

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CIVIL LIBERTIES UNION,)
<u>et al.</u> ,)
)
Plaintiffs,)
)
v.	04 Civ. 4151 (AKH))
)
DEPARTMENT OF DEFENSE, <u>et al.</u> ,)
)
Defendants.)
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DECLARATION OF WENDY M. HILTON
ASSOCIATE INFORMATION REVIEW OFFICER
NATIONAL CLANDESTINE SERVICE
CENTRAL INTELLIGENCE AGENCY

I. INTRODUCTION

I, WENDY M. HILTON, hereby declare and say:

1. I continue to serve as an Associate Information Review Officer (AIRO) for the National Clandestine Service (NCS) of the Central Intelligence Agency (CIA). I was appointed to this position in March 2007. I have held a variety of positions in the CIA since I became a staff officer in 1983.

2. The NCS is the organization within the CIA responsible for conducting the CIA's foreign intelligence and counterintelligence activities; conducting special activities, including covert action; conducting liaison with foreign intelligence and security services; serving as

the repository for foreign counterintelligence information; supporting clandestine technical collection; and coordinating CIA support to other federal departments and agencies. Specifically, the NCS is responsible for the conduct of foreign intelligence collection activities through the clandestine use of human sources.

3. As the AIRO, I am authorized to assess the current, proper classification of CIA information based on the classification criteria of Executive Order 12958, as amended,¹ and applicable regulations. As part of my official duties, I ensure that determinations such as the release or withholding of information related to the CIA are proper and do not jeopardize CIA interests, personnel, or facilities, and, on behalf of the Director of National Intelligence (DNI) and the Director of the CIA, do not jeopardize CIA intelligence activities, sources, or methods. I am able to describe, based on my experience, the damage to the national security that reasonably could be expected to result from the unauthorized disclosure of classified information.

¹ Executive Order 12958 was amended by Executive Order 13292. See Exec. Order No. 13292, 68 Fed. Reg. 15315 (Mar. 28, 2003). All citations to Exec. Order No. 12958 are to the Order as amended by Exec. Order No. 13292. See Exec. Order No. 12958, 3 C.F.R. § 333 (1995), reprinted as amended in 50 U.S.C.A. § 435 note at 204 (West Supp. 2009).

4. As a senior CIA official and under a written delegation of authority pursuant to section 1.3(c) of Executive Order 12958, as amended, I hold original classification authority at the TOP SECRET level. I am authorized, therefore, to conduct classification reviews and to make original classification and declassification decisions.

5. Through the exercise of my official duties, I am familiar with this civil action. I make the following statements based upon my personal knowledge and information made available to me in my official capacity. I also hereby incorporate Director Leon Panetta's 8 June 2009 classified and unclassified declarations.

6. On 7 May 2009 the Court ordered the Government to compile a list of documents related to the contents of 92 destroyed videotapes of detainee interrogations. Pursuant to that Order, the CIA identified 580 documents, and a sample of 65 documents was selected for purposes of resolving disputes with regard to the CIA's withholding determinations. On 8 June 2009, Director Panetta filed unclassified and classified declarations justifying the withholding in full of the entire sample of 65 documents pursuant to FOIA exemptions b1, b3, b5, and b6. I understand that the CIA will also be submitting a

supplemental declaration in further support of the CIA's invocation of FOIA exemptions b1 and b3.

7. I submit this declaration in further support of the CIA's invocation of FOIA exemptions b5 and b6 to the sample set of 65 documents. The CIA invokes exemption b5 to withhold information contained in documents 28, 54, 56, 57, 59, 60, 61, and 62, as described in the Vaughn index submitted on 8 June 2009 with the Director's unclassified declaration. The CIA invokes exemption b6 to withhold the names of CIA employees, contractors, and consultants contained in 62 of the documents, also as identified in the Vaughn index. I do not address in this declaration the CIA's invocation of exemptions b1 and b3, but rather leave those justifications to Director Panetta.

