

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CIVIL LIBERTIES UNION, et al., :

Plaintiffs, :

v. :

DEPARTMENT OF DEFENSE, et al., :

Defendants. :

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AMERICAN CIVIL LIBERTIES UNION, et al., :

Plaintiffs, :

v. :

DEPARTMENT OF JUSTICE, AND ITS
COMPONENT OFFICE OF LEGAL COUNSEL, :

Defendants. :

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ELECTRONICALLY FILED

04 Civ. 4151 (AKH)

**DECLARATION OF
DAVID J. BARRON**

05 Civ. 9620 (AKH)

I, David J. Barron, declare the following:

1. I am the Acting Assistant Attorney General for the Office of Legal Counsel (“OLC” or “the Office”) of the United States Department of Justice (“DOJ” or the “Department”), a position I have held since January 20, 2009. In this position, I supervise all OLC operations, including OLC’s response to requests under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. I submit this *Vaughn* declaration in connection with the remand of this case to the district court, which the government requested in order to permit the reprocessing of the documents at issue in this case. The statements made herein are based on my personal knowledge and on information provided to me by OLC attorneys.

2. This Second Declaration supplements, and hereby incorporates, the Declaration of David J. Barron, dated September 21, 2009 (“First Declaration”).

PART I

Introduction

3. As part of its review and reprocessing of the documents in connection with the remand of this case, OLC searched its files for the documents identified on the original *Vaughn* index. Between June and September 2009, OLC, with the assistance of attorneys from the Office of the United States Attorney for the Southern District of New York and the Central Intelligence Agency (“CIA”), conducted extensive search efforts to locate the documents listed on the original *Vaughn* index, as explained in detail in my First Declaration. Through these searches, OLC concluded that a supplemental search should be conducted in order to identify all responsive documents in the relevant safe drawers of the OLC SCIF. Accordingly, after plaintiffs agreed to a three-week extension of the court’s original deadline, the government obtained from the court an extension of time in order to allow for this additional search.

4. As a result of this supplemental search of the relevant safe drawers, OLC identified an additional 224 documents that initially appeared to be responsive to plaintiffs’ FOIA request. OLC referred 168 of these documents to CIA and 56 to other Executive Branch entities for processing or a determination that they had already been processed in this case.¹ In a letter provided to the Court on September 21, 2009, the Assistant United States Attorneys litigating this matter represented that OLC and CIA would use their best efforts to process the

¹ A *Vaughn* declaration concerning exemptions with respect to the documents sent to other Executive Branch entities for processing is scheduled to be complete on November 20, 2009. I do not address these additional documents in this declaration.

168 documents involving CIA by October 30, 2009, including determining whether there were any duplicates of documents addressed elsewhere in this litigation, and submit any appropriate *Vaughn* declaration for withheld information by November 13, 2009. This declaration provides an explanation of the exemptions asserted by OLC over responsive documents not addressed previously in this litigation.

5. Of the 168 documents OLC referred to CIA, 152 are described in the *Vaughn* index. OLC determined in the course of processing not to include in the index the other 16 documents from the set of 168 for the following reasons. Five of these documents were nonresponsive, and CIA had already processed and released in full or in part five of these documents in earlier stages of this litigation. OLC further determined that four of the 168 documents were duplicates and two are publicly available documents.

6. After OLC referred the 168 documents to CIA, OLC referred an additional two documents to CIA for processing once they were determined to be versions of documents among the 168 initially referred to CIA. These two documents are also included in the *Vaughn* index. The *Vaughn* index, therefore, describes 154 documents.

7. Informed by the FOIA guidelines issued by the Attorney General on March 19, 2009, the Presidential Memorandum of January 21, 2009, which directed agencies to administer FOIA with a presumption of openness, the President's statement of April 16, 2009, and the legitimate and substantial public interest in the advice provided by OLC regarding the government's interrogation and detention practices (*see* First Declaration, ¶ 3), OLC and other

DOJ components decided not to assert any FOIA exemptions with respect to 56 of the 154 documents described in the *Vaughn* index.

8. Upon completion of processing the 154 documents described in the *Vaughn* index, the government provided plaintiffs seven of these documents, in full or in part, on October 30, 2009.

9. OLC and other DOJ components continue to assert Exemption Five, 5 U.S.C. § 552(b)(5), in full or in part with respect to certain of the 154 documents described in the *Vaughn* index. Part II of my declaration below identifies the documents subject to Exemption Five, in full or in part, by *Vaughn* number and provides explanations and justifications for the withholding of these documents. In addition, OLC asserts Exemption 6, 5 U.S.C. § 552(b)(6), with respect to certain of the 154 documents, including some for which Exemption Five is asserted in full or in part. Part III of my declaration below identifies these documents by *Vaughn* number and provides an explanation and justification for the withholding of these documents.

PART II

Withholdings Pursuant to Exemption Five

10. Exemption Five of FOIA exempts from disclosure “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). This provision exempts from disclosure those documents or information normally privileged in the civil discovery context, including documents or information protected by the deliberative process privilege.

11. OLC has determined that the following documents described in the *Vaughn* index warrant withholding in full under Exemption Five. These documents, identified by their numbers on the *Vaughn* index, are: 1, 2, 3, 4, 7, 9, 15, 19, 26, 34, 36, 38, 39, 40, 44, 45, 46, 50, 51, 52, 53, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 77, 78, 79, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, 94, 95, 96, 97, 98, 99, 102, 104, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 148, 152, and 154. OLC is also partially withholding documents 14, 17, 31, 47, 49, 76, 106, 108, and 146 pursuant to Exemption Five. Of the remaining documents, two (5 and 6) are withheld in full under Exemption Five by other DOJ components.

