

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, and)
AMERICAN CIVIL LIBERTIES UNION)
FOUNDATION,)

Plaintiffs,)

v.)

NATIONAL SECURITY AGENCY,)
CENTRAL INTELLIGENCE AGENCY,)
DEPARTMENT OF DEFENSE,)
DEPARTMENT OF JUSTICE, and)
DEPARTMENT OF STATE,)

Defendants.)

Case No.13-cv-9198 (KMW)(JF)

SUPPLEMENTAL DECLARATION OF DAVID J. SHERMAN

I, DAVID J. SHERMAN, hereby declare and state:

1. Please refer to my UNCLASSIFIED Declaration in this case (Dkt. No. 64), dated 26 February 2016, for a summary of my background, my role as a TOP SECRET original classification authority (“OCA”), the National Security Agency’s (“NSA” or “Agency”) origin and mission, and the importance of SIGINT to the national security.

2. This declaration supplements my CLASSIFIED¹ and UNCLASSIFIED (Dkt. No. 64) declarations of 26 February 2016, as well as my UNCLASSIFIED Supplemental Declarations of 7 June 2016 (Dkt. No. 79) and 14 June 2017 (Dkt. No. 103). The purpose of this declaration is to provide additional information regarding certain withholdings taken by the NSA that have been challenged by Plaintiffs, the American Civil Liberties Union and the American Civil Liberties Union Foundation (collectively, “Plaintiffs” or “ACLU”), in response to Plaintiffs’ Memorandum

¹ Referenced in Dkt. No. 74, Notice of Filing of Classified Document.

of Law in Support of their Second Cross-Motion for Partial Summary Judgment and in Opposition to Defendants' Second Motion for Partial Summary Judgment ("Pls.' Opp." or "Opposition").

Background: Withholdings of Unclassified and For Official Use Only Material

3. As discussed in my 14 June Declaration, the Court, in its Opinion and Order of 27 March 2017, directed Defendants to, with respect to certain withholdings, conduct a segregability review or "inform the Court that this review has already occurred." (Mem. Op. at 36; *see also* NSA Second Supp. Decl., Dkt. No. 103, ¶ 17). Plaintiffs' Opposition contends that a subset of these materials—NSA Documents 22 and 23, and NSD Documents 42 and 47—must contain segregable Unclassified (U) and For Official Use Only (U/FOUO) material. Specifically, Plaintiffs observe that material marked (U) and (U/FOUO) "*has already been segregated* from information that is designated as classified" in these documents. (Pls.' Opp., Dkt. No. 107, at 24). Plaintiffs also argue that the length of these documents alone means that they must contain segregable information. (*Id.* at 23).

4. First and foremost, to clarify NSA's position concerning (U/FOUO) material, NSA policy defines such material as "[i]nformation which has not been given a security classification pursuant to the criteria of an Executive Order,"—*i.e.*, is not classified—"but which may be withheld from the public on the basis of one or more FOIA exemptions 2 through 9"² For the documents at issue, the applicable FOIA provision is Exemption 3, which, as detailed in my prior UNCLASSIFIED declaration of 26 February 2016, exempts from disclosure information protected by statute. (NSA Decl., Dkt. No. 64, ¶ 32). The applicable statutory protections afforded the withheld (U/FOUO) material relevant here are (i) Section 6 of the National Security Agency Act,

² *See* NSA/CSS Policy 1-5, *Freedom of Information Act Program*, ¶ 41 (May 24, 2004), available at <https://www.nsa.gov/resources/everyone/foia/assets/files/policy1-5.pdf>.

