

**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 supervise 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. The FOIA and Declassification Unit also processes the NSD records 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 implicates 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. A person with knowledge of NSD record systems and activities relating to the intelligence community's electronic surveillance under Executive Order 12333 considered what search was possible and likely to recover records responsive to plaintiff's request(s). There is no central NSD record repository or searchable database that contains all responsive records. Therefore, in order to locate and retrieve responsive records, NSD identified individuals whose work involved the use of Executive Order 12333. NSD attorneys who are familiar with NSD operations, personnel, and areas of responsibility, and who obtained input from relevant additional NSD personnel, identified six attorneys in the NSD's Office of Intelligence<sup>1</sup> and one attorney in the NSD's Office of Law and Policy<sup>2</sup> who have worked on issues concerning electronic surveillance under Executive Order 12333 described in the request. Due to the nature of their duties, no other NSD personnel were likely to have responsive records that these seven attorneys did not also have.

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<sup>1</sup> 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.

<sup>2</sup> 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.

9. Each of these seven attorneys searched for responsive records by searching their email files, any other electronic files, and paper files, as well as anywhere else they thought responsive records might have been stored. In addition, NSD FOIA staff also conducted searches of OIPR's policy files. As noted above, OIPR was the predecessor organization of the Division's Office of Intelligence. These searches captured all the systems and types of files that were likely to contain responsive records possessed by each attorney. The attorneys who performed these searches were unaware of other locations or personnel that would be likely to yield additional responsive information, and NSD believes there are no additional locations that are likely to contain additional responsive records beyond those located through the searches that NSD personnel performed.

10. 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. See NSD's *Vaughn* index, attached as Exhibit A. Plaintiffs are also challenging the partial withholding of the documents Bates numbered NSD 94-125 and NSD 202-207. The documents Bates numbered NSD 94-125 and NSD 202-207 are attached as Exhibits B and C, respectively.

11. This declaration addresses the withholding of certain portions of NSD Documents 4, 12, 13, 14, 17, 23, 31, 33, and 49<sup>3</sup> and NSA Documents 11 and 12 under FOIA Exemption (b)(5). The withholding in full of Document 2 is addressed in the declaration of Arthur R. Sepeta of the U.S. Department of Homeland Security. The withholding of NSD Documents 9 and 36 under Exemption (b)(5) is discussed in the declaration of Paul B. Colborn of DOJ's

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<sup>3</sup>A description of NSD Document 49 was not previously provided to Plaintiffs. In preparing its summary judgment briefing, the government identified NSD Document 49 as an additional responsive document, and because Plaintiffs did not have an opportunity to determine whether they challenge its withholding, it is addressed herein.

Office of Legal Counsel. The withholding in full of NSD Documents 7, 31, 37, 42, 44, 47, and 48 is addressed in the declaration of David J. Sherman of the National Security Agency, as are the (b)(1) and (b)(3) withholdings of NSD Documents 4, 12, 13, 14, 17, 18, 23, 30, 31, 33, and 36, and the partial withholding of the NSD document Bates-numbered NSD 94-125. The withholding of NSD document 18 under Exemption (b)(5) pursuant to the presidential communications and deliberative process privileges is discussed in the declaration of Christina M. Butler. The (b)(1) and (b)(3) withholdings of NSD Document 49 are discussed in the declaration of Antoinette Shiner. The partial withholding of the NSD document Bates-numbered NSD 202-07 is discussed in the declaration of David M. Hardy of the Federal Bureau of Investigation.

**Exemption (b)(5)**

12. NSD has determined that certain withheld portions of the documents at issue are exempt from disclosure pursuant to FOIA Exemption (b)(5). FOIA Exemption (b)(5) protects “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 exemption protects records which would normally be privileged in the civil discovery context.

13. Among the privileges incorporated into Exemption 5 is the attorney-client privilege. The attorney-client privilege protects confidential communications between an attorney and his/her client pertaining to a legal matter for which the client has sought the attorney’s counsel. The purpose of this privilege is to encourage attorneys and their clients to communicate fully and honestly without fear of embarrassment and other harms. Particularly in the context of government attorneys, the privilege further serves to promote the public interest in the observance of law and administration of justice.

