

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION,)
et al.,)
)
Plaintiffs,)
)
v.) 04 Civ. 4151 (AKH)
)
DEPARTMENT OF DEFENSE, et al.,)
)
Defendants.)
)

AMERICAN CIVIL LIBERTIES UNION,)
et al.,)
)
Plaintiffs,)
)
v.) 05 Civ. 9620 (AKH)
)
DEPARTMENT OF JUSTICE, AND ITS)
COMPONENT OFFICE OF LEGAL COUNSEL,)
)
Defendants.)
)

**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

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).

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.

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 my 13 May 2009 declaration, as well as Director Leon Panetta's 8 June 2009 classified and unclassified declarations.

6. In January 2009 President Barack Obama discontinued the CIA's terrorist Rendition, Detention, and Interrogation program (program). Subsequently, on 16 April 2009 four Office of Legal Counsel (OLC) memoranda

responsive to Plaintiff's FOIA request were largely declassified and released in part pursuant to this case. In light of these developments, the U.S. Government (USG) requested remand from the Second Circuit Court of Appeals to this Court of 321 documents which had earlier been denied-in-full and for which this Court had ruled and Plaintiffs had appealed. The USG sought remand so the Agency could re-process the documents at issue to determine if any additional information could be released in light of the discontinuation of the program and the declassification, in large part, of the OLC memoranda. The remand documents include a sample of documents from the CIA's Office of the Inspector General (OIG); the 2004 CIA OIG Special Review (OIG Report) of the CIA's terrorist rendition, detention, and interrogation program; and two documents previously identified by Plaintiffs as Item No. 29, and Item No. 61 on their 16 August 2004 request for 70 specific documents (collectively the "remand documents").²

7. The Agency has reevaluated the remand documents at issue and determined that certain portions of documents that were previously withheld in their entirety could now

² The remand sample also included 181 documents from the Department of Justice's Office of Legal Counsel (OLC). I do not address the remanded OLC documents in this declaration, as I understand that the remanded OLC documents will be addressed in separate submissions at a later time.

be released. On 16 April 2009 the USG released, with minor redactions, Item 29, a 1 August 2002 OLC opinion to the CIA.³ On 24 August 2009 the USG also released in part the OIG Report, as well as eight other documents from the CIA OIG sample. Item 61 and the remaining documents from the OIG sample continue to be withheld in full.

8. The purpose of this declaration and accompanying Vaughn index (attached and hereby incorporated) is to describe, to the greatest extent possible on the public record, the information withheld from the documents at issue, and the FOIA exemptions upon which the CIA relied to withhold that information. Part II of this declaration describes the CIA documents and information at issue; Part III discusses the applicable FOIA exemptions.⁴

II. CIA DOCUMENTS AND INFORMATION AT ISSUE

9. The CIA documents at issue are primarily documents from closed investigations conducted by the CIA's OIG of alleged improprieties in the treatment of detainees in Iraq and Afghanistan. These documents include cables,

³ While Item 29 is an OLC document, the same version of the 1 August 2002 opinion has also been re-released on 24 August 2009 as Appendix C to the 2004 OIG report. Therefore, for the Court's convenience, we will address Item 29 in this declaration.

⁴ If the Court desires, the CIA is prepared to supplement this unclassified declaration with a classified declaration containing information that the CIA cannot file on the public record

OIG interview reports of CIA officers, emails written by CIA officers, memoranda and other inter-office communications, memoranda for the record, presentations, and handwritten notes.

10. While most of the OIG remand documents at issue continue to be withheld in full, as no reasonably segregable non-exempt information can be released, the CIA has released in part eight of the OIG documents on remand.⁵ In addition to these documents, the USG has also released Item 29, and the OIG Report, in part, but continues to withhold portions of those documents as described below and in the accompanying Vaughn index.