Pub. L. No. 86-36 (50 U.S.C. § 3605), which protects from disclosure the organization, function, and activities of the NSA, and (ii) Section 102A(i)(1) of the National Security Act of 1947 (50 U.S.C. § 3024(i)(1)), which protects from public release intelligence sources and methods. This protection is “absolute” and “[w]hether the sources and methods at issue are classified is *irrelevant* for purposes of [this] protection” (NSA Decl., Dkt. No. 64, ¶ 34 (emphasis added)). Accordingly, NSA is not, in fact, contending that the material marked (U/FOUO) is classified, and therefore concurrently protected by Exemption 1.³ Instead, in accordance with its stated policy, NSA is withholding this information pursuant to Exemption 3. This approach is underscored by the remaining redactions in NSA Document 79; as detailed in my Second Supplemental Declaration of 14 June 2017, “with respect to the (U/FOUO) material that remains redacted in NSA Document 79, every such withholding was made pursuant to Exemption 3 only, in order to protect from disclosure, *inter alia*, NSA organization, functions, or activities.” (NSA Second Supp. Decl., Dkt. No. 103, ¶ 25).⁴

³ I have observed in my prior declarations in this case that certain information which, “viewed in isolation, could be considered unclassified, is nonetheless classified,” and properly withheld under Exemption 1, “in the context of this case because it can reasonably be expected to reveal (directly or by implication) classified national security information concerning the timing or nature of intelligence activities, sources, and methods when combined with other information that might be available to the public or adversaries of the United States.” (NSA Decl., Dkt. No. 64, ¶ 85; *accord* NSA Second Supp. Decl., Dkt. No. 103, ¶ 18). While Exemption 1 can be invoked where “the disclosure of even seemingly mundane information, such as document titles, when considered in conjunction with other publicly available information, could reasonably be expected to assist a sophisticated adversary in deducing particular intelligence activities,” NSA is withholding the (U/FOUO) material in the aforementioned documents pursuant to Exemption 3 alone.

⁴ Plaintiffs’ Opposition also asks that NSA address whether its re-review for segregability led to the determination that there are additional segregable portions of NSA Document 79. (Pls.’ Opp. at 23). To clarify, prior to Defendants’ first motion for summary judgment, NSA had already performed a segregability analysis of all documents (with a few noted exceptions). (NSA Second Supp. Decl., Dkt. No. 103, ¶ 18). As such, no re-review was required pursuant to the language of the Court’s Opinion and Order. (*Id.* ¶ 17 (citing Mem. Op. at 36)). In any event, because the Agency already rigorously segregated for release large portions of NSA Document 79, there would be no additional benefit to re-reviewing the document.

5. Second, as discussed in my Second Supplemental Declaration, the fact that material withheld in full may contain a limited amount of unclassified information does not mandate release of that information should such excerpts, when released alone and without context, be rendered meaningless. (NSA Second Supp. Decl., Dkt. No. 103, ¶ 23). Accordingly, the unclassified material present in documents withheld in full, which—if released without context—would provide no meaningful information to ACLU or the public, does not overcome the Agency’s proper invocations of Exemptions 1 and 3.

Analysis: NSA Documents 22 and 23; NSD Documents 42 and 47

6. NSA Document 22 is a report from NSA’s Office of Inspector General (“OIG”) that discusses a classified NSA program whose very existence has not been publicly acknowledged. This document, which is discussed in detail in my CLASSIFIED declaration, contains four categories of material marked (U), none of which are reasonably segregable. The first such subset of (U) material in this document is simply non-substantive headings (*e.g.*, “Highlights,” “Findings and Recommendations,” and “Assessment of Internal Controls”). Such headings, without context, are not meaningfully segregable, as they are standalone, non-substantive excerpts that offer no information responsive to Plaintiffs’ request. The second category of (U) material reflects information concerning the organizations responsible for undertaking actions related to the report, together with the statuses and target completion dates of such actions. This information, which is common to most such reports, is marked (U), but, without more, provides no responsive information. Third, a small remainder of the withheld material is erroneously marked (U), but on further review should have been marked as Top Secret/Special Intelligence (TS/SI): namely, a heading reflecting the subject matter of the classified program, as well as accompanying and related footnotes. Relatedly, a limited amount of information marked

