

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

|                                 |   |                         |
|---------------------------------|---|-------------------------|
| AMERICAN CIVIL LIBERTIES UNION, | ) |                         |
| et al.                          | ) |                         |
|                                 | ) |                         |
| Plaintiffs,                     | ) |                         |
|                                 | ) | Civil No. 12-00794 (CM) |
| v.                              | ) |                         |
|                                 | ) |                         |
| 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 Deputy Chief of the Initial Request (IR) Staff of the Office of Information Policy (OIP), United States Department of Justice. In this capacity, I am responsible for supervising the handling of the Freedom of Information Act (FOIA) requests processed by 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, Deputy Attorney General, Associate Attorney General, Legal Policy, Legislative Affairs, and Public Affairs. 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 the basis of information acquired by me in the course of performing my official duties.

Plaintiff's Initial FOIA Request

3) By letter dated October 19, 2011, Nathan Wessler, on behalf of the American Civil Liberties Union Foundation and the American Civil Liberties Union, submitted a FOIA request addressed to, inter alia, the Department of Justice, Office of Information Policy, seeking six categories of records, the first and second pertaining to the legal basis and process for use of lethal force against U.S. citizens and categories three through six seeking records concerning the use of lethal force against three named individuals: Anwar al-Awlaki, Samir Khan, and Abdulrahman al-Awlaki. (A copy of plaintiff's October 19, 2011 letter is attached hereto as Exhibit A.)

4) OIP received plaintiffs' FOIA request on October 20, 2011, and initiated processing on behalf of the Offices of the Attorney General (OAG), Deputy Attorney General (ODAG), and Associate Attorney General (OASG).

5) Plaintiffs requested expedited processing of the request based on the Department of Justice standard permitting expedition for requests involving "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv) (2011). Plaintiffs directed a copy of their request for expedited processing to the Director of Public Affairs, who makes the decision whether to grant or deny expedited processing under this standard. See id. § 16.5(d)(2). On October 26, 2011, the Director of Public Affairs advised OIP that she had determined that plaintiffs' request for expedited processing under this standard should be granted.

6) By letter dated October 27, 2011, OIP acknowledged receipt of plaintiffs' FOIA request on behalf of OAG, ODAG, and OASG. Additionally, OIP advised plaintiffs that their request for expedited processing pursuant to 28 C.F.R. § 16.5(d)(1)(iv) had been granted. (A copy of OIP's October 27, 2011 letter is attached hereto as Exhibit B.)

7) In response to plaintiffs' FOIA request, on November 3, 2011, OIP initiated searches in OAG, ODAG, and OASG for responsive records subject to the FOIA. OIP was processing the request at the time this suit was filed.

8) OIP located one responsive document, totaling two pages, which is being released, and is attached hereto as Exhibit C. These are final talking points prepared for the use of the Attorney General and others in addressing hypothetical questions about Anwar al-Aulaqi's death. OIP located three additional responsive unclassified records, totaling five pages, which are being withheld in full pursuant to Exemptions 3, 5, and 6 of the FOIA, with certain portions determined to be not responsive to plaintiffs' request. Separately, the Office of Legal Counsel (OLC) referred one unclassified document, totaling three pages, to OIP. This material is being withheld in full pursuant to the deliberative process privilege of Exemption 5 of the FOIA, with certain portions determined to be not responsive to plaintiffs' request. Lastly, OIP's searches also identified classified material responsive to plaintiffs' request. OIP has been advised that this material should be withheld in full and cannot be further identified or described on the public record, pursuant to FOIA Exemptions 1 and 3. Further information can be found in the declaration of John F. Hackett.

