



U.S. Department of Justice

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Southern District of New York*

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May 1, 2018

BY ECF

The Honorable Paul A. Engelmayer
United States District Judge
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: *ACLU, et al. v. DOD, et al.*, No. 17 Civ. 3391 (PAE)

Dear Judge Engelmayer:

We write respectfully on behalf of defendants the Department of Defense (“DOD”), Department of State (“DOS”), and Department of Justice, Office of Legal Counsel (“OLC”), per the Court’s Fourth Revised Scheduling Order (Dkt. No. 62), to describe the bases for these defendants’ anticipated summary judgment motion regarding outstanding issues that the parties have identified relating to the FOIA requests and responses in this case. All defendants have completed their FOIA responses in this matter; DOD, OLC, and DOS provided Plaintiffs with additional information in response to follow-up questions regarding their FOIA releases; and Plaintiffs have provided a preliminary list of withholdings (in records released by OLC, DOS, and DOD) that Plaintiffs anticipate challenging in upcoming motion practice. Plaintiffs also identified a limited challenge that Plaintiffs anticipate making to the adequacy of DOD’s searches for responsive documents.¹

OLC, DOS, and DOD intend to move for summary judgment upholding their application of FOIA exemptions in the records identified by Plaintiffs, and DOD intends also to move for summary judgment regarding the adequacy of its searches for responsive documents. Defendants will support their motions with agency declarations explaining the applicability of the relevant FOIA exemptions (and, for DOD, the steps that the agency took to search for responsive documents). In a FOIA case, “[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an

¹ The DOD Office of Inspector General and the DOJ Office of Information Policy both provided FOIA responses stating that these components located no records responsive to the FOIA requests, and Plaintiffs have indicated that they do not intend to challenge these responses. The parties’ cross-motions relating to the Glomar response provided by the Central Intelligence Agency are *sub judice*.

exemption are sufficient to sustain the agency's burden." *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). The law is well established that an agency declaration need only "describe the justifications for nondisclosure with reasonably specific detail, [and] demonstrate that the information withheld logically falls within the claimed exemption." *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009). Moreover, an agency's declarations in support of its determinations are "accorded a presumption of good faith," *Carney*, 19 F.3d at 812, and "[i]n the national security context, [the Court] must accord *substantial weight* to an agency's affidavit concerning the details of the classified status" of withheld records, *ACLU v. DOJ*, 681 F.3d 61, 69 (2d Cir. 2012). Finally, the agencies' submissions will also establish that DOD, DOS, and OLC produced all "reasonably segregable portion[s]" of the responsive records, as required by FOIA. 5 U.S.C. § 552(b). The particular searches and withholdings that Defendants anticipate defending are outlined briefly below.

Adequacy of DOD's Searches. Plaintiffs have indicated that they anticipate challenging the adequacy of DOD's searches for documents relating to two specific records that DOD did locate and process. First, Plaintiffs anticipate challenging DOD's search for attachments to an email ("CENTCOM 019"), which could not be retrieved in its entirety from a document archiving system. Second, Plaintiffs anticipate challenging DOD's search for responses to an email denoted as "CENTCOM 272." According to DOD, CENTCOM 272 set forth a request for information to staff judge advocates, but the agency did not locate any record of a response, if any exists, to that request.

DOD will support the adequacy and reasonableness of its searches for documents relating to these two records with a declaration explaining the technical issues associated with the agency's archive system, and the steps that the agency took to search for relevant documents. As a general matter, FOIA does not impose a heavy burden on the Government in defending the searches it performed in response to a FOIA request; the Government need only show "that its search was adequate." *Long v. Office of Personnel Mgmt.*, 692 F.3d 185, 190 (2d Cir. 2012). The search "need not be perfect, but rather need only be reasonable." *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999). Moreover, to the extent Plaintiffs challenge DOD's archiving systems, FOIA "does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained." *Kissinger v. Reporters Comm. For Freedom of the Press*, 445 U.S. 150, 152 (1980).

DOD's Application of FOIA Exemptions. Plaintiffs have indicated that they anticipate challenging DOD's application of FOIA exemptions in 45 records that DOD located, processed, and released in part or withheld in full. Generally speaking, the challenged documents include records concerning after action reports and deliberations regarding those reports, the legal review of proposed military operations, coordination between U.S. and foreign officials, proposed operations and operational plans, deliberations regarding detainee operations or ancillary military support operations, real-time military operational status reports, and intelligence reporting or updates.

DOD applied one or more of the following FOIA exemptions to withhold certain information contained in these records: (1) Exemption 1, which provides that FOIA's

disclosure mandate does not apply to matters 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); (2) Exemption 3, which protects information that is specifically exempted from disclosure by statute (in this instance, 10 U.S.C. § 130b, which exempts from disclosure personally identifying information regarding “any member of the armed forces assigned to an overseas unit, a sensitive unit, or a routinely deployable unit”), *see* 5 U.S.C. § 552(b)(3); (3) Exemption 5, which protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency,” 5 U.S.C. § 552(b)(5), and which “incorporate[s] into the FOIA all the normal civil discovery privileges,” *Hopkins v. HUD*, 929 F.2d 81, 84 (2d Cir. 1991); and (4) Exemption 6, which protects from disclosure information from personnel, medical, or other similar files, “the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,” 5 U.S.C. § 552(b)(6).

DOS’s Application of FOIA Exemptions. Plaintiffs have indicated that they intend to challenge DOS’s application of FOIA exemptions to withhold certain information in nine DOS records (some of which are duplicates). Generally speaking, these records include draft briefing papers containing confidential and privileged legal analysis, memoranda discussing and analyzing foreign policy issues and draft proposals, and intra-agency emails providing readouts of inter-agency deliberations. DOS applied one or more of the following FOIA exemptions to withhold certain information in these records, all of which are referenced above with respect to DOD’s records: Exemptions 1, 5, and 6. More specifically as to Exemption 5, DOS withheld information protected by the attorney-client and deliberative process privileges.

OLC Document 4. Finally, Plaintiffs have indicated that they intend to challenge OLC’s application of FOIA exemptions to withhold certain information from one attachment to an email (“OLC Document 4”) that OLC processed in response to the FOIA request. According to OLC, the attachment is a classified “proposed final version” of a draft legal advice document, with respect to which a government legal adviser solicited input from an interagency group of attorneys (as reflected in OLC Document 4). OLC withheld this attachment in full pursuant to Exemption 5, because of the applicability of the deliberative process, attorney-client, and presidential communications privileges, and in part pursuant to Exemptions 1 and 3. The material withheld pursuant to Exemptions 1 and 3 is properly classified and exempted from disclosure by the National Security Act, 50 U.S.C. § 3024(i)(1), as amended, which protects intelligence sources and methods from unauthorized disclosure.

We thank the Court for its consideration of this matter.

Respectfully submitted,

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