

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION,
et al.,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY,
et. al.,

Defendants.

Case No. 13-cv-9198 (AT)

DECLARATION OF ANTOINETTE B. SHINER
INFORMATION REVIEW OFFICER
FOR THE LITIGATION INFORMATION REVIEW OFFICE
CENTRAL INTELLIGENCE AGENCY

I, ANTOINETTE B. SHINER, hereby declare and state:

1. I currently serve as the Information Review Officer ("IRO") for the Litigation Information Review Office ("LIRO") at the Central Intelligence Agency ("CIA" or "Agency"). Although I only recently assumed this position,¹ I have worked in the information review and release field since 2000.

2. Prior to becoming the IRO for LIRO, I served as the IRO for the Agency's Directorate of Support ("DS") for over sixteen months. In that capacity, I was responsible for making classification and release determinations for information originating within the DS. Prior to that, I was the Deputy IRO

¹ I became the IRO for LIRO effective 19 January 2016.

for the Director's Area of the CIA ("DIR Area") for over three years. In that role, I was responsible for making classification and release determinations for information originating within the DIR Area. Before assuming that role, I was a reviewer in the DS for seven months, where I performed research and provided input and recommendations on classification and release decisions. Prior to that position, I worked in the Public Information Program Division ("PIPD") within the Information Management Services ("IMS") Group for over ten years and in that capacity engaged in all aspects of FOIA case management. Before transitioning to the area of information review and release, I worked as a paralegal and held various administrative positions within the Office of General Counsel for over thirteen years.

3. 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 13526, 75 Fed. Reg. 707 (Jan. 5, 2010) ("E.O. 13526"). This means that 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 E.O. 13526 and applicable regulations.

4. Among other things, 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, and the Privacy Act of 1974, 5 U.S.C. § 552a.

5. This declaration supports the Government's Motion for Partial Summary Judgment in this case. The purpose of this declaration and the accompanying *Vaughn* index, attached as Exhibit A, is to provide the Court with a detailed description of the records at issue and to justify the invocation of FOIA exemptions 1, 3, 5, and 7(E) to protect certain classified and national security information and privileged material. Through the exercise of my official duties, I have become familiar with this civil action. I make the following statements based upon my personal knowledge and information made available to me in my official capacity.

I. PLAINTIFFS' FOIA REQUEST

6. By letter dated 13 May 2013, which is attached as Exhibit B, plaintiffs requested three broad categories of records concerning the Agency's authorities under Executive Order 12333 ("E.O. 12333")² and activities undertaken pursuant to those authorities. Specifically, plaintiffs requested: (1) any

² Executive Order 12333 sets forth "general principles that, in addition to and consistent with applicable laws, are intended to achieve the proper balance between the acquisition of essential information and protection of individual interests." As described below, plaintiffs have limited their request to the aspects of E.O. 12333 that concern electronic surveillance and U.S. persons.

records construing or interpreting the authority of the CIA under E.O. 12333 or any regulations issued thereunder; (2) any record describing the minimization procedures used by the Agency with regard to both intelligence collection and intelligence interception conducted pursuant to the Agency's authority under E.O. 12333 or any regulations issued thereunder; and (3) any records describing the standards that must be satisfied for the "collection," "acquisition" or "interception" of communications, as the Agency defines these terms, pursuant to the Agency's authorities under E.O. 12333 or any regulations issued thereunder. Plaintiffs also asked that they be considered representatives of the news media for FOIA fee purposes and requested a waiver of all fees associated with processing the request.³ The CIA responded by letter dated 26 July 2013, which is attached as Exhibit C, concluding that plaintiffs' FOIA request in its current form did not reasonably describe the records requested and would require the Agency to conduct an unduly burdensome search.

7. Plaintiffs filed the instant civil action on 20 December 2013 and subsequently filed an amended complaint on 18 February 2014. The parties, including other defendant-agencies, then entered into discussions regarding ways to modify the scope of

³ No fees have been charged to plaintiffs in the course of this lawsuit.