#### Explanation of Records Searches

9) OIP conducted searches in OAG, ODAG, and OASG for any records responsive to



plaintiffs' FOIA request. As described in detail below, these searches consisted of a comprehensive review of the paper and electronic files of both current and departed employees in those Offices, as well as a search of the Departmental Executive Secretariat, which is the official records repository for those offices. OIP searched all files likely to contain responsive documents. With respect to searches conducted in individual Offices, OIP's standard practice is to initiate such searches by sending a memorandum to each Office notifying the Office of the receipt of the request and the need to conduct a search. The general practice for all of these Offices is, upon receipt of a search memorandum, to notify each individual staff member in that Office of the receipt of OIP's memorandum requesting that a search be conducted, and each staff member's files, both paper and electronic, are then searched as necessary for records responsive to the request. In some instances, the Offices will request that staff members from OIP assist in the search. A search of an official's computer files usually includes a search of the e-mail systems of that official, and can include a hard drive search if the official indicates that one is called for.

Search of the Office of the Attorney General

10) By memorandum dated November 3, 2011, a search was initiated in OAG.

11) By memorandum dated December 6, 2011, OAG identified five officials (which included one former OAG official still with the Department) who might have responsive records. Specifically, OAG advised that all five officials (including one former OAG official) may have responsive e-mails, one of them may also have responsive unclassified paper files, and one of them may also have responsive unclassified computer files and classified paper files.

12) OIP conducted a search of the unclassified e-mails of the four current OAG officials,

as well as the departed official. For the departed official, a search was conducted of this official's Enterprise Vault (EV Vault). The EV Vault maintains e-mails of current and former employees in the senior leadership offices of the Department. For all five e-mail searches, OIP used the following terms to conduct the searches: "targeted killings," "kill lists," "lethal operation," "lethal force," "al-Aulaqi" and "target," "al-Awlaki" and "target," "al-Alwaki" and "target," "Samir Khan" and "target," and "Abdulrahman" and "target." For the principal OAG records custodian OIP reviewed each potentially responsive record. For the remaining four custodians OIP reviewed a sample of potentially responsive material and determined that none was responsive to the request.

13) One OAG official indicated that he may have responsive unclassified paper files. OIP searched and reviewed those files subject to the FOIA for responsiveness to plaintiffs' FOIA request.

14) One OAG official indicated that she may have responsive unclassified computer files. OIP searched those files using the terms: "targeted killings," "kill lists," "lethal operation," and "lethal force." All material subject to the FOIA located in this search was reviewed by OIP for responsiveness to plaintiffs' FOIA request.

15) That same OAG official indicated that she may have responsive classified paper files. That official conducted a search of her classified records for material responsive to the request. OIP cannot further identify or describe on the public record if responsive material was located.

16) Subsequently, OAG advised that the former OAG official still with the Department, who was the principal OAG records custodian on this matter, may have responsive classified e-

mails and classified paper files. That official conducted a search of his classified e-mails and a search was conducted of his classified records for material responsive to the request. OIP cannot further identify or describe on the public record if responsive material was located.

Search of the Office of the Deputy Attorney General

17) By memorandum dated November 3, 2011, a search was initiated in ODAG.

18) By memorandum dated January 18, 2012, ODAG identified five officials who might have records responsive to the request. Specifically, ODAG advised that all five officials may have responsive e-mails, two of them may also have responsive unclassified paper files, two of them may also have responsive unclassified computer files, and four of them may also have classified paper files. ODAG also provided potentially responsive paper material from one official to OIP for further review.

19) OIP conducted a search of the unclassified e-mails of the five current ODAG officials. OIP used the following terms to conduct the searches: “targeted killings,” “kill lists,” “lethal operation,” “lethal force,” “al-Aulaqi” and “target,” “al-Awlaki” and “target,” “al-Alwaki” and “target,” “Samir Khan” and “target,” and “Abdulrahman” and “target.” For the principal ODAG records custodian OIP reviewed each potentially responsive record. For the remaining four custodians OIP reviewed a sample of potentially responsive material and determined that none was responsive to the request.