11. As further described below, the documents contain information relating to how the CIA conducted counter-terrorism operations against al-Qa'ida and affiliated groups. This highly sensitive information details how the CIA developed its program, coordinated with various other elements of the United States Government, targeted and exploited terrorists, worked with its liaison partners, and

⁵ Per the sampling agreement reached between the parties, the OIG document sample was divided into four categories: Cables, Emails, Interview Reports, and "Other" documents, which served as a catch-all category. These documents were ordered on the CIA's original Vaughn Index under those categories. For the Court's convenience the attached Vaughn index maintains this convention. The documents that the CIA was able to release in part are identified on the CIA's Vaughn Index as: Other-29, Other-39, Other-63, Other-71, Other-93, Other-103, Interview-83, and Email-196.

developed information that was essential to protecting the United States.

12. The withheld information generally falls into the following categories:

1. Information relating to intelligence sources, methods, or collections; operational intelligence activities; or the foreign relations and foreign activities of the United States and that, as described below, is protected from disclosure under FOIA Exemption (b) (1);
2. Information that relates to CIA sources, methods, functions, or the names of CIA employees or contractors and that, as described below, is protected from disclosure under FOIA Exemption (b) (3);
3. Information relating to predecisional inter- and intra-agency discussions and deliberations, attorney-client communications, and attorney work-product created in anticipation of litigation that, as described below, is protected from disclosure under FOIA Exemption (b) (5);
4. Information that relates to personnel and similar files, the disclosure of which would constitute a clearly unwarranted invasion of

personal privacy, and that, as described below, is protected from disclosure under FOIA Exemption (b) (6).

III. APPLICABLE FOIA EXEMPTIONS

A. Exemption (b) (1)

13. FOIA Exemption (b) (1) provides that FOIA does not require the production of records that are:

(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and

(B) are in fact properly classified pursuant to such Executive order.

5 U.S.C. § 552(b) (1).

14. The authority to classify information is derived from a succession of Executive orders, the most recent of which is Executive Order 12958. I have reviewed the documents responsive to Plaintiffs' FOIA request under the criteria established by Executive Order 12958. I have determined that the information withheld from these documents is in fact properly classified pursuant to the Order.

1. Procedural Requirements

15. Section 6.1(h) of the Executive Order defines "classified national security information" or "classified information" as "information that has been determined

pursuant to this order or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form." Section 6.1(y) of the Order defines "national security" as the "national defense or foreign relations of the United States."

16. Section 1.1(a) of the Executive Order provides that information may be originally classified under the terms of this order only if all of the following conditions are met:

(1) an original classification authority is classifying the information;

(2) the information is owned by, produced by or for, or is under the control of the United States Government;

(3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and

(4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

Exec. Order 12958, § 1.1(a).

17. *Original classification authority* - Section 1.3(a) of the Executive Order provides that the authority to classify information originally may be exercised only by

the President and, in the performance of executive duties, the Vice President; agency heads and officials designated by the President in the *Federal Register*; and United States Government officials delegated this authority pursuant to section 1.3(c) of the Order. Section 1.3(b) of the Executive Order provides that original TOP SECRET classification authority includes the authority to classify information originally as SECRET and CONFIDENTIAL. Section 1.3(c)(2) provides that TOP SECRET original classification authority may be delegated only by the President; in the performance of executive duties, the Vice President; or an agency head or official designated pursuant to section 1.3(a)(2) of the Executive Order.

18. In accordance with section 1.3(a)(2), the President designated the Director of the CIA as an official who may classify information originally as TOP SECRET.⁶ Under the authority of section 1.3(c)(2), the Director of the CIA has delegated original TOP SECRET classification authority to me. With respect to the information described below in this declaration relating to CIA intelligence

⁶ Order of President, Designation under Executive Order 12958, 70 Fed. Reg. 21,609 (Apr. 21, 2005), reprinted in 50 U.S.C.A. § 435 note at 205 (West Supp. 2008). This order succeeded the prior Order of President, Officials Designated to Classify National Security Information, 60 Fed. Reg. 53,845 (Oct. 13, 1995), reprinted in 50 U.S.C.A. § 435 note at 486 (West 2003), in which the President similarly designated the Director of the CIA as an official who may classify information originally as TOP SECRET.

activities, sources, and methods, I have determined that this information is properly classified TOP SECRET, SECRET, and/or CONFIDENTIAL by an original classification authority.

