

**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.

No. 13-CV-9198 (KMW)

DECLARATION OF KEVIN G. TIERNAN

I, Kevin G. Tiernan, declare as follows:

1. I am the Supervisory Records Manager of the Records and Freedom of Information Act (“FOIA”) Unit of the Office of Risk Management and Strategy in the National Security Division (“NSD”) of the United States Department of Justice (“DOJ” or “Department”). NSD is a component of the Department. NSD formally began operations on October 2, 2006, by consolidating the resources of the Department’s Office of Intelligence Policy and Review (“OIPR”)¹ and the Criminal Division’s Counterterrorism Section (“CTS”) and Counterespionage Section (“CES”)². As the Supervisory Records Manager, I supervise NSD’s records management and FOIA personnel. In that capacity, I oversee the processing of all FOIA requests made to NSD and the management of the Division’s records, a large percentage of

¹ OIPR is now known as the Office of Intelligence (“OI”).

² CES is now known as the Counterintelligence and Export Control Section.

NSD's records include information that is properly classified under Executive Order 13526. In addition, I am the Department's liaison to the Interagency Security Classification Appeals Panel ("ISCAP") which reviews appeals of mandatory declassification review requests under Executive Order 13526.

2. In a letter dated May 13, 2013, plaintiffs the American Civil Liberties Union and the American Civil Liberties Union Foundations ("plaintiffs"), 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.

3. Plaintiffs served their complaint in this lawsuit on the United States Attorney for the Southern District of New York on December 30, 2013.

4. In a letter dated May 14, 2014, NSD informed plaintiffs 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.

5. 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.

6. On October 31, 2014, ACLU filed an amended complaint, which made the July 29, 2014 request a part of the December 30, 2013 lawsuit.

7. After a series of voluntary disclosures and discussions among the parties, the Government moved for summary judgment, supported by various declarations describing each agency's search for responsive records, and explaining the basis for any withholdings of responsive records. One such declaration (ECF NO. 65) was made on February 26, 2016, by John Bradford Wiegmann, who serves as the Deputy Assistant Attorney General of NSD ("Wiegmann Decl."). As the Wiegmann Declaration explained, NSD's search 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 19 of the 68 NSD documents withheld in full, namely NSD 2, 4, 7, 9, 12, 13, 14, 17, 18, 23, 30, 31, 33, 36, 37, 42, 44, 47, and 48. Plaintiffs also challenged the partial withholding of the documents Bates numbered NSD 94-125 and NSD 202-207. These documents were described in an index attached to the Wiegmann Declaration. NSD withheld the documents numbered NSD 2, 4, 7, 9, 12, 13, 14, 17, 18, 23, 30, 31, 33, 36, 37, 42, 44, 47, and 48 in full and NSD 94-125 and NSD 202-207 in part pursuant to FOIA Exemptions 1, 3, and/or 5, as detailed in the Wiegmann Declaration and the index. Mr. Wiegmann also provided a supplemental declaration (ECF No. 80)("Supplemental Wiegmann Decl.") in June 2016 in connection with the Government's reply memorandum and opposition to plaintiffs' cross-motion for partial summary judgment, which provided further information regarding the withheld documents.

8. In a Memorandum Opinion and Order dated March 27, 2017, this Court stated that it could not conclude based on the information provided to date that NSD had conducted an adequate search for documents responsive to plaintiffs' request. This Court also denied the Government's motion for summary judgment to the extent that motion was based on the assertion of FOIA Exemption 5 as to NSD 12, 13, 14, 23, 33, and 49. The same ruling, however, upheld the Government's assertion of FOIA Exemptions 1 and 3 as to those same documents. The Court further invited the Government to submit additional information to also justify NSD's assertion of Exemption 5 as to these documents, as well as to further explain the agency's search. This declaration provides additional information from and on behalf of NSD. Declarants from other agencies will address other issues identified in the Court's order.