20) Based on knowledge gained after OIP had completed its search for records maintained by those officials identified by ODAG in its memorandum of January 18, 2012, OIP also conducted a search of the unclassified e-mails of one former ODAG official who was the principal ODAG records custodian on this matter. All material subject to the FOIA located in



this search was reviewed by OIP for responsiveness to plaintiffs' FOIA request.

21) OIP conducted a review of two current ODAG officials' unclassified paper files for responsiveness to plaintiff's FOIA request. All material subject to the FOIA located in this search was reviewed by OIP for responsiveness to plaintiffs' FOIA request.

24) Two ODAG officials indicated that they may have responsive unclassified computer files. OIP conducted a search of these two ODAG officials' computer files. The terms used to complete this search were: "targeted killings," "kill lists," "lethal operation," and "lethal force." All material subject to the FOIA located in this search was reviewed by OIP for responsiveness to plaintiffs' FOIA request.

25) Four ODAG officials indicated that they may have responsive classified paper files. Those four officials conducted a search of their own classified records. OIP cannot further identify or describe on the public record if responsive material was located.

26) Subsequently, ODAG advised that certain ODAG officials may have responsive classified e-mails. The principal ODAG records custodian on this matter conducted a search of her classified e-mail and those of her predecessor. OIP cannot further identify or describe on the public record if responsive material was located.

Search of the Office of the Associate Attorney General

27) By memorandum dated November 3, 2011, a search was initiated in the OASG.

28) By memorandum dated December 21, 2011, OASG provided potentially responsive unclassified material from one OASG official to OIP for further review. All material subject to the FOIA located in this search was reviewed by OIP for responsiveness to plaintiffs' FOIA request. OASG identified no additional officials who required a search for responsive material.

None of the material provided by OASG was determined to be responsive to the request, and no supplemental searches were conducted.

Search of the Departmental Executive Secretariat

29) On March 23, 2012, OIP initiated a search in the electronic database of the Departmental Executive Secretariat for records responsive to plaintiffs' FOIA request. As noted above, the Departmental Executive Secretariat is the official records repository for OAG, ODAG and OASG. The Departmental Executive Secretariat uses a central database to control and track certain incoming and outgoing correspondence for the Department's senior management offices. This Intranet Quorum (IQ) database maintains records from January 1, 2001, through the present. Records received by the designated senior management offices are entered into IQ by trained Executive Secretariat 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. Key word searches of the electronic 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 key words. The terms used to complete this search included: "targeted killings," "kill lists," "lethal operation," "lethal force," "al-Aulaqi" and "target," "al-Awlaki" and "target," "al-Alwaki" and "target," "Samir Kahn" and "target," and "Abdulrahman" and "target." All material subject to the FOIA located in this search was reviewed by OIP and was determined to be not responsive to plaintiffs' request.

Search of Records Indices of Departed OAG, ODAG, and OASG Employees' Files



30) On March 23, 2012, OIP initiated a search of the records indices of officials from the administrations of former Attorneys General Ashcroft, Gonzales, and Mukasey for OAG, ODAG, and OASG. These indices supplement the electronic database of the Departmental Executive Secretariat and list file folder titles, arranged according to subject, for the records of former OAG, ODAG, and OASG staff. Any subject file titles of the former officials that appeared to contain potentially responsive records would then need to be retrieved and reviewed from retired records storage facilities. The terms used to complete this search included: “targeted killings,” “kill lists,” “lethal operation,” and “lethal force.” No responsive records were located in this search.

Referral from the Office of Legal Counsel

31) On April 18, 2012, the Office of Legal Counsel referred two responsive documents to OIP that are subject to the FOIA. One of these documents was duplicative of material previously located by OIP and identified in OIP’s Vaughn Index as document one. The responsive portions of the second document, totaling three pages, have been withheld in full and the document is listed in the attached Vaughn Index as document four.

Plaintiffs’ Narrowed Request

32) By letter dated April 3, 2012, plaintiffs agreed to narrow their request to exclude draft legal analyses. (A copy of plaintiffs’ April 3, 2012 letter is attached hereto as Exhibit D.)

