

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

AMERICAN CIVIL LIBERTIES UNION,
et al.,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, et al.,

Defendants.

Case No. 15 CV 1954 (CM)

DECLARATION OF MARTHA M. LUTZ
INFORMATION REVIEW OFFICER
LITIGATION INFORMATION REVIEW OFFICE
CENTRAL INTELLIGENCE AGENCY

I, MARTHA M. LUTZ, hereby declare and state:

1. I am the Information Review Officer for the Central Intelligence Agency's ("CIA" or "Agency") Litigation Information Review Office. I have held this position since October 2012. My title and the name of my office changed in February 2015, but the adjustment reflected no change in my underlying responsibilities and authorities, or those of my office.

2. Prior to assuming this position, I served as the Information Review Officer for the Director's Area of the CIA for over thirteen years. In that capacity, I was responsible for making classification and release determinations for information originating within the Director's Area, which includes, among other offices, the Office of the Director of the

CIA, the Office of Congressional Affairs, and the Office of General Counsel. I have held other administrative and professional positions within the CIA since 1989.

3. As an Information Review Officer, I am responsible for the classification review of CIA documents and information that may be the subject of court proceedings or public requests for information under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. I am a senior CIA official and hold original classification authority at the TOP SECRET level under written delegation of authority pursuant to section 1.3(c) of Executive Order No. 13526. Because I hold original classification authority at the TOP SECRET level, I am authorized to assess the current, proper classification of CIA information, up to and including TOP SECRET information, based on the classification criteria of Executive Order 13526 and applicable regulations.

4. Through the exercise of my official duties, I have become familiar with this civil action and the underlying FOIA request. This declaration will explain, to the greatest extent possible on the public record,¹ the Agency's searches and the decision to withhold responsive records in this case.

¹I am also submitting a classified declaration for the Court's *ex parte, in camera* review that contains additional information which cannot be described on the public record.

I. FOIA REQUEST AT ISSUE

5. By letter dated 15 October 2013, the ACLU requested four discrete categories of records related to the U.S. government's "targeted-killing program." The Court stayed proceedings with respect to the two categories of records that sought casualty information and substantially duplicated information sought from the CIA in the ACLU's related action in the District of Columbia. The two portions of the request that were not encompassed by the Court's stay order are:

- 1) 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").
- 2) 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."

6. Based on the wording and surrounding context set forth in the ACLU's full request, past ACLU requests on this subject matter, and communications with ACLU, the Agency interpreted ACLU's request as one for programmatic documents that discuss the "legal basis" for the U.S. Government's use of lethal force and/or detail the broader "process" for designating individuals or groups for targeted lethal operations.² The Agency's interpretation is consistent with the ACLU's most recent articulation of its request contained in the Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment, filed on 28 August 2015, which describes items 1 and 2 of the request as seeking "the legal basis for the targeted-killing program" and "the standards and evidentiary processes the government uses to evaluate (and approve or reject) the use of lethal force (including the Presidential Policy Guidance applicable to targeted killings outside 'areas of active hostilities')." .

7. The first category of the ACLU's request would include records that establish the legal basis for such operations in general, including the legal standards that are employed. Also included as responsive would be final legal opinions (or, as agreed to by the ACLU, the latest draft of legal opinions where

² Notably, unlike items 3 and 4 of the ACLU's request, which have been stayed, items 1 and 2 do not specifically go to what the ACLU has characterized as "individual targeted-killing strikes."

no final version is available) analyzing what the appropriate legal standards should be. The Agency did not interpret the request to include records that simply refer to those established standards or apply them to specific circumstances. This same approach was applied to the portion of the request seeking records about which groups should be considered "associated forces" under the AUMF.

8. With respect to the second category of records, the Agency similarly interpreted the request as seeking records that establish the processes employed by the U.S. Government for designating individuals or groups for targeted lethal operations, including who is authorized to make such determinations and the evidentiary standards that are used. The Agency did not interpret the request to include records that would apply those processes to individual circumstances. To the extent that the request could be construed more broadly, the Agency notes that the fact of whether or not it has had an operational role in any particular lethal operation carried out by the U.S. Government beyond the Anwar al-Aulaqi operation, as well as the nature and extent of such involvement, is classified. Any records revealing such a role, if they existed, would also be classified.

