

**THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

AMERICAN CIVIL LIBERTIES UNION)
THE AMERICAN CIVIL LIBERTIES UNION)
FOUNDATION,)

Plaintiffs,)

v.)

No. 15-CV-1594 (CM)

U.S. DEPARTMENT OF JUSTICE,)
including its components)
the OFFICE OF LEGAL COUNSEL and)
OFFICE OF INFORMATION POLICY,)
DEPARTMENT OF DEFENSE,)
DEPARTMENT OF STATE, and)
CENTRAL INTELLIGENCE AGENCY,)

Defendants.)

DECLARATION OF JOHN BRADFORD WIEGMANN

I, John Bradford Wiegmann, declare as follows:

1. I am a Deputy Assistant Attorney General in the National Security Division (“NSD”) of the United States Department of Justice (“DOJ” or “Department”). NSD is a component of the Department which formally began operations on October 2, 2006, by consolidating the resources of the Office of Intelligence Policy and Review (“OIPR”) and the Criminal Division’s Counterterrorism Section (“CTS”) and Counterespionage Section (“CES”).

2. In my capacity as Deputy Assistant Attorney General, I supervise the Freedom of Information (“FOIA”) and Declassification Unit which is responsible for responding to requests for access to NSD records and information pursuant to the FOIA, 5 U.S.C. § 552 and the Privacy

Act of 1974. The FOIA and Declassification Unit also processes the NSD records which are responsive to FOIA requests received by other Executive Branch agencies. In addition, I am responsible for overseeing NSD's Law and Policy Office which implements Department of Justice policies with regard to intelligence, counterterrorism, and other national security matters and provides legal assistance and advice on matters of national security law. Further, I have been designated by the Attorney General of the United States as an original classification authority and a declassification authority pursuant to Executive Order 13526, §§ 1.3 and 3.1. The statements contained in this declaration are based upon my personal knowledge, information provided to me in the course of my official duties, and determinations I have made following a review of NSD's potentially responsive documents.

3. On or about October 15, 2013, plaintiff submitted a Freedom of Information Act ("FOIA") request to the Department of Justice's Office of Legal Counsel ("OLC") and Office of Information Policy ("OIP") for the following:

- 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
- 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.
- 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.

- 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.

4. On or about August 17, 2015, OLC referred to NSD a number of documents which consisted of electronic mail messages and memoranda of law. On or about September 17, 2015, OIP referred to NSD a number of documents which also consisted of electronic mail messages and memoranda of law. Some of the referred materials were duplicates of documents which other agencies had already located, and others were outside the scope of the request. NSD did not process the duplicate and out of scope materials. NSD asked OLC and OIP to withhold the remaining documents in full pursuant to FOIA Exemptions (b)(1), (b)(5), and (b)(6). NSD's documents are listed in an unclassified index attached as Exhibit A.

Exemption (b)(1)

5. FOIA exemption (b)(1), 5 U.S.C. § 552(b)(1), provides that the FOIA disclosure provisions do not apply to matters 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.

6. Section 1.1 (a) of Executive Order ("E.O.") 13526 provides that information may be originally classified under the terms of this order only if all of 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 E.O. 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.

7. All of the records referred to NSD by OLC and OIP are properly classified.¹ The information contained in these documents is owned by and under the control of the U.S. Government. The withheld information is classified TOP SECRET. Section 1.2 (a)(1) of E.O. 13526 states:

“Top Secret” shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe.

Section 1.4 of E.O. 13526 identifies the types of information that may be considered for classification. Of relevance to the information withheld here, the provision states that:

Information shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security ... and it pertains to: ... (a) military plans, weapons systems, or operations; (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology; (d) foreign relations or foreign activities of the United States, including confidential sources.

8. In this case, the responsive, classified materials detail classified military and

¹The classified information being withheld by NSD is derivatively classified by NSD. NSD's records are also referenced in the classified declaration being submitted herewith.

intelligence operations and plans, including the process for determining whether groups of individuals are proper targets of lethal or combat operations, the policy considerations important in making those determinations, and factors considered in developing potential military operations. This information is currently and properly classified, and must be withheld under E.O. 13526 Sections 1.4(a) (military plans, weapons systems, or operations). Al Qaeda and other adversaries review publicly available information to attempt to disrupt or avoid U.S. intelligence-gathering and counterterrorism operations. Disclosure of the classified factors and procedures for potential targeting decisions would assist adversaries in avoiding operations against them. Further, identifying whether a group is or is not currently considered an associated force could afford an operational advantage to those groups. In addition, the information in the classified materials also relates to intelligence activities, sources, or methods. Disclosure of this information would reveal the scope of sensitive U.S. intelligence operations. These documents discuss ongoing intelligence operations, including intelligence gathering methods. Disclosure of this information would provide our adversaries and foreign intelligence targets with insight into the United States Government's foreign intelligence collection capabilities, which in turn could be used to develop the means to degrade and evade those collection capabilities. Finally, the information contained in the responsive materials concerns sensitive aspects of U.S. foreign relations, including issues relating to identifying potential threats to U.S. national security in various regions of the world and efforts to counter those threats. In particular, the withheld information includes discussions of sensitive national security topics involving the advancement of United States strategic interests in various regions. Release of this classified information has the potential to inject friction into, or cause damage to, a number of our bilateral relationships

with countries whose cooperation is vital to U.S. national security, including some in which public opinion might not currently favor close cooperation with the United States. Disclosure of sensitive information pertaining to U.S. strategic interests in these regions could compromise the ability of the United States to advance those interests through its foreign policy. And release of the withheld information could pose a particular threat to the national security of the United States in light of the political and security instability in the regions in question. For all of the reasons listed above, the information in the withheld material is currently and properly classified pursuant to Sections 1.4 (a), (c), and (d) of E.O. 13526, and is therefore exempt from disclosure under FOIA Exemption (b)(1).