Unclassified Documents Responsive to Plaintiffs’ FOIA Request

33) The cut-off date for documents responsive to plaintiffs’ request was November 3, 2011, the day the search for records commenced. Upon completion of its searches for records responsive to plaintiffs’ request, combined with OLC’s referral, and in light of plaintiffs’ narrowing, OIP determined that five unclassified documents, totaling ten pages, were subject to

the FOIA and responsive to plaintiffs' request. OIP has released to plaintiffs one of these documents, totaling two pages. The remaining four documents, totaling eight pages, are being withholding in full pursuant to the deliberative process and presidential communication privileges of Exemption 5 of the FOIA. The identities of certain government personnel within these records is also protected pursuant to Exemptions 3 and 6.

34) The speech of Attorney General Eric Holder at Northwestern University School of Law on March 5, 2012 was delivered after the searches had been initiated, and the speech is therefore not included in the responsive material. A true and correct copy of those prepared remarks is nonetheless attached here as Exhibit E.

#### Explanation of Withheld Unclassified Material

35) Attached to this declaration as Exhibit F is a Vaughn Index containing a detailed description of the four unclassified documents, totaling eight pages, that are being withheld pursuant to Exemptions 3, 5, and 6. The Vaughn Index contains a description of the responsive documents at issue, including the date, provides the number of pages for each document, and identifies the exemption and, when applicable, privilege protecting each document from disclosure under Exemption 5 of the FOIA. (OIP's Vaughn Index is attached hereto as Exhibit F.)

#### FOIA Exemption 5

36) Exemption 5 of the FOIA protects certain inter- and intra-agency communications protected by the deliberative process and presidential communication privileges. The responsive documents withheld from plaintiffs were created and exchanged entirely within the Executive Branch. As detailed in the attached Vaughn Index, documents one, two, and four were

exchanged only within the Department of Justice. Document three was exchanged between the Department of State and various federal agencies, including the intelligence community.

Deliberative Process Privilege

37) The four unclassified documents withheld from plaintiffs are inter- or intra-agency communications exchanged, or drafts and briefing material created within, the Executive Branch. The information withheld falls into two overall but inter-related categories: (1) draft talking points and briefing material prepared for the Attorney General and (2) e-mail discussions about draft documents.

38) A significant part of the deliberative decisionmaking process is the creation of draft talking points and briefing material designed as preparatory material to aid in briefing senior officials in preparing for high-level meetings and to answer inquiries that may arise from outside sources. Documents one (talking points), two (briefing material), and four (e-mails concerning document one) of the attached Vaughn Index consist of such material.

39) In drafting such talking points and briefing material, the authors attempt to identify important issues and background and provide key talking points in concise, summary format for ease of understanding and presentation. In doing to, the authors distill pertinent information from underlying events as they attempt to anticipate questions and concerns that senior Executive Branch leadership, including the Attorney General, may encounter about the issues at hand, to ensure that they are prepared to respond appropriately. 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. In doing so, they provide their own advice based on these background points.



40) Here, document one consists of draft talking points prepared for the Attorney General, by his staff, to assist him in preparing for an upcoming meeting with the President. The talking points, which are themselves identified as a draft document, contain legal analysis regarding the use of lethal force that the Attorney General's senior staff believed was important to convey to the President. The process by which a draft document evolves into a final document is itself a deliberative process. This is demonstrated in document four, which consists of an e-mail exchange between officials in ODAG and OLC deliberating on the content of the advice provided to the Attorney General within document one.

41) Similarly, document two consists of briefing material prepared to assist the Attorney General in responding to possible questions at an upcoming Congressional hearing. The Executive Branch's most senior officials rely heavily on the creation of such talking points and briefing material so that they can be fully informed on the substance and the many nuances of issues. The employees preparing such materials must feel free to create the most thorough and candid documents possible so that the Executive Branch leadership are well-informed as they ultimately decide how to represent the federal government as a whole. With regard to document two, OIP conducted appropriate research and was able to confirm that material in question was not addressed during the Attorney General's hearing. OIP carefully reviewed these documents and determined that there was no reasonably segregable, non-exempt information that could be disclosed.