NSD's Search for Responsive Records

9. As discussed in the February 26, 2016 and June 8, 2016 Wiegmann Declarations, NSD determined that the most effective way to search for responsive documents was to identify and then direct six attorneys in NSD's OI³ and one attorney in the NSD's Office of Law and Policy,⁴ who have worked on issues concerning electronic surveillance under Executive Order 12333 described in the request, to conduct searches for responsive documents. The six attorneys within NSD's Office of Intelligence consisted of (1) a Counsel to the Assistant Attorney General, (2) the Section Chief of Operations, (3) the Section Chief of Oversight, (4) a Deputy Section Chief of Operations, (5) a second Deputy Section Chief of Operations, and (6) a Unit Chief in the Operations Section. The seventh NSD attorney who searched his files for responsive records

³ NSD's OI ensures that the Intelligence Community agencies have certain legal authorities necessary to conduct intelligence operations, particularly operations involving the Foreign Intelligence Surveillance Act (FISA); exercises oversight over the Intelligence Community's use of FISA authorities; and assists in FISA-related litigation.

⁴ 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.

was the Special Counsel within the Office of Law and Policy. In addition, as explained below, NSD staff conducted a search of historical files that predated the formation of NSD in 2006.

10. NSD searched for responsive records primarily through the aforementioned individuals because, individually and collectively, they possessed the seniority, institutional experience and knowledge, and areas of responsibility that would cover all of NSD's involvement with EO 12333 intelligence issues, and all of NSD's records that would be reasonably likely to contain records responsive to plaintiffs' requests. NSD's relevant records are not kept in a system that can readily be searched electronically using search terms, and they are not widely dispersed within the agency; rather, all pertinent NSD records are maintained in case-specific or issue-specific files maintained by NSD legal personnel, and the individuals whom NSD selected to search were organizationally responsible for and knowledgeable about NSD's activities relating to EO 12333 intelligence, and all records of any such activities. As a result, NSD's search used the best available means to uncover all NSD records responsive to plaintiffs' requests, and no additional search methods are likely to reveal responsive NSD records or record systems that were not searched as a result of the processes that NSD employed through these individuals.

11. Specifically, the Counsel for Intelligence to the Assistant Attorney General was an attorney in NSD from August 2007 (just ten months after NSD was created) to May 2016. During that time, he was an attorney advisor in NSD's Office of Intelligence ("OI") from August 2007 to December 2014 and the Counsel for Intelligence from December 2014 to May 2016. While in OI, he served as an attorney advisor in the Operations Section from August 2007 to approximately October 2008 and in the Oversight Section from October 2008 to December 2014. His duties during his time in Operations and Oversight included oversight of the National

Security Agency (“NSA”). As part of his duties as an attorney advisor in the Oversight Section, he led various aspects of NSD’s oversight program regarding NSA’s use of the Foreign Intelligence Surveillance Act (“FISA”), including but not limited to its implementation of Section 702 of FISA. While the Oversight Section did not oversee Executive Order 12333 activities, Executive Order 12333 authorities and their application were relevant to ensuring that NSA’s activities were carried out consistent with FISA. The Counsel’s job duties when he was an attorney advisor in OI included running the day-to-day operations of NSD’s oversight teams, receiving briefings regarding NSA collection capabilities and authorities, conducting oversight reviews, and investigating potential incidents of non-compliance with FISA authorities. As a result of those duties, the Counsel had access to (and in certain cases, helped create the organizational structure of) the electronic folders that contained virtually all of NSD OI’s oversight records pertaining to NSA.⁵

12. Given the nature of plaintiffs’ request and the manner in which the relevant files are kept, it would not have been effective or efficient for the Counsel for Intelligence to use search terms to try to locate potentially responsive records. Instead, he conducted a manual search through all relevant electronic folders to identify responsive documents. As both a subject matter expert and the creator of many of these oversight folders, he was aware of where materials potentially responsive to this FOIA request would be located. He supplemented this search by also searching through his hard copy files for topics related to Executive Order 12333 collection for potentially responsive documents. These hard copy files were organized in folders that were labeled by project name or subject matter.

⁵ The remaining oversight records were accessible by the Deputy Chief of Operations and the Unit Chief of Operations, both of whom conducted searches for records responsive to this FOIA request, as described below.

