

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

AMERICAN CIVIL LIBERTIES UNION,
et al.,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY,
et. al.

Defendants.

Case No. 13-cv-9198 (AT)

SUPPLEMENTAL DECLARATION OF ANTOINETTE B. SHINER
INFORMATION REVIEW OFFICER
FOR THE LITIGATION INFORMATION REVIEW OFFICE
CENTRAL INTELLIGENCE AGENCY

I, ANTOINETTE B. SHINER, hereby declare and state:

1. I currently serve as the Information Review Officer ("IRO") for the Litigation Information Review Office ("LIRO") at the Central Intelligence Agency ("CIA" or "Agency"). For a detailed description of my experience, responsibilities, and authorities, I refer the Court to my prior declaration in this matter. The earlier declaration and accompanying *Vaughn* index described how the CIA conducted its search and processed the records that are responsive to plaintiffs' Freedom of Information Act ("FOIA") request.

2. The purpose of this supplemental declaration is to address certain issues raised by plaintiffs in their opposition to the government's motion for summary judgment. Specifically,

the CIA provides additional details regarding the basis for withholding, in whole or in part, certain legal memoranda, reports, rules and regulations, and training materials concerning Executive Order 12333 ("E.O. 12333") and surveillance of U.S. persons. As explained below, this information was withheld on the basis that it remains classified, statutorily-protected, and/or privileged.

Legal Memoranda

3. Plaintiffs assert that the legal opinions authored by Agency attorneys at issue in this litigation are the "working law" of the CIA (CIA *Vaughn* index, doc. nos. 13-21, 23-35, 37-41, 44, 47-76, 78, 79, & 92-94). However, these memoranda, for which the CIA invoked the deliberative process and attorney-client privileges as well as other FOIA exemptions, are not controlling interpretations of policy that the Agency relies upon in discharging its mission. Client-offices sought advice from Agency attorneys in confidence, on discrete national security issues, to gain an understanding of the legal implications associated with taking certain courses of action. That advice served as one consideration, among others, weighed by Agency personnel in deciding whether to undertake a particular intelligence activity.

4. For example, plaintiffs request that this Court conduct an *in camera* review of "CIA 65" to assess whether it

contains "working law." As with the other legal memoranda at issue, this document consists of confidential attorney-client communications between Agency counsel and personnel in certain CIA components. The client provides the factual background relevant to the legal question posed, and the attorney then gives legal counsel analyzing the potential legal concerns raised by the issue. Here, the attorney's legal advice highlights a number of considerations to ensure that the use of a particular technology complies with the law. This advice is not an authorization to conduct a given activity and does not constitute a final agency action. It is one step in the client's deliberations - *i.e.*, determining legally available options associated with a proposed activity. Disclosure of routine legal advice, such as this, would diminish the quality of legal representation provided by Agency attorneys because clients would be reluctant to freely and accurately communicate factual information, questions, or concerns for fear that those discussions would be publicly disclosed.

5. Moreover, these attorney-client communications, as noted on the CIA's *Vaughn* index, are also covered by other exemptions because they deal with classified topics. Indeed, plaintiffs' request for "formal legal opinions addressing the CIA's authority under E.O. 12333 to undertake *specific* programs, techniques, or other types of electronic surveillance that

implicates U.S. persons . . .", explicitly seeks the attorney-client communications about sensitive intelligence collection methods considered by the Agency. Unsurprisingly, disclosure of the facts, analysis, and even citations to legal authorities in this context would tend to reveal not only the nature of the legal advice sought, but also the underlying classified material associated with those programs and techniques. As explained in the Agency's previous declaration, the CIA conducted a page-by-page, line-by-line review of this material and find that it consists fully of privileged, classified, and statutorily protected information and, accordingly, there is no segregable information that can be released from these memoranda.

Reports

6. Plaintiffs challenge the Freedom of Information Act ("FOIA") exemptions asserted for five reports processed in connection with this litigation - two fiscal year reports provided to congressional oversight committees on activities conducted under E.O. 12333, follow-up responses to questions posed by the Senate Select Committee on Intelligence in connection with a fiscal year report, and two reports authored by the CIA's Office of Inspector General ("OIG") on compliance with E.O. 12333 (CIA Vaughn index, doc. nos. 8, 10, 12, 30 & 77). As a preliminary matter, plaintiffs comment that the extent to which these reports were redacted raises concerns

regarding segregability and request that the Court conduct an *in camera* review of "CIA 12" to assess whether the Agency has released all nonexempt segregable information. However, as noted on the CIA's *Vaughn* index and from the face of the documents produced to plaintiffs, large portions of each report were redacted on the basis that they are not responsive to the litigation. These non-responsive portions concern other CIA activities, which do not involve electronic surveillance under E.O. 12333 implicating U.S. persons.¹ As explained below, the responsive portions of those reports, which constitute a small part of each document, are withheld on the basis that the information is classified and statutorily protected.²

7. The redacted information consists of details related to specific intelligence gathering activities of the Agency and discussions of the underlying intelligence sources and methods used in the course of those operations. As the CIA has explained in its previous declaration, that material is currently and properly classified and protected by statute as it would reveal intelligence sources, methods, and activities of the Agency. Release of any of this information could reasonably

¹ The non-responsive portions of the report are also classified.

