

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

_____)	
AMERICAN CIVIL LIBERTIES UNION, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 15-cv-1954 (CM)
)	
DEPARTMENT OF JUSTICE, et al.,)	
)	
Defendants.)	
_____)	

DECLARATION OF JENNIFER L. HUDSON
DIRECTOR, INFORMATION MANAGEMENT DIVISION,
OFFICE OF THE CHIEF INFORMATION OFFICER,
OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

Pursuant to 28 U.S.C. § 1746, I, Jennifer L. Hudson, declare the following to be true and correct:

1. I am the Director of the Information Management Division (“IMD”) for the Office of the Director of National Intelligence (“ODNI”). I have held this position since May, 2013. I joined ODNI in 2007 as the Chief, Information Review and Release Branch, and was directly involved in the creation of ODNI’s IMD. After a one-year assignment working in the ODNI’s Office of Legislative Affairs, I returned to IMD and assumed my current position as the Director of that office. Prior to my arrival in ODNI, I held information management positions in the Joint Personnel Recovery Agency, the Defense Prisoner of War/Missing Persons Office, and later in the Public Access Branch at the Defense Intelligence Agency.

2. IMD is responsible for facilitating the implementation of information

management-related Executive orders, laws, regulations, and ODNI policy. This function entails controlling information throughout its life cycle and includes the areas of records management, classification management and declassification, pre-publication reviews, and responding to requests under the Freedom of Information Act (“FOIA”) and the Privacy Act (“PA”).

3. Under a written delegation of authority by the Director of National Intelligence (“DNI”) pursuant to section 1.3(c) of Executive Order 13526, I hold original classification authority (“OCA”) at the TOP SECRET level. I am authorized, therefore, to conduct classification reviews and to make original classification and declassification decisions for intelligence information up to and including the TOP SECRET level. In my current position, I am the final decision-making authority regarding FOIA and PA processing for the ODNI/IMD.

4. Through the exercise of my official duties, I have become familiar with this civil action and the underlying FOIA request. I make the following statements based upon my personal knowledge and information made available to me in my official capacity.

5. I submit this declaration in support of the Department of Justice’s (“DOJ”) Motion for Summary Judgment in this proceeding. The purpose of this declaration is to explain, to the fullest extent possible on the public record, the actions taken by the ODNI in responding to the American Civil Liberties Union’s (“ACLU”) request for information under the FOIA, 5 U.S.C. § 552. This declaration will be supplemented by a *Vaughn* index.

I. ODNI BACKGROUND

6. Congress created the position of the Director of National Intelligence (DNI) in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §§ 1101(a) and 1097, 118 Stat. 3638, 3643-63, 3698-99 (2004) (amending Sections 102 through 104 of Title I of the National Security Act of 1947). Subject to the authority, direction, and control of the

President, the DNI serves as the head of the Intelligence Community (IC), and as the principal adviser to the President and the National Security Council for intelligence matters related to the national security. 50 U.S.C. §§ 3023(b)(1), (2).

7. The responsibilities and authorities of the DNI are set forth in the National Security Act. These responsibilities include ensuring that national intelligence is provided to the President, heads of the departments and agencies of the Executive Branch, the Chairman of the Joint Chiefs of Staff and senior military commanders, and the Senate and House of Representatives and committees thereof. 50 U.S.C. § 3024(a)(1). The DNI is charged with establishing the objectives of; determining the requirements and priorities for; and managing and directing the tasking, collection, analysis, production, and dissemination of national intelligence by elements of the IC. 50 U.S.C. §§ 3024(f)(1)(A)(i) and (ii).

8. In addition, the National Security Act provides that the DNI “shall protect intelligence sources and methods from unauthorized disclosure.” 50 U.S.C. § 3024(i)(1). Consistent with this responsibility, the DNI establishes and implements guidelines for the IC for the classification of information under applicable laws, Executive orders, or other Presidential Directives, and for access to and dissemination of intelligence. 50 U.S.C. § 3024(i)(2)(A), (B).

9. The function of the ODNI is to assist the DNI in carrying out his duties and responsibilities under the National Security Act and other applicable provisions of law, and to carry out such other duties as may be prescribed by the President or by law.

II. THE ACLU’S FOIA REQUEST AND THE DEPARTMENT OF JUSTICE’S COORDINATION WITH THE ODNI

10. On October 15, 2013, the ACLU transmitted a FOIA request to the Department of Defense, the Central Intelligence Agency, the Department of State, and the Department of

Justice's Justice Management Division, its Office of Legal Counsel, and its Executive Office for United States Attorneys seeking the following information:

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").

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."

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.**

11. On March 16, 2015, the ACLU filed a complaint for injunctive relief against the DOJ, the Department of Defense, the Department of State, and the Central Intelligence Agency requesting the court to direct those agencies to produce the documents described above.

