

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

_____)	
AMERICAN CIVIL LIBERTIES UNION)	
FOUNDATION,)	
)	
Plaintiff,)	
)	
v.)	No. 12 Civ. 7412 (WHP)
)	
UNITED STATES DEPARTMENT OF)	ECF Case
JUSTICE,)	
)	
Defendant.)	
_____)	

SECOND DECLARATION OF JOHN E. CUNNINGHAM III

I, John E. Cunningham III, declare as follows:

1. I am a Trial Attorney in the Freedom of Information Act (“FOIA”)/Privacy Act (“PA”) Unit of the Office of Enforcement Operations in the Criminal Division of the United States Department of Justice (the “Criminal Division”). I have held this position since November of 2011. Prior to that time, I was employed as a Trial Attorney in the Criminal Division’s Fraud Section since 1998.

2. Due to the nature of my official duties, I am familiar with, and was personally involved in, the processing of the FOIA request submitted by plaintiff the American Civil Liberties Union Foundation (“ACLU”) that is at issue in this litigation. I make the statements herein on the basis of personal knowledge, as well as on information acquired by me in the course of performing my official duties in the FOIA/PA Unit.

3. I submit this declaration in further support of the United States Department of Justice’s (“DOJ”) motion for summary judgment and in opposition to the ACLU’s cross-motion

for summary judgment. This declaration supplements my first declaration dated February 28, 2013 (“First Cunningham Declaration”), and is intended to provide additional information regarding the Criminal Division’s application of FOIA Exemption 5, 5 U.S.C. § 552(b)(5), and FOIA Exemption 7(E), 5 U.S.C. § 552(b)(7)(E), to the two memoranda at issue: (1) a memorandum dated February 27, 2012 with the subject “Guidance Regarding the Application of *United States v. Jones*, 132 S. Ct. 945 (2012), to GPS Tracking Devices” (the “February Memorandum”); and (2) a memorandum dated July 5, 2012 with the subject “Guidance Regarding the Application of *United States v. Jones*, 132 S. Ct. 945 (2012), to Additional Investigative Techniques” (the “July Memorandum”) (together the “Memoranda”).

Application of FOIA Exemption 5

4. As described in the First Cunningham Declaration, the Criminal Division withheld information from the Memoranda pursuant to FOIA Exemption 5 because it is privileged attorney work product.

5. The Memoranda discuss potential legal strategies, defenses, and arguments that might be considered by federal prosecutors in light of the Supreme Court’s decision in *United States v. Jones*, 132 S. Ct. 945 (2012) (“*Jones*”). The Memoranda are intended to outline possible arguments or litigation risks that prosecutors could encounter following the *Jones* decision in the context of defendants’ motions to exclude or suppress evidence in cases involving GPS tracking devices and other investigative techniques. The Memoranda assess the strengths and weaknesses of alternative litigating positions.

6. The Memoranda were directed to all federal prosecutors within DOJ, which includes all prosecutors in the Criminal Division and all criminal prosecutors in the ninety-four United States Attorney’s Offices around the country. It therefore would have been impractical

for the Memoranda to specifically identify each of the cases in which GPS tracking devices and the investigative techniques addressed in the July Memorandum have been or may be employed, and consequently, they do not. Rather, the Memoranda describe the general facts common to these types of cases, and address possible legal arguments that may have already arisen in such cases or could arise in the future. The Memoranda were prepared because of ongoing litigation and the prospect of future litigation in federal cases involving certain types of specified investigative techniques.

Application of FOIA Exemption 7(E)

7. As described in the First Cunningham Declaration, the Criminal Division withheld information from the Memoranda pursuant to FOIA Exemption 7(E) because such information would disclose techniques and procedures for law enforcement investigations or prosecutions, and guidelines for law enforcement investigations or prosecutions that could reasonably be expected to risk circumvention of the law.

