

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION,)	
et al.)	
)	
Plaintiffs,)	
)	
v.)	Civil No. 15-01954 (CM)
)	
DEPARTMENT OF JUSTICE,)	
et al.)	
)	
Defendants.)	
)	
)	
)	

DECLARATION OF DOUGLAS R. HIBBARD

I, Douglas R. Hibbard, declare the following to be true and correct:

1. I am the Senior Advisor to the Initial Request Staff (IR Staff) of the Office of Information Policy (OIP), United States Department of Justice (Department). In this capacity, I am responsible for supervising the handling of the Freedom of Information Act (FOIA) requests processed by the IR Staff of OIP. 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, as well as on

information acquired by me in the course of performing my official duties.

Processing of Plaintiffs' FOIA Request

3. By letter dated October 15, 2013, plaintiffs submitted a FOIA request addressed¹ to the FOIA/PA Mail Referral Unit (MRU), Justice Management Division (JMD),² Department of Justice. Plaintiffs seek records on the United States' use of targeted lethal force. In its request letter, plaintiffs sought expedition and a waiver or, in the alternative, limitation of fees.³ (A copy of Plaintiffs' initial request letter dated October 15, 2013 is attached hereto as Exhibit A.)

4. On October 22, 2013, the Department's counsel in a related matter provided a copy of the request to OIP. As the request was not addressed to OIP nor any of the senior leadership offices for which OIP processes FOIA requests, OIP had not received it prior to October 22, 2013.

5. On December 18, 2013, I spoke to a representative of plaintiff who informed me that he was seeking records that may be maintained by OAG and ODAG. On that same date, OIP opened a FOIA administrative file for plaintiffs' request on behalf of OAG and ODAG and assigned it tracking numbers AG/14-00935 (F) and DAG/14-00937 (F), respectively. Records searches (as described in detail below) were subsequently initiated for records maintained by those Offices.

6. By letter dated December 31, 2013, OIP acknowledged receipt of plaintiffs' FOIA request. In this letter, OIP notified plaintiffs that the Director of Public Affairs, who makes the expedition determinations regarding a matter of widespread and exceptional media interest, under 28 C.F.R. § 16.5 (e)(2), had granted plaintiffs' request for expedited processing. OIP

¹ On that same date, plaintiff submitted its request to the Department of Defense, Central Intelligence Agency, Department of State, and two other Department of Justice components, the Office of Legal Counsel and the Executive Office for the United States Attorneys.

² The Department has a decentralized system for processing FOIA requests, and each component of the Department processes and responds to requests for its own records. 28 C.F.R. § 16.3(a)(1). However, the Department's MRU is designated to receive FOIA requests and route them to appropriate components. See id at § 16.3(a)(2).

³ No fees have been assessed for this request and so the fee waiver and limitation of fees request is moot.

also advised plaintiff that the records being sought required searches in other offices, and so its request falls within “unusual circumstances,” under 28 C.F.R. § 16.5 (c). In addition, OIP offered plaintiffs an opportunity to reformulate its request and the services of the FOIA Public Liaison. Lastly, OIP confirmed that pursuant to the December 18, 2013 conversation with plaintiff’s representative, records searches would be conducted in the Offices of the Attorney General and Deputy Attorney General. (A copy of OIP’s December 31, 2013 letter is attached hereto as Exhibit B.)

7. By e-mail dated January 29, 2014, OIP discussed the scope of the request with plaintiff’s representative, who agreed to exclude publicly available documents and limit the request to records dated on or after September 11, 2001. (A copy of OIP’s January 29, 2014 e-mail is attached as Exhibit C.)