19. *U.S. Government information* - Information may be originally classified only if the information is owned by, produced by or for, or is under the control of the USG. With respect to the information relating to CIA intelligence activities, sources, and methods, and foreign relations and foreign activities, as described herein and for which FOIA Exemption (b)(1) is asserted in this case, that information is owned by the USG, was produced by the USG, and is under the control of the USG.

20. *Categories in Section 1.4 of the Executive Order* - With respect to the information relating to CIA intelligence activities, sources, and methods, and foreign relations and foreign activities, described herein and for which FOIA Exemption (b)(1) is asserted in this case, that information falls within the following classification categories in the Executive Order: "information . . . concern[ing] . . . intelligence activities . . . [and] intelligence sources or methods" [§ 1.4(c)]; and "foreign relations or foreign activities of the United States"

[§ 1.4(d)]. I describe this information and its relation to the national security below.

21. *Damage to the national security* - Section 1.2(a) of the Executive Order provides that information shall be classified at one of three levels if the unauthorized disclosure of the information reasonably could be expected to cause damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage. Information shall be classified TOP SECRET if its unauthorized disclosure reasonably could be expected to result in *exceptionally grave damage* to the national security; SECRET if its unauthorized disclosure reasonably could be expected to result in *serious damage* to the national security; and CONFIDENTIAL if its unauthorized disclosure reasonably could be expected to result in *damage* to the national security.

22. With respect to the information relating to CIA intelligence activities, sources, and methods, and foreign relations and foreign activities, described herein and for which FOIA Exemption (b)(1) is asserted, I have determined that this information is classified SECRET or TOP SECRET because it constitutes information the unauthorized disclosure of which reasonably could be expected to result

in serious or exceptionally grave damage to the national security, which includes defense against transnational terrorism. The damage to national security that reasonably could be expected to result from the unauthorized disclosure of this classified information is described below.

23. *Proper purpose* - With respect to the information relating to CIA intelligence activities, sources, and methods, and foreign relations and foreign activities, described herein and for which FOIA Exemption (b)(1) is asserted, I have determined that this information has not been classified in order to conceal violations of law, inefficiency, or administrative error; prevent embarrassment to a person, organization or agency; restrain competition; or prevent or delay the release of information that does not require protection in the interests of national security.

24. *Marking* - With respect to the information relating to CIA intelligence activities, sources, and methods, and foreign relations and foreign activities, described herein and for which FOIA Exemption (b)(1) is asserted in this case, I have reviewed the documents and have determined that they are properly marked in accordance with section 1.6 of the Executive Order. Each document

bears on its face the SECRET or TOP SECRET classification levels defined in section 1.2 of the order; the identity, by name or personal identifier and position, of the original classification authority or the name or personal identifier of the person derivatively classifying the document in accord with section 2.1 of the order; the agency and office of origin, if not otherwise evident; declassification instructions; and a concise reason for classification that, at a minimum, cites the applicable classification categories of section 1.4.⁷

25. *Proper classification* - With respect to the information relating to CIA intelligence activities, sources, and methods, and foreign relations and foreign activities, described herein, and for which FOIA Exemption (b)(1) is asserted, I have determined that this information has been classified in accordance with the substantive and procedural requirements of Executive Order 12958 and that this information is currently and properly classified.

2. Substantive Requirements

26. In processing the documents at issue, I have reviewed the records identified as exempt under Exemption

⁷ Some of these documents also contain markings for "Special Access Programs," also known as "Sensitive Compartmented Information" or "SCI." Section 4.3 of Executive Order 12958 establishes the legal requirements for establishing SCI programs. Some of these markings are themselves classified and were redacted from the documents at issue.

(b) (1) in this declaration and have determined that they contain information that is currently and properly classified. I will describe, to the greatest extent possible on the public record, the damage to the national security that reasonably could be expected to result from the unauthorized disclosure of this information.