the initial FOIA request. By the terms of the stipulation between the parties, the CIA agreed to search for and process five categories of records: (1) any formal regulations or policies relating to the Agency's authority under E.O. 12333 to undertake "electronic surveillance" that implicates "United States persons" (as those terms are defined in the Executive Order), including regulations or policies relating to the CIA's acquisition, retention, dissemination, or use of information or communications to, from, or about U.S. persons under such authority (searches for this item were limited to documents that are currently in use or effect or that were created or modified on or after September 11, 2001); (2) any document that officially authorizes or modifies under E.O. 12333 the Agency's use of specific programs, techniques, or types of electronic surveillance that implicate U.S. persons, or documents that adopt or modify official rules or procedures for the Agency's acquisition, retention, dissemination or use of information or communications to, from or about U.S. persons under such authority generally or in the context of particular programs, techniques, or types of electronic surveillance (searches for this item were limited to records residing in the offices of the Director, Deputy Director, and Executive Director of the CIA and materials maintained at the Agency's directorate level and to documents that are currently in use or effect or that were

created or modified on or after September 11, 2001); (3) any formal legal opinions addressing the CIA's authority under E.O. 12333 to undertake specific programs, techniques, or other types of electronic surveillance that implicates U.S. persons, including formal legal opinions relating to the Agency's acquisition, retention, dissemination or use of information or communications to, from, or about U.S. persons under such authority generally or in the context of particular programs, techniques, or types of electronic surveillance (searches for this item were limited to records maintained in a particular division of the CIA's Office of General Counsel ("OGC Division") that is responsible for providing legal advice on complex or novel questions and to documents that are currently in use or effect or that were created or modified on or after September 11, 2001); (4) any formal training materials or reference materials (such as handbooks, presentations or manuals) that expound on or explain how the Agency implements its authority under E.O. 12333 to undertake electronic surveillance that implicates U.S. persons, including its acquisition, retention, dissemination or use of information or communications to, from, or about U.S. persons under such authority (searches for this item were limited to records created by the CIA OGC Division or created or maintained at the Agency's directorate level and to documents that are currently

in use or effect); and (5) any formal reports relating to electronic surveillance under E.O. 12333 implicating U.S. persons, one of whose sections or subsections is devoted to (a) the Agency's compliance, in undertaking such surveillance with E.O. 12333, its implementing regulations, the Foreign Intelligence Surveillance Act, or the Fourth Amendment; or (b) the Agency's interception, acquisition, scanning, or collection of the communications of U.S. persons, whether incidental or otherwise, in undertaking such surveillance; and that are or were: (i) authored by the Agency's inspector general or the functional equivalent thereof; (ii) submitted by the Agency to Congress, the Office of the Director of National Intelligence, the Attorney General, or the Deputy Attorney General; or (iii) maintained by the office of the Agency's director (searches for this item were limited to documents that were created or modified on or after September 11, 2001 and searches for item (5)(b)(ii) were limited to records residing in the offices of the Director, Deputy Director, and Executive Director of the CIA and materials maintained at the Agency's directorate level). See Stipulation and Order Regarding Document Searches, ECF No. 30. In addition to the documents located in searches for the items discussed above, the CIA also reviewed two additional documents from Department of Justice components (OLC 5; NSD 49).

8. On 30 April 2015, the CIA produced to plaintiffs two documents in full, 46 documents in part, and advised that it was withholding an additional 110 documents in full. In the course of preparing for this filing, the CIA determined that the number of responsive documents withheld in full is actually 82 (not 110 as previously noted). Plaintiffs have indicated that they are challenging all of the documents that were withheld in full and only 12 of the documents that were withheld in part (C06235713; C06235714; C06235715; C06235758; C06235759; C06235760; C06229027; C06234421; C06235700; C06236483; C06229019; C06317256). The bases for withholding the information in the documents released in part and those withheld in full is described in detail in this declaration and in the attached *Vaughn* index. As explained below, the information contained in these documents was withheld on the basis that it was exempt pursuant to FOIA Exemptions 1, 3, 5, 6, and 7(E). Additionally, OLC 5 and NSD 49 were also withheld in full on the basis of Exemptions 1 and 3.⁴ Plaintiffs have indicated that they are not challenging the assertion of Exemption 6.

⁴ I understand that the declarations submitted by the National Security Division and the Office of Legal Counsel discuss the reasons that certain information in these documents is also withheld on the basis of Exemption 5.

