

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

.....X
THE NEW YORK TIMES COMPANY, et al.,

Plaintiffs,

v.

11 Civ. 9336 (CM)

U.S. DEPARTMENT OF JUSTICE, et al.,

Defendants.

.....X
AMERICAN CIVIL LIBERTIES UNION et al.,

Plaintiffs,

v.

12 Civ. 794 (CM)

U.S. DEPARTMENT OF JUSTICE, et al.,

Defendants.

.....X

THIRD DECLARATION OF JOHN E. BIES

I, John E. Bies, declare as follows:

1. As explained in my prior declarations in this case, I am a Deputy Assistant Attorney General in the Office of Legal Counsel (“OLC”) of the United States Department of Justice (the “Department”). My responsibilities include the supervision of 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 Government’s Motion for Summary Judgment with respect to documents identified as responsive by the Central Intelligence Agency (“CIA”) and the Department of Defense (“DoD”) to FOIA requests received by those agencies from the

American Civil Liberties Union and the American Civil Liberties Union Foundation (collectively, the “ACLU”). These statements are based on my personal knowledge, on information provided to me by OLC attorneys and staff working under my direction, and on information provided to me by others within the Executive Branch of the Government. I have also provided an additional classified declaration *ex parte* and under seal with additional information for the Court in connection with today’s filing.

The Documents at Issue

2. As explained more fully in the Second Declaration of Martha M. Lutz of the CIA, filed November 14, 2014, the CIA searched for documents responsive to the ACLU FOIA request and identified responsive records. Likewise, as explained more fully in the Second Declaration of Sinclair M. Harris of DoD, filed November 14, 2014, DoD searched for documents responsive to the ACLU FOIA request and identified responsive records. CIA and DoD identified for OLC responsive records located by the CIA and DoD respectively that implicate OLC equities. I am personally familiar with the responsive records identified by the CIA and DoD as implicating OLC equities, and which are at issue in this case. (I will refer to this subset of the CIA and DoD’s responsive documents collectively as “the withheld records.”)

3. The withheld records include documents falling in the following categories:
- a. Documents containing or reflecting confidential, predecisional legal advice provided by OLC or the Department of Justice to Executive Branch policymakers;
 - b. Draft legal analysis, including draft white papers and draft OLC attorney work product generated during the preparation of OLC advice, such as sections of draft OLC memoranda circulated for review and comments;

- c. Requests from Executive Branch officials for legal advice, and including confidential and classified factual information potentially relevant to the requests;
- d. Interagency Executive Branch communications reflecting legal deliberations regarding the appropriate legal analysis of potential actions or legal determinations, including communications seeking and providing factual information determined to be potentially relevant to that analysis, as well as comments and legal deliberations regarding draft legal advice and analysis, including views provided to OLC by other agencies regarding the appropriate legal analysis, many of which include classified factual information conveyed as part of those legal deliberations; and
- e. Intelligence products containing classified factual information regarding terrorist organizations and individuals involved with such organizations provided to OLC in connection with a request for legal advice.

4. The withheld records would be protected from disclosure in civil discovery because of the applicability of one or more privileges. Accordingly, they are properly withheld from disclosure under FOIA pursuant to Exemption Five, 5 U.S.C. § 552(b)(5). These privileges include the deliberative process and attorney-client privileges. The withheld records may also be protected under FOIA Exemptions One and Three, 5 U.S.C. § 552(b)(1), (3), as addressed in the declarations filed today on behalf of the CIA and DoD, and for additional reasons under Exemption Five as identified in those declarations. I am also filing a classified, *ex parte* declaration today providing additional information regarding the withheld records that involve OLC equities.

Applicable Privileges

5. The withheld records consist primarily of records conveyed in the course of preparing confidential, predecisional OLC legal advice to assist Executive Branch clients in making policy decisions, or memorializing such advice, or in interagency deliberations regarding the appropriate legal analysis. Accordingly, such records are covered by the deliberative process and/or attorney-client privileges, and therefore are exempt under FOIA Exemption Five, unless those privileges have been waived.

6. The deliberative process privilege protects documents that are (a) predecisional, in that they were generated prior to decisions or potential decisions, such as decisions regarding contemplated counterterrorism operations or decisions regarding the drafting of contemplated opinions or legal analyses; and (b) deliberative, in that they contain, reflect, or reveal discussions, proposals, and the “give and take” exchanges that characterize the government’s deliberative processes.

7. As discussed below, the withheld records are protected by the deliberative process privilege in whole or in part. They are predecisional, in that they contain, reflect, or reveal discussions, proposals, and the “give and take” exchanges that characterize the government’s deliberative processes. Requiring disclosure of these documents would undermine the deliberative processes of the government and chill the candid and frank communications necessary for effective governmental decisionmaking. It is essential to OLC’s mission and the deliberative processes of the Executive Branch that the development of OLC’s considered legal advice not be inhibited by concerns about the compelled public disclosure of predecisional matters, including factual information necessary to develop accurate and relevant legal advice, and draft analyses reflecting preliminary thoughts and ideas. Protecting the withheld documents

from compelled disclosure is central to ensuring that Executive Branch attorneys will be able to examine relevant facts and analysis, and draft and vet legal arguments and theories thoroughly, candidly, effectively, and in writing, and to ensuring that Executive Branch officials will seek legal advice from OLC and the Department of Justice on sensitive matters.

8. The attorney-client privilege protects documents that contain or reflect confidential legal advice provided by an attorney to a client, and confidential client requests for legal advice and other confidential communications and facts conveyed by the client to the attorney for the purpose of receiving legal advice.