II. SEARCHES FOR RESPONSIVE RECORDS

9. In the course of conducting searches for records responsive to plaintiff's request, CIA employees approached knowledgeable Agency officials to ascertain the location and types of responsive documents. Those officials identified the CIA offices that were likely to maintain responsive records. In turn, following discussions with knowledgeable personnel in those offices, the Agency conducted manual and electronic searches in those locations for documents using terms such as "lethal force," "Presidential Policy Guidance," "PPG," and "drone." Additional details regarding the Agency's search are provided in the CIA's classified declaration.

10. The CIA identified thirty responsive records during its search. As described below and in the CIA's classified declaration, all of those records are being withheld in full under Exemptions (b)(1) and (b)(3). Nineteen of the records are also being withheld in full under Exemption (b)(5).

III. DISCLOSURES REFERENCED BY ACLU

11. I understand that the Court has ordered the Government to review the purported official acknowledgments identified by the ACLU and, for each withheld document, to either certify that the officially acknowledged information is not discussed or explain why the applicable exemptions have not been waived. Accordingly, I have carefully examined each of these statements

submitted by the ACLU in its table of "disclosures relating to the legal basis for the targeted-killing program." I note that some of the purported official acknowledgments cited by the ACLU were made by former government officials, officials from federal agencies other than the CIA, members of Congress, or unofficial sources. Because statements by individuals who are not currently CIA officials cannot waive FOIA protections on behalf of the CIA, I have excluded such statements from my consideration.

12. To the extent that any information in the ACLU's table has been officially acknowledged, those official acknowledgments are consistent with this Court's findings in the earlier related ACLU litigation. Namely, the six facts that this Court ruled had been officially acknowledged are: (1) the fact that the Government uses drones to carry out targeted killing overseas; (2) the fact that both the Department of Defense ("DOD") and CIA have an intelligence interest in the use of drones to carry out targeted killings; (3) the fact that both DOD and CIA have an operational role in conducting targeted killings; (4) information about the legal basis (constitutional, statutory, common law, international law and treaty law) for engaging in the targeted killings abroad, including specifically the targeted killing of a U.S. national; (5) the fact that the Government carried out the targeted killing of Aulahi; and

(6) the fact that the FBI was investigating Samir Khan's involvement in jihad.

13. For each of the CIA's responsive records, I have certified in the CIA's classified declaration that no official acknowledgments have waived the claims of exemption. In particular, I have considered whether a document contains an officially acknowledged fact and, if so, whether FOIA exemptions nonetheless continue to apply because (1) the prior official acknowledgments are not as specific as the information contained in the documents responsive to this request, (2) the prior official acknowledgments appear in a materially different context and consequently do not constitute waiver with respect to the information contained in the documents responsive to this request, and/or (3) the officially acknowledged information is not reasonably segregable from exempt information. I note, however, that the Agency has not had the benefit of this Court's ruling regarding which, if any, of the purported official acknowledgments identified by the ACLU suffice to waive any FOIA exemptions with respect to CIA information. Should the Court require additional certifications to address specific concerns after making such a ruling, the Agency is prepared to submit supplemental affidavits.

IV. FOIA EXEMPTIONS PROTECTING CLASSIFIED INFORMATION

A. Exemption (b) (1)

14. Exemption (b) (1) provides that the FOIA does not require the production of records that are: "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b) (1). As explained below, the Exemption (b) (1) withholdings in the documents at issue satisfy the procedural and the substantive requirements of Executive Order 13526.

15. Section 1.1(a) of Executive Order 13526 provides that information may be originally classified under the terms of this order if the following conditions are met: (1) an original classification authority is classifying the information; (2) the information is owned by, produced by or for, or is under the control of the U.S. Government; (3) the information falls within one or more of the categories of information listed in section 1.4 of Executive Order 13526; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in some level of damage to the national security, and the original classification authority is able to identify or describe the damage. The Executive Order also mandates that

records be properly marked and requires that records not be classified for an improper purpose.

i. Procedural Requirements

16. Original classification authority. Pursuant to a written delegation of authority in accordance with Executive Order 13526, I hold original classification authority at the TOP SECRET level. Therefore, I am authorized to conduct classification reviews and to make original classification decisions. I have determined that the records at issue in this case are currently and properly classified.

