

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 declaration¹ supplements my CLASSIFIED and UNCLASSIFIED¹ declarations of 26 February 2016, as well as my UNCLASSIFIED Supplemental Declaration of 7 June 2016 (Dkt. No. 79). 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,

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

“Plaintiffs” or “ACLU”), in response to the Court’s Memorandum Opinion and Order of 27 March 2017.

Legal Memoranda Withheld Pursuant to Exemption 5

3. NSA withheld in full NSA Documents 7, 11, 12, and 14-21 and withheld in part NSA Document 28 pursuant to Exemption 5 of the FOIA.² NSA also withheld NSA Documents 7, 11, 12, and 14-21 in full pursuant to Exemptions 1 and 3 of the FOIA.³ ACLU challenged these withholdings. The Court denied Defendants’ motion for summary judgment concerning these materials and invited Defendants to supplement their submissions with regard to these documents concerning Exemption 5 applicability. The Court, however, upheld NSA’s withholdings of those documents withheld in full pursuant to Exemptions 1 and 3 (Mem. at 36); accordingly, this submission addresses only Exemption 5 in the context of these specified legal memoranda.

4. With respect to NSA Documents 11 and 12, the Court noted that given the description of the materials contained therein, “[w]ithout more, Defendants cannot satisfy their burden that Exemption 5 applies to these two documents” (*Id.* at 29). As in Defendants’ prior submissions, it is my understanding that NSD will continue to justify the applicability of the Attorney-Client and Deliberative Process Privileges under FOIA Exemption 5 to NSA Documents 11 and 12, providing such information in a supplemental declaration separate and apart from the instant submission. (*See, e.g.*, NSA Decl., Dkt. No. 64, ¶ 25).⁴

² Capitalized terms and abbreviations not defined herein were defined in my previous declarations.

³ As noted in my prior UNCLASSIFIED declaration, with respect to the redacted information in NSA Document 28, “[a]ll information withheld pursuant to Exemption 5 is independently exempt from public release based on Exemptions 1 and/or 3 of the FOIA.” (NSA Decl., Dkt. No. 64, ¶ 55; *see also id.* n.7).

⁴ Defendants also asserted the Presidential Communications Privilege under FOIA Exemption 5 with respect to portions of NSA Document 12, which was upheld by the Court. (Mem. at 30).

5. NSA also asserted Attorney-Client Privilege regarding NSA Documents 7, 14, 15, 16, 17, 18, 19, 20, 21, and 28. With respect to these materials, in NSA's initial submission, I explained that these documents "have not since been used to publically justify NSA actions or expressly adopted as Agency policy." (NSA Decl., Dkt. No. 64, ¶ 53). While the Court was "satisfied that these documents are protected by attorney-client privilege," it nevertheless denied Defendants' motion for summary judgment on Exemption 5, as it could not "determine whether these documents contain working law or have not been adopted." (Mem. at 30). In particular, the Court held that NSA stated the rule concerning working law "too narrowly," by not acknowledging the possibility of informal, non-public adoption. (*Id.*). As a matter of further clarification, the materials constituting NSA Documents 7, 14-21, and 28, described in detail *infra*, reflect legal advice that constitutes one consideration, of many, for decisionmakers; these memoranda do not reflect the Agency's final decision to engage in a particular course of action or to adopt a particular policy, either formally or informally. At bottom, as these memoranda have "no operative effect," they need not be disclosed "even where the agency action agrees with the conclusion of the report or recommendation." (*Id.* at 20 (citing *Brennan Ctr. for Justice v. U.S. Dep't of Justice*, 697 F.3d 184, 196 (2d Cir. 2012) (citations and quotations omitted))). None of these memoranda, which are patently advisory in nature, reflect binding statements of NSA's legal position, definitive statements of NSA policy, or final determinations with any operative effect. I will address each memorandum briefly in turn, so as to provide the court with a more complete description of the material and facilitate any further analysis of Exemption 5.

