

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION and
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

Plaintiffs,

v.

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

Defendants.

17 Civ. 3391 (PAE)

DECLARATION OF
PAUL P. COLBORN

I, Paul P. Colborn, declare as follows:

1. I am a Special Counsel in the Office of Legal Counsel (“OLC”) of the United States Department of Justice (the “Department”) and a career member of the Senior Executive Service. I joined OLC in 1986, and since 1987 I have had the responsibility, among other things, of supervising OLC’s responses to requests it receives under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. I submit this declaration in support of the Department’s Motion for Summary Judgment in this case. The statements that follow are based on my personal knowledge, as well as on information provided to me by OLC attorneys and staff working under my direction, and by others with knowledge of the documents at issue in this case.

OLC’S RESPONSIBILITIES

2. The principal function of OLC is to assist the Attorney General in his role as legal adviser to the President of the United States and to departments and agencies of the Executive Branch. OLC provides advice and prepares opinions addressing a wide range of legal questions involving the operations of the Executive Branch. OLC does not purport to make policy

decisions, and in fact lacks authority to make such decisions. OLC's legal advice and analysis may inform the decisionmaking of executive branch officials on matters of policy, but OLC's legal advice is not itself dispositive as to any policy adopted.

3. Although OLC publishes some opinions and makes discretionary releases of others, OLC legal advice in all its forms is generally kept confidential. The President and other executive branch officials (like other public- and private-sector clients) often depend upon the confidentiality of legal advice in order to fulfill their duties effectively. One important reason OLC legal advice often needs to stay confidential is that it is part of a larger deliberative process—a process that itself requires confidentiality to be effective. If government agencies and OLC had to conduct deliberations with knowledge that their deliberations were open to public view, such discussions would naturally be chilled or inhibited, and the efficiency of government policy making would suffer as a result.

4. These deliberative confidentiality concerns apply with particular force to OLC advice because of OLC's role in the decisionmaking process: OLC is often asked to provide advice and analysis with respect to very difficult and unsettled issues of law. Frequently, such issues arise in connection with highly complex and sensitive activities of the Executive Branch on matters that can be quite controversial. So that executive branch officials may continue to request, receive, and rely on candid legal advice from OLC on such sensitive matters, it is essential that OLC legal advice provided in the context of internal deliberations—and executive branch officials' willingness to seek such advice—not be inhibited by concerns about public disclosure.

5. The foregoing considerations regarding the need for confidential executive branch deliberations are particularly compelling in the context of the provision of legal advice, given the

nature of the attorney-client relationship. There is a special relationship of trust between a client and an attorney when the one seeks and the other provides independent legal advice. When the advice is provided in confidence, it is protected from compelled disclosure. As the Supreme Court has observed, “[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). It is critical to protect this relationship of trust in the governmental context, to ensure such full and frank communication between governmental attorneys and their clients, and thereby promote such broader public interests in the government’s observance of law and the administration of justice. The free and candid flow of information between agency decisionmakers and their outside legal advisers depends on the decisionmakers’ confidence that the advice they receive will remain confidential. Moreover, disclosure of legal advice may often reveal confidential communications from agency clients made for the purposes of securing advice.

6. When asked to provide counsel on the law, OLC attorneys stand in a special relationship of trust with their agency clients. Just as disclosure of client confidences in the course of seeking legal advice would seriously disrupt the relationship of trust so critical when attorneys formulate legal advice to their clients, disclosure of the advice itself would be equally disruptive to that trust. Thus, the need to protect the relationship of trust between OLC and the client seeking its legal advice provides an additional reason OLC legal advice often needs to stay confidential.

7. When OLC's client is the President or his senior advisers, OLC's advice also requires confidentiality for a third reason: its disclosure would inhibit the President's ability to engage in effective communications and decisionmaking. In order to discharge his duties under Article II of the Constitution, the President must be able to receive confidential advice of all kinds, including legal advice. For this reason, OLC legal advice to the President or his senior advisers is also generally protected by the presidential communications privilege.

