

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

AMERICAN CIVIL LIBERTIES UNION
and AMERICAN CIVIL LIBERTIES
UNION FOUNDATION,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY,
CENTRAL INTELLIGENCE AGENCY,
DEPARTMENT OF DEFENSE,
DEPARTMENT OF JUSTICE, and
DEPARTMENT OF STATE,

Defendants.

No. 13-cv-9198 (AT)

DECLARATION OF ARTHUR R. SEPETA

I, Arthur R. Sepeta, do hereby state and declare as follows:

1. I am the Branch Chief of the Information Compliance Branch (“ICB”), Office of Intelligence and Analysis (“I&A”), U.S. Department of Homeland Security (“DHS”). I&A is a component of DHS and an element of the U.S. Intelligence Community. In this capacity, I have direct oversight of Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and Privacy Act, 5 U.S.C. § 552a (“Privacy Act”), policies, procedures, and litigation involving DHS I&A records. I have been employed by DHS I&A in this capacity since May 2010.

2. My responsibilities include: acting as a liaison with other DHS components and offices in responding to requests and litigation filed under both the FOIA and the Privacy Act; reviewing requests for access to I&A records; reviewing correspondence related to such requests; and evaluating FOIA searches and responses to determine whether determinations to release

and/or withhold are made in accordance with the FOIA, Privacy Act, and DHS regulations located at 6 C.F.R. §§ 5.1 et seq.

3. As the Branch Chief of the ICB, I have authority to release and/or withhold records, and the authority to advocate the position of I&A in actions brought under the FOIA and the Privacy Act.

4. The statements contained in this Declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

5. The DHS is an executive department of the federal government within the meaning of title 5 of the United States Code. DHS I&A is a component of the DHS operating at the headquarters level of the department. The office is headed by an Under Secretary for Intelligence and Analysis, who also serves as the Chief Intelligence Officer for the DHS.

6. I&A has broad intelligence- and information-gathering and sharing responsibilities under the Homeland Security Act of 2002, Executive Order No. 12,333, as amended, and Executive Order No. 13,388. These responsibilities obligate I&A to gather and share information in support of the Department's broader counterterrorism, homeland security, and component-specific missions; in support of the broader national intelligence mission of the intelligence community; and as part of the federal information sharing environment.

7. The National Security Act of 1947, 61 Stat. 495 (1947) (codified as amended in scattered sections of 50 U.S.C.), defines the term "intelligence community" as including, among others, I&A. See 50 U.S.C. § 3003(4)(K) (listing I&A as one of seventeen elements of the intelligence community); Executive Order No. 12,333 § 3.5(h)(14). As such, I&A falls within

the purview of that executive order, which sets forth general guidance regarding the collection, retention, and dissemination of intelligence and information.

8. On March 31, 2015, the Department of Justice's National Security Division ("NSD") referred a 24-page document (which is referred to as NSD 2 in this litigation) that is responsive to the American Civil Liberties Union's ("ACLU") May 13, 2013 FOIA request, which was assigned NSD FOI/PA #13-175, to DHS I&A.

Exemption (b)(5)

9. I&A determined that the document provided by the Department of Justice is 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 to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption has been construed to exempt documents or information generally privileged in the civil discovery context, including materials covered by the deliberative process, attorney work product, and attorney-client privileges.

10. The deliberative process privilege protects the internal deliberations of an agency by exempting from release recommendations, analyses, speculation, drafts, and other non-factual information prepared in anticipation of agency decision-making. The general purpose of the deliberative process privilege is to prevent injury to the quality of agency decisions. Thus, material that contained or was prepared in connection with the formulation of opinion, advice, evaluations, deliberations, policy formulations, proposals, conclusions or recommendations is properly withheld.

11. To invoke the deliberative process privilege, I&A has to show that the protected information is both "predecisional" and "deliberative." To be predecisional, the document must be antecedent to the adoption of the agency policy or decision to which it relates. To be

“deliberative,” the document must be part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters, reflects the give and take of the consultative process, and bears on the formulation or exercise of agency policy-oriented judgment.

12. In this case, NSD 2 is a draft of the DHS Procedures Governing Activities of the Office of Intelligence and Analysis that Affect United States Persons. Section 2.3 of Executive Order No. 12,333 requires the head of an Intelligence Community element or the head of a Department containing an Intelligence Community element to issue “procedures” concerning the collection, retention, and dissemination of information concerning United States persons, after the Attorney General approves the procedures. On April 3, 2006, as required by section 2.3 of Executive Order No. 12,333, the Secretary of Homeland Security, as the head of a Department containing an Intelligence Community element, submitted draft Procedures Governing Activities of the Office of Intelligence and Analysis that Affect United States Persons for approval by the Attorney General. The Attorney General subsequently declined to approve the draft procedures submitted by the Secretary of Homeland Security and inter-agency negotiations over the content of these procedures remain ongoing to this day.

13. NSD 2 is thus protected by Exemption 5 under the deliberative process privilege. The document is “pre-decisional” because it preceded a final decision by the Attorney General regarding whether or not to approve the procedures as required by Executive Order No. 12,333, section 2.3. Further, the document is “deliberative” because it reflects an April 2006 proposal by the Secretary of Homeland Security regarding how the I&A would collect, retain, and disseminate information concerning United States Persons that was subsequently rejected by the Attorney General. Accordingly, the Secretary of Homeland Security never issued the

procedures, and NSD 2 is merely a draft proposal that was rejected in an inter-agency decision making process that is still ongoing. Therefore, as this document reflects one iteration of ongoing deliberations by two executive agencies on DHS I&A procedures concerning the collection, retention, and dissemination of information concerning United States Persons, it is “deliberative.”

CONCLUSION

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

Executed this 26 day of February 2016 in Washington, D.C.



Arthur R. Sepeta