

**UNITED STATES DISTRICT COURT
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.

Civil Action No. 13-CV-9198 (AT)

DECLARATION OF JOHN BRADFORD WIEGMANN

I, John Bradford Wiegmann, declare as follows:

1. I am a Deputy Assistant Attorney General in the National Security Division (“NSD”) of the United States Department of Justice (“DOJ” or “Department”). NSD is a component of the Department which formally began operations on October 2, 2006, by consolidating the resources of the Office of Intelligence Policy and Review (“OIPR”) and the Criminal Division’s Counterterrorism Section (“CTS”) and Counterespionage Section (“CES”).

2. In my capacity as Deputy Assistant Attorney General, I supervised the Freedom of Information (“FOIA”) and Declassification Unit, which is responsible for responding to requests for access to NSD records and information pursuant to the FOIA, 5 U.S.C. § 552 and the Privacy Act of 1974.¹ The FOIA and Declassification Unit also processes the NSD records

¹ The FOIA and Declassification Unit is now supervised by the Director of Risk Management and Development.

which are responsive to FOIA requests received by other Executive Branch agencies. In addition, I am responsible for overseeing NSD's Law and Policy Office, which implements Department of Justice policies with regard to intelligence, counterterrorism, and other national security matters and provides legal assistance and advice on matters of national security law. The statements contained in this declaration are based upon my personal knowledge, information provided to me in the course of my official duties, and determinations I have made following a review of NSD's potentially responsive documents.

3. In a letter dated, May 13, 2013, plaintiff, the American Civil Liberties Union ("ACLU") requested the following:

- (1) Any records construing or interpreting the authority of the National Security Division ("NSD") under Executive Order 12,333 or any regulations issued thereunder;
- (2) Any records describing the minimization procedures used by the NSD with regard to both intelligence collection and intelligence interception conducted pursuant to the NSD's authority under EO 12,333 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 NSD defines these terms, pursuant to the NSD's authority under EO 12,333 or any regulations issued thereunder.

This request was assigned NSD FOI/PA #13-175.

4. ACLU served its complaint in this lawsuit on the United States Attorney for the Southern District of New York on December 30, 2013.

5. In a letter dated, May 14, 2014, NSD informed plaintiff that Executive Order 12333 governs intelligence collection by intelligence agencies, and that because NSD is not an intelligence agency, it does not collect intelligence. In addition, NSD stated that it has no authority under Executive Order 12333, and, as a result, NSD possessed no responsive records.

6. In a letter dated July 29, 2014, ACLU submitted a new request for the following information:

- (1) Formal regulations or policies relating to any agency's authority under EO 12,333 to undertake "Electronic Surveillance" (as that term is defined in EO 12,333) that implicates "United States Persons" (as that term is defined in EO 12,333), including regulations or policies relating to the acquisition, retention, dissemination, or use of information or communications to, from, or about United States Persons under such authority.
- (2) Records that officially authorize or modify under EO 12,333 any agency's use of specific programs, techniques, or types of Electronic Surveillance that implicate United States Persons, including official rules or procedures for the acquisition, retention, dissemination, or use of information or communications to, from, or about United States persons under such authority generally or in the context of particular programs, techniques, or types of Electronic Surveillance.
- (3) Formal legal opinions addressing any agency's authority under EO 12,333 to undertake specific programs, techniques, or types of Electronic Surveillance that implicate United States Persons, including formal legal opinions relating to the acquisition, retention, dissemination, or use of information or communications to, from, or about United States Persons under such authority generally or in the context of particular programs, techniques, or types of Electronic Surveillance.
- (4) Formal training materials or reference materials (such as handbooks, presentations, or manuals) that expound on or explain how any agency implements its authority under EO 12,333 to undertake Electronic Surveillance that implicates United States Persons, including the acquisition, retention, dissemination, or use of information or communications to, from, or about United States Persons under such authority.
- (5) Formal reports relating to Electronic Surveillance under EO 12,333 implicating United States Persons that contain any meaningful discussion of (1) any agency's compliance, in undertaking such surveillance, with EO 12,333, its implementing regulations, the Foreign Intelligence Surveillance Act, or the Fourth Amendment; or (2) any agency's interception, acquisition, scanning, or collection of the communications of United States Persons, whether "incidental" or otherwise, in undertaking such surveillance; and that are or were:

- (a) Authored by an inspector general or the functional equivalent thereof;
- (b) Submitted to Congress, the Office of the Director of National Intelligence, the Attorney General, or the Deputy Attorney General;
- or
- (c) Maintained by the office of the Assistant Attorney General for National Security.

This request was assigned NSD FOI/PA #14-177.

7. On October 31, 2014, ACLU filed an amended complaint, which made the July 29, 2014 request a part of the December 30, 2013 lawsuit.