8. The interests protected by the deliberative process, attorney-client, and presidential communications privileges continue to apply fully to confidential OLC legal advice in circumstances where the Executive Branch or one of its departments or agencies elects, in the interest of transparency, to explain publicly the Executive Branch's understanding of the legal basis for current or contemplated executive branch conduct. There is a fundamental distinction between an explanation of the rationale and basis for a decision, which would not be privileged, and legal advice received prior to making a decision, which is privileged. There is no disclosure of privileged legal advice, and therefore no waiver of attorney-client privilege, when, as part of explaining the rationale for its actions or policies, the Executive Branch explains its understanding of their legal basis without reference to any confidential legal advice that executive branch decisionmakers may have received before deciding to take the action or adopt the policy. If merely explaining publicly the legal basis for executive branch conduct were understood to remove the protection of the attorney-client privilege from the confidential legal advice provided as part of the Executive Branch's internal deliberations, it would substantially harm the ability of executive branch decisionmakers to request, receive, and rely upon full and frank legal advice from government lawyers as part of the decisionmaking process, and it would

also harm the public by discouraging the Executive Branch from explaining its understanding of the legal basis for its actions publicly in the future.

PLAINTIFF'S FOIA REQUEST

9. On March 15, 2017, OLC received a request from Anna Diakun on behalf of plaintiffs, the American Civil Liberties Union and the American Civil Liberties Union Foundation (together, "ACLU"), requesting "records pertaining to (1) the legal basis for the United States' January 29, 2017 raid in al Ghayil, Yemen ('the al Ghayil Raid'); (2) the process by which the government evaluated and approved the al Ghayil Raid, including the evidentiary standard by which the factual evidence for conducting the raid was evaluated; (3) the factual basis for the decision to designate certain portions of Yemeni provinces as 'areas of active hostilities' prior to the raid, and the process by which that decision was made; (4) before-the-fact and after-action assessments of civilian or bystander casualties of the raid; and (5) the number, identities, legal status, and affiliations of those killed by the United States during the raid." See Ex. A, at 1 (FOIA Request (Mar. 15, 2017) (hereinafter, "the FOIA Request")). Plaintiff requested expedited processing of its request. *Id.* at 5-10.

10. By letter dated March 24, 2017, I responded to Ms. Diakun on behalf of OLC, acknowledging receipt of the FOIA Request and informing her that the request for expedited processing had been denied. See Ex. B, at 1 (OLC Acknowledgment (Mar. 24, 2017)).

11. Following the commencement of this litigation and negotiations through counsel narrowing the scope of the request, by letter dated November 17, 2017, I partially responded to the FOIA Request. See Ex. C, at 1 (OLC First Response (Nov. 17, 2017)). I informed Ms. Diakun that a search of OLC's records, prioritizing documents most relevant to the request, had identified one responsive record. *Id.* I also informed her that OLC was withholding the record

in full pursuant to Exemption Five. *Id.* I further informed Ms. Diakun that the withheld document was marked classified and may also be protected from disclosure by statute. Finally, I informed her that OLC had determined the document was not appropriate for discretionary release. *Id.*

12. By letter dated December 15, 2017, I provided a final response to the FOIA request. *See* Ex. D, at 1 (OLC Final Response (Dec. 15, 2017)). I informed Ms. Diakun that the search for records in OLC's possession that were responsive to the narrowed FOIA Request had been completed, and that OLC had located four additional records. *Id.* I further informed her that OLC was withholding those records in full pursuant to Exemption Five, and in part pursuant to Exemptions One and Three, because the documents were protected by the deliberative process, attorney-client, and presidential communications privileges, and contained material that was properly classified and protected from disclosure by 50 U.S.C. § 3024(i)(1). *Id.*

13. Through counsel, OLC provided additional information to plaintiffs about the five withheld records and their attachments, including providing a description of the withheld records and their attachments by letter on February 9, 2018, and responding to subsequent questions from plaintiffs. I understand through counsel that plaintiffs are challenging OLC's withholding of only one single document, which is an attachment to one of the five responsive records located in OLC's search.

