

**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 CHRISTINA M. BUTLER

I, Christina M. Butler, declare the following to be true and correct:

1. I am an Attorney-Advisor in the Office of Information Policy (OIP), United States Department of Justice. In this capacity, I am responsible for, among other things, reviewing records and coordinating the handling of the Freedom of Information Act (FOIA) requests processed by the Initial Request Staff (IR Staff) of OIP that are subject to litigation. The IR Staff of OIP is responsible for processing FOIA requests seeking records from within OIP and from six senior leadership offices of the Department of Justice, specifically the Offices of the Attorney General (OAG), Deputy Attorney General (ODAG), Associate Attorney General (OASG), Legal Policy (OLP), Legislative Affairs (OLA), and Public Affairs (PAO). The IR Staff determines whether records responsive to access requests exist and, if so, whether they can be released in accordance with the FOIA. In processing such requests, the IR Staff consults with personnel in

the senior leadership offices and, when appropriate, with other components within the Department of Justice, as well as with other Executive Branch agencies.

2. I make the statements herein on the basis of personal knowledge, including my personal review of the records discussed herein, as well as on information provided to me by others within the Executive Branch of the Government with knowledge of the documents at issue in this case and on information acquired by me in the course of performing my official duties.

Plaintiff's FOIA Request

3. By letters dated May 13, 2013 and July 29, 2014, Plaintiffs submitted FOIA requests to the National Security Division (NSD), United States Department of Justice seeking various records relating to Executive Order 12333. See Declaration of John Bradford Wiegmann filed contemporaneously herewith.

OIP's Involvement in the Instant Litigation

4. On December 22, 2015, NSD notified OIP that, during the course of responding to Plaintiff's FOIA request, it located one record which had been identified as containing information of potential interest to senior leadership offices. This document is listed as NSD Document 18. See NSD's *Vaughn* Index, attached as Exhibit A to the Declaration of John Bradford Wiegmann.

5. On February 3, 2016, NSD notified OIP that it located an additional record which had been identified as containing information of potential interest to senior leadership offices. This document is listed as NSA Document 12. See NSA's *Vaughn* Index, attached as Exhibit AEX 13 to the Declaration of David J. Sherman.

6. OIP subsequently reviewed these records and determined that Documents NSA 12 and NSD 18 contained information of interest to the Office of the Attorney General (OAG) and,

as such, should be further reviewed and processed pursuant to Department regulation 28 C.F.R. § 16.4(d)(2). FOIA requests for OAG records are submitted to OIP pursuant to 28 C.F.R. § 16.3(a)(1) & pt. 16 app.1 (2015). As such, OIP reviewed the material on behalf of the OAG.

Overview of Material Withheld on Behalf OIP

7. This declaration concerns material withheld from disclosure on behalf of OIP pursuant to FOIA Exemption 5 because they are Executive Branch communications that reflect advice and recommendations to the President regarding a National Security Agency (NSA) program concerning particular intelligence sources and related methods used to collect and process foreign communications. Additionally, the documents reveal advice and recommendations regarding the types of communication data the NSA is able to collect. The following describes the challenged material withheld by OIP.¹

8. NSA Document 12 at pages 2-4 and 30-38: This material consists of an approval package for an NSA program that includes a memorandum from the Attorney General to the President reflecting advice and recommendations concerning classified SIGINT activities undertaken pursuant to Executive Order 12333.

9. NSD Document 18, three pages: This material consists of a memorandum from the Attorney General to the President that reveals advice and recommendations relating to an NSA program.

¹ This declaration addresses only the documents referenced herein, to the extent that they are being withheld pursuant to FOIA Exemption 5. I understand that the documents referenced herein are also being withheld pursuant to FOIA Exemptions 1 and 3 and are being addressed in a separate declaration of the National Security Agency. See Declaration of David J. Sherman filed contemporaneously herewith.

Explanation of Withheld Information
Exemption 5: Threshold

10. Exemption 5 of the FOIA exempts from mandatory 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).

11. The information withheld from NSD Document 18 and the specified pages of NSA Document 12 are communications generated by, exchanged within, and internal to the Executive Branch. As such, they are “inter-agency and intra-agency” documents within the threshold of FOIA Exemption 5. As discussed below, because these documents fall squarely within both the presidential communications privilege and deliberative process privilege, they are being withheld in full. Each of these privileges will be discussed in turn.

Exemption 5: Presidential Communications Privilege

12. Pages 2-4 and 30-38 of NSA Document 12 and all of NSD Document 18 are protected in their entireties by the presidential communications privilege encompassed by FOIA Exemption 5. The presidential communications privilege protects confidential communications that relate to presidential decisionmaking which involve the President or his senior advisors. More specifically, the privilege extends to advice or recommendations conveyed to the President or his senior advisors, as well as direct, confidential communications from the President to senior officials on sensitive topics.

13. The information addressed by this declaration is limited to portions of NSA Document 12 and all of NSD Document 18 as described above in paragraphs 7 and 8. The material reveals deliberative Executive Branch communications by which the Attorney General conveyed advice and recommendations to the President related to an NSA program. Disclosure of this material would inhibit the President’s ability to engage in effective communications and

decisionmaking by interfering with the ability of the President to obtain candid information and written advice from Cabinet-level officials such as the Attorney General, who are expected to and relied upon to give the President their best possible advice.

14. These records reflect Attorney General advice to the President on matters of presidential decision. As such, direct communications from the Attorney General to the President on this topic, through which the Attorney General provides his frank and thorough advice, fall entirely within the protections afforded by the presidential communications privilege, and are protected in full pursuant to FOIA Exemption 5.

Exemption 5: Deliberative Process Privilege

15. In addition to being fully withheld by the presidential communications privilege, these documents are protected in part by the deliberative process privilege encompassed by FOIA Exemption 5. The deliberative process privilege is intended to protect the decisionmaking processes of the Executive Branch from public scrutiny in order to enhance the quality of agency decisions. In order to invoke the deliberative process privilege, the protected information must be both “pre-decisional” and “deliberative.”

16. Both NSA Document 12 (pages 2-4 and 30-38) and NSD Document 18 are pre-decisional because they consist of advice and recommendations that were prepared for the consideration of the President related to an NSA program and expressed prior to a final decision being made by the President. Additionally, certain portions of these documents are deliberative in that they express advice and recommendations of the Attorney General to the President as part of a presidential deliberative process regarding a matter of presidential decision.

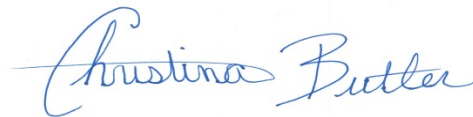
17. In sum, OIP has therefore determined that the material forwarded for review by NSD on behalf of OAG is appropriately protected in full pursuant to the presidential

communications privilege, and in part pursuant to the deliberative process privilege, encompassed by Exemption 5 of the FOIA. The protection of confidential deliberative communications such as these is essential to the quality and integrity of the President's decisionmaking process and to the proper functioning of the Executive Branch. Release of such information would inhibit the frank discussion between Executive Branch officials necessary for effective governmental decisionmaking. As such, it is imperative that internal deliberations and communications such as these not be inhibited by concern of public disclosure.

Segregation of Nonexempt Information

18. Because pages 2-4 and 30-38 of NSA Document 12 and all of NSD Document 18, as described in paragraphs 7 and 8 above, were sent by the Attorney General to the President providing advice and recommendations regarding a matter of presidential decision, they are protected by FOIA Exemption 5 in full and contain no non-exempt, reasonably segregable information.

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



Christina M. Butler

Executed this 26th day of February 2016