

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMNESTY INTERNATIONAL USA, CENTER
FOR CONSTITUTIONAL RIGHTS, INC., and
WASHINGTON SQUARE LEGAL SERVICES,
INC.,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY,
DEPARTMENT OF DEFENSE, DEPARTMENT
OF HOMELAND SECURITY, DEPARTMENT
OF JUSTICE, DEPARTMENT OF STATE, and
THEIR COMPONENTS,

Defendants.
----- X

ECF CASE

07 CV 5435 (LAP)

**DECLARATION OF
DAVID J. BARRON**

I, David J. Barron, declare as follows:

1. I am the Acting Assistant Attorney General for the Office of Legal Counsel (“OLC” or “the Office”) of the United States Department of Justice (the “Department”), a position I have held since January 20, 2009. In this position, I supervise all OLC operations, including OLC’s response to requests under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. I submit this declaration in support of the Central Intelligence Agency’s (“CIA”) Motion for Summary Judgment. The statements made herein are based on my personal knowledge and information provided to me by OLC attorneys with knowledge of the documents at issue in this matter.

PART I

OLC’S RESPONSIBILITIES

2. The principal function of OLC is to assist the Attorney General in his role as a legal adviser to the President of the United States and to departments and agencies in the Executive

Branch. In connection with this function, OLC provides advice and prepares documents addressing a wide range of legal questions involving Executive Branch operations. OLC is authorized to render advice and opinions on legal questions presented to OLC by clients throughout the Executive Branch, including the CIA. See 28 C.F.R. § 0.25. A significant portion of OLC's work involves performing a purely advisory role as legal counsel to the Attorney General, providing confidential legal advice and analysis to the Attorney General and, through him or on his behalf, to agencies of the Executive Branch.

PART II

DOCUMENTS AT ISSUE

3. On March 10, 2008, CIA asked OLC to review twenty-one classified documents that originated with the Office but copies of which CIA located in its files while processing Plaintiffs' FOIA requests. The twenty-one documents consist of letters and memoranda prepared by OLC in the course of providing legal advice to CIA regarding the detention and interrogation of certain high value detainees. The dates of the documents span from September 6, 2004, to February 16, 2007. Eight of the documents (nos. 6, 7, 16, 70, 75, 78, 86, and 87)¹ constitute final legal advice issued by the Office. Twelve of the remaining documents (nos. 1, 8, 9, 10, 11, 12, 13, 19, 25, 30, 65, and 68) are non-final drafts of OLC opinions that the Office shared with CIA in the course of developing OLC legal advice. The last of the twenty-one documents (no. 83) is an OLC letter responding to comments that were submitted by another agency regarding a draft OLC opinion. This document was thus also generated in the course of developing OLC legal advice.

¹ The current version of the Vaughn index no longer contains the documents referenced in this paragraph as nos. 6, 7, and 16. We nevertheless continue to reference these documents as "nos. 6, 7, and 16" because they appeared as such on the Vaughn index at the time CIA asked OLC to review them on March 10, 2008. See infra ¶ 6(a) & n.3.

4. On April 21, 2008, OLC submitted a declaration in this case explaining its decision to withhold all twenty-one documents pursuant to FOIA Exemption Five, 5 U.S.C. § 552(b)(5). That declaration, and the CIA's Motion for Summary Judgment in support of which it was filed, were withdrawn prior to a ruling by this Court on the motion due to the discretionary release on April 16, 2009 of three of the documents at issue in this litigation. Five additional documents at issue in this litigation were part of another discretionary release on August 24, 2009.

5. Since the 2008 declaration, CIA and OLC have released a total of eight of the original twenty-one documents to Plaintiffs and the public, and CIA has released three additional documents that CIA authored in which OLC asserted equities. My declaration replaces the withdrawn 2008 declaration.