6. NSA Document 7 is a legal memorandum to a Deputy General Counsel of NSA written by a senior NSA intelligence law attorney concerning a classified NSA SIGINT activity. The memorandum was provided to this Deputy General Counsel in order to provide updated

information concerning past legal advice regarding the parameters of certain classified SIGINT activity.

7. NSA Document 14 is a legal memorandum written by a senior NSA intelligence law attorney for NSA's former Signals Intelligence Directorate (SID)⁵ concerning classified SIGINT activities and reflects legal advice concerning a range of options to be considered by decisionmakers.

8. NSA Document 15 is a legal memorandum written by a senior NSA intelligence law attorney for the Director of SID concerning classified NSA activities and is informational in nature. It does not reflect a decision to engage in a particular course of action, but rather, constitutes recommendations from the attorney to the SID.

9. NSA Document 16 is a legal memorandum written by a senior NSA intelligence law attorney providing legal advice to the SID concerning classified activities undertaken pursuant to EO 12333 and reflects non-binding, attorney guidance.

10. NSA Document 17 is a legal memorandum written by a senior NSA intelligence law attorney for the Director of SID concerning audits of SIGINT activities undertaken pursuant to EO 12333. The memorandum constitutes recommendations and analysis provided by the senior attorney in response to a request for legal advice.

11. NSA Document 18 is a legal memorandum written by a senior NSA intelligence law attorney for NSA senior leadership concerning the protection of US Person information under EO 12333 and related regulations. The memorandum presents multiple points of consideration for leadership in its analysis, and reflects the attorney's legal interpretation of various aspects of the questions presented.

⁵ In August 2016, NSA reorganized. Functions of the SID, to include the SIGINT activities in NSA 14, now reside with NSA's Operations Directorate.

12. NSA Document 19 is a legal memorandum written by a senior NSA intelligence law attorney for the SID concerning the protection of US Person information during classified SIGINT activities undertaken pursuant to EO 12333. The memorandum contains legal conclusions concerning these issues and reflects recommendations to decisionmakers.

13. NSA Document 20 is a legal memorandum written by a senior NSA intelligence law attorney for the SID concerning querying data collected pursuant to EO 12333. This memorandum is informational in nature and reflects legal advice concerning certain queries of this data. The memorandum contains recommendations for consideration concerning such queries.

14. NSA Document 21 is a legal memorandum written by a senior NSA intelligence law attorney for the SID concerning NSA's authority to conduct certain classified SIGINT activities. The memorandum reflects legal interpretations of the regulatory environment and provides clarifications regarding NSA authority, and also presents recommendations for future.

15. With respect to NSA Document 28, I discussed this document in detail in my Supplemental Declaration of 7 June 2016, noting that NSA 28 is a "legal opinion drafted by the NSA OGC at the request of its client," the SID. (NSA Supp. Decl., Dkt. No. 79, ¶¶ 14-16). In particular, I explained that the redacted attorney-client privileged information should not be considered "working law" of the NSA, as the memorandum instead "sets out legal advice concerning the legal limits to access by non-NSA personnel of NSA signals intelligence databases," as well as advice concerning privacy protections and "potential changes to existing NSA dissemination procedures." (*Id.* ¶ 14). As this document was never binding upon SID, which "was free to decline to adopt any of the dissemination practices discussed in the memorandum" (*id.* ¶ 15), it too reflects considerations for decisionmakers rather than itself constituting a binding policy determination.

16. At bottom, the Office of General Counsel (OGC), from which each of the aforementioned documents originated, has no policy role, but rather, provides legal advice to its clients that constitutes one consideration among many for policymakers. As noted in my prior submissions, “[t]he NSA OGC is the exclusive NSA component for providing legal services to all NSA elements and is led by the General Counsel, who is the NSA’s chief legal officer.” (Supp. NSA Decl., Dkt. No. 79, ¶ 16). While OGC “provides legal advice on a number of different legal matters, . . . the office has no authority to issue final decisions or authoritative statements on NSA policy,” to include those policies referenced in NSA Documents 7, 14-21 and 28. (*Id.*).