II. SEARCHES FOR RESPONSIVE RECORDS

9. As outlined above, the parties' stipulation described five separate categories of records: (1) formal regulations or policies regarding E.O. 12333; (2) documents that officially authorize or modify the CIA's use of electronic surveillance or documents that modify official rules or procedures for acquisition, retention and dissemination concerning electronic surveillance of U.S. persons; (3) legal opinions addressing the Agency's authority under E.O. 12333; (4) training materials or reference materials regarding the CIA's authority under E.O. 12333 to undertake electronic surveillance that implicates U.S. persons; and (5) certain reports relating to electronic surveillance of U.S. persons. Further, as explained above, the scope of the searches for these items was limited by agreement of the parties to specific offices and to certain timeframes. In the course of conducting searches for this material, CIA personnel consulted with Agency officials knowledgeable about this subject matter to identify the relevant databases and repositories containing such materials and to ascertain the universe of responsive records. For item 1, the CIA identified Agency Regulation 2-2 and its appendices and annexes as responsive. This regulation implements the provisions of E.O. 12333, which governs the conduct of the intelligence activities of the United States, including electronic surveillance as it

relates to U.S. persons. The CIA released portions of this regulation to plaintiffs.

10. For item 2, in accordance with the parties' stipulation, CIA information management professionals conducted searches of the offices of the Director, Deputy Director and Executive Director of the CIA ("Director's area") and the front offices of the Agency directorates for any records that officially authorize or modify the use of specific techniques and methods regarding electronic surveillance as well as documents that modify the rules or procedures on this subject. The CIA used broad search terms, such as "12333," in the databases that were determined to maintain responsive documents. No other databases or repositories were deemed likely to contain additional responsive records. For item 3, the CIA searched the database maintained by the OGC Division that is responsible for providing legal advice on complex or novel questions for responsive legal opinions. By agreement of the parties, the searches were limited to this OGC Division. Further, the database that was searched is the sole repository for the requested legal opinions. For item 4, in accordance with the terms of the stipulation, the CIA conducted searches of the relevant databases of the OGC Division and the front offices of the Agency directorates and additionally requested that attorneys staffing those offices to identify and provide the

formal training and reference materials on E.O. 12333 that are currently in use. These are the only databases and individuals deemed likely to maintain responsive records. Lastly, for item 5, Agency information management professionals conducted searches of the relevant databases located in the Office of the Inspector General, the Office of Congressional Affairs, and the Director's area using relevant search terms, and enlisted the assistance of knowledgeable personnel in those offices to identify any reports touching on this topic. The offices and repositories searched were deemed the only places likely to contain records responsive to item 5.

11. Due to the broad nature of the searches, Agency information management personnel uncovered a large volume of duplicative documents and non-responsive records. During the course of the review process, that material was excluded from the litigation. For records that were released to plaintiffs in part, the portions of the documents that did not concern electronic surveillance were marked as non-responsive.⁵ The searches described above were conducted in all locations in which it is reasonably likely that responsive records would reside and used search terms and methods reasonably calculated to locate those documents. The CIA's rationale for withholding

⁵ I note that, as a matter of administrative discretion, the CIA processed the complete Agency Regulation 2-2 and certain annexes and appendices, including portions that did not concern electronic surveillance.

records, both in full or in part, is explained below and is also documented in the accompanying *Vaughn* index.

III. EXEMPTIONS CLAIMED

A. EXEMPTION 1

12. Exemption 1 provides that 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). Here, the information withheld pursuant to Exemption 1 satisfies the procedural and the substantive requirements of E.O. 13526, which governs classification. See E.O. 13526 § 1.1(a), § 1.4(c).

13. As an original classification authority, I have determined that certain records and discrete portions of documents responsive to the FOIA request in this case are currently and properly classified. Additionally, this information is owned by and is under the control of the U.S. Government. As described below, the information falls under classification category § 1.4(c) of the Executive Order because it concerns "intelligence activities (including covert action), [or] intelligence sources or methods." Further, its unauthorized disclosure could reasonably be expected to result

in damage to national security. None of the information at issue has 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. Further, the responsive documents that contain classified information are properly marked in accordance with § 1.6 of the Executive Order. As detailed below, the Agency has attempted to explain the nature of the information withheld pursuant to Exemption 1 to the extent possible on the public record without disclosing the underlying classified information. Should the Court require additional detail regarding the withheld information, the CIA can submit an *in camera*, *ex parte* affidavit to provide a fuller explanation of this material.

Damage to National Security

14. The primary objective of E.O. 12333 is to provide for the effective conduct of U.S. intelligence activities consistent with the Constitution and applicable laws. Part 1 of the Executive Order explains that “[i]ntelligence collection under this order should be guided by the need for information to respond to intelligence priorities set by the President” and notes that “[s]pecial emphasis should be given to detecting and

countering: (1) espionage and other threats and activities directed by foreign powers or their intelligence services against the United States and its interests; (2) threats to the United States and its interests from terrorism; and (3) threats to the United States and its interests from the development, possession, proliferation, and use of weapons of mass destruction." E.O. 12333, §§1.1(c)-(d). The Executive Order also directs the heads of elements of the intelligence community to "protect intelligence and intelligence sources, methods and activities from unauthorized disclosure." *Id.* at §1.6(d).