Deliberative Process Privilege

12. The documents or redacted portions of documents listed in paragraph 11 above do not constitute final legal advice of the Office. Instead, these documents are: (a) pre-decisional, *i.e.*, generated prior to a decision; and (b) deliberative, *i.e.*, reflecting discussions, proposals, and the “give and take” exchanges that characterize the government’s deliberative process. These documents fall squarely within the deliberative process privilege. They include draft legal

memoranda or opinions; documents memorializing or reflecting pre-decisional deliberations of the office; informal attorney work product such as attorney notes or comments generated or used in the preparation of legal advice; and communications between OLC and client agencies reflecting deliberations in connection with the formulation of OLC legal advice. The categories into which each of the withheld documents falls are identified below.

- a. Drafts of, or draft inserts for, OLC memoranda or other documents providing legal advice: 7, 19, 26, 36, 39, 40, 46, 47, 52, 53, 55, 56, 57, 58, 59, 60, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 77, 78, 79, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 93, 94, 95, 96, 97, 102, and 154.
- b. Documents memorializing or summarizing internal, pre-decisional deliberations of the Office: 9, 44, 45, 50, 61, 97, and 98.
- c. Informal attorney work product generated during the preparation of OLC advice, such as handwritten notes on separate pieces of paper or in the margins of draft memoranda or other documents providing legal advice: 1, 2, 3, 4, 7, 14, 17, 26, 31, 39, 40, 46, 47, 49, 52, 53, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 70, 71, 72, 73, 75, 76, 77, 78, 79, 81, 82, 83, 84, 85, 86, 87, 89, 90, 91, 93, 94, 95, 96, 99, 102, 104, 106, 108, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 146, 152, and 154.
- d. Communications between OLC and client agencies reflecting pre-decisional discussion of legal issues pertinent to the preparation of OLC advice and comments on draft OLC opinions: 15, 34, 38, 51, and 148.

13. Creating and distributing draft documents is an integral part of OLC's deliberative and decision-making processes. Through the writing process, OLC attorneys articulate, focus, and refine their advice and analysis. Drafts do not represent the final position or ultimate views of OLC. To the contrary, drafts are, by their very nature, pre-decisional and deliberative. They are part of the exchange of ideas and suggestions that accompanies sound decisionmaking, and they reflect the preliminary assessments and suggestions of OLC attorneys. OLC attorneys exchanged the draft documents identified above with each other and with other Executive Branch attorneys for input, comments, edits, and suggestions. Inevitably, initial drafts of documents differ substantially from the final versions, as attorneys adjust their analysis in response to input from their colleagues and other Executive Branch attorneys.

14. The confidentiality of attorney notes and similar informal work product used in the preparation and formulation of legal advice is also integral to OLC's deliberative processes. These documents contain attorneys' informal views and preliminary thoughts and reactions, and they are integral to the development of OLC's final legal advice. Similarly, attorneys' markings and marginalia on documents are important aspects of OLC's deliberative processes. Like many attorneys, OLC lawyers regularly mark, underline, highlight, bracket, and place comments on the documents they write, review and edit. These markings reflect attorneys' impressions and evaluations, and the markings highlight sections of documents for future reference.

15. As part of its deliberative process in the preparation of legal advice for client agencies, OLC seeks and receives input from client agencies concerning legal theories and arguments and sometimes will share draft opinions with client agencies. OLC depends upon these submissions and input by officials of the client agencies who have knowledge or expertise

in the relevant subject matter in order to resolve the legal questions presented for its review. The confidentiality of these submissions allows OLC to receive candid and fully reasoned and considered legal arguments from client agencies. Like draft opinions and informal attorney work product, the confidentiality of these submissions is also integral to the deliberative processes of the Office, and they are likewise protected by the deliberative process privilege.

16. Similarly, the two documents over which other DOJ components have asserted Exemption Five are also predecisional and deliberative. The first, document 5, consists of handwritten attorney notes in the margins of a final OLC opinion already released in part in this case and written in connection with the preparation of department legal advice. It is therefore protected by the deliberative process privilege. (*See* ¶ 12, *supra*.) The second, document 6, is a draft document discussing arguments in response to a court order in the Moussaoui trial. It is therefore protected by the deliberative process and attorney work product privileges.

17. Compelled disclosure of the documents listed in paragraph 11 would cause serious harm to the deliberative processes of DOJ and the Executive Branch. It is essential to DOJ's mission and the deliberative processes of the Executive Branch that the development of DOJ's considered legal advice not be inhibited by concerns about compelled public disclosure of pre-decisional matters. Protecting from compelled disclosure the confidentiality of the documents with respect to which DOJ continues to assert Exemption Five is necessary to ensure that Executive Branch attorneys will examine legal arguments and theories candidly, effectively, and in writing, and to ensure that Executive Branch officials will seek legal advice from DOJ on sensitive matters.

PART III

Withholdings Pursuant to Exemption Six

18. Of the documents protected by deliberative process privilege described above, 19 documents also contain information that warrants withholding pursuant to FOIA Exemption Six, 5 U.S.C. § 552(b)(6). These documents, identified by their numbers in the *Vaughn* index, are: 6, 9, 50, 51, 55, 56, 58, 61, 65, 66, 71, 73, 75, 77, 83, 89, 94, 95, and 154. Two documents, 101 and 141, over which DOJ asserts no deliberative privilege, also contain information that warrants withholding pursuant to FOIA Exemption Six. These documents reveal the identities of non-supervisory OLC attorneys. The disclosure of those names would subject the individuals to a clearly unwarranted invasion of personal privacy, and any legitimate public interest in the release of this information is insufficient to outweigh the intrusion on personal privacy.

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

Dated: Washington, D.C.
November 13, 2009



DAVID J. BARRON