27. In general, the documents at issue contain information that implicates intelligence activities, sources, and methods, and information relating to the foreign relations and activities of the United States. This information is classified, as its unauthorized disclosure could reasonably be expected to result in serious or exceptionally grave damage to the national security. This information is also protected from disclosure under the National Security Act of 1947 and the Central Intelligence Agency Act of 1949, as discussed below. The classified and otherwise protected information at issue includes information concerning the capture, detention, confinement, and interrogation of known and suspected terrorists. The information impacting foreign relations contained within the documents includes the locations of CIA intelligence activities overseas and the assistance provided by certain foreign governments in furtherance of those activities.

a. Intelligence Activities and Methods

28. I will first provide a general description of intelligence activities and their classified nature, and next describe the specific information relating to intelligence activities included in the documents at issue that the CIA redacted or withheld in this case.

Intelligence activities refer to the actual implementation of intelligence sources and methods in the operational context. Intelligence activities are highly sensitive because their disclosure often would reveal details regarding specific intelligence collection activities. The CIA is charged with both foreign intelligence and counter-intelligence collection and analysis responsibilities. Although it is obviously widely acknowledged that the CIA is responsible for performing activities in support of this mission for the United States, the CIA cannot confirm or deny the existence of any specific intelligence collection or disclose the target of such intelligence gathering activities.

29. To disclose the existence (or non-existence) of a particular intelligence collection activity would reveal U.S. intelligence needs, priorities, and capabilities to a foreign intelligence service or hostile organization seeking to take advantage of any national security

weakness. The damage that would be caused by such an admission is clear. Foreign government services and hostile organizations would be advised that their activities and information had been targeted by the CIA; future intelligence collection activities would be made more difficult by such a revelation; and, as a result, the conduct of such operations would become even more dangerous.

30. Some of the redacted information at issue in this case concerns two specific intelligence activities: (1) the capture, detention, and confinement of terrorists; and (2) the interrogation of terrorists.

*(1) Capture, Detention, and Conditions
of Confinement*

31. Some of the redacted information at issue in this case relates to the now discontinued CIA program, to capture, detain, and interrogate key terrorist leaders and operatives. As part of this program, then-President George W. Bush authorized the CIA to set up terrorist detention facilities outside the United States. Even though the program has been discontinued, many of the details of the program remain classified. However, I will attempt to provide, to the extent possible on the public record, more detail regarding these specific intelligence activities of

the CIA, and how these documents relate to classified sources and methods.

32. On September 6, 2006, President Bush delivered a speech in which he disclosed the existence of the program. President Bush also disclosed that fourteen individuals formerly in CIA custody had been transferred to Guantanamo Bay.⁸ Subsequently, the program was discontinued by President Barack Obama in January 2009 and on 16 April 2009 the USG declassified certain details of the program, including descriptions of the enhanced interrogation techniques in the abstract.

33. As Director Panetta explained to the Court in his 8 June 2009 unclassified and classified declarations, many specific details of the program remain classified. These details include information concerning: EITs in application; assistance of foreign liaison services in any aspect of the program; details concerning locations; the names of detainees; confinement and capture information; information that could identify USG employees involved in counterterrorist operations; and other operational details. In fact, many of these details constitute TOP SECRET, Sensitive Compartmented Information (SCI). Documents

⁸ Since President Bush's 6 September 2006 speech, the Government has disclosed that two additional individuals were transferred to Guantanamo Bay.

responsive to Plaintiffs' FOIA request with these details have been redacted or withheld in their entirety.

34. I have already described the levels of classification outlined in Executive Order 12958. In addition to those levels of classification, Executive Order 12958, section 4.3, provides that specified officials may create special access programs upon a finding that the vulnerability of, or threat to, specific information is exceptional, and the normal criteria for determining eligibility for access applicable to information classified at the same level are not deemed sufficient to protect the information from unauthorized disclosure. The DNI is authorized to establish special access programs relating to intelligence activities, sources, and methods. These special access programs relating to intelligence are called Sensitive Compartmented Information (SCI) programs.

35. Information that is still classified relating to the CIA terrorist detention program has been placed in a TOP SECRET//SCI program to enhance protection from unauthorized disclosure. The unauthorized disclosure of the intelligence sources and methods relating to the Program reasonably could be expected to cause exceptionally grave damage to national security. Specifically, and as is discussed in greater detail in the previously-referenced

Panetta declarations, as well as my 13 May 2009 declaration, disclosure of such information is reasonably likely to degrade the USG's ability to effectively question terrorist detainees and elicit information necessary to protect the American people.