OLC'S SEARCH

14. I understand that plaintiffs do not challenge the reasonableness of OLC's search, and so I do not discuss it further here.

DOCUMENT AT ISSUE

15. I am personally familiar with the withheld document at issue in this case.

16. The withheld document is a draft classified legal advice document prepared by an interagency group of attorneys (“the lawyers group”)—including OLC attorneys—for the purpose of providing advice and recommendations to the President and/or other senior Executive Branch officials regarding the legal basis for potential military action. The matters discussed in the withheld document only partly relate to the particular military action that is the subject of plaintiff’s FOIA request. The document contains confidential client communications made for the purpose of seeking legal advice and predecisional legal advice from OLC attorneys and other government attorneys transmitted to senior advisers to the President as part of governmental deliberative processes in connection with Presidential decisionmaking. The document was intended to be confidential, and to my knowledge, the confidentiality of the document has been maintained.

17. The withheld document is attached to a classified email located by OLC’s search. The email is dated January 10, 2017, and was sent from the National Security Council (“NSC”) Legal Adviser to the lawyers group. This email describes the withheld document as a “proposed final version” and solicits comments on the draft proposed legal advice contained in the document and in the body of the email. I understand through counsel that plaintiffs do not challenge OLC’s withholding of the email to which the document is attached, nor do plaintiffs challenge OLC’s withholding of the other attachment to that email, which is identical except that it displays visible redline edits. OLC’s searches for responsive documents in this matter did not locate any “final” legal advice document corresponding to the withheld document, nor did OLC locate a later-edited version. Because OLC was not the author or intended recipient of the advice, but only a participant in its drafting, OLC would not necessarily receive the final version, if one was created.

APPLICABLE PRIVILEGES

Withholding Pursuant to Exemption Five

18. FOIA's Exemption Five exempts from mandatory disclosure "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). Exemption Five incorporates the traditional privileges that the government may assert in civil litigation against a private litigant and exempts from FOIA's reach documents covered by such privileges. Exemption Five applies to OLC 1 because it is protected by the deliberative process, attorney-client, and presidential communications privileges.

19. The withheld document is protected by the deliberative process privilege because it is pre-decisional and deliberative. The document is pre-decisional because it was prepared before a final decision was made by decisionmakers regarding any of the matters discussed within. As a draft document, it was also predecisional to a decision by the lawyers group on whether to finalize the document. The document was attached to an email that identified it as a "proposed final version" and solicited comments on the draft legal advice it contains, without any indicia that it was ever finalized. The document is deliberative both because it is a draft and because it reflects the internal deliberations of the interagency group of attorneys as they developed advice for senior decisionmakers. We do not know whether the document was conveyed to decisionmakers, either as a final document or as a draft. But if it was, the document would be : (1) pre-decisional because it was prepared for the consideration of the President's national security advisers in their deliberations over whether to recommend that the President authorize a contemplated military action and (2) deliberative both because it was legal advice used by those advisers in preparing their recommendation and because it reflects the give-and-

take and candor of an executive branch deliberative process. The limited factual material contained in the document is closely intertwined with the advice and analysis that the document conveys. Compelled disclosure of the document would undermine the deliberative processes of the Executive Branch—in this case, both of OLC and the lawyers group and of the President and his senior advisers. As noted above, attorneys at OLC are often asked to provide advice and analysis with respect to very difficult and unsettled questions of law, and on matters that can be quite controversial. It is essential to the President in carrying out his mission and to the proper functioning of the Executive Branch overall that OLC legal advice, whether provided directly by OLC or as part of advice from a group such as the lawyers group, not be inhibited by concerns about the risk of public disclosure. Protecting the confidentiality of legal advice provided by OLC and other government attorneys in the context of presidential (or other executive branch) deliberations is essential both to ensure that creative and sometimes controversial legal arguments and theories may be examined candidly, effectively, and in writing, and to ensure that the President, his advisers, and other executive branch officials continue to request and rely on frank legal advice from OLC and other government attorneys on sensitive matters.

