLC. In addition, to the extent that the Court concludes that information contained in the purported disclosures identified by the ACLU did constitute an official acknowledgement, the material separately remains exempt because there has been no waiver of applicable privileges to the documents and redacted material withheld by OLC.

Discretionary Release

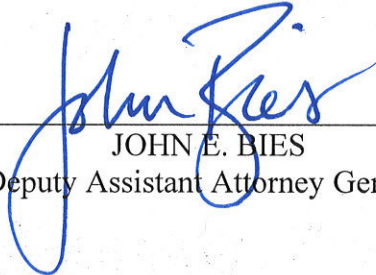
63. None of the withheld documents or redacted portions of produced documents is appropriate for discretionary release.

* * * * *

64. In conclusion, I respectfully submit that, except as noted in my classified *ex parte* declaration, all of the withheld responsive documents or redacted portions of documents are covered by the deliberative process privilege and/or the attorney-client privilege, and certain of the documents or redacted materials are covered by the presidential communications privilege. Accordingly, the withheld documents and portions of documents fall squarely within Exemption Five. The compelled disclosure of these documents would harm the deliberative processes of the government and would disrupt the attorney-client relationship between OLC and its clients throughout the Executive Branch.

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

Executed: October 2, 2015



JOHN E. BIES
Deputy Assistant Attorney General