Segregability and Unclassified/FOUO Information in Withholdings Made Pursuant to FOIA Exemptions 1 and 3

17. In addition to the aforementioned legal memoranda, NSA withheld in full two Inspector General Reports (NSA Documents 22 and 23), as well as withheld in part a Quarterly Report to the President’s Intelligence Oversight Board (NSA Document 79), pursuant to Exemptions 1 and 3, which were in turn challenged by ACLU. Plaintiffs similarly challenged the withholding in full of NSD Documents 7, 37, 42, 44, and 47. With respect to these materials, the Court stated that Defendants failed to “address in their reply whether they did conduct a line-by-line segregability review on these . . . documents,” instructing Defendants to “conduct such a segregability review . . . or inform the Court that this review has already occurred.” (Mem. at 36).

18. First and foremost, I respectfully direct the Court to Paragraph 84 of my UNCLASSIFIED declaration which states that “[a]ll of these documents have been reviewed for purposes of complying with FOIA’s segregability provision,” adding that “[a]n intensive, line-by-line review of each document was performed.” (NSA Decl., Dkt. No. 64, ¶ 84). Moreover, I explained that with respect to these materials and any information withheld under Exemption 1, even “information that, viewed in isolation, could be considered unclassified, is nonetheless

classified in the context of this case because it can reasonably be expected to reveal (directly or by implication) classified national security information” (*Id.* ¶ 85).

19. Specifically, with respect to NSD Documents 7, 37, 42, 44, and 47, which were also discussed in detail in my CLASSIFIED declaration, I explained in my supplemental UNCLASSIFIED declaration that “these documents concern in their entirety specific classified operations or activities of the Agency that have not been publicly acknowledged and *do not contain any segregable information*,” as the “compliance matters discussed therein are inextricably intertwined with factual descriptions of NSA functions and activities that are both classified and protected from public disclosure by statute.” (Supp. NSA Decl., Dkt. No. 79, ¶ 13 (emphasis added)). Accordingly, after performing a segregability review of these NSD materials containing NSA equities, I “determined that no portion of these documents could reasonably be segregated and released.” (*Id.*).

20. With respect to NSA Document 22 (as well as the aforementioned NSD documents), which are all discussed in my CLASSIFIED declaration (*see, e.g.*, NSA Class. Decl. ¶¶ 7-10), my initial review determined that “[o]ther than the . . . dates and number of pages, no information . . . [could] be released because the very fact of” the intelligence sources and methods implicated “is currently and properly classified.” (NSA Decl., Dkt. No. 64, ¶ 38).

21. Similarly, concerning NSA Document 23, my UNCLASSIFIED declaration explains that NSA fully withheld this OIG Report “concerning particular intelligence activities of the NSA, including the dissemination of communications intelligence to partner agencies,” after determining “that there is no reasonably segregable, non-exempt information in the report.” (*Id.* ¶ 58).

22. By contrast, during its review of NSA Document 79, NSA determined that it could indeed segregate certain information, and accordingly, NSA released UNCLASSIFIED materials

including “publicly acknowledged NSA functions and activities,” while nevertheless “protecting the material that remains classified and/or protected from disclosure by law.” (Supp. NSA Decl., Dkt. No. 79, ¶ 13).

