

by decisionmakers during interagency deliberations. Compelled disclosure of such documents would undermine the deliberative processes of the government and chill the candid and frank communication 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 compelled public disclosure of predecisional matters. Protecting such documents from compelled disclosure is critical to ensuring that Executive Branch attorneys will examine 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.

34. Documents providing legal advice are also protected by the attorney-client privilege. As confidential legal advice provided to Executive Branch clients, such documents are protected by the attorney-client privilege. The considerations regarding the need for confidential Executive Branch deliberations discussed in paragraph 33 above are particularly compelling in the context of the provision of legal advice by OLC or the Department of Justice to their Executive Branch clients. Such documents reflect confidential communications among OLC, the Department of Justice, and Executive Branch clients made for the purpose of requesting and providing legal advice. In providing the legal advice contained in such documents, OLC and the Department of Justice was serving in an advisory role as legal counsel to the Executive Branch. Having been requested to provide counsel on the law, OLC and the Department of Justice stood in a special relationship of trust with the various Executive Branch agencies, departments, and officials seeking the advice. Just as disclosure of client confidences in the course of seeking legal advice would seriously disrupt the relationship of trust so critical when attorneys formulate

legal advice to their clients, disclosure of the advice itself would be equally disruptive to that trust.

35. The advice or deliberations reflected in any such documents has not been made public, and to the extent that such documents have been shared with others in the Government, 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.

36. In addition, the factual information reflected in any such documents would have been provided in connection with a request for legal advice. Moreover, the factual information contained in these documents is primarily classified information. Such client confidences are likewise protected by the attorney-client privilege.

37. For reasons stated in paragraph 30, waiver of applicable privileges has not occurred with respect to any documents conveying or memorializing predecisional legal advice that have not been released.

38. In addition, for the reasons stated in paragraph 25, applicable privileges have not been waived with respect to any statement and discussion of classified facts found in any such legal advice documents.

**Documents Reflecting Information Conveyed in the Course of
Requesting or Obtaining Legal Advice**

39. Requests by Executive Branch officials seeking legal advice from OLC and conveying information and materials relevant to those requests are part of Executive Branch deliberative processes, and disclosing such documents would tend to harm the same deliberative interests as disclosing the resulting advice, as discussed in paragraph 33 above. These

documents are predecisional because they were prepared in connection with contemplated future counterterrorism operations or gathered and selected in connection with seeking recommendations about such contemplated future counterterrorism operations. They are deliberative because they constitute inputs both to OLC's internal deliberative process for rendering legal advice, and inputs to the broader Executive Branch decisionmaking process. In addition, the information or documents provided to OLC are also deliberative to the extent that the decisions to provide them to OLC for its consideration reflect judgments by OLC and/or its Executive Branch clients regarding what information and factors are relevant to OLC's deliberation regarding a particular legal question. Compelled disclosure of these documents would undermine the deliberative processes of the government and chill the candid and frank communication 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 compelled public disclosure of predecisional matters. Protecting these documents from compelled disclosure is critical to ensuring that Executive Branch attorneys will have full access to facts and legal arguments necessary to provide through, candid, and accurate written legal advice, and to ensuring that Executive Branch officials will seek legal advice from OLC and the Department of Justice on sensitive matters.

40. Such documents are also protected by the attorney-client privilege. The considerations regarding the need for confidential Executive Branch deliberations discussed in paragraph 39 above are particularly compelling in the context of requests for confidential legal advice of OLC or the Department of Justice by their Executive Branch clients. These documents reflect confidential communications among OLC, the Department of Justice, and Executive

Branch clients made for the purpose of requesting and providing legal advice. Disclosure of client confidences offered in the course of requesting such advice would seriously disrupt the relationship of trust so critical when attorneys formulate legal advice to their clients.

41. These documents have not been made public, and to the extent that they have been shared with others in the Government, 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 these documents would have understood the need for confidentiality.

42. In addition, the factual information contained in these documents is primarily classified information provided to OLC in connection with a request for legal advice. Such client confidences are likewise protected by the attorney-client privilege.

43. For the reasons discussed in paragraph 26, no waiver has occurred with respect to confidential and classified documents conveying information in the process of requesting or obtaining confidential legal advice.

44. For the reasons discussed in paragraph 25, no waiver has occurred with respect to classified factual material contained in such documents.

Documents Reflecting Internal Executive Branch Legal Deliberations

45. Documents reflecting internal Executive Branch legal deliberations all fall squarely within the deliberative process privilege because they are both predecisional and deliberative. These documents are predecisional because they were prepared in connection with contemplated future Executive Branch policy decisions. They are deliberative because they constitute advice used by decisionmakers. Compelled disclosure of these documents would undermine the deliberative processes of the government and chill the candid and frank

communication necessary for effective governmental decisionmaking. As discussed above, protecting these documents from compelled disclosure is critical to ensuring that Executive Branch attorneys will examine 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.