I. Deliberative Process

8. The CIA withheld all eight documents under FOIA exemption b5 on the grounds that the documents contained information that reflected the impressions, analysis, and beliefs of CIA officers engaged in pre-decisional deliberations. The following types of deliberations are contained within the documents:

A. Recommendations Regarding the
Interrogation of Abu Zubaydah

9. Documents 28 and 57 contain the deliberations and recommendations of CIA officers during the interrogation of Abu Zubaydah. These deliberations represent the impressions of those officers and do not represent official policy guidance generated by CIA management.

B. Recommendations for the Interrogation of
Future High Value Detainees (HVDs)

10. Document 28 also contains the recommendations of CIA officers, based on the experience of interrogating Abu Zubaydah, for potential future interrogations. This information was conveyed to CIA Headquarters in the context of the CIA still determining the most effective way to conduct interrogations. The experience of the CIA officers contained in this document was but one of the many factors considered by CIA management as part of the evolving CIA program.

C. Comments Concerning the CIA Office of the
Inspector General (OIG) Special Review

11. Documents 56, 59, 61, and 62 contain information developed as part of the CIA OIG's review of CIA interrogations. As part of the review, OIG officers, among other things, reviewed documents and interviewed other CIA officers. The four documents reflect the impressions and

deliberations of OIG officers as they determined what facts were relevant, what avenues of inquiry they should pursue, and what importance their impressions of the facts, combined with their understanding of the relevant law and policy, should have for the review as it goes forward. All of these impressions predate the drafting and publication of the OIG's May 2004 report² and were part of the myriad sources of information the OIG analyzed before drafting its report.

D. Comments on the Office of General Counsel
(OGC) Legal Review of Certain Interrogations

12. The CIA OGC also conducted a legal review of the interrogation of Abu Zubaydah to ensure compliance with the relevant legal and policy guidance. This review was implemented not only to ensure that the interrogation of Abu Zubaydah was consistent with the law and United States policy, but also to improve the CIA's program going forward. Document 60 contains the analysis and impressions of a CIA Attorney shortly after the Attorney's review of subsequently destroyed videotapes, as well as the relevant cable traffic. The document reflects the CIA attorney's view on what facts were relevant to determine whether the interrogation of Abu Zubaydah was compliant with law and

² Document 56 is an email drafted in 2007 but contains an attached report from 2003. The 2007 email is little more than a cover sheet with no non-exempt, responsive information.

policy, as well as what information would be informative to CIA management in improving the program going forward.

E. OIG comments on a Draft Public Statement
to be made by DCIA Michael Hayden

13. Document 54 contains the impressions, reactions, and comments of an OIG investigator to a proposed 2007 statement by the DCIA regarding the destruction of the 92 interrogation videotapes. The investigator evaluates whether the DCIA's conclusions of fact and law correspond with his own based on his role in the OIG special review. The investigator's management solicited his comments as part of a broader coordination of the DCIA's statement within the CIA prior to the statement's release.

14. None of the eight documents contain or represent final CIA law or policy. While these documents do contain the "on the ground" analysis and impressions of CIA officers that contributed to the body of knowledge the CIA likely relied on to make decisions, none of the documents, or the pre-deliberative information contained therein, were ever directly incorporated or adopted as the final rule or analysis by the CIA. Nor did the CIA publicly adopt or cite any of these documents as the reason why the CIA pursued a certain policy.

15. Furthermore, the facts discussed in all of the documents are intimately related to the deliberative process itself. In all cases the analysis and recommendations are fact-specific and any revelation of the facts would also serve to reveal the pre-decisional analysis and recommendations of the CIA officer, frustrating FOIA's intent to preserve such analysis from disclosure. Therefore, there is no otherwise releasable, segregable information in the documents.

II. Attorney-Client Communications

16. The CIA also asserted FOIA exemption b5 over documents 59 and 60 on the basis of the attorney-client communications privilege. The information contained within those documents reflects the legal opinions and advice of a CIA attorney, provided to and at the request of the CIA, the client, regarding the legality of certain activities. In addition, the documents contain the analysis of fact and law that lead to the opinions. The communications between the CIA attorney and the client were made with the expectation that they would remain confidential and have remained confidential.

