

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

THE NEW YORK TIMES COMPANY,  
et al.,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE,

Defendant.

Case No. 11-cv-9336 (CM)

AMERICAN CIVIL LIBERTIES UNION,  
et al.,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, et al.,

Defendants.

Case No. 12-cv-794 (CM)

DECLARATION OF MARTHA M. LUTZ  
CHIEF OF THE LITIGATION SUPPORT UNIT  
CENTRAL INTELLIGENCE AGENCY

I, MARTHA M. LUTZ, hereby declare and state:

1. I am the Chief of the Litigation Support Unit of the Central Intelligence Agency ("CIA" or "Agency"). I have held this position since October 2012. Prior to assuming this position, I served as the Information Review Officer ("IRO") for the Director's Area of the CIA for over thirteen years. In that capacity, I was responsible for making classification and

release determinations for information originating within the Director's Area, which includes, among other offices, the Office of the Director of the CIA, the Office of Congressional Affairs, and the Office of General Counsel. I have held other administrative and professional positions within the CIA since 1989.

2. As the Chief of the Litigation Support Unit, I am responsible for the classification review of CIA documents and information that may be the subject of court proceedings or public requests for information under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. I am a senior CIA official and hold original classification authority at the TOP SECRET level under written delegation of authority pursuant to section 1.3(c) of Executive Order No. 13526. Because I hold original classification authority at the TOP SECRET level, I am authorized to assess the current, proper classification of CIA information, up to and including TOP SECRET information, based on the classification criteria of Executive Order 13526 and applicable regulations.

3. Pursuant to authority delegated by the Executive Director of the CIA, I also have been appointed as a Records Validation Officer ("RVO"). As a RVO, I am authorized to sign on behalf of the CIA regarding searches for records and the

contents of any located or referred records that are under the cognizance of any or all CIA directorates or areas.

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

**I. BACKGROUND**

5. In its opinion dated 23 June 2014, the U.S. Court of Appeals for the Second Circuit held that the CIA's "operational role" in the lethal use of drones generally, and in the strike that killed Anwar al-Aulaqi specifically, have been official acknowledged by virtue of statements made by certain government officials. As part of that holding, the Second Circuit ordered disclosure of portions of a 16 July 2010 Department of Justice Office of Legal Counsel ("OLC") memorandum that discussed the legal bases for targeting Aulaqi (referred to as the "OLC-DOD Memorandum"). The Second Circuit released a redacted version of this OLC-DOD Memorandum with the Court's 23 June 2014 opinion.

6. The Second Circuit also ordered disclosure of certain portions of an index prepared by OLC that documented the responsive classified records which that office had located in connection with this litigation. OLC has publicly released a version of this index, redacting certain material that the

Second Circuit indicated could be withheld as set forth in its order dated 11 August 2014. In support of the government's motion for summary judgment on the OLC records still in dispute, the CIA provides the following explanation as to why the CIA records and the CIA information contained in records generated by other government agencies remain exempt from disclosure pursuant to Exemptions (b) (1), (b) (3) and (b) (5).

## II. FOIA EXEMPTIONS PROTECTING CLASSIFIED INFORMATION

### A. Exemption (b) (1)

7. Exemption (b) (1) provides that the FOIA does not require the production of records 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." 5 U.S.C. § 552(b) (1). As explained below, the Exemption (b) (1) withholdings in the responsive documents satisfy the procedural and the substantive requirements of Executive Order 13526.

8. Section 1.1(a) of Executive Order 13526 provides that information may be originally classified under the terms of this order if 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 Executive Order 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. The Executive Order also mandates that records be properly marked and that the records have not been classified for an improper purpose.

**i. Procedural Requirements**

9. Original classification authority. Pursuant to a written delegation of authority in accordance with Executive Order 13526, I hold original classification authority at the TOP SECRET level. Therefore, I am authorized to conduct classification reviews and to make original classification decisions. I have determined that certain records or portions of records responsive to the ACLU's request are currently and properly classified.