12. DOJ subsequently informed the ODNI that it had located various documents within its systems of records that might be responsive to the ACLU's request and that contained ODNI information. As is standard procedure in such cases, the ODNI was instructed to review the documents and to identify those portions of the ODNI information that ODNI would seek to withhold under an appropriate FOIA exemption. The documents came to the ODNI in several tranches.

13. The first tranche arrived on June 25, 2015. On that day DOJ (the Office of Information Policy) transmitted six documents totaling fifty seven (57) pages to the ODNI. The Department asked that the ODNI review five of the documents (totaling fiftyfour (54) pages) prior to DOJ's responding to the requester; it also asked ODNI to review a single document (totaling three pages) containing DOJ redactions made pursuant to exemption (b)(5) and to respond directly to the requester. IMD assigned the six documents ODNI file number DF2015-00251 for identification and indexing purposes. On July 6, 2015, IMD informed DOJ that some of the names of ODNI personnel within DF2015-00251 should be protected under exemption (b)(3), and it provided proposed redactions to this effect back to DOJ. On that same day IMD informed the requester that material in the single document required protection pursuant to exemptions (b)(3) and (b)(5) and that, upon application of both the DOJ and ODNI redactions, there was no meaningful segregable material to release.

14. On August 20, 2015, DOJ (the Office of Legal Counsel) transmitted thirty five (35) documents totaling one hundred and seventy five (175) pages to the ODNI. The Department asked that the ODNI review the documents prior to DOJ's responding to the requester, and IMD assigned those documents ODNI file number DF2015-00299 for identification and indexing purposes. On September 10, 2015, IMD informed DOJ that some of the names of ODNI personnel within DF2015-00299 should be protected under exemption (b)(3), and it provided proposed redactions to this effect back to DOJ.

15. On September 1, 2015, DOJ (the Office of Legal Counsel) transmitted eleven (11) classified records totaling thirty three (33) pages to the ODNI. The Department asked that the ODNI review the documents prior to DOJ's responding to the requester, and IMD assigned those documents ODNI file number 2015-00308. On September 10, 2015 IMD informed DOJ that

some information within the document was properly classified and should be withheld under exemption (b)(1), that the names of and contact information regarding certain ODNI personnel should be withheld under exemption (b)(3), and that certain other information within the documents was deliberative and should be withheld under exemption (b)(5). IMD provided proposed redactions to this effect back to DOJ.

16. On September 9, 2015, DOJ (the National Security Division) transmitted a single document of four pages to the ODNI. The Department asked ODNI to review the document prior to DOJ's responding to the requester, and IMD assigned that document ODNI file number DF2015-00317 for identification and indexing purposes. In its September 25, 2015 response IMD told DOJ that some ODNI information within the document was properly classified and should be withheld under exemption (b)(1); that the names of and contact information regarding certain ODNI personnel should be withheld under exemption (b)(3); that personal identifying information (full names and dates of birth) used to verify security clearances of both ODNI and non-ODNI personnel should be withheld under exemptions (b)(3) and (b)(6), respectively; and that certain other information within the document was deliberative and should be withheld under FOIA exemption (b)(5). IMD provided proposed redactions to this effect back to DOJ.

17. On September 9, 2015, DOJ (the Office of Information Policy) transmitted two document sets containing a total of thirty seven (37) pages to the ODNI. The first document set contained twenty nine (29) pages. The Department asked that the ODNI review this first document set prior to DOJ's responding to the requester. It also asked ODNI to review the second document set (totaling eight pages) and to respond directly to the requester. IMD assigned the two document sets ODNI file number DF2015-00318 for identification and indexing purposes. In its September 25, 2015 response to DOJ, IMD informed the Department

that it had determined that certain names and contact information of ODNI personnel within that first set of documents should be withheld under exemption (b)(3) and that certain other information within the documents was deliberative and should be withheld under exemption (b)(5). IMD provided proposed redactions to this effect back to DOJ. On the same day IMD informed the requester that the material in the second document set required protection under exemptions (b)(3) and (b)(5).

III. EXPLANATION OF WITHHELD MATERIAL

A. FOIA EXEMPTION 1

18. Ten of the eleven documents that constitute DF2015-308 contain classified ODNI information, and those classified portions of these documents should be withheld pursuant to FOIA Exemption 1. Exemption 1 protects from release matters that are specifically authorized under criteria established by an Executive order to be kept classified in the interest of the national defense or foreign policy, and are in fact properly classified pursuant to such Executive order. 5 U.S.C. § 552(b)(1). The current Executive order which establishes such criteria is E.O. 13526.

19. Section 1.1 of E.O. 13526 provides that information may be originally classified if: 1) an OCA 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 the Executive Order; and 4) the OCA determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, and the OCA is able to identify or describe the damage.