8. On March 16, 2015, plaintiffs filed suit in connection with its FOIA request.

9. By e-mail dated June 4, 2015, Department counsel discussed the scope of the request with plaintiffs’ counsel, who agreed to additional limitations to the scope. Specifically, plaintiffs agreed that the request could be limited to records created on or after September 11, 2001 (plaintiffs had previously agreed to this time frame pursuant to the January 29, 2014 e-mail exchanged with OIP; in this instance, the same “start date” is being confirmed for all defendants, not just OIP). Plaintiffs also indicated that certain categories of records could be excluded from the scope of the request, including (1) publicly-available documents (similar to the “start date,” plaintiffs had previously already agreed to this limitation with OIP; the June 4, 2015 agreement confirms that same limitation for all defendants), (2) communications that are purely internal to a singular Department of Justice component, (3) drafts of documents to which the final versions have been disclosed to plaintiffs, (4) drafts of documents which have not been disclosed to plaintiffs insomuch as an individual version of the draft is listed in the public Vaughn Index, (5)

documents created by other agencies subject to the instant case inasmuch as such material is listed on the other agency's public *Vaughn* Index, (6) documents created for the purpose of litigation or in connection with the processing of FOIA requests, and (7) documents related to the raid that resulted in the death of Osama bin Laden. (A copy of OIP's June 4, 2015, e-mail is attached as Exhibit D.)

Searches in the Offices of the Attorney General and Deputy Attorney General

10. When processing a FOIA request for one or more of the senior leadership offices, OIP typically initiates records searches by sending a memorandum to the specific office(s), which notifies the office of the receipt of the request and the need to conduct a search. OIP's search memoranda are sent to a designated point-of-contact in each office who serves as the liaison between OIP and the senior leadership office(s). The liaison in each office then, upon receipt of OIP's search memorandum, notifies each individual staff member in that office of the receipt of OIP's memorandum requesting that a search be conducted. The individual staff members of each office, as the custodians of their own records and the best authorities on what records they would personally maintain, will then advise the liaison if they (1) have no records responsive to the request; (2) have potentially responsive material which will be provided directly to OIP for review and processing (in which case the staff member conducts their own search); or (3) have potentially responsive material for which they request an OIP Government Information Specialist to conduct a search. Senior leadership office staff members who conduct their own searches will do so depending on how they maintain their own records. If, for example, an individual organizes their records by topic, office, or other category and already knows where potentially responsive material would be located, they may simply review that material and provide it to OIP without the need for a "keyword" search. This practice ensures that each individual staff member of the given office reviews OIP's search memorandum and the accompanying FOIA request, and the records searches

are conducted by or for only those individuals who indicate that they would have potentially responsive material. Once the review of the search memoranda and accompanying request is completed in the senior leadership office(s), the designated liaison responds to OIP's records search request on behalf of the senior leadership office,⁴ and OIP takes next steps – e.g., conducting searches of identified records custodians, or reviewing records returned to OIP – as appropriate.⁵

11. As stated above, plaintiffs advised that it was seeking records in OAG and ODAG. Accordingly, by memoranda dated January 9, 2014, OIP initiated searches within OAG and ODAG for records responsive to plaintiffs' request. As noted above, the practice for these offices is for the OAG and ODAG liaisons to notify each individual staff member in those offices of receipt of OIP's memorandum requesting that a search be conducted, and each staff members' files, including electronic files, are then searched as necessary – either by the staff member directly, or by OIP staff – for records responsive to the request.

12. By memorandum dated February 25, 2014, OAG responded to OIP's records search request. OAG identified four current and former officials within that office who might have potentially responsive electronic records. OAG requested that OIP conduct a search of the e-mails of these four officials and of the computer of one of these officials. OAG did not identify any potentially responsive paper records. OIP subsequently conducted a records search of the e-mails and computer files identified by OAG.

13. By memorandum dated July 7, 2014, ODAG responded to OIP's records search

⁴ Where appropriate, the senior leadership offices may also identify former staff whose records should be searched by OIP.

⁵ The initial determination regarding records custodians is not always final; rather, in order to ensure that reasonably thorough records searches are conducted, during the course of processing a given FOIA request, OIP continually assesses -- based on our review of records that are located in the initial records searches, discussions with Department personnel, or other pertinent factors -- whether other (both current and former) staff members' records should be searched, and will initiate such additional searches as appropriate.

request. ODAG identified six current and former officials within that office who might have potentially responsive records. ODAG requested that OIP conduct a search of the paper records and classified files of these six officials, e-mails of these six officials, and of the computer of three of these officials. OIP subsequently conducted a records search of the e-mail, paper files, classified records, and computer files records identified by ODAG.