9. As discussed below, certain of the withheld records are protected by the attorney-client privilege in whole or in part. Many of the documents contain or reflect legal advice or drafts of legal advice that was ultimately communicated in confidence from OLC to Executive Branch clients, or disclose confidential client requests for legal advice. In addition, many of the documents also contain factual information that was communicated in confidence by Executive Branch clients to OLC for the purpose of obtaining confidential legal advice, and the existence of confidential legal advice documents reflects the privileged fact that a client requested confidential legal advice on a particular subject. Having been asked to provide legal advice, OLC attorneys stood in a relationship of trust with their Executive Branch clients. Just as disclosure of client confidences provided in the course of seeking legal advice would seriously disrupt the relationship of trust so critical when attorneys formulate legal advice for their clients, so too would disclosure of the legal advice itself undermine that trust.

10. For the reasons discussed in paragraphs 23 to 31 of my Second Declaration, filed October 3, 2014, the privileges applicable to the withheld records have not been lost.

The Categories of Withheld Records

11. As discussed above in paragraph 3(a), the withheld records include documents containing or reflecting confidential, predecisional legal advice provided by OLC or the Department of Justice to Executive Branch policymakers. For the reasons discussed regarding such documents in paragraphs 32 to 44 of my Second Declaration, filed October 3, 2014, these documents are protected by the deliberative process and attorney-client privileges.

12. As discussed above in paragraph 3(b), the withheld records include draft legal analysis, including draft white papers and draft OLC attorney work product generated during the preparation of OLC advice, such as sections of draft OLC memoranda circulated for review and comments. Given that these documents reflect internal Executive Branch deliberations, attorney-client confidences, or facts conveyed in the course of seeking legal advice, for the reasons discussed regarding such documents in paragraphs 32 to 38 of my Second Declaration, these documents are protected by the deliberative process and attorney-client privileges. Furthermore, for the reasons discussed regarding such documents in paragraphs 49 to 52 of my Second Declaration, the fact that these documents contain draft legal analysis provides an additional basis for their protection under the deliberative process privilege.

13. As discussed above in paragraph 3(c), the withheld records include requests from Executive Branch officials for legal advice, and including confidential and classified factual information potentially relevant to the requests. For the reasons discussed regarding such documents in paragraphs 39 to 44 of my Second Declaration, these documents are protected by the deliberative process and attorney-client privileges.

14. As discussed above in paragraph 3(d), the withheld records include interagency Executive Branch communications reflecting legal deliberations regarding the appropriate legal

analysis of potential actions or legal determinations, including communications seeking and providing factual information determined to be potentially relevant to that analysis, as well as comments and legal deliberations regarding draft legal advice and analysis, including views provided to OLC by other agencies regarding the appropriate legal analysis, many of which include classified factual information conveyed as part of those legal deliberations. Given that these documents contain interagency legal deliberations, for the reasons discussed regarding such documents in paragraphs 45 to 48 of my Second Declaration, these documents are protected by the deliberative process and attorney-client privileges. To the extent that these documents reflect confidential factual information conveyed for the purposes of obtaining legal advice, for the reasons discussed regarding such documents in paragraphs 39 to 44 and 53 to 55 of my Second Declaration, this provides an additional basis for concluding that they are protected by the deliberative process and attorney-client privileges. Furthermore, for the reasons discussed regarding such documents in paragraphs 49 to 52 of my Second Declaration, the fact that these documents contain draft legal analysis provides an additional basis for their protection under the deliberative process privilege.

15. As discussed above in paragraph 3(e), the withheld records include intelligence products containing classified factual information regarding terrorist organizations and individuals involved with such organizations provided to OLC in connection with a request for legal advice. For the reasons discussed regarding such documents in paragraphs 39 to 44 and 53 to 55 of my Second Declaration, any portions of these records revealing the fact that these particular records were provided to OLC in connection with a request for legal advice—including facsimile lines, cover pages, routing slips, or other indications regarding distribution to OLC—are protected by the deliberative process and attorney-client privileges. Accordingly,

those portions of these records are exempt from release. I understand that the CIA and DoD have concluded that these records are also exempt in full under Exemptions One, Three, and/or Five for additional reasons.

16. With the exception of the unredacted portions of the February 19, 2010 and the July 16, 2010 memoranda regarding Aulahi, which have been released in redacted form, the legal advice or deliberations reflected in the withheld records has not been made public, and to the extent that such documents have been shared with others in the Government, the individuals who received them would have been aware of the need for confidentiality. In addition, the withheld records are classified (or were classified at the time of their circulation) and these individuals would, pursuant to Executive Order 13,526, only have been persons with appropriate security clearances and a need to know—that is, individuals whose job responsibilities relate to national security. There is no question that anyone who reviewed such documents would have understood the need for confidentiality.

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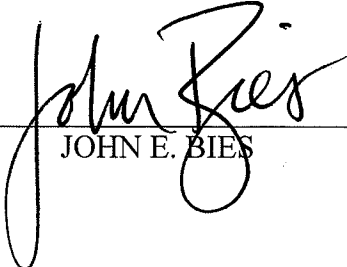
17. I have reviewed the withheld records individually and determined that no reasonably segregable, non-exempt information can be provided. I have noted above and in my classified declaration where the exemption under Exemption Five relating to OLC's equities only supports withholding a portion of the documents. I understand that the CIA and DoD have concluded that these records are also exempt in full under Exemptions One, Three, and/or Five for additional reasons.

18. In conclusion, as explained above and for reasons elaborated in my in my classified *ex parte* declaration filed today, I respectfully submit that the withheld records (or identified portions of the withheld records) are covered by the deliberative process privilege

and/or the attorney-client privilege, and accordingly fall squarely within Exemption Five. The compelled disclosure of these records (or portions of records) would harm the deliberative processes of the government and would disrupt the attorney-client relationship between OLC and its clients throughout the Executive Branch.

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

Executed: November 14, 2014



JOHN E. BIES