8. The February Memorandum discloses techniques and procedures related to GPS tracking devices and the July Memorandum discloses techniques and procedures related to approximately a dozen investigative techniques other than GPS tracking devices. While the public may know that federal investigators use some of these techniques, the details of their use are not publicly known. The Memoranda discuss such non-public details as where, when, how, and under what circumstances GPS tracking devices and other investigative techniques are used. The Memoranda also disclose certain entities with whom federal investigators may coordinate in employing certain investigative techniques. Accordingly, the Criminal Division determined that information in the Memoranda is exempt from disclosure under the first clause of FOIA Exemption 7(E).

9. The Criminal Division also concluded that information in the Memoranda is exempt from disclosure under the second clause of FOIA Exemption 7(E) because the details about GPS tracking devices and other investigative techniques disclosed in the Memoranda could reasonably be expected to risk circumvention of the law. If would-be wrongdoers have access to the information in the Memoranda regarding where, when, how, and under what circumstances GPS tracking devices and other investigative techniques are used by federal investigators, they will also learn when and where certain investigatory techniques are *not* employed, and would be able to conform their activities to times, places, and situations where they know that unlawful conduct will not be detected.

10. The specific investigative techniques available to federal prosecutors and the details related to the use of such techniques are reflected throughout the Memoranda. The Memoranda's discussions of potential legal strategies, defenses, and arguments that might be considered by federal prosecutors in cases involving GPS tracking devices and other investigative techniques are intertwined with facts regarding those techniques and generally not reasonably segregable. The Criminal Division carefully reviewed the Memoranda to determine if reasonably segregable portions of the documents could be disclosed to the ACLU. The Criminal Division concluded that the material on pages 1 and 6-8 of the February Memorandum and page 1 of the July Memorandum is not exempt under FOIA Exemption 7(E) and could reasonably be segregated from the rest of the document. This material would otherwise be exempt from disclosure pursuant to FOIA Exemption 5, but the Criminal Division made a discretionary release of the material to the ACLU.

The Memoranda Are Not Agency Law

11. The Memoranda do not constitute the working law or policies of DOJ.

12. The Memoranda provide federal prosecutors with guidelines, not directives, to consider in litigating their cases. Both Memoranda are explicitly framed in terms of what prosecutors *may* argue in response to possible arguments that they could encounter regarding the exclusion or suppression of evidence, and practices that *may* increase or decrease litigation risk following the *Jones* decision.

13. The Memoranda do not require DOJ attorneys to make any particular arguments or follow any particular course of conduct. While the Memoranda suggest potential arguments, practices, and litigating positions that federal prosecutors may consider employing, decisions about such employment are left to the discretion of the prosecutor. Throughout both Memoranda, the author acknowledges that the facts and considerations of each case will require prosecutors to make their own case-specific judgments about what arguments and practices to use. Further, while the Memoranda were intended to alert federal prosecutors to the potential implications of *Jones*, the author acknowledges that they do not to provide an exhaustive list of all possible arguments and counter-arguments prosecutors may encounter.

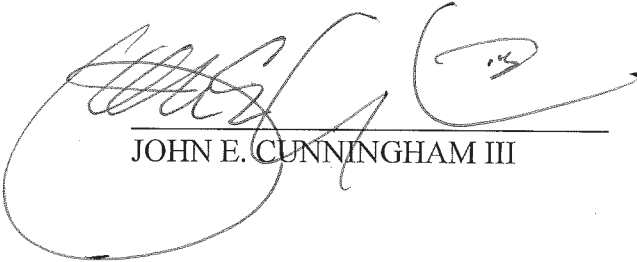
14. The Memoranda do not set forth, analyze, or interpret DOJ regulations, rules, or policies. The Memoranda do not contain reasoning or conclusions that have been adopted as official DOJ policy or opinions and do not provide any official interpretation of DOJ's Fourth Amendment obligations.

CONCLUSION

15. The Criminal Division properly withheld information in the Memoranda protected from disclosure by FOIA Exemption 5 and FOIA Exemption 7(E).

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

Executed this 17th day of May, 2013 in Washington, D.C.



JOHN E. CUNNINGHAM III