² Plaintiffs also assert that the defendants have failed to release the "number of compliance violations" that have occurred. Although certain statistics can reveal intelligence sources and methods, here, no overall compliance numbers have been redacted. Rather, the reports to the oversight committees, like "CIA 12," contain responses to specific questions posed by those bodies and the OIG reports discuss broader compliance concerns.

be expected to damage national security because it would show precisely how the CIA collects intelligence - rendering those sources and methods ineffective.

8. Plaintiffs further claim that the fact that the CIA withheld two sections entitled "Targeting Standards" and "The Department of Justice's Role in E.O. Compliance" from "CIA 10" is evidence that the Agency has improperly withheld information reflecting the "law constraining the CIA's surveillance of U.S. persons abroad." This is the not the case. As evidenced from the face of "CIA 10," which is an intelligence assessment authored by the OIG about E.O. 12333 compliance, the Agency segregated and released to plaintiffs the nonexempt portions of the document that describe the state of the law in this area. In contrast, the redacted portions of the report, including the two sections highlighted by plaintiffs, discuss specifics of the Agency's intelligence collection - both methods and process - which remain classified. For the same reasons discussed above and in the previous Agency declaration, the information is protected by Exemption 1 and the National Security Act.

Rules and Regulations

9. In challenging the application of the deliberative process privilege, plaintiffs characterize "CIA 22" as an Agency "rule" or "regulation." It is neither. Rather, this document is classified correspondence between the CIA and the National

Security Council providing guidance on a particular issue.³ Although listed as a single document on the CIA's *Vaughn* index, the record consists of several memos - a memorandum from the White House, a memorandum written from the Director of the CIA to the National Security Advisor recommending and requesting certain action, and internal Agency correspondence preceding those memos. The Agency has asserted the deliberative process privilege with respect to the memorandum requesting guidance from the National Security Council and the internal Agency memoranda preceding that request. These memos contain Agency deliberations regarding the request to the National Security Council, which pre-date the Executive branch's final action on the request. In addition, the presidential communications privilege applies to the memoranda exchanged between the National Security Advisor/White House and CIA. These are direct, confidential communications from the President to senior officials on sensitive topics, and disclosure would inhibit the President's ability to engage in effective communications and decisionmaking. Further, I note that each of the constituent memos of "CIA 22" is classified in its entirety and is also protected in full by the National Security Act.

³ Plaintiffs also incorrectly refer to "CIA 36" as a rule or regulation - when, in fact, it is also correspondence between the CIA and the National Security Council. The presidential communications privilege also applies to this document. Additionally, it is independently covered by Exemptions 1 and 3.

10. Plaintiffs also misstate that a training slide ("CIA 11") entitled "AR 2-2 Collection Rules" contains information that was previously released from an internal Agency regulation produced in connection with this litigation. It is not a recitation of the regulations. Rather, this slide contains details about specific intelligence collection techniques. Revealing how intelligence is obtained would permit the targets of those efforts to evade detection, which in turn could reasonably be expected to cause damage to the national security.

11. Further, plaintiffs request that for segregability purposes the Court conduct an *in camera* review of "CIA 4," which is a memorandum of understanding concerning overseas and domestic activities of the CIA and the Federal Bureau of Investigation annexed to the CIA's internal regulations. As apparent from the face of the record, substantial portions of that memorandum were released. The redacted information consists entirely of foreign intelligence and counterintelligence measures governing operational activities of the CIA and FBI, reporting requirements, and the passage of information between the two agencies. Disclosure of these details would provide a roadmap for individuals seeking to

circumvent those measures. On that basis, Exemptions 1 and 3 were applied to discrete sections of the memorandum.⁴

Training Materials

12. Plaintiffs assert that the Exemption 5 should not apply to four sets of classified talking points (CIA *Vaughn* index, doc. nos. 76, 77, 79 & 80). However, each of these talking points was utilized as a tool for Agency attorneys to provide legal guidance to their clients on specific topics related to E.O. 12333. These documents are rough outlines, which contain hypothetical scenarios and different points to raise depending upon the questions asked by the clients. These documents are part of the larger process of providing training on the application of E.O. 12333 to Agency operations. They are the notes and memory aids for presenters, not finished guidance provided to Agency personnel. Additionally, the attorney-client privilege applies to these records as well because they consist of confidential legal advice that is tailored to specific mission needs and requests for legal guidance from particular internal Agency clients on specific topics.

⁴ I note that the FBI is providing additional details regarding the information redacted pursuant to Exemption 7(E), which is also covered by Exemptions 1 and 3.

* * *

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

Executed this 7th day of June 2016.

Antoinette B. Shiner
Antoinette B. Shiner
Information Review Officer
Litigation Information Review
Office
Central Intelligence Agency