

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION,  
et al.,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, et al.,

Defendants.

Case No. 1:10-CV-00436-RMC

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. Through the exercise of my official duties, I am 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.

4. As discussed below, based on discussions between the parties, plaintiffs have agreed to narrow its initial request to two discrete categories of records. The instant declaration describes the CIA's search for responsive records and explains

why certain material is being withheld in full pursuant to Exemptions (b) (1), (b) (3) and (b) (5).

I. BACKGROUND

5. Some of the records initially requested by plaintiffs in this case are also at issue in two consolidated FOIA cases brought by the American Civil Liberties Union ("ACLU") and the *New York Times* in the U.S. District Court for the Southern District of New York. In connection with that case, the U.S. Court of Appeals for the Second Circuit held that the fact that the CIA has an "operational role" in the lethal use of drones generally, and in the strike that killed Anwar al-Aulaqi specifically, has been disclosed 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 memorandum authored by the Department of Justice's ("DOJ's") Office of Legal Counsel ("OLC") that discussed the legal bases for targeting Aulqi (referred to as the "OLC-DOD Memorandum"). The Second Circuit released a redacted version of this OLC-DOD Memorandum with its 23 June 2014 opinion.<sup>1</sup> The Second Circuit also ruled that the Agency's "no number, no list" response was insufficiently justified. In the course of that litigation and consistent with the Second Circuit's holdings, the CIA

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<sup>1</sup> The Second Circuit permitted the Government to redact portions of the OLC-DOD Memorandum in order to protect certain classified and privileged information.

subsequently released portions of another OLC opinion regarding Aulahi and portions of a classified DOJ White Paper.

6. In light of the Second Circuit's decision, the CIA withdrew its pending motion for summary judgment in this action, which had relied upon the "no number, no list" response as the basis for withholding responsive records. The parties then conferred for the purpose of determining how to proceed with the case. Based on those discussions, the ACLU agreed to limit its initial FOIA request to two categories of items: (1) Any and all final legal memoranda (as well as the latest version of draft legal memoranda which were never finalized) concerning the U.S. Government's use of armed drones to carry out premeditated killings;<sup>2</sup> and (2) four types of records containing charts or compilations about U.S. Government strikes sufficient to show the identity of the intended targets, assessed number of people killed, dates, status of those killed, agencies involved, the location of each strike, and the identities of those killed if known.

7. In response to the narrowed request, the CIA conducted certain searches reasonably calculated to locate records responsive to the two items requested by the ACLU. The parameters of those searches are described in detail below. I

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<sup>2</sup> The ACLU agreed to exclude any OLC memoranda currently being considered by the U.S. District Court for the Southern District of New York that are responsive to the ACLU's request in that case.



note that the information released in connection with the Second Circuit litigation has informed the release determinations made in this case. The CIA has determined that, with the exception of one document that has already been released in part to the ACLU in connection with the Second Circuit litigation, no additional information can be released.<sup>3</sup> With respect to the remaining records, the CIA has determined that disclosure of these documents would compromise classified, statutorily-protected, and privileged information and therefore has asserted Exemptions (b) (1), (b) (3) and (b) (5) to protect this material.

## **II. SEARCHES FOR RESPONSIVE RECORDS**

8. Based on the nature of plaintiffs' narrowed request, the CIA determined that records responsive to the portion of plaintiffs' request asking for "legal memoranda on the U.S. Government's use of armed drones to carry out premeditated killing" would be located in the CIA's Office of General Counsel ("OGC"). OGC was identified as an office that would maintain responsive records because the General Counsel serves as the chief legal officer of the CIA, and OGC attorneys assist the General Counsel in providing legal advice to Agency leadership and other personnel in accordance with the performance of their duties. In addition, OGC engages with DOJ and counterparts at

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<sup>3</sup> Although this document -- the DOJ Classified White Paper -- has been produced in connection with the other case, the Agency has included this record here because it is not among the OLC memoranda that were remanded to the District Court by the Second Circuit.

other federal agencies on various legal matters affecting the Agency, which would include the exchange of legal memoranda. As discussed in my classified declaration, the Agency searched in all areas reasonably likely to maintain responsive records. Each of the searches was conducted by personnel who are knowledgeable about the subject matter and the Agency's holdings. These individuals tailored their searches to locate all responsive legal memoranda, including those that did not originate with the Agency. Additionally, the searches included all relevant hard copy and electronic files. The CIA determined that a search of Agency emails would not likely yield any responsive material because, as a general rule, legal memoranda are not conveyed in the body of email messages. Legal memoranda attached to email communications, however, would have been included in the other searches. Based on those searches, the CIA identified twelve responsive records, described in detail below.