36. While the former program has been discontinued, it is likely that the CIA will continue to be involved in debriefing terrorists consistent with the law and policies of the United States. An effective program to obtain intelligence through questioning terrorists requires the cooperation of foreign governments and the use of effective elicitation techniques. As Director Panetta described in his aforementioned declarations, unauthorized disclosure of the details of the former program would likely undermine both of these requirements and reasonably could be expected to result in exceptionally grave damage to the national security.

(2) *Interrogation Methods, Questions,
and Intelligence Collection*

37. The USG is aware that al-Qa'ida and other terrorists train in counter-interrogation methods. Public disclosure of the questioning procedures and methods used by the CIA as part of the detention program would allow al-Qa'ida and other terrorists to more effectively train to

resist such techniques, which would result in degradation in the effectiveness of the techniques in the future. If detainees in USG custody are more fully prepared to resist interrogation, it could prevent the USG from obtaining vital intelligence that could disrupt future attacks targeting U.S. persons and property. These interrogation methods are integral to the USG's interrogation program and are therefore classified TOP SECRET//SCI.

38. In addition to interrogation methods generally, the types of questions asked and specific questions asked to particular detainees must be protected. The questions asked during interrogation could provide insight into the intelligence interests and knowledge of the CIA. Public disclosure of the specific questions that the CIA has asked detainees could reveal what the CIA knew at the time and allow others to infer what the CIA did not know at the time. This information would allow other terrorists to make judgments about the intelligence capabilities of the CIA and to anticipate the type of questioning they might undergo.

39. Although certain instances of intelligence gained through interrogation methods have been publicly disclosed by the USG, the withheld information remains classified. Intelligence information gained through interrogation is

currently used by the USG to conduct counterterrorism operations and pursue terrorists. If the CIA were to reveal intelligence information gained through its use of interrogation methods, the information would no longer be useful in counterterrorism efforts.

b. Foreign Relations and Foreign Activities of the United States

40. Among the most critical sources and methods in the collection of foreign intelligence are the relationships that the United States maintains with the intelligence and security services of foreign countries. Through these intelligence liaison relationships, the CIA can collect intelligence and provide to national security and foreign policy officials information that is critical to informed decision making -- information that the CIA cannot obtain through other sources and methods.

41. As such, the CIA has determined that unauthorized disclosure of information which reasonably could be expected to harm foreign relations or foreign activities of the United States, is currently and properly classified as SECRET and/or TOP SECRET pursuant to the criteria of Executive Order 12958, as its disclosure could reasonably be expected to cause serious and exceptionally grave damage

to the national security of the United States, and is thus exempt from disclosure pursuant to FOIA Exemption (b)(1).

42. Foreign governments have provided critical assistance to CIA counterterrorism operations, under the condition that their assistance is kept secret. As Director Panetta explained in his 8 June 2009 declarations, disclosing information concerning the specific assistance of foreign countries to the CIA's counterterrorism operations would damage the CIA's relations with these foreign governments and could cause them to cease cooperating with the CIA on such matters. Such information has therefore been withheld from the documents at issue. If the United States demonstrates that it is unwilling or unable to stand by its secrecy commitments to foreign governments, they will be less willing to cooperate with the United States on counterterrorism activities.

43. While the OIG documents that have been released in part on remand reveal information concerning the program, the releases are limited in scope. The information released in the OIG documents is limited to the historical genesis of the program, its legal underpinnings, and rare occasions where unauthorized techniques were used. Much of the information withheld from these documents is the same kind of operational information described in the

aforementioned Panetta Declarations. For this reason, despite the recent releases, the withheld information cannot be disclosed and must remain exempt from disclosure under FOIA Exemption (b)(1).

B. Exemption (b)(3)

44. FOIA Exemption (b)(3) provides that the FOIA does not apply to matters that are:

specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute

(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(B) establishes particular criteria for withholding or refers to particular types of matters to be withheld . . .