6. This declaration sets forth the basis for the continued withholding of the thirteen documents that have not been released out of the twenty-one documents addressed in the original declaration. It also provides the basis for withholding two additional documents, one that CIA recently referred to OLC for the first time and one that CIA recently added to its Vaughn index.² The developments that have resulted in this declaration covering a different set of documents than the original April 21, 2008 declaration are as follows:

a. On April 16, 2009, three of the twenty-one documents were released to Plaintiffs and the public as a matter of administrative discretion. Those three documents were at the time of their release listed on the CIA's Vaughn index as nos. 6, 7, and 16. OLC has also made those documents available to the public by posting them on the "OLC FOIA Reading Room" website at <http://www.usdoj.gov/olc/olc-foia1.htm>. Due to a stipulation between the

² Descriptions of each of the fifteen documents that are the subject of this declaration are included in the Vaughn index attached as Exhibit A to the declaration of Wendy Hilton, Associate Information Review Officer for the CIA's National Clandestine Service.

parties, the documents then appearing as nos. 6, 7, and 16 on the CIA's Vaughn index were replaced by other documents assuming the same numbers on the Vaughn index.³ The replacement document for index number 16 is a non-final draft of an OLC opinion that the Office shared with CIA in the course of developing OLC legal advice. That document will be referred to as "new no. 16" in this declaration to avoid confusion with the released document described as no. 16 in the original declaration. As discussed infra, OLC is withholding the new no. 16.

b. On August 19, 2009, in preparation for a discretionary release of additional documents, CIA located additional documents in its files while processing Plaintiffs' FOIA request and referred them to OLC because, although those documents were authored by CIA, OLC had equities in them. On August 24, 2009, three of those documents (nos. 80, 93, and 99) were released with limited redactions requested by OLC of Office phone and fax numbers. OLC no longer seeks to withhold that information under a FOIA exemption, and accordingly, it is my understanding that this previously redacted information will be made available to Plaintiffs. OLC also requested that one of those documents (no. 99) redact the name of an OLC non-supervisory attorney. As discussed infra, OLC continues to withhold that name.

c. On August 24, 2009, the government also released to Plaintiffs and the public as a matter of discretion five more of the twenty-one documents prepared by OLC: nos.

³ The CIA Vaughn index represents a sample of all responsive documents. Subject to a stipulation between the parties, documents subject to litigation in American Civil Liberties Union v. Dep't of Defense, No. 04 Civ. 4151 (AKH), are not to be included in this sample. When the documents listed as nos. 6, 7, and 16 in the Vaughn index at the time of OLC's April 21, 2008 declaration were released on April 16, 2009, they contained redactions. Those redactions are being litigated in the American Civil Liberties Union case. Accordingly, pursuant to the first paragraph of the parties' stipulation, those documents have been removed from the Vaughn index and replaced by other documents with the same numbers. See Stipulation and Order Between Plaintiffs and the Central Intelligence Agency Regarding Procedures for Adjudicating Summary Judgment Motions, dated April 21, 2008, ¶ 1 ("The CIA's withholding of records that have been or currently are being litigated in American Civil Liberties Union v. Dep't of Defense, No. 04 Civ. 4151 (AKH) (ACLU v. DOD'), will not be litigated in this action, except that this limitation shall not apply to those records that the Court in ACLU v. DOD has determined to be outside the scope of that litigation.").

70, 75, 78, 86, and 87. OLC has also made those documents available to the public by posting them on the “OLC FOIA Reading Room” website at <http://www.usdoj.gov/olc/olc-foia1.htm>.

d. On September 15, 2009, CIA referred to OLC document no. 152, which is a memorandum from the National Security Advisor to senior Administration officials attaching two pages of draft legal analysis prepared by OLC. That analysis is represented as non-final in the National Security Advisor’s memorandum.

PART III

DISCRETIONARY RELEASE

7. Over the past several months, the Executive Branch has conducted a comprehensive, ongoing review of documents related to CIA detention and interrogation practices in order to determine which documents are appropriate for discretionary release. In undertaking the review and reprocessing of its documents, OLC has followed the revised FOIA guidelines issued by the Attorney General on March 19, 2009. Those guidelines were issued in response to a Presidential Memorandum of January 21, 2009, which directed agencies to administer FOIA with a presumption of openness. The Attorney General’s memorandum instructed agencies to consider information for discretionary release, and to consider partial disclosures of information where a full disclosure is not possible. OLC has conducted its review of the documents at issue in this matter pursuant to this guidance.

8. As noted supra, eight of the original twenty-one documents addressed in the April 21, 2008 declaration have since been publicly released: three on April 16, 2009, and five on August 24, 2009.

9. In January 2009, the President discontinued the interrogation practices addressed in these released documents. He issued Executive Order 13491 of January 22, 2009, which

generally prohibits the use by the United States Government, in any armed conflict, of any interrogation technique or approach, or treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3. The President's statement accompanying the April 16, 2009 release provided that "after consulting with the Attorney General, the Director of National Intelligence, and others," he "believe[d] that exceptional circumstances surround these memos and require their release." See Daily Comp. Pres. Docs., 2009 DCPD No. 00263, p. 1 (Apr. 16, 2009). The August 24, 2009 release of additional documents was based on the same considerations and principles.