9. In addition, I note that during the course of the discussions with plaintiffs over narrowing the request, the CIA represented that four types of pre-existing intelligence products produced by the Agency contain the various details about U.S. Government drone strikes sought by the ACLU. The CIA conducted a search of the relevant offices and located thousands of records responsive to this portion of plaintiffs' request.

Because I cannot provide any additional detail on the public record, I refer the Court to the classified declaration for a full description.

### **III. FOIA EXEMPTIONS PROTECTING CLASSIFIED INFORMATION**

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

10. 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 documents at issue satisfy the procedural and the substantive requirements of Executive Order 13526.

11. 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 requires that records not be classified for an improper purpose.

**i. Procedural Requirements**

12. 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 portions of the records at issue in this case are currently and properly classified.

13. 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.

14. 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 section 1.4(c) of the Executive Order. Additionally, Exemption (b)(1) also applies to information that pertains to "foreign relations or foreign activities of the



United States, including confidential sources" under section 1.4(d).

15. Damage to the national security. I have determined that the CIA information contained in the records at issue 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.

16. 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.

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

**ii. Substantive Requirements**

18. As explained below, in the course of this litigation, I have reviewed the responsive records and determined that they contain certain information that is currently and properly classified at the TOP SECRET level. Specifically, I have determined that this information has been properly withheld because its disclosure could lead to the identification of

intelligence sources, methods and activities of the CIA and/or harm foreign relations or foreign activities of the United States, including confidential sources within the meaning of sections 1.4(c) and 1.4(d) of Executive Order 13526. As such, disclosure of this information could reasonably be expected to result in damage, including exceptionally grave damage, to national security.

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

19. 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).

20. Here, the CIA has determined that Section 102A(i) (1) of the National Security Act of 1947, as amended, 50 U.S.C. § 3024 (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. I note that the National Security Act has been widely recognized to be a withholding statute under Exemption (b) (3).

21. The CIA also invoked Section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 3507 (the "CIA Act"), in conjunction with Exemption (b) (3). Section 6 of the CIA Act protects from disclosure information that would reveal the CIA's organization, functions, including the function of protecting intelligence sources and methods, names, official titles, salaries, or numbers of personnel employed by the CIA. The CIA Act has been widely recognized by courts to be a federal statute that "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b) (3). I note that some courts have taken a narrow reading of the Section 6 of the CIA Act, linking the information qualifying for protection to personnel. However, this information falls under even the narrower interpretation of the statute as all of the records at issue would reveal the specific functions of Agency personnel.

#### **IV. DAMAGE TO NATIONAL SECURITY**

22. As noted above, the CIA deemed the DOJ Classified White Paper, which was released in connection with the case pending in the U.S. District Court for the Southern District of New York, to be responsive in the instant case. This paper, which was prepared by DOJ for Congress, 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 al-Aulaqi. Considering the Second Circuit's opinion and 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. In accordance with this review, the CIA has released all reasonably segregable, non-exempt portions of the DOJ Classified White Paper. However, I have determined that, based on my page-by-page, line-by-line review of the record, some information in the DOJ Classified White Paper remains currently and properly classified.

23. Because revealing additional details about the redactions would disclose the classified equities involved, I cannot provide specifics on the public record about the information redacted from this document. Although the U.S. Government has officially acknowledged some information about the subject of the paper, Anwar al-Aulaqi, the redacted information goes beyond what has been publicly disclosed. Disclosure of this additional information could reasonably be expected to cause damage to national security because it would reveal classified intelligence activities, sources, and methods. Among other things, this information could be exploited by Aulaqi's associates in al-Qa'ida in the Arabian Peninsula and other terrorist organizations to defeat the U.S. Government's



counterterrorism efforts. Further, the DOJ Classified White Paper discusses a contemplated CIA operation in a foreign country -- Yemen. As such, the redacted information could lead to the identification of intelligence sources, methods and activities of the CIA and/or pertains to foreign relations or foreign activities of the United States within the meaning of sections 1.4(c) and 1.4(d) of the Executive Order, the release of which would tend to cause harm to national security. I respectfully refer the Court to the CIA's *in camera*, *ex parte* declaration, which provides additional justification for these redactions.