14. Based on their knowledge of the records that may be responsive to plaintiffs' request, the Department's counsel in this instant FOIA litigation recommended that the records of a former Department official should also be searched. OIP subsequently conducted a search of the records including the unclassified e-mail, classified e-mail, unclassified paper, and classified paper of this former official.

Records Searches of Former OAG and ODAG Officials

15. Plaintiffs' request is seeking records covering a wide time frame – from September 11, 2001, to January 9, 2014, (the date OIP initiated records searches in the OAG and ODAG). In an effort to locate responsive material within the records of former Department officials – other than the official identified by the Department's counsel (see paragraph 14) – OIP conducted a search of the records indices of former personnel of OAG and ODAG. When personnel leave the Department, their official records are collected, catalogued, and provided to the Office of Records Management Policy (ORMP), who is responsible for maintaining them until they can be accessioned to the National Archives and Records Administration (NARA)⁶ pursuant to appropriate records retention schedules. In cataloguing these records, ORMP officials create an official records index of all material within the collection, including both classified and unclassified material, with the records organized by subject matter. These records indices are then arranged by the administration of each United States Attorney General under which the

⁶ The time frame of the request would not include any records that have been official accessioned to NARA.

personnel served on a shared electronic folder to which OIP has access.

16. In this case, based on the time frame of the request, OIP conducted a search of the indices of the OAG and ODAG officials who were in office from September 11, 2001, to January 9, 2014, which included the administrations of former Attorneys General, John Ashcroft (2001-2005), Alberto Gonzales (2005-2007), and Michael Mukasey (2007-2009), and the records of former staff under Attorney General Eric Holder (2009-2015). This search identified three custodians, in addition to those already identified by OAG, ODAG, and Department's counsel, that might have potentially responsive records. This material was subsequently reviewed for any records responsive to plaintiffs' request.

Searches of Unclassified and Classified E-mail

17. OIP searched the unclassified e-mail for the eleven identified OAG and ODAG officials. On May 4, 2015, OIP conducted a search using an electronic review platform system to isolate and locate potentially responsive records within that collection of electronic communications.

18. OIP searched the classified e-mail for eight OAG and ODAG officials, both current and former personnel, identified by those Offices.⁷ The same search terms and date parameters described in paragraph 17 were applied here. The records located as a result of these unclassified and classified records searches were reviewed for responsiveness to plaintiffs' request. Records responsive to plaintiffs' request were identified.

Search of the Departmental Executive Secretariat

19. On May 5, 2015, an OIP Government Information Specialist conducted a search for records responsive to plaintiffs' FOIA request in the electronic database of the Departmental

⁷ OIP was informed by the ODAG liaison that two ODAG officials identified to have potentially responsive records do not have classified e-mail accounts.

Executive Secretariat (DES). The DES is the official records repository of OAG and ODAG, and in particular, of records of all formal, controlled, unclassified⁸ correspondence sent to or from OAG and ODAG from January 1, 2001, to the present day. Moreover, the DES is used to track internal Department correspondence sent through formal channels.

20. Records received by the designated senior leadership offices are entered into Departmental Executive Secretariat's Intranet Quorum (IQ) database by trained analysts. The data elements entered into the system include such items as the date of the document, the date of receipt, the sender, the recipient, as well as a detailed description of the subject of the record. In addition, entries are made that, among other things, reflect what action is to be taken on the records, which component has responsibility for that action, and when that action should be completed. Keyword searches of the electronic IQ database may then be conducted by utilizing a single search parameter or combinations of search parameters. Search parameters may include the subject, organization, date, name, or other keywords.

21. Records located as a result of this search were then reviewed for responsiveness to plaintiffs' request. Records responsive to plaintiffs' request were identified.

Summary of OIP's Records Searches

22. In sum, plaintiffs' request seeks a broad range of records, some of which are highly classified, covering a time frame of over twelve years – from September 11, 2001, to January 9, 2014. As a result of the records searches conducted in OAG and ODAG, the advice of Department's counsel, the review of the records indices of the former officials of those offices covering the administrations of former Attorneys General Ashcroft, Gonzales, and Mukasey, and the former staff from the administration of Attorney General Holder, OIP identified a total of fourteen officials that may maintain potentially responsive records. As appropriate, OIP searched

⁸ The DES does not maintain classified information.

the unclassified e-mail, classified e-mail, computers records, unclassified paper files, and classified paper files of all of the identified officials, as well as the electronic database of the Departmental Executive Secretariat, to locate records responsive to plaintiffs' request.