23. As part of its review in conjunction with the Court’s 27 March Opinion, NSA again analyzed these materials for segregability, confirming that there are no reasonably segregable portions of those documents that it withheld in full. At bottom, even where “each and every word” in a withheld document is neither classified, nor protected from disclosure by statute, Courts have recognized that to provide such material “standing in a vacuum would be meaningless,” whereas to provide “sufficient context . . . to make the non-exempt material meaningful, the circumstances warranting the classification of the [document] would be revealed.” *Cf. Am. Civil Liberties Union v. Dep’t of Justice*, No. 15 Civ. 9002 (PKC), --- F. Supp. 3d ----, 2017 WL 213812, at *4 (S.D.N.Y. Jan. 18, 2017). It is clear that the “FOIA does not require redactions and disclosure to this extent.” *Id.* (citation omitted); *accord N.Y. Times Co. & Charlie Savage v. Nat’l Sec. Agency*, 205 F. Supp. 3d 374, 381 (S.D.N.Y. 2016) (“This [segregability] provision [of the FOIA] does not require disclosure of non-exempt material rendered meaningless by surrounding deletions.”).

24. Relatedly, with respect to NSA Documents 22, 23, and 79, as well as NSD Documents 7, 37, 42, 44, and 47, the Court instructed Defendants to review these documents “for improper withholding” under Exemption 1 of “Unclassified/For Official Use Only” or “U/FOUO” material. (Mem. at 37). Further to the Court’s direction, upon another review, NSD Documents 7, 37, and 44 do not contain any U/FOUO information and contain solely classified information. NSD Documents 42 and 47, as well as NSA Documents 22 and 23, do contain a limited amount of U and/or U/FOUO information, as well as classified information. These documents were all withheld in full pursuant to both Exemption 1 and Exemption 3. As described in my supplemental UNCLASSIFIED declaration, with respect NSD Documents 42 and 47, “these documents concern

in their entirety specific classified operations or activities of the Agency that have not been publicly acknowledged and do not contain any segregable information.” (See NSA Suppl. Decl., Dkt. No. 79, ¶ 13). I have reviewed the unclassified materials in these documents and find that all such U or FOUO material is not only “inextricably intertwined with factual descriptions of NSA functions and activities that are both classified and protected from public disclosure by statute,” but also meaningless when segregated. (See *id.*). Similarly, with respect to the aforementioned NSD materials, as well as with respect to NSA Document 22, “any description of the information withheld beyond that given below would reveal information that is currently and properly classified . . . and is protected from release by statute as this information would reveal the intelligence sources, methods, activities, and functions of SIGINT collection and exploitation.” (NSA Decl., Dkt. No. 64, ¶ 26 (emphasis added); see also *id.* ¶¶ 41-44). Finally, my UNCLASSIFIED declaration also addressed NSA Document 23 in detail, explaining how “[a]ny disclosure of the withheld information would reveal NSA’s capabilities and the tradecraft used to carry out its vital communications intelligence mission.” (*Id.* ¶ 61); (see also *id.* ¶ 59 (“I have reviewed NSA’s withholding in full of this document and determined . . . that this decision was correct . . .”))).

25. Additionally, specifically 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. 50 U.S.C. § 3605. Accordingly, NSA is not improperly asserting Exemption 1 over this redacted material.

Classified Annex to DoD Procedures, NSD Document 94-125

26. Defendants also withheld in part the 1988 Classified Annex to the DoD Procedures under EO 12333, or NSD Bates Number NSD094-125. Plaintiffs advanced the argument that the Government had already officially released some of the withheld material in this document,

prompting an additional review by NSA. (See NSA Supp. Decl., Dkt. No. 79, ¶ 16 n.3). The Court directed Defendants to “inform the Court of the result” of this additional review. (Mem. at 38).

27. By letter dated September 26, 2016, Defendants provided a supplemental release of NSD094-125 to Plaintiffs. That letter explained that Defendants “re-processed this document in an attempt to maximize the disclosure of segregable, non-exempt portions of the document, and further, to ensure consistency with prior releases of the same document.”

CONCLUSION

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

Executed this 14th day of June, 2017, pursuant to 28 U.S.C. § 1746.



Dr. David J. Sherman
Associate Director for Policy and Records,
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