17. U.S. Government information. The information at issue is owned by the U.S. Government, was produced by or for the U.S. Government, and is under the control of the U.S. Government.

18. Classification categories in Section 1.4 of the Executive Order. Exemption (b)(1) is asserted in this case to protect information that concerns "intelligence activities (including covert action), intelligence sources or methods, or cryptology," pursuant to section 1.4(c) of the Executive Order. Additionally, Exemption (b)(1) also applies to information that pertains to "foreign relations or foreign activities of the United States, including confidential sources" under section 1.4(d).

19. Damage to the national security. I have determined that the CIA information contained in the records at issue are

classified TOP SECRET, because they constitute information the unauthorized disclosure of which could reasonably be expected to result in exceptionally grave damage to the national security.

20. Proper purpose. With respect to the information for which Exemption (b)(1) is asserted in this case, I have determined that this information has not been classified in order to conceal violations of law, inefficiency, or administrative error; prevent embarrassment to a person, organization or agency; restrain competition; or prevent or delay the release of information that does not require protection in the interests of national security.

21. Marking. The documents are properly marked in accordance with section 1.6 of the Executive Order.

ii. Substantive Requirements

22. In the course of this litigation, I have reviewed the responsive records and determined that they contain certain information that is currently and properly classified. Specifically, I have determined that this information is properly withheld because its disclosure could reasonably be expected to lead to the identification of intelligence sources, methods and activities of the CIA and/or to cause damage to foreign relations or foreign activities of the United States, including confidential sources within the meaning of sections 1.4(c) and 1.4(d) of Executive Order 13526. The CIA has found

that disclosure of this information could reasonably be expected to result in exceptionally grave damage to national security. As such, all of the CIA records at issue in this case are currently and properly classified at the TOP SECRET level.

B. Exemption (b) (3)

23. Exemption (b)(3) protects information that is specifically exempted from disclosure by statute. A withholding statute under Exemption (b)(3) must (A) require that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establish particular criteria for withholding or refer to particular types of matters to be withheld. 5 U.S.C. § 552(b)(3).

24. Here, the CIA has determined that Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. § 3024 (the "National Security Act"), which provides that the Director of National Intelligence "shall protect intelligence sources and methods from unauthorized disclosure," also applies to the information for which Exemption (b)(1) was asserted. As an initial matter, the National Security Act has been widely recognized to be a withholding statute under Exemption (b)(3).

25. The CIA also invoked Section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 3507 (the "CIA Act"), in conjunction with Exemption (b)(3). Section 6 of the CIA Act protects from disclosure information

that would reveal the CIA's organization, functions, including the function of protecting intelligence sources and methods, names, official titles, salaries, or numbers of personnel employed by the CIA. The CIA Act has been widely recognized by courts to be a federal statute that "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3).

V. DAMAGE TO NATIONAL SECURITY

26. As detailed below, each of the thirty responsive records have been withheld in full on the basis of FOIA Exemptions (b)(1), (b)(3) and/or (b)(5). The CIA is unable to describe the documents on the public record because the contents are currently and properly classified. However, the CIA's classified declaration and Vaughn Index, which were submitted for the Court's *ex parte*, *in camera* review, contain detailed information as to the content of those documents and the rationale for non-disclosure.

27. These records contain sensitive classified information reflecting intelligence activities, sources and methods -- which serve as the principal means by which the CIA accomplishes its mission. The protection of intelligence sources and methods is crucial in situations such as this one, where the source of information, and the capabilities, techniques and applications of certain methods are unknown to others, such as foreign

intelligence services or terrorist organizations. Secret collection techniques and sources of intelligence are effective from an intelligence-gathering perspective only so long as they remain unknown and unsuspected. Once the nature of an intelligence source or method, or the fact of its use in a certain situation, is discovered, its value in that situation is neutralized and the ability to utilize that source or apply that method in other situations is significantly impaired.

