

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, and)	
AMERICAN CIVIL LIBERTIES UNION)	
FOUNDATION,)	
)	Case No. 13-cv-9198 (AT)
Plaintiffs,)	
)	
v.)	
)	
NATIONAL SECURITY AGENCY,)	
CENTRAL INTELLIGENCE AGENCY,)	
DEPARTMENT OF DEFENSE,)	
DEPARTMENT OF JUSTICE, and)	
DEPARTMENT OF STATE,)	
)	
Defendants.)	
)	

SUPPLEMENTAL DECLARATION OF DAVID J. SHERMAN

I, DAVID J. SHERMAN, hereby declare and state:

1. Please refer to the UNCLASSIFIED Declaration of David J. Sherman, 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. The declaration supplements my CLASSIFIED and UNCLASSIFIED declarations of 26 February 2016. 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, “Plaintiffs” or “ACLU”).

Legal Memoranda Withheld in Full Under Exemptions 1 and 3

3. ACLU has challenged NSA’s withholding in full of certain legal memoranda, arguing that it appears that the Agency claimed Exemptions 1 and 3 over only portions of the memoranda while improperly claiming Exemption 5 over the entirety of the memoranda. The

NSA documents falling within this category include NSA Documents 7, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21.

4. As previously explained in my 26 February 2016 UNCLASSIFIED declaration at paragraphs 38-52 and 54 and my CLASSIFIED declaration at paragraphs 7-11, the legal analyses in all of the memoranda and opinions that Plaintiffs are challenging in this category are inextricably intertwined with factual descriptions of NSA functions and activities that are both classified and protected from public disclosure by statute. The mere subject matter of these memoranda and opinions pertains to classified NSA operations and activities that have not been publicly acknowledged. The release of even the basic factual or legal background in these memoranda could reasonably be expected to cause harm to the national security or an interest protected by statute, as the formulation of the legal analysis itself could enable Plaintiffs and the public to discern classified or protected facts about the program or activity being discussed. Indeed, even the title and subject matter of these documents would tend to reveal classified and protected information about NSA functions and activities. As a result, I have determined that no portion of these documents could reasonably be segregated and released. Further, even if the working law doctrine were applicable here, which is not the case, the fact that the challenged redactions are currently and properly classified matters in accordance with E.O. 13526 and protected from release by statute means that the information continues to be properly withheld. *See N.Y. Times Co. v. U.S. Dep't of Justice*, 806 F.3d 682, 687 (2d Cir. 2015).

5. By contrast, NSA assessed and determined that certain of the factual discussion in the memorandum identified as NSA 28 is UNCLASSIFIED and not inextricably intertwined with the legal analyses contained therein. Moreover, the subject matter of NSA 28 – the sharing of raw signals intelligence through database access with personnel from other U.S. government agencies – has been publicly acknowledged by NSA and is considered to be UNCLASSIFIED. Consequently, unlike NSA documents 7, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21, NSA

determined that portions of NSA 28 were reasonably segregable and releasable in part. In a similar vein, OLC 3, 4, 6, 8, and NSD 36 also relate to subjects that have been publicly acknowledged by NSA. The Department of Justice's Office of Legal Counsel has explained its justification for withholding these documents in their entirety based on FOIA Exemption 5. In addition to OLC's withholdings, I have also determined that certain information in these documents may be independently withheld pursuant to FOIA Exemptions 1 and 3 because the information is currently and properly classified in accordance with E.O. 13526 and protected from release by statute. It is my assessment, however, that these documents also contain some reasonably segregable UNCLASSIFIED information that could not be withheld based on Exemptions 1 and 3.¹

6. As discussed in paragraphs 40, 46, and 47 of my 26 February 2016 UNCLASSIFIED declaration, the information contained in the challenged documents is currently and properly classified at levels ranging from SECRET to TOP SECRET because the release of this information could reasonably be expected to cause serious to exceptionally grave damage to the national security. The NSA withholdings in the documents challenged in this category describe both classified and protected information regarding NSA information assurance and network defense activities, SIGINT collection activities and access points, uses of particular SIGINT collection, and NSA's relationships with partners and providers. The damage to national security that reasonably could result from disclosure of this information is described in detail in paragraphs 39 and 48 of my 26 February 2016 UNCLASSIFIED declaration and paragraph 9 of my CLASSIFIED declaration. Therefore, this information meets the criteria for classification set forth in Sections 1.4(c), 1.4(d), and 1.4(g) of Executive Order 13526.