24. With respect to the other legal memoranda at issue, the CIA invokes Exemption (b)(1) to protect these records in full because they are currently and properly classified. Disclosure of these memoranda could reasonably be expected to cause damage to national security because they would reveal classified intelligence activities, sources, and methods. I cannot provide additional details about this material on the public record. However, I note that, in the course of reviewing these records for disclosure, I have considered the information released in the course of the other ACLU litigation and other government disclosures and have confirmed that there has been no official acknowledgement of this information. In addition, as explained below, certain of the legal memoranda at issue are

also withheld on the basis of the deliberative process and attorney-client privileges.

25. As to the second category of information requested by the ACLU, the CIA asserts Exemption (b)(1) to withhold in full all of the responsive intelligence products. The information contained in these intelligence products would reveal the sources and methods of underlying intelligence collection. Disclosure of these records would tend to show how the information was gathered, the weight assigned to certain sources, and the types of information tracked by CIA analysts. Revealing this information would not only compromise the specific intelligence sources and intelligence methods used, but would also reveal the methodology behind the assessments and the priorities of the Agency. In addition, these records would reflect the information available to the CIA at a certain point in time, which could show the breadth, capabilities, and limitations of the Agency's intelligence collection. There are no reasonably segregable portions of these records as any release would disclose classified intelligence and analysis. I further note that there has been no official disclosure of any of this information.

26. Additionally, I note that Exemption (b)(3) in conjunction with the National Security Act and the CIA Act also applies to all the information for which Exemption (b)(1) was

invoked. The National Security Act was asserted to protect all of these records because they would tend to reveal certain sensitive intelligence sources and methods employed by the CIA. The CIA Act was asserted for this material because release of the withheld information would require the CIA to disclose details about its core functions, including, but not limited to, the function of protecting intelligence sources and methods. Additionally, I note that the CIA Act was invoked to protect the names of Agency personnel mentioned in these records. These statutes do not require the CIA to demonstrate harm in order to withhold any applicable material. However, for the same reasons noted above as well as those discussed in the CIA's classified declaration, release of this information could cause exceptionally grave damage to national security.

**V. PRIVILEGED MATERIAL**

27. Additionally, for certain of the legal memoranda, the CIA asserted Exemption (b)(5) to protect certain information covered by the attorney-client, deliberative process and the attorney-work product privileges. I note that all of the privileged information discussed below is also withheld on the grounds that it is currently and properly classified in accordance with Exemption (b)(1) and protected by statute pursuant to Exemption (b)(3).

28. The deliberative process privilege was invoked to protect certain documents that are pre-decisional and deliberative in nature, including drafts. All of the material for which the deliberative process privilege was asserted reveals an interim stage in intra-agency and inter-agency discussions, which preceded a final decision of the CIA or other agency or component of the Executive Branch. These documents reflect and/or contain the "give and take" exchanges that characterize the government's deliberative processes. Disclosure of this information would inhibit the frank communications and the free exchange of ideas that the privilege is designed to protect.

29. Further, the CIA has asserted the attorney-client privilege to protect certain communications between the CIA and DOJ in connection with a request for the provision of legal advice as well as information provided by Agency personnel in furtherance of that advice. In all instances for which the attorney-client privilege was asserted, the confidentiality of these communications was maintained. If this type of confidential information were to be disclosed, it would inhibit open communication between client-agencies and their lawyers, thereby depriving the Agency of the full and candid counsel of its attorneys.



30. Additionally, for the reasons discussed in my classified declaration, certain documents are also covered by the presidential communications privilege. These documents reflect communications between Executive Branch agencies and presidential advisors for the purpose of presidential decision-making.

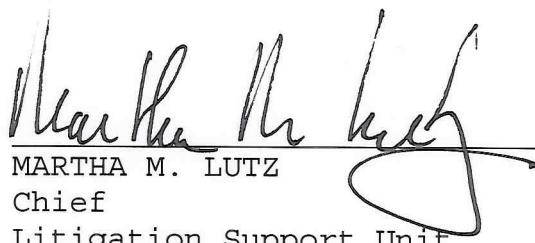
**VI. SEGREGABILITY**

31. In evaluating the responsive documents, the CIA conducted a page-by-page and line-by-line review and determined that there is no reasonably segregable, non-exempt portions of documents that can be released without potentially compromising classified information, intelligence sources and methods, and/or material protected by privilege. Accordingly, each withheld record is wholly exempt pursuant to Exemptions (b)(1), (b)(3), and/or (b)(5). I respectfully refer the Court to the *in camera*, *ex parte* submissions in this case which provide detailed explanations of classified, statutorily-protected, and privileged 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 25<sup>th</sup> day of November 2014.

  
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MARTHA M. LUTZ  
Chief  
Litigation Support Unit  
Central Intelligence Agency