20. Section 1.2(a) of E.O. 13526 provides that information shall be classified at one of three levels. Information shall be classified at the TOP SECRET level if its unauthorized

disclosure reasonably could be expected to cause exceptionally grave damage to the national security. Information shall be classified at the SECRET level if its unauthorized disclosure reasonably could be expected to cause serious damage to the national security. Information shall be classified at the CONFIDENTIAL level if its unauthorized disclosure reasonably could be expected to cause damage to the national security by revealing sensitive information about counterterrorist activities..

21. I have personally and independently examined the portions of the documents that have been redacted under exemption (b)(1) as part of my responsibilities as an OCA at ODNI. As a result of this examination, I have determined that the responsive information withheld under the (b)(1) exemption remains currently and properly classified, is appropriately withheld pursuant to E.O 13526, § 1.4(c), and is exempt from disclosure pursuant to FOIA exemption 1. The redacted information contains details that could be expected to cause exceptionally grave damage to the national security of the United States, and thus is properly classified at the TOP SECRET level.

B. FOIA EXEMPTION 3

22. In its responses to the DOJ, the ODNI has asked that certain materials be withheld under exemption 3. Exemption 3 provides that FOIA does not require the production of records that are:

specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.
5 U.S.C. § 552(b)(3).¹

¹ The OPEN FOIA Act of 2009 was enacted on October 28, 2009, Pub. L. No. 111-83, 123 Stat. 2142, 2184, 5 U.S.C. § 552(b)(3)(B), after the applicable National Security Act and NSA Act provisions were enacted, and therefore is not applicable to the analysis in this case.

23. The exemption statute in question is Section 6 of the CIA Act (P.L. 11 of June 20, 1949, 63 Stat. 208). It provides in part:

In the interests of the security of the foreign intelligence activities of the United States, and in order further to implement section 403-1(i) of this title that the Director of National Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of sections 1 and 2 of the Act of August 28, 1935 (citations omitted), and the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency.

24. This exemption statute is applied to the ODNI through the National Security Act, 50 U.S.C. § 3024(i), which further provides:

that the Director of National Intelligence may exercise with respect to the personnel of the Office of the Director of National Intelligence any authority of the Director of the Central Intelligence Agency with respect to the personnel of the Central Intelligence Agency under the Central Intelligence Agency Act of 1949 (citation omitted), and other applicable provisions of law, as of the date of the enactment of this subsection to the same extent and subject to the same conditions and limitations, that the Director of the Central Intelligence Agency may exercise with respect to personnel of the Central Intelligence Agency.

25. All of the documents reviewed by IMD and returned to DOJ pursuant to a consultation request contain personal information about ODNI personnel, including names, work email addresses, and in some cases, work phone numbers. This information has been withheld to protect the identities of intelligence community personnel, a safeguard that Congress has intended, pursuant to exemption (b)(3).

C. FOIA EXEMPTION 5

26. Exemption 5 protects intraagency or interagency memoranda or letters that are drafted as part of an agency's deliberative process. The purpose of protecting this information is to encourage open, frank discussions on matters of policy between subordinates and superiors; to

protect against premature disclosure of proposed policies before they are actually adopted; and to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's actions.

27. DF 2015-308 contains email traffic between members of a lawyers' group discussing information for possible inclusion in a summary of conclusions. There are also emails containing comments by senior officials representing different agencies on a draft process document, on a proposed after-action review process, on a proposed standard, on the first draft of a paper, on possible answers to questions in a question-and-answer document, and on proposed language for public explanations of US counterterrorism operations.

28. DF2015-317 contains an email in which an ODNI employee discusses questions received from the Privacy and Civil Liberties Board.

29. DF2015-318 contains a draft of a letter to the Senate Select Committee on Intelligence (SSCI) regarding ODNI views on the FY2014 Intelligence Authorization Act. Most of the letter is non-responsive, but the responsive sections as set forth in the document did not make it into the final version of the document that was sent to the committee. This document set also contains emails that comment on drafts of speeches and that offer comments on how to respond to questions posited to the ODNI by a member of the SSCI.

30. These are all examples of the kinds of internal debates that are integral to the development of ODNI policies and positions. Publicly disclosing the intra- and inter-agency discussions of ODNI personnel as they exchange comments or observations on policies, public statements, or responses to Congressional inquiries during the drafting or pre-decisional stage of a response will have a chilling effect on the willingness to government officials to provide honest advice. This absence of candor will inhibit the development of well-vetted policies that best

serve the public good.

D. LACK OF OFFICIALLY ACKNOWLEDGED MATERIAL

31. I am familiar with the officially acknowledged material (contained in six “Listed Facts”) previously found by the Court in *ACLU I*. 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. Each of the documents (or portions of documents) withheld by ODNI either does not contain any officially acknowledged material; or if such material is contained within the withheld documents (or portions of documents), it is not reasonably segregable from material that is exempt from disclosure.

CONCLUSION

I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 2nd day of October, 2015

A handwritten signature in black ink, appearing to read "Jennifer L. Hudson", is written over a horizontal line.

Jennifer L. Hudson
Director, Information Management Division
Office of the Director of National Intelligence