

**VICTORIA L. FRANCIS  
MARK STEGER SMITH**  
Assistant U.S. Attorney  
U.S. Attorney's Office  
2601 2nd Ave. North, Suite 3200  
Billings, MT 59101  
Phone: (406) 247-4633 – Victoria  
(406) 247-4667 – Mark  
Fax: (406) 657-6058  
Email: victoria.francis@usdoj.gov  
mark.smith3@usdoj.gov

**ATTORNEYS FOR FEDERAL DEFENDANTS**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

---

**AMERICAN CIVIL LIBERTIES UNION,  
AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION, and AMERICAN CIVIL  
LIBERTIES UNION OF MONTANA  
FOUNDATION, INC.,**

**Plaintiffs,**

**vs.**

**DEPARTMENT OF DEFENSE,  
DEPARTMENT OF HOMELAND  
SECURITY, DEPARTMENT OF THE  
INTERIOR, and DEPARTMENT OF  
JUSTICE,**

**Defendants.**

---

**CV 18-154-M-DWM**

**DECLARATION OF MICHELLE  
BARTLETT**

I, Michelle Bartlett, make the following declaration pursuant to 28 U.S.C. §1746:

1. I am an employee of the United States Army Corps of Engineers (USACE) currently working in the Humphreys Engineer Center Support Activity (HECSA) Office of Counsel. My primary duties as Assistant Counsel began in July of 2008, and continue. I currently serve as the Freedom of Information Act (FOIA) Officer for USACE HQ, and my supervisor, Ms. Emily Green has been delegated responsibility as the Initial Denial Authority, pursuant to Army Regulation 25-55, for the coordination of document preparation and response to requests for information under the FOIA, on behalf of the Chief of Engineers and its serviced activities. Due to my official duties and past experience with FOIA requests, responses, denials and appeals, I am familiar with the provisions of the FOIA 5 U.S.C. §552. I make this declaration in my official capacity. All information herein is based upon my personal knowledge or upon information furnished to me in my official capacity from third parties in their official capacities.
2. The Army FOIA Regulation 25-55, and related documents authorize the Chief of Engineers, as an Initial Denial Authority (IDA or more commonly known as release authority), to act on requests for records involving civil works, military construction, engineer procurement, and ecology. The Chief is also authorized to act on requests for the records of the U.S. Army Engineer divisions, districts, laboratories, and field operating agencies. The Chief of Engineers has further delegated the Initial Denial Authority to Office of the Chief Counsel. Pursuant to this delegation of Initial Denial Authority, the HECSA Counsel acts as Initial Denial Authority on FOIA requests for records maintained by USACE Headquarters (HQUSACE).
3. I am aware that Plaintiffs filed a Complaint, dated 4 September 2018, which seeks an order compelling the defendants to produce records in response to their FOIA request concerning cooperation between federal, state, and local law enforcement entities and between federal law enforcement entities and private security companies around preparations for anticipated protests against the Keystone XL Pipeline. As FOIA Officer for HQUSACE, I am familiar with the processing of Plaintiffs' FOIA request including the search, review, and redaction of responsive documents in accordance with the FOIA.

#### CHRONOLOGY OF FACTS

4. By letter dated January 23, 2018, Mr. Jacob J. Hutt submitted a Freedom of Information Act (FOIA) request on behalf of the American Civil Liberties Union Foundation ("ACLU") to the U.S. Army Corps of Engineers' (the Corps) Humphreys Engineer Center Support Activity. Mr. Hutt requested all records created since January 27, 2017 concerning cooperation between federal, state, and local law enforcement entities and between federal law enforcement entities and private security companies around preparation for anticipated protests against the Keystone XL pipeline.

5. A final response was issued by letter dated July 16, 2018, in which the ACLU was informed that our office coordinated with USACE Headquarters Operational Protection Division and received 12 pages of emails that were considered responsive to his request. We also advised that one email consisting of five pages was being withheld in its entirety pursuant to Exemptions 5, 6 and 7(A) of the FOIA. We provided seven pages of redacted e-mails pursuant to Exemption 6 of the FOIA, responsive to the request.

6. By letter dated August 3, 2018, Mr. Jacob J. Hutt of the ACLU appealed our determination of July 16, 2018. The bases for Mr. Hutt's appeal were that (1) the agency did not conduct an adequate search for records; (2) the agency improperly withheld documents; and (3) the agency improperly redacted the documents provided in response to the Request. USACE was in the process of drafting the appeal package for submission to the Secretary of the Army when it received notice of the instant suit. As such, no additional processing of the administrative appeal has occurred.