10. U.S. Government information. The information at issue is owned by the U.S. Government, was produced by or for the U.S. Government, and is under the control of the U.S. Government.

11. Classification categories in Section 1.4 of the Executive Order. Exemption (b)(1) is asserted in this case to protect information that concerns "intelligence activities

(including covert action), intelligence sources or methods, or cryptology," pursuant to § 1.4(c) of the Executive Order.

12. Damage to the national security. I have determined that the CIA information contained in the responsive records is classified TOP SECRET, because it constitutes information the unauthorized disclosure of which could reasonably be expected to result in exceptionally grave damage to the national security.

13. Proper purpose. With respect to the information for which Exemption (b)(1) is asserted in this case, I have determined that this information has not been classified in order to conceal violations of law, inefficiency, or administrative error; prevent embarrassment to a person, organization or agency; restrain competition; or prevent or delay the release of information that does not require protection in the interests of national security.

14. Marking. The documents are properly marked in accordance with section 1.6 of the Executive Order.

**ii. Substantive Requirements**

15. In processing the documents for this litigation, I have reviewed the records containing CIA equities that are listed on the index provided by OLC and determined that they contain information that is currently and properly classified.

16. Specifically, I have determined that this information was properly withheld because its disclosure could be expected

to lead to the identification of intelligence sources, methods and activities of the CIA within the meaning of § 1.4(c) of Executive Order 13526. Additionally, the CIA found that disclosure of this information could reasonably be expected to result in exceptionally grave damage to national security and therefore that information is currently and properly classified at the TOP SECRET level.

**B. Exemption (b) (3)**

17. Exemption (b) (3) protects information that is specifically exempted from disclosure by statute. A withholding statute under Exemption (b) (3) must (A) require that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establish particular criteria for withholding or refer to particular types of matters to be withheld. 5 U.S.C. § 552(b) (3).

18. Here, the CIA has determined that Section 102A(i) (1) of the National Security Act of 1947, as amended, 50 U.S.C. § 403-1(i) (1) (the "National Security Act"), which provides that the Director of National Intelligence "shall protect intelligence sources and methods from unauthorized disclosure," also applies to the information for which Exemption (b) (1) was asserted. As an initial matter, the National Security Act has been widely recognized to be a withholding statute under Exemption (b) (3) that refers to particular types of matters to

be withheld, and "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C. § 552(b)(3).

### **III. DAMAGE TO NATIONAL SECURITY**

19. During the course of this litigation, DOJ released portions of a DOJ Classified White Paper dated May 25, 2011 (described as Document 9 on the OLC index). This paper was prepared by DOJ for Congress and discusses the legal basis upon which the CIA could use lethal force in Yemen against a U.S. citizen. Although this paper does not mention the U.S. citizen by name - the target of the contemplated operation was Anwar Aulagi. Considering the information acknowledged by virtue of the disclosure of portions of the OLC-DOD Memorandum, the CIA reviewed the DOJ Classified White Paper and determined that certain information, consistent with that earlier disclosure, could be released. As with the other records addressed in the declaration, I conducted a page-by-page, line-by-line review to produce all reasonably segregable, nonexempt information in this record. However, I determined that some information in the paper remains currently and properly classified. I cannot provide additional details about the redacted information in the DOJ Classified White Paper on the public record except to say that the disclosure of this information could reasonably be expected to cause harm to



national security. I respectfully refer the Court to my *in camera*, *ex parte* declaration, which provides an additional justification for these redactions. Additionally, I note that Exemption (b)(3) in conjunction with the National Security Act also applies to this information.