Exemption (b)(5)

9. NSD has also determined that certain responsive records are exempt from disclosure pursuant to FOIA Exemption (b)(5). FOIA Exemption (b)(5) protects “inter-agency or intra-agency memorandums or letters which would not be available by law or to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). This exemption protects documents which would normally be privileged in the civil discovery context. Among the privileges incorporated into Exemption 5 is the Deliberative Process Privilege whose purpose is to prevent injury to the quality of agency decisions. Thus, material that contains or was prepared in connection with the formulation of opinions, advice, evaluations, deliberations, policies, proposals, conclusions, or recommendations may properly be withheld. Disclosure of this type of information would have an inhibiting effect upon agency decision-making and the development of policy because it would chill full and frank discussions between agency personnel and decision makers regarding a decision. If agency personnel know that their

preliminary impressions, opinions, evaluations, or comments would be released for public consumption, they could be less candid and more circumspect in expressing their thoughts, which would impede the full discussion of issues necessary to reach a well-reasoned decision.

10. In order to invoke the deliberative process privilege, the protected information must be both “pre-decisional” and “deliberative.” Information is “pre-decisional” if it temporally precedes the decision or policy to which it relates. It is “deliberative” if it played a direct part in the decision-making process because it consists of recommendations or opinions on legal or policy matters, or reflects the give-and-take of the consultative process. The deliberative process privilege applies to those NSD records that reflect deliberations by NSD in conjunction with other DOJ components, regarding the legal framework of direct action.

11. In addition, NSD’s records are also exempt under (b)(5) under the Attorney Client Privilege. The attorney-client privilege concerns confidential communication between an attorney and his/her client pertaining to a legal matter for which the client has sought the attorney’s counsel. This privilege’s purpose is to encourage attorneys and their clients to communicate fully and honestly without fear of embarrassment and other harms. Particularly in the context of government attorneys, the privilege further serves to promote the public interest in the observance of law and administration of justice.

12. In this case, the withheld materials include legal advice prepared by Department of Justice attorneys for other government personnel who represent the client, the United States. The electronic messages and memorandums reflect those attorneys’ views on questions of law, were sought by the government’s decision makers and their representatives to obtain legal advice on those questions, and indeed provided such advice. The materials furthermore were intended

to be, and were in fact, kept confidential; to the best of my knowledge, they were circulated only within the Executive Branch, and accessed only by government officials and staff working on the issues addressed by the messages and memorandums. They are therefore protected by the attorney-client privilege.

Exemption (b)(6)

13. Additionally, NSD's records also contain information that is exempt from disclosure pursuant to FOIA Exemption (b)(6), which protects information when its disclosure would constitute an unwarranted invasion of personal privacy.

14. Exemption (b)(6) permits withholding of "personnel and medical files and similar files when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). When withholding information pursuant to this exemption, the Government must balance the privacy interests of the individuals against any public interest in disclosure. The public interest in disclosure is determined by whether the information would inform the general public about how NSD fulfills its responsibilities and protects the national security.

15. Here, NSD asserts Exemption (b)(6) to protect the names and identifying information of government employees. Specifically, NSD's records contain names and/or identifying information concerning Department of Justice personnel. These individuals have privacy interests in avoiding publicity in connection with their work because it could subject them to harassment or intimidation. And there is no discernible public interest in identifying these individuals, because providing the names and/or identifying information of particular employees would not shed light on NSD's operations. As a result, releasing this information

would constitute a clearly unwarranted invasion of their privacy which outweighs the public interest in disclosure.

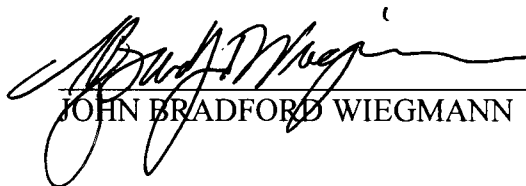
Segregability

16. These records contain no reasonably segregable, non-exempt information that can be released without potentially compromising classified information, and/or material protected by privilege. Any unclassified and/or non-privileged material in the relevant portions of the responsive documents, to the extent it exists, is so inextricably intertwined with the classified and/or privileged material that the release of any non-exempt information would produce only incomplete, fragmented, or unintelligible sentences and phrases. The unclassified and non-privileged information in the relevant portions of the responsive documents, to the extent that any exists, does not contain meaningful information responsive to the ACLU request.

17. I am aware of the Court's determination in a separate case, *ACLU v. DOJ, No. 1:12-cv-794-CM* (S.D.N.Y.), that there are certain facts relating to lethal strikes by the U.S. government that have been officially acknowledged. I also have reviewed the 13 alleged "facts" that the ACLU claims in its August 28, 2015 filing in this case have been officially acknowledged by the U.S. government. I have reviewed the responsive records that were referred to NSD and described above and determined that each of the withheld documents either does not contain officially acknowledged material or, if such material is contained within the documents, it is inextricably intertwined with properly classified or otherwise exempt information.

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

Executed this 2nd day of October, 2015.



JOHN BRADFORD WIEGMANN