15. In accordance with the parties' search stipulation, plaintiffs have limited their request to certain records that demonstrate how the Agency has implemented procedures and/or complies with the directives contained in Executive Order 12333 related to electronic surveillance and U.S. persons. Under the terms of the Executive Order, elements of the intelligence community must "use the least intrusive collection techniques feasible within the United States or directed against United States persons abroad." E.O. 12333, at §1.6(d). Unsurprisingly, documents related to the intersection of electronic surveillance and U.S. persons pose some of the most complicated issues for the Intelligence Community. Although the Agency has released portions of responsive materials to the greatest extent

possible, the records at issue necessarily contain sensitive intelligence sources, methods and activities of the CIA.

16. Here, the information withheld pursuant to Exemption 1 deals with the intelligence priorities set forth in the Executive Order, such as intelligence collection related to espionage, terrorism and proliferation. It tends to identify the targets of intelligence-gathering efforts, reveal the specific collection techniques and methods employed, and contain details concerning the locations and timing of that collection.

17. For example, the Agency's internal regulation implementing E.O. 12333 (item 1) contains details about specific types of intelligence-gathering techniques, the procedures and permissions required for certain foreign intelligence and counterintelligence activities, and limitations on intelligence gathering. The Agency's training and reference materials (item 4) also contain these principles of collection and provide real-world examples and hypotheticals to reinforce those concepts and underscore compliance considerations. These details show the actual intelligence techniques and methods used by the CIA. The documents, which authorize or modify specific techniques or modify official rules or procedures (item 2), all deal with specific situations where departures from the standard procedures are necessary. Similarly, the legal opinions (item 3) address questions posed by Agency component personnel

requesting guidance regarding the permissibility, limitations and other legal considerations associated with certain contemplated intelligence activities. Lastly, the reports (item 5) review specific instances of collection as part of evaluating the Agency's compliance with the dictates of E.O. 12333.

18. The withheld information would provide sensitive details as to how intelligence is acquired, retained and disseminated, thereby revealing strengths, weaknesses, and gaps in intelligence coverage. Additionally, this information would tend to reveal the resources and capacity of the Agency to collect and share certain types of intelligence at different points in time. If this information were to be released, adversaries could alter their behavior to avoid detection or use countermeasures to undermine U.S. intelligence capabilities and render collection efforts ineffective. Accordingly, disclosure of the information withheld pursuant to Exemption 1 could reasonably be expected to cause damage to national security. As described in further detail below, Exemption 3 in conjunction with the National Security Act applies to all the information protected by Exemption 1. Additionally, some classified information is also protected by the deliberative process and attorney-client privileges, as described below.

B. EXEMPTION 3

19. Exemption 3 protects information that is specifically exempted from disclosure by statute. A withholding statute under Exemption 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). I note that the both statutes relied upon by the Agency have been widely recognized by courts to constitute Exemptions 3 withholding statutes.

20. In this case, the National Security Act, as amended, 50 U.S.C. § 3024(i)(1), which "protect[s] intelligence sources and methods from unauthorized disclosure," applies to the same information for which Exemption (b)(1) was asserted as well as other information that would reveal sources and methods of the Agency, such as techniques used by the CIA to assess and evaluate intelligence and different sources of intelligence. Although no harm rationale is required, as indicated above, the release of this information could significantly impair the CIA's ability to carry out its core missions of gathering and analyzing foreign intelligence. 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.

21. The CIA has 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. Pursuant to Section 6 of the CIA Act, the CIA withheld the names of CIA employees; official titles; contact information of CIA personnel; and internal offices that reveal information about the functions of the Agency personnel. Although this statute does not require the Agency to establish damage to national security, I note that disclosure of this information would disclose the identities of CIA officers and highlight functions of Agency personnel in the conduct of intelligence activities, which could render them ineffective.

C. EXEMPTION 5

22. Exemption 5 provides that the FOIA's disclosure requirements do not apply to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). As a preliminary matter, all of the documents for which Exemption 5 was asserted have been circulated either within the Agency or were shared with the

Department of Justice and therefore satisfy the intra- and inter-agency threshold of the exemption. As described in the attached *Vaughn* Index, the information for which Exemption 5 was asserted is protected by the deliberative process and/or the attorney-client privileges.