20. With respect to the remaining OLC records in which CIA equities are at issue, I have determined that each of these documents contains information that is currently and properly classified pursuant to the criteria laid out in Executive Order 13526. The CIA asserted Exemption (b)(1) here to protect the classified factual information provided to OLC and the analysis incorporating those details. The CIA information withheld in those materials consists of intelligence activities, sources, and methods - which serve as the principal means by which the CIA accomplishes its mission. The protection of intelligence sources and methods is particularly critical in situations such as this one, where the source of information, and the capabilities, techniques and applications of certain methods are unknown to others, such as a foreign intelligence service or terrorist organization. Secret collection techniques and sources of intelligence are effective from an intelligence-gathering perspective only so long as they remain unknown and unsuspected. Once the nature of an intelligence source or method, or the fact of its use in a certain situation, is

discovered, its usefulness in that situation is neutralized and the ability to utilize that source or apply that method in other situations is significantly impaired.

21. Although the U.S. Government has officially acknowledged some information about the continuing and imminent threat that Aulqi posed to the United States, the information contained in these records goes beyond what has been disclosed. These records show the means by which this intelligence about Aulqi was obtained as well as undisclosed details about Aulqi's terrorist activities - all of which remain classified. Although Aulqi is deceased, many of his associates in al-Qa'ida in the Arabian Peninsula ("AQAP") remain at large and continue to plot attacks against the United States and U.S. interests abroad. Additionally, these records also contain CIA intelligence on other subjects, disclosure of which would reveal the sources and methods of that collection. Likewise, there has been no official acknowledgement of this information.

22. Because revealing additional details would disclose classified equities involved, I am limited in my ability to describe the intelligence activities, sources and methods at issue and the harm from their disclosure on the public record. Accordingly, I refer the Court to the classified declarations for a more detailed description of the information at issue and why it is properly withheld. However, publicly, I can say that

it would greatly benefit AQAP and other terrorist organizations to know which clandestine sources and methods were used to obtain information about Aulagi and other subjects, as well as the specific intelligence that these techniques produced. This information could be used by AQAP and other terrorist organizations to uncover current collection activities and take countermeasures to avoid future detection by Intelligence Community agencies, thereby harming national security. In some instances, even indirect references to information obtained by classified sources and methods must be protected. Terrorist organizations and other hostile groups have the capacity and ability to gather information from a myriad of public sources, analyze it, and determine the means and methods of intelligence collection from disparate details. This type of disclosure could defeat the specific collection efforts of the CIA and, more broadly, the Intelligence Community. Accordingly, even seemingly innocuous, indirect references to an intelligence method could have significant adverse effects when coupled with other publicly-available data. For these reasons and the reasons set forth in the classified submissions, I have determined that disclosure of the CIA information in the records at issue reasonably could be expected to cause serious -- and in some cases, exceptionally grave -- damage to the national security.

23. For the same reasons outlined above, the information at issue here also is exempt from disclosure pursuant to Exemption (b)(3). In reviewing the records that contain CIA information, I have determined that the information constitutes protected intelligence sources and methods -- information that falls squarely within the scope of Section 102A(i)(1) of the National Security Act. Although no harm rationale is required, as noted above, the release of this information could significantly damage the ability of CIA and other members of the Intelligence Community to collect and analyze foreign intelligence information. Disclosure of this information is prohibited by statute and having reviewed the material, I find it to be properly exempt from disclosure under the National Security Act.

24. Upon conducting a page-by-page, line-by-line review, I have determined that there are no segregable portions of the records withheld in full and that each record is wholly exempt pursuant to the combination of FOIA Exemptions 1, 3, and/or 5.<sup>1</sup> The records located by OLC consist of classified, statutorily protected, and attorney-client privileged information, which is wholly integrated in the documents. I respectfully refer the Court to the *in camera*, *ex parte* submissions in this case which provide detailed explanations of classified and statutorily-

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<sup>1</sup> The Bies Declaration, filed herewith, discusses the application of Exemption (b)(5) to these records.

protected material contained in the documents - information for which a complete discussion on the public record is not possible.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct,

Executed this 2<sup>nd</sup> day of October 2014.

  
MARTHA M. LUTZ  
Chief  
Litigation Support Unit  
Central Intelligence Agency