#### ADEQUACY OF THE SEARCH

7. The agency did conduct an adequate search. As an initial matter, we queried the Headquarters Chief of Insider Threat Operations, Mr. David R. Paravecchia to ascertain who would likely have responsive information. Mr. Paravecchia advised that his office was the primary point of contact for the requested information and the only individual other than himself that should be included in a search was the Deputy for Civil Works, Mr. Steven A. Kopecky. Both Mr. Paravecchia and Mr. Kopecky conducted a search of their documents and provided this office with responsive material.

#### JUSTIFICATION FOR WITHHOLDING INFORMATION

##### EXEMPTION 5

8. Exemption 5 of the FOIA is intended to protect information relating to "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." This exemption incorporates civil rules of discovery, most notably the Deliberative Process Privilege, the Attorney-Client privilege, and the Attorney-Work Product Privilege. The applicable privilege concerning the instant case is the Deliberative Process Privilege which exists (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. To effect these purposes, the Deliberative Process Privilege protects from disclosure, documents containing opinions, recommendations, statements and other communications which are deliberative or pre-decisional in nature. It is invoked where it is

determined that the protection of the decision-making process and the give and take between agency employees in determining courses of action or voicing opinions regarding policies, procedures or potential agency actions is critical to prevent injury to the quality of agency decisions in that regard. The omitted information which was characterized as deliberative is an email between Headquarters USACE (HQUSACE) and the Department of Justice. That email and its attachment contained information and discussions concerning potential protest activity and protestor targeting of USACE leadership. Because these portions reflect predecisional opinions and recommendations, they are deliberative and protected from disclosure.

#### EXEMPTION 6

9. Exemption 6 of the FOIA protects information that if released, would constitute a clearly unwarranted invasion of privacy. In applying Exemption 6, an individual privacy interest must be weighed against the public interest in that information. If the privacy interest outweighs the public interest, the information should be withheld. Since the terrorist attacks of September 11, 2001, there has been a heightened interest in protecting the security and privacy of DoD personnel. In the current world security climate, DoD personnel and their families are particularly vulnerable to harassment and attack from those wishing to do them harm. The redacted information includes the names and contact information (email addresses) of certain Army Employees. It was determined that there was no public interest in disclosure of that personal contact information, and that the privacy interest was paramount. Therefore, the information was withheld.

#### EXEMPTION 7(A)

10. Exemption 7 of the FOIA protects from disclosure “records or information compiled for law enforcement purposes....” Exemption 7 subpart 7(A) protects information that, if released, could reasonably be expected to interfere with enforcement proceedings. The email withheld pursuant to Exemption 7(A) is between a Department of Justice Intelligence Specialist and the USACE Operational Protection Division concerning potential protest activity and protestor targeting of USACE leadership. Release of this type of material may degrade federal agencies’ ability to anticipate, prevent, and respond to certain criminal threats to oil pipelines. Specifically, the material reveals areas of infrastructure that are of greater concern because of their unique vulnerability to sabotage. Additionally, release of the information, which includes contact information of law enforcement personnel could lead to harassment and attacks targeting USACE leadership as occurred in response to DAPL and which is detailed in the withheld information. Such harassment may be used as a tool to intimidate those responsible for the regulatory decisions concerning the Keystone pipeline in the future and those charged with federal security and threat response.

REASONABLE SEGREGABILITY

11. This declaration and the documents referred to in the Vaughn Index constitute the defendant's FOIA response regarding the documents requested by Plaintiffs' Complaint. Based on the process described above, the documents have been thoroughly reviewed by the agency for segregability. USACE conducted a search reasonably calculated to find all responsive documents. All documents responsive to the Plaintiffs' requests have been identified, processed, and released as required under FOIA. All reasonably segregable information has been released to the Plaintiffs. A thorough review of all the responsive documents was conducted, including an in-depth re-examination coinciding with the drafting of this declaration and the Vaughn Index. All responsive records that did not fall under a valid FOIA exemption have been released. All responsive records withheld were authorized using proper FOIA exemptions.

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

Executed this 9th day of January, 2019, in Springfield, Virginia.



---

Michelle Bartlett