5 U.S.C. § 552(b)(3). The CIA has reviewed the documents responsive to Plaintiffs' FOIA Request and determined that there are two relevant withholding statutes: the National Security Act of 1947 and the Central Intelligence Agency Act of 1949.

45. *National Security Act of 1947* - Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C.A. § 403-1(i)(1) (West Supp. 2008), provides that the DNI shall protect from unauthorized disclosure intelligence sources and methods. Where documents at issue contain information that, if disclosed,

would reveal intelligence sources and methods, that information is protected from disclosure by both Exemption b(1) and Exemption b(3).

46. *Central Intelligence Agency Act of 1949* - Section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C.A. § 403g (West Supp. 2008), provides that in the interests of the security of the foreign intelligence activities of the United States and in order to further implement section 403-1(i) of Title 50, which provides that the DNI shall be responsible for the protection of intelligence sources and methods from unauthorized disclosure, the CIA shall be exempted from the provisions of any law which requires the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the CIA, including, as discussed in my unclassified 13 May 2009 declaration, paid and unpaid contractors and consultants of the CIA. Among the functions of the CIA are the collection, analysis, and dissemination of foreign intelligence. The collection function includes the clandestine intelligence sources, methods, and activities by which the CIA collects foreign intelligence from human sources. In this case, the information withheld from the documents at issue includes details of critical functions

of the CIA and information that could reveal the identities of CIA personnel engaged in counterterrorist operations. As described above, each classified category of information contained in the documents at issue relates primarily to the CIA's ability to collect counterterrorism intelligence and perform counterterrorism operations--functions that reside at the core of the CIA's mission.

47. In contrast to Executive Order 12958, the National Security Act's statutory requirement to protect intelligence sources and methods and the CIA Act's exemptions from disclosure of certain information do not require the CIA to identify or describe the damage to national security that reasonably could be expected to result from their unauthorized disclosure. In any event, the information relating to intelligence sources and methods in these documents that is covered by the National Security Act and the CIA Act is the same as the information relating to intelligence sources and methods that is covered by the Executive Order for classified information. Therefore, the damage to national security that reasonably could be expected to result from the unauthorized disclosure of such information relating to intelligence sources and methods is co-extensive with the damage that

reasonably could be expected to result from the unauthorized disclosure of classified information.

C. Exemption (b) (5)

48. FOIA Exemption (b) (5) provides that FOIA does not apply to inter-agency or intra-agency memoranda or letters that would not be available by law to a private party in litigation with the agency. The documents identified as exempt under Exemption (b) (5) on the attached Vaughn index are intra-agency or inter-agency records that contain information that is protected from disclosure by three privileges, described below.

49. *Attorney work-product* - The attorney work product privilege protects information, mental impressions, legal analysis, conclusions, and opinions prepared by attorneys or other representatives of a party in anticipation of criminal, civil, or administrative proceedings. Those documents, for which the work product privilege has been asserted, as specified in the attached Vaughn index, contain information prepared by CIA attorneys in anticipation of criminal, civil, and administrative proceedings, as described below and in the accompanying Vaughn index.

50. For example, several documents withheld under FOIA Exemption (b) (5) contain requests for legal advice

from CIA attorneys to the Department of Justice (DOJ). The CIA's purpose in requesting advice from DOJ was the prospect of criminal, civil, or administrative litigation against the CIA and CIA personnel who participated in the program. This advice was not solicited in the ordinary course of business. Rather, the requests for advice were solicited in anticipation of future criminal, civil or administrative proceedings.

51. Similarly certain documents described on the Vaughn reflect CIA attorneys' analysis, thoughts, opinions, mental impressions, and/or advice regarding the legal implications of certain operational aspects of the program. These documents similarly were prepared in anticipation of litigation, and in preparation for future anticipated civil, criminal and administrative proceedings. As subsequent events have shown, this anticipation was not unwarranted. Those records described on the attached Vaughn index for which the CIA has asserted the work product privilege were prepared in contemplation of specific litigation and reflect attorneys' tactical and strategic thinking. Those records were created with the expectation that they would be held in confidence, and they have been held in confidence. Accordingly, they are

properly withheld pursuant to the attorney work product privilege.