23. As a result of the searches conducted, ODAG and OAG identified approximately 2000 pages of potentially responsive unclassified emails. These emails contained deliberative discussions within the Department of Justice and components of the intelligence community about a variety of subjects, including the following:

- Emails coordinating DOJ's responses to congressional inquiries and questions for the record ("QFRs");
- Emails discussing, and commenting on, the Attorney General's speech at Northwestern University;
- Emails circulating publicly-sourced materials, including newspaper articles, op-eds, and a memorandum by the Congressional Research Service on "Legal Issues Related to the Lethal Targeting of U.S. Citizens Suspected of Terrorist Activities;"
- Emails coordinating the public congressional testimony of the Attorney General, the Deputy Attorney General, the Assistant Attorney General for National Security, and the Assistant Attorney General for the Office of Legal Counsel;
- Emails coordinating and proposing talking points (for DOJ and the White House) regarding OLC opinions, drones, and litigation;
- Emails coordinating, discussing, and editing a letter to Congress from the Attorney General about drones, a briefing paper for the Attorney General, CIA Director Brennan's confirmation hearing, a speech by Secretary of Defense Jeh Johnson, a speech by Lisa Monaco at the Aspen Security Forum, Associate Attorney General Tony West's speech to the American Bar Association, the UN's delisting of al-Aulaqi from its Al-Qa'ida sanctions list, and Mr. Brennan's Wilson Center speech;
- Emails discussing a white paper on the use of lethal force, which was unofficially disclosed, and coordinating DOJ's public response;
- Emails discussing and commenting on an AUMF hearing, a statement by UN High Commissioner for Refugees on U.S. targeted killings, a State Department statement on extrajudicial, summary, or arbitrary executions, and a speech by Howard Koh at Columbia Law School;

- Emails coordinating responses to inquiries from the UN Special Rapporteur on human rights and counter-terrorism, inquiries from ICCPR on targeted killing, inquiries from Amnesty International, and a complaint from the Human Rights Council;

24. Many of these emails were non-responsive to the FOIA request because the emails contained no substantive legal analysis regarding lethal strikes nor discussion of the process for conducting lethal strikes. In addition, even with respect to those emails that were broadly responsive, the Office of Legal Counsel located many of the same emails in its search of unclassified email, which OLC redacted and released in part to the plaintiffs. Accordingly, OIP did not process these unclassified emails from ODAG and OAG for release to plaintiffs. To do so would be largely redundant and enormously burdensome on the Department and the Court. In addition, all substantive information in the emails was deliberative and protected by (b)(5) under the deliberative process privilege.

25. Searches of classified material resulted in 25 documents that are being withheld in full, for the reasons explained below. These documents are listed and explained in detail in the government's classified index, in the format previously approved by this Court.

Explanation of Information Withheld

26. In all, OIP is withholding material pursuant to Exemptions 1, 3, 5, of the FOIA. In some instances, these excisions were made on behalf of other federal entities to protect information of specific interest to them.

27. Attached to this declaration is a Vaughn Index containing a public description of all the classified responsive documents located as a result of OIP's search (OIP's Vaughn Index is attached hereto as Exhibit E).

Exemption 1

28. Exemption 1 pertains to information properly classified in the interest of national security pursuant to the relevant Executive Order (EO), which in this instance is Section 1.4(c) of

EO 13526. The application of Exemption 1 by OIP applies to 25 documents, including documents concerning the development of the Presidential Policy Guidance (PPG).⁹ These documents, inasmuch as they concern the creation and drafting of Presidential policy, are also appropriate for protection under the deliberative process privilege of Exemption 5.

Exemption 3

29. Exemption 3 protects information exempt from release by statute. In this instance, the use of Exemption 3 is taken under the National Security Act, to protect sources and methods.