46. These documents are also protected by the attorney-client privilege. They reflect confidential client communications to OLC and the Department of Justice made for the purpose of seeking legal advice, and many also reflect a back-and-forth between OLC and its Executive Branch clients, and such give-and-take inevitably reflects OLC's view regarding the appropriate legal analysis in the circumstances under deliberation, and thus contains implicit legal advice from OLC to those clients. As such, these documents are all also protected by the attorney-client privilege. The legal deliberations reflected in any such documents has not been made public, and to the extent that such documents have been shared with others in the Government, 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.

47. For the reasons described in paragraph 27, no waiver of applicable privileges has occurred with respect to these documents, which contain internal Executive Branch legal deliberations and interagency comments on draft legal analysis.

48. For the reasons discussed in paragraph 25, no waiver has occurred with respect to classified factual material contained in these documents.

Documents Containing Draft Legal Analysis or Other Preliminary Attorney Work Product

49. Preliminary attorney work product, such as drafts, notes, and outlines, generated in connection with the preparation of OLC legal advice, is quintessential deliberative material. Such documents contain attorneys' informal views and preliminary thoughts and reactions, and are integral to the development of OLC's final legal analysis of the issue at hand. These documents are thus predecisional to both the final legal analysis of the question at hand, and to the contemplated future Executive Branch decisions to which the analysis relates. And they are deliberative, because they are drafts or preliminary thoughts regarding legal advice to be used by decisionmakers regarding such future decisions.

50. These documents are also protected by the attorney-client privilege. Disclosure of this internal work product would disclose confidential facts regarding the nature and subject of requests for OLC legal advice. In addition, much of this internal draft work product would contain confidential information provided to OLC in connection with a request for legal advice. The attorney-client privilege protects such client confidences. The disclosure of internal draft work product would also tend to disclose the content of related legal advice provided by OLC to its clients, which is also protected by the attorney-client privilege. The internal work product and attorney-client confidences reflected in any such documents have not been made public, and to the extent that such documents have been shared with others in the Government, 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.

51. For reasons discussed in paragraph 28, no waiver of applicable privileges has occurred with respect to these documents containing draft legal analysis and other preliminary attorney work product.

52. For the reasons discussed in paragraph 25, no waiver has occurred with respect to classified factual material contained in these documents.

Documents Containing Classified Factual Information for Deliberations

53. Documents containing privileged and/or classified factual information provided to OLC in connection with a request for legal advice, or the fact of OLC's possession of them, is likewise protected by the deliberative process privilege. The fact that these documents are in OLC's possession reflects Executive Branch deliberations regarding what information is relevant to certain Executive Branch policy decisions. Disclosing these documents would reveal privileged and confidential information about the nature and subject of those decisions, and that OLC and its Executive Branch clients considered the information contained in the documents potentially relevant to that determination. Accordingly, the fact that OLC has possession of the particular factual information contained in these documents is protected by the deliberative process privilege.

54. These documents are also protected by the attorney-client privilege. This factual information was provided to OLC in confidence in connection with a request for legal advice. Moreover, disclosing OLC's possession of these documents would reveal confidential facts regarding the nature and subject of requests for OLC legal advice. Again, the attorney-client privilege protects such client confidences. The classified and/or privileged factual information reflected in any such documents has not been made public, and to the extent that such documents have been shared with others in the Government, 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.

55. For reasons discussed in paragraph 25, no waiver of applicable privileges has occurred with respect to documents that consist of privileged and/or classified factual material.

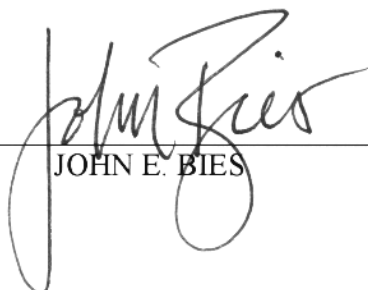
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56. As directed by the Court, I have reviewed the withheld documents individually and have determined that no reasonably segregable, non-exempt information can be provided beyond the unredacted portions already provided to Plaintiffs from Documents 4, 5, and 9.

57. In conclusion, for the reasons discussed herein and in my third classified declaration, I respectfully submit that all but two of the documents whose withholding ACLU is challenging are exempt from disclosure pursuant to FOIA Exemption Five, because they are protected by the deliberative process and attorney-client privileges. The compelled disclosure of these documents, or any unreleased portions thereof, would harm the deliberative processes of the government and would disrupt the attorney-client relationship between OLC and the Department of Justice and their clients throughout the Executive Branch. I also understand that one document and redacted portions of another not covered by FOIA Exemption Five are exempt from disclosure under FOIA Exemption One and Three.

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

Executed: October 3, 2014



JOHN E. BIES