¹ As I stated in my prior UNCLASSIFIED declaration to this Court, should the Court determine that the information in these documents was not properly withheld in full under Exemption 5, NSA will segregate and release all non-exempt information in these documents.

7. Additionally, this same information is protected from released under FOIA Exemption 3, as described in paragraphs 41-44 and 49-52 of my 26 February 2016 UNCLASSIFIED declaration. This information is protected from release by Section 6 of the National Security Agency Act of 1959 (50 U.S.C. § 3605) because it involves a “function of the [NSA], or...information with respect to the activities thereof.” The information is further protected based on Section 102A(i)(1) of the National Security Act of 1947, as amended, which states that the Director of National Intelligence “shall protect intelligence sources and methods from unauthorized disclosure.” 50 U.S.C. § 2034(i)(1). Finally, this information is protected from release under 18 U.S.C. § 798, which protects from disclosure information concerning the communications intelligence activities of the United States, or information obtained by communications intelligence processes. As discussed in detail above in paragraph 4, the release of any portion of these memoranda and opinions would enable Plaintiffs and the public to discern information about NSA programs, operations, and activities that is both classified and protected from disclosure by these three statutes. As a result, no portion of the documents in this category can be segregated and released without disclosing protected information.

Inspector General and Compliance Reports

8. ACLU has also challenged NSA’s withholding of certain numbers (to include the numbers of compliance incidents) from an NSA intelligence oversight board report (NSA 79). As previously explained in my declaration dated 26 February 2016, and as explained in greater detail below, the disclosure of such information would reveal the overall scope of NSA’s foreign intelligence collection efforts, to include NSA’s ability to collect specific foreign intelligence information. The disclosure of this information would also reveal gaps in NSA’s collection capabilities. Such information concerns core NSA functions and activities – the collection, analysis, and dissemination of foreign intelligence information derived from signals intelligence obtained pursuant to E.O. 12333 and, by law, is exempt from disclosure. Further, a subset of the

withheld information is classified as its public disclosure would be reasonably likely to damage national security.

9. Specifically, this information is protected from release under FOIA Exemption 3, as described in paragraph 68 of my 26 February 2016 UNCLASSIFIED declaration. This information is exempt from release under Section 6 of the National Security Agency Act of 1959 (50 U.S.C. § 3605), which protects from disclosure “the organization or any function of the National Security Agency, [or] of any information with respect to the activities thereof” Although in this case, the disclosure of the withheld information reasonably could be expected to cause damage or serious damage to the national security, to invoke Section 6, NSA must demonstrate only that the information it seeks to protect falls within the scope of the statute, and is not required to demonstrate a specific harm to national security.

10. In this case, the withheld numbers all relate to NSA’s collection, analysis, and dissemination of signals intelligence for foreign intelligence purposes and the manner in which NSA conducts compliance and oversight over that SIGINT mission. As such, the withheld information falls squarely within the scope of Section 6 as it relates to both a core Agency function, its SIGINT mission, and the compliance and oversight activities conducted in support thereof.

11. In addition to being exempt from disclosure by statute, much of the withheld information that falls into this category is also protected as classified pursuant to FOIA Exemption 1. For example, NSA withheld each number that would reveal the number of times that a particular compliance incident was documented during the timeframe of the intelligence oversight board report. It did so because the disclosure of such numbers, in compilation with information that has been previously released, would tend to disclose the overall scope of NSA’s foreign intelligence collection efforts. This information, if released, could be pieced together to reveal highly sensitive information to our adversaries. For example, the number of compliance incidents could permit our adversaries to determine the scope of NSA’s collection activities under particular programs

and/or NSA's ability and accuracy in determining the "foreignness" of the selectors targeted for acquisition. Other withheld numbers would allow an adversary to assess which NSA capabilities the Agency uses most frequently, and in turn to assess which of their communications may or may not be secure. Adversaries could then take countermeasures to prevent the NSA from collecting their communications, such as changing methods of communication to one more difficult for NSA to intercept or engaging in tradecraft to avoid NSA collection. As a result, NSA could potentially lose valuable sources of intelligence unless and until the Agency is able to identify a replacement source. In compilation, the numbers that were withheld for classification purposes would disclose the overall scope of NSA's E.O. 12333 collection capabilities.