42) Another significant part of the decisionmaking process within the Executive Branch involves the exchange of e-mail messages in which various stakeholders strategize, opine, advise, and otherwise discuss working matters under their purview. Executive Branch employees

routinely e-mail each other, sharing interpretations, opinions and language, giving and responding to suggestions, and providing input. E-mail operates as a way for individual Executive Branch employees to communicate with each other about current matters and to key in a wide range of stakeholders without having to leave their offices. These “discussions,” which get memorialized by e-mail, are part of the exchange of ideas and suggestions that accompanies all decisionmaking and often reflect staff members’ preliminary assessments about issues on which they have not yet decided, or on which they may be asked to make recommendations. Indeed, such e-mail discussions most resemble conversations between staff members, which are part of the give and take of agency deliberations.

43) Documents three and four of the attached Vaughn Index consist of such communications. In document three, an official from the Department of State is providing comments, recommendations, and suggested language changes on a draft document discussing a proposed public statement. These communications were intended to assist the Attorney General in determining the nature, scope and content of a major address on national security policy, and they ultimately resulted in the Attorney General’s speech at Northwestern. As part of developing that speech, subordinate advisors to the Attorney General provided draft documents containing proposed language for discussion. These draft documents were circulated for consideration and comment both within the relevant offices of the Department and to agency stakeholders within the Executive Branch with an interest in the subject matter. Relevant DOJ and agency officials in turn provided comments on the draft documents, which resulted in further deliberations. These deliberations took place through e-mail communications, in which suggestions and recommendations were offered, discussed and responded to, before the Attorney General

finalized and delivered his address on March 5, 2012. These deliberations are essential to the decisionmaking process.

44) Likewise, document four discusses draft language contained within document one, which itself is a draft of talking points. The author is providing his insight into the language contained within the talking points, which were still in draft form at this time. This exchange of recommendations and suggestions is an inherent part of the deliberative process involved in drafting a document. Disclosure of such material would severely hamper the efficient day-to-day working of the Executive Branch, as individuals would no longer feel free to candidly present their views on pending matters.

45) If communications such as these are routinely released to the public, Executive Branch employees will be much more circumspect in their discussions with each other and in providing information and viewpoints to senior officials in a timely manner. This lack of candor would seriously impair the Executive Branch's ability to foster the forthright, internal discussions necessary for efficient and proper decisionmaking. Agency decisionmaking 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. OIP carefully reviewed this document and determined that there was no reasonably segregable, non-exempt information that could be disclosed.

46) Similarly, the material marked classified that is being protected pursuant to the deliberative process privilege consists of deliberative e-mails and briefing materials. For the reasons detailed above concerning the withheld unclassified material, this material is also predecisional and deliberative in nature in that it consists of the same type of preliminary, deliberative discussions, only conducted at a classified level.



Presidential Communications Privilege

47) In addition to being protected by the deliberative process privilege, document one of the attached Vaughn Index is also protected by the presidential communications privilege. As mentioned above, document one consists of draft talking points prepared for a meeting between the President and member of his cabinet. That meeting occurred the following day. It therefore reflects communications that one can fairly infer were provided to the President. The underlying purposes of the presidential communications privilege are similar to those of the deliberative process privilege, but they take on a distinct significance at the level of presidential decisionmaking because presidential decisionmaking must be informed by candid advice of the highest caliber. Accordingly, this document is also protected by the presidential communications privilege.

FOIA Exemption 6

48) The application of Exemption 6 to this material is limited to the identities of certain personnel of other federal agencies. The justification for OIP's decision to withhold this information is contained in the declaration of John F. Hackett.

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



Douglas R. Hibbard

Executed this 20 day of June 2012.