8. As discussed in my February 26, 2016 declaration, NSD located 68 responsive records; eight of those records were released in full to plaintiffs, nine were released in part, and the remaining 51 were withheld in full. Plaintiffs indicated that they wished to challenge only some of the documents withheld in full: NSD Document Numbers 2, 4, 7, 9, 12, 13, 14, 17, 18, 23, 30, 31, 33, 36, 37, 42, 44, 47, and 48. Plaintiffs also challenged the partial withholding of the documents Bates numbered NSD 94-125 and NSD 202-207. These documents were described in an index attached to that declaration.

9. I have reviewed and am familiar with all of the documents discussed above, including NSD Document 4. NSD Document 4 was withheld in full pursuant to FOIA Exemptions 1 and 3 and Exemption 5 under the deliberative process privilege and the attorney client privilege. My February 26, 2016 declaration and the Vaughn index attached to it describe the privileged nature of NSD Document 4.

10. NSD Document 4 is an NSD legal memorandum regarding amending Department of Defense (“DOD”) procedures, along with accompanying documentation. The memorandum recommends that the Attorney General approve the amendment to the DOD procedures. NSD

Document 4 is a recommendation memo; it does not have the force and effect of law within the Department, and it has not been adopted by the Department as a governing policy. Therefore, NSD Document 4 is not “working law.” Further, I am unaware of any official acknowledgment or release of NSD Document 4.

11. In addition, as described in my February 26, 2016 declaration, NSD conducted a search for responsive documents after identifying and then directing six attorneys in NSD’s Office of Intelligence² and one attorney in the NSD’s Office of Law and Policy³ who have worked on issues concerning electronic surveillance under Executive Order 12333 described in the request to conduct searches for responsive documents. Due to the nature of their duties, no other NSD personnel were likely to have responsive records that at least one of these seven attorneys did not also have. The six attorneys within NSD’s Office of Intelligence consisted of some of the most senior and knowledgeable attorneys within that office, each having extensive institutional knowledge and supervisory responsibilities. These attorneys were (1) a Counsel to the Assistant Attorney General, (2) the Section Chief of Operations, (3) the Section Chief of Oversight, (4) a Deputy Section Chief of Operations, (5) a second Deputy Section Chief of Operations, and (6) a Unit Chief of Operations. These six attorneys oversaw all of the work OI did on matters pertaining to Executive Order 12333, and any additional records possibly located in the files of another OI employee would likely have been duplicated in the files of at least one of these six attorneys. In addition, NSD searched the records of the Special Counsel within the Office of Law and Policy. Prior to working in the Office of Law and Policy, the Special Counsel

² NSD’s Office of Intelligence ensures that the Intelligence Community agencies have the legal authorities necessary to conduct intelligence operations, particularly operations involving the Foreign Intelligence Surveillance Act (FISA); that the office exercises meaningful oversight over various national security activities of Intelligence Community agencies; and that it can play an effective role in FISA-related litigation.

³ NSD’s Law and Policy Office develops and implements Department of Justice policies with regard to intelligence, counterterrorism, and other national security matters and provides legal assistance and advice on matters of national security law.

worked as a Deputy Counsel in OIPR⁴, and he is among the most knowledgeable attorneys in the Office of Law and Policy on surveillance matters. Because of this, he continues to work on and advise others working on critical surveillance related matters as a Special Counsel in the Office of Law and Policy. In addition, the Special Counsel works more on 12333 related matters than anyone else in the Office of Law and Policy. As a result, it is unlikely that any additional significant records would be located in the files of another employee within the Office of Law and Policy. Further, NSD FOIA staff also conducted a historical search of OIPR's policy files for any potentially responsive records generated before the formation of the National Security Division. These searches captured all the systems and types of files that were likely to contain responsive records possessed by each attorney, and NSD FOIA is unaware of other locations or personnel that would be likely to yield additional responsive information.

12. Further, because NSD Documents 12, 13, 14, 23, and 33 and NSA Documents 11 and 12 are classified, this declaration cannot provide additional information further justifying why the memoranda contained within are protected by the attorney-client privilege. But I reaffirm the explanation in paragraph 15 of my February 26, 2016 declaration that the memoranda within all of these documents are properly protected by the attorney-client privilege. I respectfully refer this Court to my February 26, 2016 declaration and to the Classified Declaration of David J. Sherman for additional information.

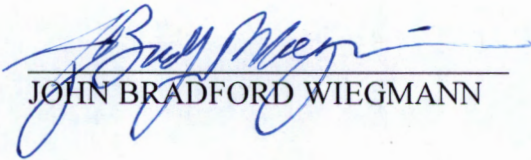
13. Additionally, attached to this declaration is a true and correct copy of NSD's May 1, 2015 transmittal letter to plaintiffs which discusses withholdings under multiple FOIA exemptions, including FOIA Exemption (b)(6).

⁴ OIPR was the predecessor organization of NSD's Office of Intelligence.

CONCLUSION

I certify, pursuant to 28 U.S.C. § 1746, under penalty of perjury that the foregoing is true and correct.

Executed this 8th day of June 2016, Washington, DC



JOHN BRADFORD WIEGMANN