(U) should have been marked (U/FOUO), as it pertains to the organization, function, and activities of NSA and is therefore properly exempt from disclosure pursuant to Exemption 3. This material constitutes certain high-level recommendations as part of inter-Agency review of the report that are marked (U), which standing alone may be innocuous, but in the context of this report provide properly protected information concerning NSA functions. Similarly, six bullet points reflecting certain findings of the report are marked (U), but reflect information concerning the organization, functions, and activities of the Agency; as such, these bullet points are properly protected pursuant to Exemption 3. Also within this category is the distribution list, which reveals protected information concerning the organization of NSA. Finally, three paragraphs concerning certain collection authorities, as well as Department of Defense and NSA policy are marked (U), because alone the descriptions are not classified. However, in this context, the policies would reveal information concerning the subject matter of the report beyond that already provided in an unclassified setting that is decidedly exempt from disclosure due to its classified or protected nature. Separate and apart from these categories of material, NSA Document 22 also contains a standard cover letter detailing the role of the OIG (marked (U/FOUO)), as well as contact information on the OIG staff for additional information concerning the report (marked (U)).

7. NSA Document 23 is another OIG report concerning classified NSA intelligence activities, including the Agency's relationships with partner agencies. (*See* NSA Second Supp. Decl., Dkt. No. 103, ¶¶ 21, 24; NSA Decl., Dkt. No. 64, ¶¶ 58-61). The information marked (U) in this document falls into the same general categories as such material in NSA Document 22, none of which is subject to disclosure under FOIA. First, similar to NSA Document 22, there is certain material that, while unclassified, is non-substantive when segregated. Material in this category includes standard recitations concerning the OIG common to that office's reports

(describing OIG's role and audit function), the report's table of contents, and many (non-substantive) section headings. Examples of the section headings include "Executive Summary," "Summary of Recommendations," "This Page is Intentionally Left Blank," "NSA/Central Security Service (CSS) Policies and Procedures," "Findings and Recommendations," "Management Response," "OIG Comment," "Objectives," and "Scope and Methodology." Such section headings alone are meaningless and provide no additional information to Plaintiffs not already available from the unclassified descriptions of this document previously provided in my declarations. Relatedly, NSA Document 23 contains a non-substantive footnote concerning the formatting of numbers in the report, which, although marked (U), is meaningless when segregated. Second, NSA Document 23 also lists the status of management response actions related to the report along with their target completion dates, which is not substantively responsive information. Third, there is a small amount of information erroneously marked (U), which should have been marked as (U/FOUO). Such information includes the list of acronyms and organizations relevant to this report, and at least one section heading, as well as the title of this OIG report. Also included in this category is high-level information concerning OIG comments reflecting the recommendations and plans, as well as a listing of relevant internal controls, which relate to activities and functions of NSA. Finally, there is certain material marked (U), which, on its own, reflects unclassified facts (such as descriptions of unclassified NSA policies or general collection authorities), but which, in context, would reveal the subject of this particular report, and consequently, would reveal intelligence sources and methods, or Agency organizations and functions; this information is properly protected from disclosure by statute and thus falls squarely within Exemption 3.

8. NSD Documents 42 and 47 contain relatively little (U/FOUO) material. First, both the documents' titles and subtitles are marked with this designation. This material falls directly within Exemption 3, as the documents in their entirety (as reflected in their titles) concern classified operations or activities of the Agency that have never been publicly acknowledged, and thus reflect compliance matters "inextricably intertwined with factual descriptions of NSA functions and activities" (NSA Supp. Decl. ¶ 13). In addition, NSD Document 42 contains one additional word that is marked (U/FOUO). That word in isolation is meaningless, but, in context, reflects information protected from disclosure pursuant to Exemption 3. There is no material marked (U) in either of these two documents.

CONCLUSION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 4th day of August, 2017, pursuant to 28 U.S.C. § 1746.



Dr. David J. Sherman
Chief, Strategy, Plans, and Policy
National Security Agency