Exemption 5: Threshold

30. Exemption 5 of the FOIA applies to certain inter- and intra- agency communications protected by the deliberative process and attorney work-product privileges. The information withheld from plaintiffs is inter- or intra-agency communications generated by, exchanged within, and internal to the Executive Branch.

Exemption 5: Deliberative Process Privilege

31. The deliberative process privilege is intended to protect the decision-making processes of government agencies from public scrutiny in order to enhance the quality of agency decisions. If pre-decisional, deliberative communications are routinely released to the public, Department employees will be much more circumspect in their discussions with each other and in providing all pertinent information and viewpoints to senior officials in a timely manner. This lack of candor would seriously impair the Departments ability to foster the forthright, internal discussions necessary for efficient and proper decision-making. Certainly disclosure of preliminary assessments and opinions would make officials commenting on sensitive matters

⁹ An unclassified fact sheet explaining the broad parameters of the PPG can be found online at https://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf.

much more circumspect in providing their views and severely hamper the efficient day-to-day workings of the Department, as individuals would no longer feel free to candidly present their views on component operations, or to discuss their ideas and advice on these activities in e-mail messages. Agency decision-making is at its best when employees are able to focus on the substance of their views and not on whether their views may at some point be made publicly available.

32. Another aspect of the decision-making process consists of the creation of draft documents which are then reviewed, edited, and modified before they become final. The documents identified on the classified index include drafts, sometimes with handwritten edits. Another aspect of the decision-making process consists of the drafting of briefing materials, talking points, and preparatory materials to aid senior leadership officials and preparing them to address various legal and policy points that may arise. The drafters of these briefing papers, talking points, and preparatory material attempt to succinctly summarize particular events that occurred, identify important issues, and provide key background information in a concise, summary format for ease of understanding and presentation. In doing so, the authors distill pertinent information underlying events as they attempt to anticipate questions that senior Department leadership, including the Attorney General, may encounter about the issues at hand, to ensure that they are prepared to respond to those questions. Throughout this process, the authors necessarily review the universe of facts and possible issues arising on the topic, and then select those facts and issues that they deem most appropriate for briefing senior officials. The decision to include or exclude certain factual information in or from analytical documents is itself an important part of the deliberative process. The Department's most senior officials rely heavily on the creation of such briefing materials so that they can be fully informed on the substance of the many legal and policy issues being worked on in the Department every day in

individual offices. These senior officials are then prepared to decide how best to respond to inquiries on the Departments activities. Such briefing materials, talking points, and preparatory materials are therefore preliminary and do not embody final agency action. The employees preparing such materials must feel free to create the most thorough and candid document possible so that the Department leadership are well-informed as they ultimately decide how to represent the interests of the Department as a whole.

Exemption 6

33. FOIA Exemption 6 protects information about individuals when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). When determining whether to withhold information pursuant to Exemptions 6, OIP balances the privacy interests of individuals identified in records against any “FOIA public interest” in disclosure of that information. In making this analysis, the FOIA public interest considered in the balance is limited to information which would shed light on the Department’s performance of its mission. The information protected by OIP pursuant to Exemptions 6 consists of the e-mail addresses of intelligence community and military personnel, including names of certain personnel.

Segregation of Nonexempt Information

34. OIP carefully reviewed the entirety of the material responsive to plaintiffs’ request and determined that, while some non-classified fragments were included in the classified documents, they were intertwined with classified information and pre-decisional deliberations. Accordingly, no segregable information could be released.

35. I am aware of the Court’s determination in a separate case, *ACLU v. DOJ*, No. 1:12-cv-794-CM (S.D.N.Y.), that there are certain facts relating to lethal strikes by the U.S. government that have been officially acknowledged. I also have reviewed the 13 alleged

“facts” that the ACLU claims in its August 28, 2015 filing in this case have been officially acknowledged by the U.S. government. I have reviewed the responsive records identified in the Department’s searches described above and determined that each of the documents withheld by the Department either does not contain officially acknowledged material or, if such material is contained within the documents, it is inextricably intertwined with properly classified or otherwise exempt information.

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



Douglas R. Hibbard

Executed this 2nd day of October 2015.