52. *Attorney-client* - The attorney-client privilege protects confidential communications between a client and his attorney relating to a matter for which the client has sought legal advice. The records described on the attached Vaughn index for which the CIA has asserted the attorney-client privilege contain confidential communications between CIA staff and the CIA's legal advisors, including both attorneys within the CIA's Office of General Counsel and attorneys with DOJ, acting in their capacity as legal advisors to the CIA. These communications relate to matters for which the attorneys provided legal advice to the CIA. Some of this legal advice was based upon, and reflects, confidential facts provided by the CIA to its attorneys. These documents were prepared by and at the direction of the CIA's attorneys, with the joint expectation of the attorneys and CIA staff that they would be held in confidence. Moreover, these documents have been held in confidence.

53. *Deliberative process* - Exemption (b)(5) has been construed to incorporate the civil discovery concept that information or documents of pre-decisional, deliberative process are exempt from disclosure. The deliberative

process privilege protects the internal deliberations of the government by exempting from release those recommendations, analyses and discussions - both factual and legal - prepared to inform or in anticipation of decision-making. The integrity of the government's deliberative process, not just the documents themselves, is protected by this privilege.

54. Some of the records specified on the attached Vaughn index are protected by the deliberative process privilege because they each contain information that reflects the pre-decisional deliberations of CIA and other executive branch officials. For example, as described on the attached Vaughn index, these records reflect pre-decisional discussions between executive branch officials regarding possible approaches to take with respect to outstanding policy issues, candid internal discussions between CIA staff regarding policy issues, non-final drafts, working papers, briefing papers, recommendations, legal advice, requests to DOJ for legal advice, and recommendations for actions to policymakers from staff members. These records were all solicited, received or generated as part of the process by which policy is formulated, either by the CIA or by other executive branch officials. Disclosure of this information would therefore

reveal the pre-decisional deliberations of executive branch officials.

55. The deliberative process privilege also protects the factual information contained in these documents to the extent that the particular facts contained in these drafts, working papers, briefing papers, recommendations, requests for advice, and other similar documents were identified, extracted, and highlighted out of other potentially relevant facts and background materials by the authors, in the exercise of their judgment. Accordingly, the disclosure of the facts that were selected for inclusion in drafts, briefing materials, recommendations, advice or other such documents would themselves tend to reveal the author's and the agency's deliberative process.

56. Because the officials involved in these pre-decisional deliberations expected that their candid discussions and recommendations regarding sensitive national security issues would remain confidential, release of these records would discourage open and frank discussions among executive branch officials in the future, thereby threatening the confidence needed to ensure the candor of future CIA deliberations. Such information is therefore properly exempt from disclosure under Exemption (b) (5).

D. Exemption (b) (6)

57. FOIA Exemption (b) (6) provides that the FOIA does not apply to personnel and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Information from the documents at issue that is personally identifying information has been withheld, as the disclosure of that information would constitute a clearly unwarranted invasion of personal privacy. Disclosing information that could identify CIA employees, contractors, and other personnel engaged in clandestine counterterrorism operations could place those individuals, and their families and friends, at grave risk from extremists seeking retribution. There is no legitimate countervailing public benefit that could come close to outweighing this paramount concern to protect U.S. Government employees and their associates.

E. Segregability

58. As described previously, the CIA has released some documents, in whole or in part, in response to Plaintiffs' FOIA request. With respect to the records released in part, I conducted a line-by-line review of these documents to identify and release all reasonably segregable, non-exempt portions of the documents. Based on

this review, I determined that the information released to Plaintiffs could be released in segregable form while the remaining information is exempt from disclosure under FOIA exemptions (b)(1), (b)(3), b(5), and b(6) as explained above.

IV. CONCLUSION

59. For the reasons described above, information from the documents at issue has been withheld in whole or in part on the basis of FOIA exemptions (b)(1), (b)(3), (b)(5), and b(6).

* * * *

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

Executed this 31st day of August, 2009.



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