14. NSD Document 17, the vast majority of a certain memorandum in NSD Document 4, and an email message in NSD Document 31 are protected by the attorney-client privilege. These documents discuss legal issues pertaining to an NSA program, set forth legal advice prepared by NSD lawyers for other attorneys to assist those other attorneys in representing the Government, and were sought by a decision-maker for the Government to obtain legal advice on questions of law and indeed reflect such advice. As such, NSD Document 17, the vast majority of a certain memorandum in NSD Document 4, and an email message in NSD Document 31 are protected from disclosure under the attorney-client privilege. More information about NSD Document 17 and a certain memorandum in NSD Document 4 is provided in the Classified Declaration of David J. Sherman. More information about the email message in NSD Document 31 is provided in the Unclassified Declaration of David J. Sherman.

15. NSD Documents 12, 13, 14, 23, 33, and 49 and NSA Documents 11 and 12 contain memoranda from NSD attorneys to other Government attorneys, and they provide advice with respect to one or more NSA programs or other intelligence activities. These memoranda were sought by decision-makers for the Government to obtain legal advice on questions of law and indeed reflect such advice. The vast majority of these memoranda constitute legal advice prepared by NSD lawyers to assist other attorneys who represented the Government. As a result, the vast majority of the memoranda are protected from disclosure under the attorney-client privilege. More information about NSD Documents 12, 13, 14, 23, and 33 and NSA Documents 11 and 12 is provided in the Classified Declaration of David J. Sherman. More information about NSD Document 49 is provided in the Declaration of Antoinette Shiner.

16. NSD Document 17 and the vast majority of the memoranda contained in NSD Documents 4, 12, 13, 14, 23, 33, and 49 and NSA Documents 11 and 12 are also protected by the

deliberative process privilege, and exempt under Exemption 5 for this additional reason. The purpose of this privilege is to prevent injury to the quality of agency decision-making. Thus, certain material that contains or was prepared in connection with the formulation of opinions, advice, evaluations, deliberations, proposals, conclusions, or recommendations may properly be withheld. Disclosure of this type of information would have an inhibiting effect upon agency decision-making and the development of policy because it would chill full and frank discussions between agency personnel and decision-makers. If agency personnel know that their preliminary impressions, opinions, evaluations, or comments will be released for public consumption, they will be less candid and more circumspect in expressing their thoughts, which will impede the full discussion of issues necessary to reach well-reasoned decisions.

17. In order to invoke the deliberative process privilege, the protected information must be both “pre-decisional” and “deliberative.” Information is “pre-decisional” if it temporally precedes the decision or policy to which it relates. It is “deliberative” if it played a direct part in the decision-making process because it consists of recommendations or opinions on legal or policy matters, or reflects the give-and-take of the consultative process.

18. In this case, NSD Document 17 and the vast majority of a certain memorandum in NSD Document 4 are “pre-decisional” because they related to and preceded a final decision regarding one or more NSA programs or other intelligence activities. In addition, the vast majority of the memoranda contained in NSD Documents 12, 13, 14, 23, 33, and 49 and NSA Documents 11 and 12 are also “pre-decisional” because they related to and preceded a final decision regarding one or more NSA programs or other intelligence activities. Further, NSD Document 17 and the vast majority of the memoranda contained in NSD Documents 4, 12, 13, 14, 23, 33, and 49 and NSA Documents 11 and 12 are “deliberative” because they reflect



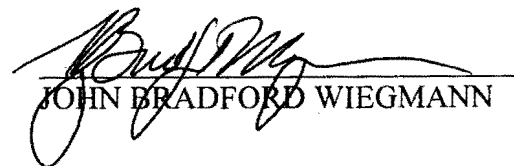
ongoing deliberations by government attorneys on DOD procedures and one or more NSA programs. These documents describe the views and recommendations of Department attorneys as part of a process to assist the Government's decision-making prior to an ultimate decision, and as part of the exchange of ideas and suggestions that accompanies careful and reasoned decision-making. These documents have not been expressly adopted or incorporated by reference by any Government decision-maker. Additionally, I am not aware of any public statement by any Government official referring to these documents, much less expressly adopting them as agency policy. As a result, NSD Document 17 and the vast majority of the memoranda contained in NSD Documents 4, 12, 13, 14, 23, 33, and 49 and NSA Documents 11 and 12 are protected from disclosure under the deliberative process privilege.

19. There is no segregable, non-exempt material in NSD Document 17, in the email message contained in NSD Document 31, or in the memoranda in NSD Documents 4, 12, 13, 14, 23, 33, and 49 and in NSA Documents 11 and 12.

#### CONCLUSION

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

Executed this 26th day of February 2016, Washington, DC

  
JOHN BRADFORD WIEGMANN