12. Accordingly, I have determined that the specific numbers that NSA withheld pursuant to FOIA Exemption 1 pertain to intelligence activities, intelligence sources or methods, or cryptology, or the vulnerabilities or capabilities of systems or projects relating to the national security and therefore meet the criteria for classification set forth in sections 1.4(c) and 1.4(g) of E.O. 13526. This information is currently and properly classified at levels ranging from CONFIDENTIAL to SECRET because the release of this information could reasonably be expected to cause damage or serious damage to the national security. Finally, in accordance with Section 1.7 of E.O. 13526, no information was classified and withheld in order to conceal violations of law or to prevent embarrassment to the Agency.

13. ACLU is also challenging the withholding in full of NSD documents 7, 37, 42, 44, and 47. As discussed in detail in my classified declaration, 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. 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. As a result, I have determined that no portion of these documents could reasonably be segregated and released. NSA 79, in

contrast, generally describes a number of different compliance-related matters reported to NSA's overseers pursuant to E.O. 12333. During its review, NSA determined that it could segregate and release UNCLASSIFIED materials from NSA 79 (to include publicly acknowledged NSA functions and activities) while protecting the material that remains classified and/or protected from disclosure by law, to include factual descriptions of specific NSA operations or activities that have not been publicly acknowledged.

Documents Characterized by Plaintiffs as Containing "Working Law"

14. NSA 28 is a legal opinion drafted by the NSA OGC at the request of its client, the NSA's Signals Intelligence Directorate ("SID"). My purpose herein is to provide the court with a more fulsome factual description of NSA 28. Portions of NSA 28 were properly redacted as attorney-client privileged information and should not be considered "working law" of the NSA. NSA 28 sets out legal advice concerning the legal limits to access by non-NSA personnel of NSA signals intelligence databases. The document further provides legal advice regarding the constitutional and statutory privacy protections that constrain access to such databases depending on whether the databases contain content or metadata. Finally, the document describes potential changes to existing NSA dissemination procedures that OGC anticipated might be proposed and provides OGC views and recommendations regarding such potential changes.²

15. NSA 28 is, at its core, legal advice offered by the NSA OGC to its client, NSA's SID, at the client's request. It is a legal memorandum that describes the legal advisability or permissibility of possible policies, but does not authoritatively state or determine NSA's policy. The document sets forth an NSA attorney's analysis of the legal boundaries for a particular NSA

² A similar rationale also applies to NSA Documents 11, 12, and 16. As described above, however, the very subject matter of NSA 11, 12, and 16 is classified and properly protected by law from public disclosure. Accordingly, nothing more can be said of these documents on the public record.

activity, but does not constitute a final Agency decision nor should it be considered binding NSA policy. As a matter of policy, SID could implement the sharing of raw SIGINT database access to non-NSA personnel in any number of possible ways, to include deciding to not implement any such access. The NSA OGC's advice was not binding upon SID, and that component was free to decline to adopt any of the dissemination practices discussed in the memorandum.

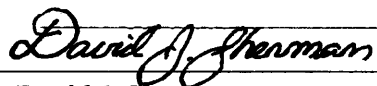
16. Moreover, the NSA OGC is not authorized to make decisions about SID policy nor can the OGC legal opinion be considered an authoritative statement of SID policy. The NSA OGC is the exclusive NSA component for providing legal services to all NSA elements and is led by the General Counsel, who is the NSA's chief legal officer. The office provides legal advice on a number of different legal matters, but the office has no authority to issue final decisions or authoritative statements on NSA policy, to include NSA's implementation of raw SIGINT database access by non-NSA personnel. The NSA OGC opinion merely amounts to advice offered by that office for consideration by personnel within the NSA SID. In short, the memorandum addresses the legal advisability and/or permissibility of anticipated policy changes but is neither authoritative nor determinative of NSA's policy in this regard. Consequently, NSA 28 should not be considered the "working law" of NSA.³

³ ACLU's opposition also called to NSA's attention that there may be inconsistencies to information redacted from a 1988 version of the Classified Annex to DoD Procedures Under E.O. 12333, ACLU Memorandum of Law at 42 (citing Exs. L and M. to Manes Decl.) (NSD 94-125), with a document issued subsequent to the Classified Annex. NSA is reviewing ACLU's assertions and hopes to complete its assessment within 30 days.

CONCLUSION

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

Executed this 7th day of June, 2016, pursuant to 28 U.S.C. § 1746.



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