17. As described herein, there are no segregable, otherwise releasable facts contained in the documents. The confidential, candid, communications between the CIA

attorney and his client were and are an essential part of the dialogue between attorney and client, which framed and shaped the attorney's advice. If this type of information was disclosed it would likely chill future communications between client-agencies and their attorneys, depriving the agencies of the full and frank counsel of their attorneys and frustrating FOIA's intention to protect such communications from disclosure.

III. Attorney-Work-Product

18. Lastly, the CIA asserted FOIA exemption b5 over documents 59 and 60 on the basis of the attorney-work-product privilege. As stated above, the documents at issue contain the legal opinions, and the analysis of fact and law supporting those opinions, of CIA attorneys. This analysis was done in anticipation of both criminal and civil litigation.

19. Throughout the CIA's terrorist interrogation program the CIA was concerned that its officers could face civil and criminal liability for their actions. The CIA directed its attorneys to review the record of the first interrogations to ensure that they were conducted consistent with the Department of Justice's guidance, which could arguably provide a defense to possible domestic and international criminal and civil liability. Therefore,

while the CIA attorneys may have performed their analysis to determine legal and policy compliance, that analysis was in the context of evaluating possible defenses for anticipated civil and criminal litigation.

20. The facts which the attorney relied on to develop his analysis are an integral part of his work-product. The attorney's judgment on what facts were relevant, and what importance those facts had, are the very type of information that the attorney-work-product privilege is meant to protect. For this reason there is no segregable, otherwise releasable factual information contained in the documents at issue.

IV. FOIA Exemption b6

21. The CIA invokes FOIA exemption b6 to withhold the names of CIA employees, contractors, and consultants contained in 62 of the sample documents. I understand that plaintiff's challenge the CIA's withholding of consultant and contractor names, citing to the 2008 Senate Armed Services Committee ("SASC") report and newspaper articles. The CIA has never officially acknowledged the identities of any contractors or consultants affiliated with the CIA program. As a threshold matter, the publicly released SASC report does not constitute an official acknowledgement because the report is not an official communication from

the Executive Branch. Likewise, media reports do not constitute an official acknowledgement of a relationship between any consultant or contractor and the CIA.

22. While the program has been the subject of considerable public debate, the names of the individuals involved, and the operational details of their actions, have remained both classified and confidential. The individuals involved in the program have a strong interest in retaining their privacy. Disclosure would subject individuals and their families, even if erroneously implicated in the program, to a host of dangers, including but not limited to; attack from al-Qa'ida and its sympathizers, embarrassment, loss of business, and foreign criminal and civil litigation. This strong privacy interest outweighs any legitimate public interest in disclosure, therefore the names of CIA employees, contractors, and consultants must remain withheld under FOIA exemption b6.

V. Segregability

23. With respect to the records currently at issue, I have conducted a line-by-line review of these documents. Based on this review, I determined that the factual information within the documents was either so intertwined with the analysis, deliberations, or attorney work-product

protected under b5 that its release would reveal the protected exempt information, part of the exempt information itself, or otherwise exempt from disclosure on the bases of FOIA exemptions b1, b3, and b6, as described in Director Panetta's 8 June 2009 declarations, and a supplemental declaration I understand the Agency will be submitting in further support of the CIA's invocation of FOIA exemptions b1 and b3.

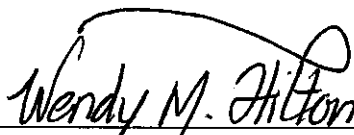
VI. Conclusion

24. For the reasons described above, the documents at issue have been withheld on the bases of FOIA exemptions b5 and b6.

* * * *

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

Executed this 19th day of September, 2009.



Wendy M. Hilton
Associate Information Review Officer
National Clandestine Service
Central Intelligence Agency