20. The attorney-client privilege also applies to the document. It was authored by an interagency group of lawyers, coordinated by the NSC Legal Adviser, for use by the President's National Security Adviser in advising the President and the National Security Council. The limited factual material contained in the document was provided to OLC and the other attorneys by the NSC staff for purposes of obtaining confidential legal advice. Having been asked to provide legal advice, OLC and other government attorneys stood in a special relationship of trust with the President and his advisers. Just as disclosure of client confidences in the course of seeking legal advice would seriously disrupt the relationship of trust so critical when attorneys

formulate legal advice to their clients, so too would disclosure of the legal advice itself undermine that trust.

21. Finally, the document is also subject to the presidential communications privilege. That privilege protects confidential communications that relate to possible presidential decisionmaking and that involve the President or his senior advisers, including those members of his immediate advisers' staffs with broad and significant responsibility for investigating and formulating the advice to be given to the President on the particular matter to which the communications relate. This privilege preserves the President's ability to obtain frank and informed opinions from his advisers and to make decisions in confidence. It is not limited to exchanges directly involving the President, but also protects communications with presidential advisers and their staffs made in the course of formulating advice or recommendations for the President. The privilege protects such communications in order to ensure that the President's advisers may fully explore options and provide appropriate advice to the President without concerns about compelled disclosure. The withheld document provided legal advice both prepared by and provided to the NSC Legal Adviser regarding the President's authority to authorize a particular military action. The NSC Legal Adviser—who also serves in the position of Deputy Counsel to the President—is “dual-hatted” as a member of the staff of the National Security Adviser and as a member of the staff of the Counsel to the President, both of whom are immediate advisers to the President. Accordingly, the document is protected by the presidential communications privilege. Compelled disclosure of such communications between OLC and other government attorneys and the NSC Legal Adviser could threaten the quality of presidential decisionmaking by impairing the deliberative process in which those decisions are made.

Withholding Pursuant to Exemption One

22. In connection with seeking advice from OLC, executive branch clients sometimes provide OLC with classified information. OLC does not have original classification authority, but when it receives or makes use of classified information provided by its clients, OLC is required to mark and treat that information as classified to the same extent as its clients have identified such information as classified. Accordingly, all classified information in OLC's possession or incorporated into its products has been classified by another entity with original classification authority.

23. The withheld document is marked as classified because it contains information from another agency or agencies that was marked as classified, and OLC has been informed that this information is properly classified. Accordingly, OLC is also withholding the document in part pursuant to FOIA Exemption One, 5 U.S.C. § 552(b)(1), which exempts information classified in the interest of national defense.

24. Because OLC lacks original classification authority, further information regarding the applicability of Exemption One to this document appears in another contemporaneously-filed declaration.

Segregability, Adoption, and Waiver

25. I have personally reviewed the document at issue to determine whether any withheld portion or portions could be released without divulging information protected by one or more of the applicable FOIA exemptions. All factual information contained in the document was provided to the lawyers group in confidence for the purpose of seeking legal advice, and the document does not contain reasonably segregable, nonexempt information.

26. To my knowledge, the document has never been adopted or incorporated by reference by any policymaker as a basis for a policy decision.

27. To my knowledge, the document has not been previously disclosed publicly. In addition, I am not aware of any public statements by government officials that could constitute waiver of the privileges applicable to the document.

* * * * *

28. In conclusion, I respectfully submit that the document at issue is protected in full by the attorney-client, deliberative process, and presidential communications privileges. Accordingly, the document falls squarely within Exemption Five. The compelled disclosure of this document would disrupt the attorney-client relationship between OLC and other government attorneys and their clients throughout the Executive Branch, would interfere with the government's deliberative processes, and would disrupt the President's ability to carry out his constitutional responsibilities. The document is also protected in part by Exemption One.

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

Executed: July 20, 2018, Washington, D.C.



PAUL P. COLBORN