PART IV

EXEMPTION FIVE

10. Of the twenty-one documents prepared by OLC that were addressed in the April 21, 2008 declaration, the eight that have been released to the public constituted final OLC legal advice. In contrast, the thirteen remaining documents described in the original declaration that continue to be withheld do not constitute final OLC legal advice. The new document that CIA recently referred to OLC (no. 152) and the document that CIA recently added to its Vaughn index (new no. 16) also do not constitute final OLC legal advice. All fifteen of these documents are pre-decisional, deliberative material generated during the preparation of OLC opinions.

11. The fifteen documents are accordingly protected by the deliberative process privilege. The documents are nos. 1, 8, 9, 10, 11, 12, 13, new 16, 19, 25, 30, 65, 68, 83, and 152. They are (a) pre-decisional, i.e., generated prior to a decision; and (b) deliberative, i.e., reflecting discussions, proposals, and the "give and take" exchanges that characterize the government's deliberative process. Thirteen of the documents (nos. 1, 8, 9, 10, 11, 12, 13, new 16, 19, 25, 30, 65, and 68) are draft OLC legal opinions, the fourteenth document (no. 152) is draft OLC legal

analysis, and the fifteenth document (no. 83) reflects pre-decisional deliberations within the Executive Branch regarding the preparation of an OLC opinion.

12. The fifteen documents originating with OLC fall squarely within the deliberative process privilege. Each of the documents is pre-decisional and deliberative in nature. Thirteen of the fifteen documents are non-final draft OLC opinions, and a fourteenth is a non-final draft of OLC legal analysis. Creating and sharing draft documents is an integral part of deliberations within OLC. Through the drafting process, OLC attorneys articulate, focus, and refine their advice and analysis. Drafts do not represent legal advice or views of the Office. To the contrary, drafts are, by their very nature, pre-decisional and deliberative. They are part of the exchange of ideas that accompanies decisionmaking, and they reflect the preliminary assessments and suggestions of OLC attorneys. OLC attorneys exchange draft documents with each other and with other Executive Branch attorneys for input, comments, edits, and suggestions (as the CIA's possession of draft documents indicates occurred in this case). Similarly, the fifteenth document is part of the deliberative process surrounding the preparation of an OLC opinion because it constitutes OLC's pre-decisional response to comments another agency offered on a draft OLC opinion. By setting forth the other agency's comments and OLC's reaction to those comments, the document reflects an exchange of deliberative views that took place prior to OLC finalizing its decision on the content of its legal opinion.

13. Compelled disclosure of the fifteen documents would cause serious harm to the deliberative processes of the Office of Legal Counsel and the Executive Branch. It is essential to OLC's mission and the deliberative processes of the Executive Branch that the development of OLC's legal advice not be inhibited by concerns about compelled public disclosure of pre-decisional matters. Protecting from compelled disclosure the confidentiality of documents with

respect to which OLC continues to assert Exemption Five is necessary to ensure that Executive Branch attorneys will examine legal arguments and theories candidly, effectively, and in writing and to ensure that Executive Branch officials will seek legal advice from OLC on sensitive matters.

PART V

EXEMPTION SIX

14. Of the fifteen documents protected by deliberative process privilege described supra, five documents (nos. 1, 9, 10, 11, and 83) also contain information that warrants withholding pursuant to FOIA Exemption Six, 5 U.S.C. §552(b)(6). A sixth document (no. 99), released with limited redactions on August 24, 2009, also contains such information. Those documents contain the names of OLC non-supervisory attorneys. The disclosure of those names would subject individuals to a clearly unwarranted invasion of personal privacy, and any legitimate public interest in the release of this information is insufficient to outweigh the intrusion on personal privacy.

PART VI

SEGREGABILITY

15. OLC attorneys who are under my supervision and are cleared into the classified program to which the fifteen OLC documents relate have carefully reviewed these documents for segregation of non-exempt information, and have determined that no portions of the documents can be released without disclosing information protected under FOIA Exemption Five.

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

Executed: Washington, D.C.
September 22, 2009

A handwritten signature in black ink, appearing to read 'D. J. Barron', written over a horizontal line.

David J. Barron
Acting Assistant Attorney General
Office of Legal Counsel