13. The Section Chief of Operations also conducted a search for responsive records. He first began working in OIPR in October 2001, and has served as the Chief of OI's Operations Section since April 2010, as well as the Acting Chief from September 2009 to April 2010. As the Section Chief of Operations, he is responsible for overseeing OI's operational work, including the preparation of requests for electronic surveillance and physical search pursuant to FISA. Again, given the nature of plaintiffs' request and the manner in which the relevant files are kept, it would not have been effective or efficient for the Section Chief of Operation to use search terms to try to locate responsive records. Instead, as part of his review, he searched in those portions of his electronic and paper files which he believed would contain potentially responsive materials. As both a subject matter expert and as the creator of his files, he knew where materials responsive to this FOIA request would be located.

14. In addition, OI's Oversight Section Chief also searched for responsive records. The Oversight Section Chief first started working in OIPR in June 2004 as an attorney advisor. He was promoted to Assistant Counsel in March 2005 and became the Oversight Section Chief in 2008. As Oversight Section Chief, he is responsible for overseeing the Intelligence Community's foreign intelligence collection. The Oversight Section Chief reviewed his hard copy and electronic files to identify responsive records in his possession. His electronic records are organized by subject matter, which allowed for ready identification of potentially responsive records. As both a subject matter expert and as the creator of his files, he knew where materials responsive to this FOIA request would be located, and did not use, or need to use, search terms to locate relevant documents.

15. Two Deputy Section Chiefs of Operations also searched for responsive records. The first Deputy Section Chief has been in the office since February 2005. He was an attorney

advisor until 2006, and then became an Associate Counsel from 2006 to 2008. From 2008 to 2010, he served as the Unit Chief for Special Operations and, since 2010, has been a Deputy Section Chief of Operations. The Deputy Section Chief of Operations personally went through his paper and electronic files and searched for relevant projects he had worked on as well as for any Executive Order 12333-related documents in his possession. As both a subject matter expert and as the creator of his files, he knew where materials responsive to this FOIA request would be located, and did not use, or need to use, search terms to locate relevant documents.

16. The second Deputy Section Chief also searched for responsive records. The second Deputy Section Chief started working as an attorney advisor in OIPR in January 2004. He was promoted to Associate Counsel in June 2006 and became a Deputy Section Chief in April 2008. He left the Department in September 2015. The second Deputy Section Chief searched his electronic files and his paper files, and as both a subject matter expert and as the creator of his files, he knew where materials responsive to this FOIA request would be located.

17. The sixth OI attorney who searched for responsive records was the Unit Chief in the Operations Section. He joined OIPR in December 2004 as an Attorney Advisor, was promoted to Deputy Unit Chief in May 2008, and became the Unit Chief of Operations in May 2010, a position he holds to this day. He manually searched his hard copy files and his electronic records. His hard copy records are organized into separate physical folders or binders and are labeled by project name or subject matter. The vast majority of his electronic files are organized into separate electronic folders labeled by project name or subject matter. He reviewed those files manually to locate and identify responsive records. He also has a small number of electronic folders that he uses to store miscellaneous documents, and those folders are labeled in a manner that makes the files' contents easily identifiable. The Unit Chief manually searched

these miscellaneous electronic folders to identify responsive documents. Due to the manner in which the Unit Chief labels his files, he did not rely on search terms or keywords to conduct his searches because doing so would have resulted in an under-inclusive search. Instead, the Unit Chief was able to look at the project names, subject matter, or file names of his paper and electronic files to determine whether a given folder or file contained responsive records.

18. These six OI attorneys were among the most senior attorneys in OI and were in the highest positions of leadership in that office. They had supervisory responsibilities and possessed the most comprehensive institutional knowledge about Executive Order 12333. They oversaw all of the work OI did on matters pertaining to Executive Order 12333, and any additional records possibly located in the files of another OI employee would likely have been duplicated in the files of at least one of these six attorneys. In addition, after these attorneys conducted their initial searches, the results of those searches were amalgamated, and all six of these attorneys met for several hours. They used their collective experience and institutional knowledge to review the potentially responsive documents and to confirm that the searches were comprehensive and produced a complete set of responsive records.