28. Because revealing additional details about the records at issue would disclose the classified equities involved, I am limited in my ability to describe the specific intelligence activities, sources and methods involved, or the harm that would be occasioned by their disclosure, on the public record. However, I can say that it would greatly benefit terrorist organizations to know which clandestine sources and methods were used to obtain information about certain individuals and groups, as well as the specific intelligence that these techniques produced. This information could be used by terrorist organizations to uncover current collection activities and take countermeasures to avoid future detection by Intelligence Community agencies, thereby harming national security. In some instances, even indirect references to information obtained by classified sources and methods must be protected. Terrorist organizations and other hostile groups have the capacity and

ability to gather information from myriad public sources, analyze it, and determine the means and methods of intelligence collection from disparate details. This type of disclosure could defeat the specific collection efforts of the CIA and, more broadly, the U.S. Government. Accordingly, even seemingly innocuous, indirect references to an intelligence method could have significant adverse effects when coupled with other publicly-available data. For these reasons and the reasons set forth in the classified submissions, I have determined that disclosure of the records at issue reasonably could be expected to cause exceptionally grave damage to the national security.

29. For the same reasons outlined above, the information at issue here also is exempt from disclosure pursuant to Exemption (b)(3). In reviewing the records that contain CIA information, I have determined that the information constitutes protected intelligence sources and methods -- information that falls squarely within the scope of Section 102A(i)(1) of the National Security Act. Additionally, the names of CIA officials were protected. This information falls within the ambit of the CIA Act. Although no harm rationale is required, as noted above, the release of this information could significantly damage the ability of the CIA and other members of the Intelligence Community to collect and analyze foreign intelligence information. Disclosure of this information is

prohibited by statute and having reviewed the material, I find it to be properly exempt from disclosure under the National Security Act and CIA Act.

VI. PRIVILEGED MATERIAL

30. Additionally, for nineteen documents, the CIA asserted Exemption (b)(5) to protect certain information covered by the attorney-client and deliberative process privileges. I note that all of the privileged information discussed below is also withheld on the grounds that it is currently and properly classified in accordance with Exemption (b)(1) and protected by statute pursuant to Exemption (b)(3).

31. The deliberative process privilege was invoked to protect certain documents that are pre-decisional and deliberative in nature, including drafts. All of the material for which the deliberative process privilege was asserted reveals an interim stage in intra- and inter-agency discussions, which preceded a final decision of the CIA or other agency or component of the Executive Branch. Disclosure of this information would inhibit the frank communications and the free exchange of ideas that the privilege is designed to protect.

32. Additionally, the CIA has asserted the attorney-client privilege to protect certain communications between clients and counsel in connection with a request for the provision of legal advice as well as information provided by certain individuals in

furtherance of that advice. In all instances for which the attorney-client privilege was asserted, the confidentiality of these communications was maintained. If this type of confidential information were to be disclosed, it would inhibit open communication between clients and their lawyers, thereby depriving the Agency of the full and candid counsel of its attorneys.

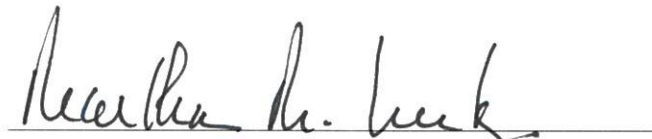
VII. SEGREGABILITY

33. In evaluating responsive documents, the CIA conducted a page-by-page and line-by-line review and determined that there is no reasonably segregable, non-exempt portions of documents that can be released without potentially compromising classified information, intelligence sources and methods, and/or material protected by privilege. Accordingly, each withheld record is wholly exempt pursuant to Exemptions (b)(1), (b)(3), and/or (b)(5). I respectfully refer the Court to the *in camera*, *ex parte* submissions in this case which provide detailed explanations of classified, statutorily-protected, and privileged material contained in the documents - information for which a complete discussion on the public record is not possible.

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 2nd day of October 2015.

A handwritten signature in black ink, appearing to read "Martha M. Lutz", written over a horizontal line.

MARTHA M. LUTZ
Information Review Officer
Litigation Information Review Office
Central Intelligence Agency