Deliberative Process Privilege

23. The deliberative process privilege protects Agency communications that are pre-decisional and deliberative. The purpose of the privilege is to prevent injury to the quality of agency decision-making. Here, the CIA invoked the deliberative process privilege in conjunction with the attorney-client privilege (as well as the national security exemptions) to protect legal advice conveyed by attorneys in the CIA's Office of General Counsel to Agency employees and by Department of Justice attorneys to CIA officials. The attorney's role, in these instances, is to provide legal counsel in connection with specific proposals. These communications reflect an interim stage associated with a given deliberation. The lawyers present a range of options and that legal advice serves as one consideration for decision-makers when deciding whether to pursue a certain course of action. The advice itself is one part of that decision-making process and does not constitute the

Agency's final decision to undertake a particular operation or action.

24. Additionally, the CIA invoked the deliberative process privilege for certain talking points and outlines used by presenters who provided instruction on the legal requirements of E.O. 12333. They are not polished pieces, prepared remarks intended to be delivered as written, or handouts provided to trainees. Rather, these documents served as presentation tools for only the presenters that contained potential responses, legal examples and points to be made should certain questions arise. As such, these documents served as informal outlines or talking points that, although not necessarily linked to specific proposals or decisions, provided guidance on E.O. 12333 intended to inform subsequent Agency decision-making regarding the use of specific authorities.

25. Although no showing of harm is required for invoking the deliberative process privilege, disclosure of these documents would significantly hamper the ability of Agency personnel to candidly discuss and assess the viability of certain courses of action. Any factual information contained in these documents is inextricably intertwined with internal Agency deliberations. Moreover, as noted above, these communications are also withheld in full on the basis that they would reveal

protected intelligence sources, methods and activities of the CIA.

Attorney-Client Privilege

26. The attorney-client privilege protects confidential communications between an attorney and his or her client relating to a legal matter for which the client has sought advice. In this case, the attorney-client privilege applies to confidential communications between Agency employees and attorneys within the CIA's Office of General Counsel and between CIA officials and Department of Justice lawyers. Here, Agency employees requested legal advice related to certain proposed courses of action or operations. These confidential communications consist of factual information supplied by the clients in connection with their requests for legal advice, discussions between attorneys that reflect those facts, and legal analysis and advice provided to the clients. The confidentiality of these communications was maintained. If this confidential information were to be disclosed, it would inhibit open communication between CIA personnel and their attorneys, thereby depriving the Agency of full and frank legal counsel.

D. EXEMPTION 7(E)

27. Exemption 7(E) allows agencies to withhold records or information compiled for law enforcement purposes if disclosure

"would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."

28. Here, Exemption 7(E) was invoked to protect law enforcement procedures and guidelines contained within C06235758 ("Memorandum of Understanding Concerning Overseas and Domestic Activities of the Central Intelligence Agency and the Federal Bureau of Investigation"), which was released in part. Exemption 7(E) requires no showing of harm, or balancing of privacy and public interests. The portions of the Memorandum of Understanding, which outlines the "coordination and cooperation between CIA and FBI in both the overseas and domestic arenas," being withheld here pursuant to Exemption 7(E) would give individuals an insight into non-public (and classified) information relating to law enforcement procedures and guidelines, nullifying their effectiveness and risking circumvention of the law.

IV. SEGREGABILITY

29. In evaluating the responsive documents, the CIA conducted a document-by-document and line-by-line review and released all reasonably segregable non-exempt information to

plaintiffs. In instances where no segregable, non-exempt portions of documents could be released without potentially compromising classified, statutorily-protected or privileged information, then such documents were withheld from plaintiffs in full. In this case, the withheld information is protected by at least one of the exemptions and, in many instances, by several overlapping and coextensive FOIA exemptions. For example, the legal memoranda withheld pursuant to the deliberative process and attorney-client privileges of Exemption 5 also contain classified information covered by Exemption 1 as well as intelligence sources and methods and Agency employee information that are protected by the Exemption 3 statutes – the National Security Act and the CIA Act. After reviewing all of the records at issue, I have determined that no additional information can be released without compromising classified or privileged material, and/or other protected information, that falls within the scope of one or more FOIA exemptions.

* * *

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

Executed this 26th day of February 2016.

Antoinette B. Shiner

ANTOINETTE B. SHINER
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Office
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