19. Finally, the Special Counsel within the Office of Law and Policy also searched his records. The Special Counsel joined OIPR, a predecessor to NSD, in 1997 as an attorney advisor. Prior to working in the Office of Law and Policy, the Special Counsel worked as a Deputy Counsel in OIPR, and he is among the most knowledgeable attorneys in the Office of Law and Policy on surveillance matters. Because of this, he continues to work on and advise others working on critical surveillance related matters. In addition, the Special Counsel works more on Executive Order 12333-related matters than anyone else in the Office of Law and Policy. The Special Counsel reviewed his hard copy and electronic files, which are organized by

subject matter to search for responsive records. As both a subject matter expert and as the creator of his files, he knew where materials responsive to this FOIA request would be located.

20. There is no other reasonably achievable search method that would be likely to uncover additional responsive records; specifically, other employees' individual files would not be likely to contain responsive records that the senior, supervisory personnel assigned to search would not have either possessed or obtained based on their own expertise about NSD activities and who at NSD worked on what EO 12333-related tasks. Therefore, it is unlikely that any additional responsive records would be located in the files of other employees within NSD.

21. The searches conducted by these senior NSD employees and their additional discussions to ensure comprehensiveness were the primary means that NSD employed to achieve a complete search that would yield all responsive records. In addition to these individuals' searches and consultations, as explained in the Supplemental Wiegmann Declaration, NSD FOIA staff also conducted a search of OIPR's historical policy working files for potentially responsive records that were generated before NSD's formation in 2006. NSD maintained these files as an archive of historic policy and operational documents that formerly was consulted by OIPR attorneys until NSD was established. The goal of this supplemental search was to identify any additional pre-NSD records (if any) on which DOJ and the IC agencies governed by EO 12333 continue to rely as authoritative, but NSD's primary means of identifying records known to NSD about EO 12333 activities was NSD's search by the senior-level individual searches. NSD electronically and manually searched the OIPR archives using the search term "12333 procedures" and evaluated each 'hit' for responsiveness to the request. Together, these searches covered all the systems and types of files that were likely to contain responsive records possessed by each attorney, and NSD FOIA is unaware of other locations or personnel that

would be likely to yield additional responsive information. Due to the nature of the duties, seniority, and institutional knowledge of the senior officials who carried out the search, it is unlikely that any other NSD personnel would have responsive records that at least one of the seven attorneys who conducted searches did not also have, beyond the historical records that were searched separately.

Invocation of Exemption 5 for NSD 12, 13, 14, 23, 33, and 49 and NSA 11 and 12

22. The Wiegmann Declaration stated that FOIA Exemption 5, and specifically the attorney-client and deliberative-process privileges, applied to the “vast majority” of the documents designated NSD 12, 13, 14, 23, 33, and 49, and NSA 11 and 12. In its order, the Court invited NSD to “supplement its submissions with detail about what portions of these documents do, and do not, contain legal advice or deliberative and pre-decisional analysis.”

23. Documents NSD 12, 13, 14, 33, and 49 and NSA 11 and 12 each consist of a number of sub-documents: privileged and deliberative memoranda from an Executive Branch official to another Department of Justice official recommending that s/he take a particular course of action; and non-privileged, non-deliberative documents reflecting the governmental action decisions that occurred after consideration of those recommendations. Document NSD 23, in its entirety, is a privileged and deliberative memorandum from a Department of Justice official to another Department of Justice official recommending that s/he take a particular course of action. NSD asserts Exemption 5 only for the portion of each of those documents that consists of memoranda. I note, however, that all of these documents are classified in their entirety and therefore protected in full from disclosure by FOIA Exemptions 1 and 3, as the Court has already held.

24. Specifically, NSD 12 is 36 pages long, of which the privileged memoranda consist of 14 pages; NSD 13 is 111 pages long, of which the privileged memoranda consist of 46

pages; NSD 14 is 45 pages long, of which the privileged memoranda consist of 32 pages; NSD 23 consists exclusively of a privileged memorandum and is four pages long; NSD 33 is 52 pages long, of which the privileged memoranda consist of 31 pages; NSD 49 is 24 pages long, of which the privileged memoranda consist of 16 pages; NSA 11 is 45 pages long, of which the privileged memoranda consists of 40 pages; and NSA 12 is 87 pages long, of which the privileged memoranda consist of 85 pages.

CONCLUSION

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

Executed this 14th day of June 2017, Washington, DC



KEVIN G. TIERNAN